STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

L. Casey Manninng, Presiding Judge, 5th Judicial Circuit

Indictment Numbers: 2017-GS-40-5854

The State,.....Respondent,

v.

Ricardo Laroy Middleton.,.....Appellant.

MOTION TO DISMISS APPEAL AS PREMATURE

On October 3rd of this year counsel for the defendant at trial, out of an abundance of caution, filed a notice of intent to appeal the conviction and sentence in the above captioned case. Post-trial motions had been filed but not scheduled or ruled upon by written order.

As of this date posttrial motions have not been scheduled or disposed of by written order. Mr. Midleton, through his counsel, does move to dismiss the above appeal as premature, and does seek leave to refile upon disposition of post-trial motions in accord with Rule 29.

November 13, 2019

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STATE OF SOUTH CAROLINA **COUNTY OF RICHLAND**	)	**IN THE COURT OF GENERAL SESSIONS**
	)	**INDICTMENT#2017-GS-40-5854**
vs.	)	**RENEWAL OF MOTIONS AND OBJECTIONS AND MOTION FOR NEW TRIAL**
Ricardo Laroy Middleton. **Defendant**	)	

TO: The Honorable L. Casey Manning, Presiding Judge, 5TH Judicial Circuit

The Defendant, through counsel, at this time renews all previous motions and objections and does move for a new trial. The motion for a new trial includes, but is not limited to, the following issues:

I. Identification

The identification procedure utilized by Investigators was patently suggestive. Testimony prior to and during the trial developed the following facts:

a. Natasha Coad was unable to identify Mr. Middleton in the initial photo lineup;
b. The Defendant's photo was released to the media by law enforcement and broadcast widely; shortly thereafter Natasha contacted law enforcement asking to see the lineup again;
c. Natasha then picked the Defendant out of the lineup claiming that the initial lineup was "slanted;" this was contradicted at trial by the Investigator and Natasha herself;
d. The photo in the second lineup was, in fact, the same photo shown in the first lineup, while the other photos were of different people;
e. Natasha incorrectly identified the Defendant as committing the actions of the codefendant in the case at trial. (The State alleged to the jury that the Defendant drove up on the left, got out of a small car, hit a second biker, and then shot Sydni Collins point blank. Natasha testified that Defendant came up on the right, got off of a motorcycle, and shot Aaron Collins).
f. No witness claimed to see the Defendant do what the State claimed that he did; one witness claimed the Defendant hit him in the mouth, another that he saw him at the scene. Natasha claimed that he shot a man that the State concedes he did not shoot.

While it is true that the media broadcasting a defendant's photo is not a State action, releasing the photo to the media most certainly is. Natasha denied seeing the photo on T.V. She also denied making various statements to law enforcement and the Solicitor's office. None of her testimony was credible by any reasonable standard. Using the same photo of the defendant at the second lineup, while changing the other photos in the lineup was unduly suggestive; she had seen the Defendant before, at a lineup a few days prior to the second lineup.

As to a substantial likelihood of misidentification, there was an ***actual*** misidentification during the trial. Natasha Coad identified Mr. Middleton step by step as the codefendant in the case. She testified that the Defendant rode up on a motorcycle, stepped down, and emptied a firearm into Aaron Collins. She asserted that she was "one hundred percent sure" that the defendant committed acts that the State acknowledges he did not. During closing the State attributed her misidentification and false testimony to being traumatized by an event two years prior; this was a concession that her testimony was not true. The identification was beyond unreliable, it was a live misidentification in front of a jury that found the Defendant not guilty of attempted murder, deadlocked on the murder of Aaron Collins, and found the Defendant guilty of the murder of Sydni Collins. This was a closely contested case as the verdicts demonstrate. The identification was not substabtially probative of the State's theory as it contradicted that theory. The resulting prejudice could well have been a determining factor in the conviction on one of three grave indictments.

Under the totality of the circumstances, in light of the ***particular*** facts of this case, the lineups were unduly suggestive. Police used the same photo that was allegedly "slanted" in the second lineup, but the other five photos were of different people. While the broadcasting of the photo was not a State action, the release of the photo to the media was a State action. Natasha's assertion that she did not view the photo on T.V. was not credible, nor was her assertion that the photo was "slanted" in the first lineup. Testimony from the Investigator firmly established that it was the same photo (as did that of Ms. Coad). Natasha misidentified the Defendant as the codefendant. That misidentification is firm evidence that the photo lineup was unduly suggestive.. *An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification.* State v. Traylor, 360 S.C. 74 at 81 (2004).

II. Gruesome/Autopsy Photographs

Over Defense objections the State introduced autopsy photographs depicting deceased persons. The Defense believes that the photographs were highly prejudicial and that their probative value was minimal in light of the proposed solution submitted by counsel at the time; to rely on diagrams and the testimony of the pathologist.

The Defendant believes that the foregoing visual evidence should have been excluded pursuant to Rules 401 and 403, SCRE, the due process clause of the Fourteenth Amendment to the United States Constitution, and Article 1, Section 3 of the Constitution of South Carolina.

In State v. Edwards, 194 S.C. 410, 10 S.E.2d 587 (1940), the Supreme Court established the rule regarding gruesome photographs and stated "photographs which are calculated to arouse the sympathies or prejudices of the jury are properly excluded if they are entirely irrelevant or not substantially necessary to show material facts or conditions." Here, a diagram would have served the same purpose.

In State v. Waitus, 224 S.C. 12, 77 S.E.2d 256 (1953), the Court reversed a conviction and death sentence, in part due to the erroneous admission of four pictures, citing Edwards as the basis for the assignment of error. The Waitus Court stated:

"Error is assigned in the admission of four pictures of deceased taken in the boiler room of the parish house before the body was removed. It is claimed by the State that these pictures were relevant as showing the marks, bruises and abrasions made as a result of the assault, the condition of the clothes of deceased, and that her rings had been removed and placed on the index finger. There was no dispute as to these facts. All of them were fully established both by uncontradicted medical and lay testimony. **These pictures were calculated to inflame and arouse the passions of the jury and their introduction was wholly unnecessary to establish the facts claimed.** They should have been excluded. The rule governing this question is discussed in State v. Edwards, 194 S.C. 410, 10 S.E.2d 587." (Emphasis added).

The analysis in the Waitus opinion essentially mirrors the current provisions of Rules 401 and 403, SCRE. In State v. Middleton, 288 S.C. 21, 339 S.E.2d 692 (1986), the Supreme Court addressed the admission of color autopsy photographs. Citing both Waitus and Edwards, the Middleton Court explained "the testimony of the forensic pathologist negated any arguable evidentiary value of the photographs. ***The prejudice created by the photographs clearly outweighed any evidentiary value.***"

Later in 1986, the Supreme Court addressed the admission of autopsy photographs in State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180 (1986). The Court found the admission of color photographs proper. However, the photos were only admitted in the sentencing phase of a death penalty case, not the guilt phase. Once again the Court cited Waitus, stating "[i]n the guilt phase of a trial, photographs of the murder victims should be excluded where the facts they are intended to show have been fully established by competent testimony." The Kornahrens Court ruled that the "trial judge is still required to balance the prejudicial effect of the photographs against their probative value. However, in the sentencing phase, the scope of the probative value is much broader."

State v. Franklin, 318 S.C. 47, 456 S.E.2d 357 (1995), also a death penalty case, explained the unique nature of admission of gruesome photographs in the sentencing phase of a death penalty case with specific regard to the circumstances of aggravation. The Court stated:

"The jury could not have understood from the pathologist's testimony the extent of the physical torture Martin suffered. The issue of aggravating circumstances remained viable throughout the sentencing phase of the trial. We find the probative value of the slides in this case clearly outweighed any prejudicial effect they may have had on the jury."

III. Conclusion

For the foregoing reasons, the Defendant, through his Counsel, does respectfully request a new

trial in the above captioned case.

Respectfully submitted,

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Columbia, South Carolina
September 26, 2019

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Motion to Dismiss Appeal as Premature in the above-referenced case has been served upon opposing counsel by delivering same this date to their office at the Office of the Solicitor, Fifth Judicial Circuit, Richland County Judicial Center, 1701 Main Street, Columbia, South Carolina 29201.

November 13, 2019

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