THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY

R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2017-001542

The State, ...Respondent,

v.

James Heyward, ...Appellant.

PETITION FOR REHEARING

Pursuant to Rules 221(a) and 240 of the South Carolina Appellate Court Rules, Appellant James Heyward requests rehearing of this Court's opinion issued October 14, 2020, affirming Mr. Heyward's convictions. *See State v. Heyward*, Op. No. 5776 (S.C. Ct. App. filed October 14, 2020 (Shearouse Adv. Sh. No. 40 at 32)). This Court overlooked or misapprehended several points and should therefore grant rehearing and reverse Mr. Heyward's convictions.

ARGUMENT

I. This Court erred in affirming the trial court's admission of evidence and testimony regarding (a) an out-of-court photograph lineup where the victim did not make a positive identification and (b) the subsequent positive identification made by the victim at trial.

This Court affirmed the admissibility of evidence and testimony regarding Granddaughter's so-called "identification" of Appellant during a photograph lineup and

Granddaughter's subsequent identification of Appellant at trial. *See Heyward*, Op. No. 5776, at 40. As an initial matter, the Court overlooked or misapprehended the suggestive nature of the photograph lineup itself. The Court accorded undue weight to Granddaughter's purported ability to appreciate the nuance and importance of Investigator Clarke's use of the word "if" to telepath to Granddaughter that she did not have to choose someone from the lineup. This overlooks the reality that Granddaughter was a recently-traumatized eight-year-old girl and Investigator Clarke's suggestive exhortation "to help [him] and see if you can see the bad man" was intended to elicit a selection, leaving Granddaughter with no option but to choose one of the photographs. Although an adult might be able to pick up on the nuance of the word "if," the suggestive nature of Investigator Clarke asking such a young child to be "brave" and help him, coupled with his request to "see if you can see the bad man," clearly suggested to Granddaughter that she should pick one of the photographs and thereby created an unduly suggestive lineup procedure.

Moreover, the Court overlooked or misapprehended Appellant's argument that the overall identification process was unduly suggestive as evidenced by Granddaughter's evolving level of certainty at each stage of the process. The Court stated that "[n]othing in the record indicates Granddaughter was exposed to Heyward's photograph repeatedly, and we found no authority requiring other members of a photograph lineup to be present in court." *See Heyward*, Op. No. 5776, at 40. Appellant has not contended that the other persons included in the photograph lineup needed to be present in the courtroom at trial. Rather, Appellant's argument was that the process of seeing Appellant's picture in the photograph lineup (where the only clear indication Granddaughter gave was that she was *not* confident in her identification), to seeing the photograph lineup picture again, along with Appellant in person, at the pre-trial *Neil v. Biggers* hearing (where she merely identified Appellant in the courtroom as being the same person she

saw in the photograph lineup), followed by seeing Appellant again at trial (when she testified that she was sure Appellant was her assailant), was an unduly suggestive process which inevitably caused her certainty to evolve and increase over time with each subsequent exposure to Appellant.

Appellant's argument largely rested on the United States Supreme Court case *Foster v. California*, which held that, like here, a process which began with an inability to make any identification which then evolved into a definite identification throughout the course of repeated identification opportunities was inadmissible because the procedure "made it all but inevitable that [the victim] would identify [the defendant] whether or not he was in fact 'the man.'" 394 U.S. 440, 443, 89 S.Ct. 1127, 1129 (1969). This Court's Opinion does not even address the binding precedent of *Foster v. California* upon which Appellant's argument is largely based.

Instead, this Court relied primarily on *State v. Washington*, 323 S.C. 106, 473 S.E.2d 479 (Ct. App. 1996), to find that Granddaughter's so-called identification was admissible because, even though "there was arguably some uncertainty in her initial selection," "certainty is not always required in the identification of witnesses." *Heyward*, Op. No. 5776, at 38. However, the situation in the *Washington* case is distinguishable from the evolving identification here. In *Washington*, the victim indicated he was "99 percent sure" when he chose the defendant from an initial photograph lineup and later testified in court that he had "no doubt" that the defendant was his assailant—merely a 1% difference between the certainty levels in the two identification opportunities. *Washington*, 323 S.C. at 108, 473 S.E.2d at 480. The *Washington* court noted that even though the victim was 99% certain of his initial identification, even such a miniscule level of uncertainty "cause[d] this court some concern." *Id.* at 111, 473 S.E.2d at 481. This uncertainty is all the more concerning here, where Granddaughter initially indicated only that

Appellant's photograph "looks *kind of* like him" and asked, "You're going to try to catch someone who looks like that? But it's *probably not exactly* because *that isn't exactly* . . ." before she was interrupted by Investigator Clarke and not allowed to finish her statement. *Heyward*, Op. No. 5776, at 38 (emphasis added). However, by the time of trial, she was sure Appellant was her assailant. This is a much more drastic evolution of a victim's identification than the 1% increase in certainty between the identification opportunities that caused the *Washington* court such concern. This Court overlooked this important distinction when relying on *Washington* to support its ruling.

Moreover, this Court noted that the *Washington* court cited *United States v. Peoples*, 748 F.2d 934 (4th Cir. 1984), for the proposition that "an identification is not unreliable because it is phrased in uncertain terms." *Heyward*, Op. No. 5776, at 38 n.4. Although *Peoples* includes this statement, the certainty of a witness identification was not actually at issue in the *Peoples* case. *See United States v. Peoples*, 748 F.2d 934, 936 (4th Cir. 1984) (per curiam).

The *Peoples* court cited to *Patler v. Slayton*, 503 F.2d 472 (4th Cir. 1974), to support this proposition, but a thorough reading of *Patler* reveals that it is distinguishable from the present case and actually lends support to Appellant's position. Unlike here, where Granddaughter testified at trial that she was sure Appellant was her assailant, neither of the witnesses in *Patler* were allowed to make a positive, in-court identification at trial. 503 F.2d at 474–76. Instead, the trial judge, recognizing that the show-up identification procedures to which the witnesses were exposed had been improper, "made certain that the questioning was limited to eliciting only what they saw at the scene and an inconclusive comparison with Patler's physical appearance." 503 F.2d at 476. The *Patler* court noted that the testimony regarding the inconclusive comparison with Patler's physical appearance "*barely* skirted constitutional error, for if there is a line

between 'resemblance' and 'identification' testimony it is admittedly thin." *Id*. (emphasis added). The court noted that the spirit of excluding positive identifications garnered as a result of improper show-up identification procedures "is to prevent the conviction of those who may be innocent when a susceptible witness is unfairly allowed to conclude: 'he is the guilty one.'" *Id.* at 476–77. Here, however, Granddaughter was able to do exactly that—conclude at trial that Appellant was her assailant despite the unconstitutionally suggestive identification procedure to which she had been exposed.

For these reasons, this Court should grant rehearing and reverse Mr. Heyward's convictions.

II. This Court erred in affirming the trial court's admission of a fingerprint card obtained from a New Jersey database and testimony based on the New Jersey fingerprint card.

The Court concluded that the trial court properly admitted the New Jersey fingerprint card under South Carolina Rule of Evidence 901(b)(3). *Heyward*, Op. No. 5776, at 42. In order to reach this conclusion, the Court overlooked the requirements for fingerprint authentication set forth in *State v. Anderson*, 386 S.C. 120, 687 S.E.2d 35 (2009), in favor of a novel authentication method for fingerprints that is inconsistent with South Carolina law and the requirements set forth in *Anderson*. Specifically, the Court concluded that the State's fingerprint expert had compared Appellant's known fingerprints—the prints taken when he was arrested and fingerprinted by Richland County in connection with this case—with the prints on the fingerprint card the investigators obtained through the AFIS system from New Jersey, and that the fingerprint expert's comparison of the two fingerprint cards was sufficient to authenticate the New Jersey fingerprints obtained through AFIS pursuant to Rule 901(b)(3). *Heyward*, Op. No. 5776, at 42.

No other South Carolina case cites Rule 901(b)(3) for the authentication of fingerprints. Instead, South Carolina's seminal case on fingerprint authentication is *Anderson*, 386 S.C. at 120, 687 S.E.2d at 35. In *Anderson*, the State's fingerprint expert testified about using AFIS to find potential matching fingerprints by taking the latent fingerprints at the scene and comparing those fingerprints to the prints obtained through AFIS. *Id.* at 123, 687 S.E.2d at 36. Critically, the fingerprint expert in *Anderson* also testified that the prints on the AFIS card were taken at a correctional facility, on a specific date, and assigned a unique state identifying number. *Id.* at 128, 687 S.E.2d at 39–40. As this Court recognized, there was no such testimony here. *Heyward*, Op. No. 5776, at 41 ("[W]e agree the State failed to establish when and where the N.J. Fingerprints were taken . . ."). Accordingly, this Court overlooked the State's admitted failure to meet the requirements of *Anderson* when finding that the New Jersey fingerprint card was nevertheless authenticated. This Court's novel reliance on Rule 901(b)(3) instead is inconsistent with governing South Carolina law.

Even if authentication under Rule 901(b)(3) was permissible, the comparison conducted by the State's fingerprint expert was insufficient to authenticate the fingerprints at issue. As the Court recognized, the State's fingerprint expert's comparison between the Richland County prints and the New Jersey prints obtained through AFIS was limited to a pattern comparison and was not a minutia comparison. *Heyward*, Op. No. 5776, at 42. The Court failed to appreciate the importance of the distinction between the two types of comparisons. When Investigator Odom testified about her comparison of the fingerprints obtained at the crime scene to Appellant's known fingerprints, she testified that she used the ACE-V methodology, which is a peer reviewed and scientifically accepted method of comparing fingerprints. (*See* R. p. 260, lines 1–17.) Investigator Odom's analysis using the ACE-V methodology was a minutia

comparison, which she conceded she did not do in her comparison between the Richland County prints and the New Jersey prints obtained through AFIS. (*See* R. p. 618, lines 1–8.) To the extent that Rule 901(b)(3) is a permissible method for authenticating fingerprints (which Appellant contends it is not), the State's fingerprint expert would have needed to use the scientifically accepted and peer reviewed ACE-V methodology to reliably authenticate the New Jersey fingerprints. Her admitted use of a simple pattern comparison is insufficient.

Finally, the admission of the improperly authenticated New Jersey fingerprints was not harmless error. As explained in Appellant's briefs, Investigator Odom did not delineate between the Richland County prints and the New Jersey prints in her report on the fingerprint evidence. Accordingly, her use of the improperly authenticated New Jersey fingerprints in that report would mean that the entire report was inadmissible and the critical fingerprint evidence would not have been presented to the jury. The trial court erred in holding that the New Jersey fingerprint card was properly authenticated, the error was not harmless, and this Court should grant rehearing and reverse Mr. Heyward's convictions.

III. This Court erred in finding the trial court's erroneous allowance of expert opinion testimony about the operational capabilities of the recovered firearm was harmless.

This Court concluded that the trial court erred in allowing expert opinion testimony regarding the operational capabilities of the firearm recovered from Appellant's home but determined that the trial court's error was harmless. *Heyward*, Op. No. 5776, at 45. The admission of this testimony was not harmless. The wrongful admission of Investigator Collins' testimony about the operational capabilities of the firearm allowed the State to hammer yet again on the fact that a gun was found in Appellant's residence, unduly prejudicing the jury against him. In fact, during the State's closing argument, the State relied solely on Investigator Collins' testimony to connect the gun found at Appellant's residence to the one described by

Granddaughter. (*See* R. p. 419, lines 6–23.) The State used Investigator Collins' testimony in an effort to paint Appellant in a bad light and tie him to the crime scene, clearly prejudicing Appellant. Because this testimony should never have been admitted and caused Appellant significant prejudice, this Court should grant rehearing and reverse Appellant's convictions.

IV. This Court erred in affirming the trial court's allowance of Appellant's alias "Abdul Muslim" for use in the indictments and at trial.

The Court concluded that Appellant's alias "Abdul Muslim" was necessary to connect the DNA from the crime scene to Appellant because the DNA matched to "Abdul Muslim" in a national database. *Heyward*, Op. No. 5776, at 46–47. However, the Court failed to address that this match also included the national identification number 220688PA. (R. p. 378, line 2–p. 379, line 9.) The jury also heard testimony that Appellant's national identification number was 220688PA. (R. p. 255, lines 10–13.) Thus, there was no probative value in using Appellant's alias in connection with this DNA match because the State could have simply used the national identification number instead. Moreover, the State never elicited any testimony that Appellant was known as "Abdul Muslim," only that he was known to one witness as "Abdul," indicating that there was no probative value in the "Muslim" reference at all. (R. p. 321, line 23–p. 322, line 3.)

Because the trial court erroneously denied Appellant's motion to strike the alias, the jury repeatedly heard Appellant referred to in the indictments and the introduction of the case as "Abdul Muslim," inviting undue religious prejudice against him which substantially outweighed any probative value of the alias and violated his constitutional rights. Trial counsel presented substantial uncontroverted evidence at the pre-trial hearing on Appellant's motion to strike demonstrating the prejudice associated with the State's use of Appellant's "Abdul Muslim" alias.

(*See* R. p. 12, line 5–p. 14, line 15.) The use of the alias was unnecessary and prejudicial and should not have been allowed.

Finally, this Court incorrectly stated that the State's use of Appellant's alias would not have been error because Appellant did not renew his motion to strike the alias at trial. *Heyward*, Op. No. 5776, at 47 n.9. However, this is not accurate. Appellant's trial counsel did renew the motion to strike at the beginning of trial. (R. p. 45, lines 5–8). Likewise, this Court incorrectly stated that Appellant's counsel conceded this issue by acknowledging that prejudice from the alias could be "addressed" by voir dire. *Heyward*, Op. No. 5776, at 47 n.10. However, trial counsel's statement about voir dire was not a concession of the issue in any way; it was merely an acknowledgement that voir dire could address—but not entirely solve—the issue after having preserved the issue on the record. Because Appellant's alias should have been stricken from the indictment and from use at trial, this Court should grant rehearing and reverse Mr. Heyward's convictions.

V. This Court erred in affirming the trial court's admission of gruesome autopsy dissection photographs of the victim's internal head injuries.

This Court erred in affirming the trial court's admission of gruesome autopsy dissection photographs of the victim's internal head injuries. First, this Court erred in affirming the trial court's admission of gruesome autopsy photographs of internal injuries on the basis that the photographs were probative of the issue of malice. *See Heyward*, Op. No. 5776, at 49. However, "[p]hotographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant *or* not necessary to substantiate material facts or conditions." *State v. Torres*, 390 S.C. 618, 623, 703 S.E.2d 226, 228 (2010) (emphasis added). Even assuming these gruesome autopsy photographs were probative of malice, they were not necessary to substantiate malice here. Dr. Durso's extensive testimony regarding the violent

nature of the strangulation and severity of the injuries to Ms. Tollison was sufficient on the issue of malice, rendering the photographs "superfluous." *See State v. Collins*, 409 S.C. 524, 539, 763 S.E.2d 22, 30 (2014) (Kittredge, J., concurring) ("The detailed and graphic testimony of the pathologist was more than sufficient to enable the State to establish the elements of the offense."). Because the photographs were calculated to arouse the sympathy or prejudice of the jury, and were not necessary to substantiate malice, this Court erred in affirming the trial court's decision that the autopsy photographs should be admitted based on their probative value on the issue of malice.

This Court also erred in affirming the trial court's determination that the autopsy photographs corroborated Dr. Durso's testimony. *See Heyward*, Op. No. 5776, at 49. Again, however, "[p]hotographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are . . . not necessary to substantiate material facts or conditions." *State v. Torres*, 390 S.C. 618, 623, 703 S.E.2d 226, 228 (2010). The extent and nature of the victim's injuries was sufficiently explained by Dr. Durso's testimony, and the photographs were unnecessary and should not have been admitted.

Lastly, this Court erred in finding that the photographs are not unduly prejudicial. *See Heyward*, Op. No. 5776, at 50. The Supreme Court of South Carolina has expressed a "growing concern" over the admission of gruesome autopsy photographs. *Id.* at 624, 703 S.E.2d at 229. Further, the Supreme Court of South Carolina has specifically held that color autopsy photographs of the victim, including photographs that depicted the victim's scalp pulled away from her skull, should be excluded because "[t]he prejudice created by the photographs clearly outweighed any evidentiary value." *State v. Middleton*, 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986) (citations omitted). Likewise, the prejudice caused by the admission of these gruesome

autopsy photographs outweighed any evidentiary value, and this Court erred in affirming their admission by the trial court.

VI. This Court erred in finding the trial court's erroneous denial of Appellant's request to remove his shackles during jury selection was harmless.

This Court erred in finding that the trial court's erroneous denial of Appellant's request to remove his shackles during jury selection was harmless because Appellant was not prejudiced. *Heyward*, Op. No. 5776, at 50. This Court misapprehended or overlooked the fact that this conclusion is contrary to binding precedent of the United States Supreme Court, which this Court actually cited in its Opinion, stating that shackling is "inherently prejudicial." *Holbrook v. Flynn*, 475 U.S. 560, 568–69, 106 S.Ct. 1340, 1345–46 (1986). Appellant's due process rights were violated by the trial court's admitted abuse of discretion in refusing to grant Appellant's request to remove his shackles, and this error is inherently prejudicial to Appellant. This error is, therefore, not harmless.

This Court also mistakenly refused to apply the burden-shifting required by *Deck v. Missouri*, 544 U.S. 622. 125 S.Ct. 2007 (2005), because, as this Court incorrectly concluded, "it is not obvious from the record that the shackles were observed." *Heyward*, Op. No. 5776, at 52. However, it is obvious from the record in this case that the shackles were observed. Importantly, in *Deck*, the record upon which the Supreme Court relied for establishing that the shackles were visible consisted entirely of the objections made by Deck's attorney for removal of the shackles. Specifically, Deck's attorney objected "because of the fact that Mr. Deck is shackled in front of the jury . . . ." *Deck*, 544 U.S. at 634, 125 S.Ct. at 2015 (finding that the record "makes clear that the jury was aware of the shackles" and specifically citing to Deck's attorney's objection on the record "that 'Mr. Deck was shackled *in front of the jury*'") (emphasis added by court). Likewise,

here, Appellant's attorney's objections were sufficient to establish that his leg shackles were visible. On the record, Appellant's trial counsel objected to Appellant's shackling, stating:

> We moved on Thursday of last week to prevent presumptive shackling of Mr. Heyward. At current, he is shackled at the feet. If you are within any of the first two rows of the gallery, if you will, directly behind Mr. Heyward, you can see that shackling. Until selection is completed, we would ask the court that Mr. Heyward's shackles be removed.

(R. p. 39, lines 8–22.) The visibility of Appellant's shackles was the very basis for the objection. Accordingly, this Court overlooked that the record here establishes just what the record in *Deck* established—that Appellant's shackles worn during jury selection were visible.

This Court also refused to apply the burden-shifting required by *Deck* on the basis that although Appellant argued that potential jurors in the first two rows of the gallery could see the shackles, the record does not establish that any of the jurors who were actually selected for Appellant's trial could or did see the shackles. *Heyward*, Op. No. 5776, at 53–54. However, again, this Court overlooked that the objections to the shackles worn in *Deck* were, just as the objections here, made during the jury selection phase of the proceeding. Accordingly, this Court overlooked that this is not a proper basis upon which to refuse to apply the burden-shifting required by *Deck* as, again, the record here established just what the record in *Deck* established as well. Accordingly, because Appellant was forced to wear shackles, admittedly without adequate justification, which the record establishes were visible during jury selection, Appellant "need not demonstrate actual prejudice to make out a due process violation" here. *Deck*, 544 U.S. at 635, 125 S.Ct. at 2015 (citing *Holbrook*, 475 U.S. at 568, 106 S.Ct. at 1340).

Finally, this Court's reliance on *State v. Johnson* in reaching its conclusion that the heightened standard in *Deck* does not apply to Appellant's case is misguided. *Heyward*, Op. No. 5776, at 52–54. In *State v. Johnson*, the defendant was being brought from the police car outside

into the courthouse in handcuffs, and the record failed to demonstrate whether any juror happened to see this procession. 422 S.C. 439, 812 S.E.2d 739. This is a completely different scenario from Appellant's situation where the record clearly establishes that he was shackled while inside the courtroom directly in front of the rows of his potential jurors, from which twelve individuals would be selected to determine his guilt or innocence. In fact, the *Johnson* court cites to *State v. Moore* for the following proposition: "We think that when a jury or members thereof see an accused *outside the courtroom* in chains or handcuffs the situation is psychologically different and less likely to create prejudice in the minds of the jury." *Johnson*, 422 S.C. at 458, 812 S.E.2d at 749 (quoting *State v. Moore*, 257 S.C. 147, 152–32, 184 S.E.2d 546, 549 (1971)) (emphasis added). This Court overlooked this significant distinction from the *Johnson* case and should not have relied thereon. The trial court wrongly refused to remove Appellant's shackles, and this error was not harmless.

CONCLUSION

For the foregoing reasons, Appellant James Heyward respectfully requests that this Court grant rehearing, reconsider its ruling on each of the above issues, and reverse Mr. Heyward's convictions.

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Respectfully submitted,

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November 13, 2020

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CERTIFICATE OF SERVICE

I certify that a true copy of the Petition for Rehearing in the above referenced case has been served upon W. Joseph Maye, Assistant Attorney General, South Carolina Attorney General's Office, Post Office Box 11549, Columbia, South Carolina 29211-1549, this 13th day of November, 2020.

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