STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions
J.C. Nicholson, Jr., Circuit Court Judge

The State, Respondent,

v.

Hank Eric Hawes, Appellant.

Appellate Case No. 2014-002288

Opinion No. 5543 (S.C.Ct.App. filed March 14, 2018)

PETITION FOR REHEARING

On March 14, 2018, this Court issued an opinion in the captioned case affirming Appellant's murder conviction. Respondent, the State, agrees with the ultimate determination; however, Respondent would respectfully ask the Court to reconsider its ruling regarding the in-life photographs. Pursuant to South Carolina Appellate Court Rules 221 and 224, the State petitions for rehearing[1] and asks the Court to consider the following points that may have been misapprehended or overlooked in regard to the photographs:

[1] Respondent also makes this petition to specifically preserve the issue for consideration should the appeal continue. See *Sloan v. Department of Transp.*, 365 S.C. 299, 307-308, 618 S.E.2d 876, 880 (2005) (issue not argued in petition for rehearing may not be argued on certiorari); *State v. Humphries,* 354 S.C. 87, 91, n. 2, 579 S.E.2d 613, 615, n.2 (2003) (consideration of argument presented on certiorari review as an additional sustaining ground for affirmance discretionary if not included in petition for rehearing and raised in an appeal); *I'On, L.L.C. v. Town of Mt. Pleasant,* 338 S.C. 406, 421–22, 526 S.E.2d 716, 724 (2000) ("An appellate court may not, of course, reverse for any reason appearing in the record. The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred."). Since technically the Supreme Court would have to reverse part of the Court of Appeals' opinion to accept this position if the issue is to be litigated further, out of an abundance of caution, Respondent makes this petition.

This Court found the crime scene photographs introduced were admissible: "...the crime scene photographs were relevant to the issue of malice because they showed how, where, and how many times Victim was attacked" and "illustrated the extreme nature of this killing as they show multiple wounds and abrasions on Victim's extremities, contusions all over her body, and a bite mark." *State v. Hawes,* No. 2014-002288, 2018 WL 1309539, at *5 (S.C. Ct. App. Mar. 14, 2018). Then the Court found the in-life photographs – admittedly taken just hours before the murder – were not admissible in further proof of malice. These photographs show Ms. Wilson in sleeveless attire and her arms and shoulders do not have the bite mark and bruises that are on her body at death several hours later. (Compare R. p. vii [State's 38] with R. p. vii [State's 322 and 325]).[2] In his brief, Appellant argued the photographs were prejudicially used in closing. (FBOA, pp. 9-10; Reply Brief, p. 5). He argued: "Whatever minimal and redundant probative effect the photo may have had was outweighed by the danger – and demonstrated reality – of unfair prejudice. (FBOA, p. 12). There is, however, no unfair prejudice where the photograph was used in argument commenting on the State's showing of malice.

Respondent submits, in these discrete circumstances, there is no clear record support for finding the trial judge abused his discretion in admitting the photographs, and, critically, there was no error in allowing the State to reference these admitted photographs in regard to the State's showing of malice. The Court's reliance on *State v. Langley,* 334 S.C. 643, 515 S.E.2d

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[2] The photographs were offered and accepted without clear discussion on the record. The record reflects the trial court heard objections at a bench conference, and overruled an objection to relevance in admitting the photographs. (R. pp. 145 and 146). Defense counsel later put on the record the offered reason at the time to admission was for "state of mind." (R. p. 1126, line 11 – p. 1127, line 9). The photographs were obviously in evidence and the solicitor referenced the bite mark directly before making the contrast in closing, (see R. p. 1106, lines 9-13). The contrast is plain. Moreover, as the judge indicated, the State is allowed to make persuasive arguments on the evidence already admitted. (See R. p. 1125, line 25 – p. 1126, line 1).

98 (1999); *State v. Livingston,* 327 S.C. 17, 488 S.E.2d 313, (1997); and *State v. Johnson,* 293 S.C. 321, 360 S.E.2d 317 (1987) in finding error and prejudice is misplaced.[3] The facts and resulting holdings in these three cases are distinctly and critically dissimilar.

In *State v. Langley,* the Court rejected the State's argument an in-life photograph was offered for identity of the victim, because the identity of the victim was not contested. 334 S.C. at 648, 515 S.E.2d at 100 n. 3. Further, the Court found the photograph amounted to good character evidence of the victim, which was not admissible. *Id.* While this specific ruling from *Langley* is referenced in the opinion, the Court appears to have overlooked there is no suggestion in this case the photographs were necessary for simple identity, or that there was an issue on identity. Rather, the photographs were used in argument in reference to the State's showing of malice. *Langley* is inopposite.

In *State v. Livingston,* a photograph of the victim and her surviving husband – who was testifying mere months after his wife's death – was introduced in a trial for felony DUI. The State offered the husband's testimony about the wife and the couple's photograph for identity, but the Court found, as in *Langley*, that identity was not in issue. 327 S.C. at 20, 488 S.E.2d at 314. Further, the Court found the *irrelevant* photograph "highly inflammatory" in a case that did not present overwhelming evidence of guilt. *Id.* The Court makes reference to *Livingston*, but again, like its treatment of *Langley*, does not speak to evidence here which was used in argument in regard to the State's showing of malice – a key and relevant showing in a murder trial.

The results in *Langley* and *Livingston* tend to support the narrow finding that photographs in cases where identity is not an issue are irrelevant. That is not a basis for wholesale rejection

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[3] Again, Appellant has not cleanly preserved and presented the issue. The ruling on admissibility is not on the record, or any argument on the prejudicial effect versus probative value at the time of the photographs were offered and accepted.

of any in-life photograph or any argument related to such photographs.[4] *Johnson* is the only case cited that reaches beyond the identity of the victim line of cases. It, in fact, references a photograph of another victim in a prior bad act showing – an even greater distinction.

In *Johnson*, a photograph of another murder victim was introduced along with excessive detail of the prior murder and armed robbery. The Court concluded "it can be asserted with reasonable certitude that the prejudicial impact of the excessively detailed evidence presented concerning appellant's prior crimes outweighed its probative value." 293 S.C. at 326, 360 S.E.2d at 320. The Court makes reference to *Johnson*, but does not speak to vast difference between photographs of *another murder victim* and evidence of an in-life photograph of the actual victim taken hours before the murder. The photograph here demonstrates the absence of the multiple of wounds which the Court had – within in the same opinion – found to be proof of malice. The Court erred in its reliance upon *Johnson.*

In sum, Appellant's complaints the in-life photographs were "irrelevant" and used merely to inflame the emotions, (see FBOA, pp. 12-13), ring hollow in light of the specific and substantial probative value in the instant case – proof that Appellant not only killed her, but did so with great malice as evidenced by the multiple stabs, bruises, cuts, and the vivid bite mark. Respondent urges the Court to reconsider finding error in admission of the in-life, close-in-time photographs, referenced in argument on proof of malice. The comparison shows in stark and

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[4] This Court has just recently visited in-life photographs again in *State v. Johnson,* Opinion No. 5533 (S.C.Ct.App. re-filed March 28, 2018). In *Johnson,* this Court again found identify was not an issue in the murder case to support admissibility of in-life photographs of the two murder victims, and noted "nothing in the photograph served to make any fact in issue more or less likely." *Id.* The Court continued, "[n]either the State nor the circuit court offered *any rationale for how the predeath photographs were relevant* to establishing Johnson's guilt." *Id.* (emphasis added). Again, the photographs here were a part of the argument in support of the State's showing of malice, not for identity. This subsequent ruling, also depending upon *Langley*, is also inopposite.

readily understandable detail, the very wounds the Court finds support malice were Appellant's work and not wounds or marks – in whatever measure or part – otherwise existing. *Langley, Livingston,* and *Johnson* simply do not control and are not comparable.

WHEREFORE, based on the foregoing, Respondent urges the Court to reconsider its ruling in this regard. Respondent, though, fully agrees that any error could only be harmless in light of its position above, but also based upon the overall strength of the case as outlined in the Opinion.

Respectfully submitted,

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March 29, 2018.
Columbia, South Carolina.

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PROOF OF SERVICE

I, Melody J. Brown, certify that I have served Respondent's *Petition for Rehearing* on Appellant by depositing two (2) copies of same in the United States mail, postage prepaid, addressed to his attorneys of record:

Nicholas Andrew Charles, Esquire
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This 29th day of March, 2018.

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March 29, 2018

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
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Re: The State v. Hank Eric Hawes
Appeal from Richland County
Appellate Case No. 2014-002288

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of Respondent's Petition for Rehearing in the above-referenced matter for filing. By copy of this letter, I am serving opposing counsel with same.

Thank you for your consideration in this matter. Please call this office if you need any additional information.

Sincerely,

Melody J. Brown
Senior Assistant Deputy Attorney General

MJB/lbb
Enclosures

cc: Nicholas Andrew Charles, Esquire
Robert M. Dudek, Esquire
Daniel E. Johnson, Solicitor
Trisha Allen, Victim Advocacy Division