THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY

R. Knox McMahon, Circuit Court Judge

Supreme Court Case No. 2021-000122

Appellate Case No. 2017-001542

The State, ...Respondent,

v.

James Heyward, ...Petitioner.

PETITION FOR A WRIT OF CERTIORARI

K&L GATES LLP
Tara C. Sullivan
134 Meeting Street, Suite 500
Charleston, SC 29401
(843) 579-5600

Chief Appellate Defender
Robert M. Dudek
South Carolina Commission on Indigent Defense, Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, SC 29201-3332
(803) 734-1330

ATTORNEYS FOR PETITIONER

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Pursuant to Rule 242 of the South Carolina Appellate Court Rules, Petitioner James Heyward ("Mr. Heyward" or "Petitioner") petitions this Court to issue a writ of certiorari[1] to review the controlling issues in the decision of the Court of Appeals in the matter styled *State v. Heyward*, Op. No. 5776 (S.C. Ct. App. filed October 14, 2020) (Shearouse Adv. Sh. No. 40 at 32) (the "Opinion"). This Court should grant Mr. Heyward's petition and reverse the Court of Appeal's erroneous Opinion.

QUESTIONS PRESENTED FOR REVIEW

Petitioner raised several trial court errors for the Court of Appeals to consider, and Petitioner believes the Court of Appeals mistakenly affirmed the trial court with respect to those errors or mistakenly held that those errors were harmless. Petitioner requests that this Court consider six errors of the Court of Appeals that present important legal questions that only this Court is suited to answer with finality:

1. Did the Court of Appeals err 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 where the fingerprint card was not properly authenticated by the State pursuant to this Court's clear precedent?

2. Did the Court of Appeals err 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 in violation of precedent of the Supreme Court of the United States aimed at excluding such improper eyewitness testimony?

3. Did the Court of Appeals wrongly conclude that the trial court's erroneous denial of Petitioner's request to remove his shackles during jury selection was harmless despite precedent of the Supreme Court of the United States recognizing that shackling is inherently prejudicial?

4. Did the Court of Appeals wrongly conclude that the trial court's erroneous allowance of expert opinion testimony about the operational capabilities of a gun found at Petitioner's residence was harmless?

[1] The undersigned hereby certifies that a rehearing petition was made and ruled on by the Court of Appeals on January 15, 2021. (Appendix Volume III, at p. 696.)

5. Did the Court of Appeals err in affirming the trial court's allowance of Petitioner's alias "Abdul Muslim" for use in the indictments and at trial, inviting undue religious prejudice against Petitioner?

6. Did the Court of Appeals err in affirming the trial court's admission of gruesome autopsy dissection photographs of the victim's internal head injuries?

These issues present important questions regarding the admissibility of certain prejudicial evidence and the prejudicial effect of visible shackles and implicate protection of the rights of criminal defendants under the United States Constitution. Certiorari should, therefore, be granted and the Court of Appeals' decision should be reversed.

STATEMENT OF THE CASE

Petitioner was convicted for murder, burglary in the first degree, armed robbery, two counts of kidnapping, assault and battery in the first degree, pointing and presenting a firearm, and possession by a person of an unlawful weapon having been convicted of a crime of violence. Prior to the commencement of Petitioner's trial, the Honorable R. Knox McMahon conducted evidentiary hearings on a number of issues. The case was called for trial on June 27, 2017, before Judge McMahon. On July 3, 2017, the jury returned a verdict of guilty as to all charges. (R. p. 420, line 2–p. 421, line 6.) The trial court sentenced Petitioner to life in prison without the possibility of parole, plus seventy years to be served consecutively and ten years to be served concurrently. (R. p. 422, line 3–p. 423, line 14.)

Petitioner timely filed his notice of appeal on July 11, 2017, and raised the controlling issues to the Court of Appeals. The Court of Appeals found that the trial court did not err in admitting a fingerprint card obtained from a New Jersey database and related testimony in direct violation of this Court's decision in *State v. Anderson*, 386 S.C. 120, 687 S.E.2d 35 (2009). The Court of Appeals also found that the trial court did not err in admitting identification evidence and

testimony, which violates and conflicts with United States Supreme Court precedent. *See Foster v. California*, 394 U.S. 440, 443, 89 S.Ct. 1127, 1129 (1969). The Court of Appeals found that the trial court did err in denying Petitioner's request to remove his shackles during the jury selection phase but ruled such error was harmless, which violates and conflicts with United States Supreme Court precedent. *See Holbrook v. Flynn,* 475 U.S. 560, 568–69, 106 S.Ct. 1340, 1345–46 (1986). The Court of Appeals found that the trial court also erred in allowing the expert testimony regarding the operational capabilities of the recovered handgun but wrongly found the trial court's error harmless. The Court of Appeals also held that the trial court did not err in allowing the use of Petitioner's alias "Abdul Muslim" in the indictments and in trial or in admitting gruesome autopsy dissection photographs of the victim.

Petitioner raised these errors in his motion for rehearing before the Court of Appeals. (Appendix Volume III, at p. 658.) After the Court of Appeals denied rehearing, Mr. Heyward now petitions this Court for a writ of certiorari.

STATEMENT OF THE FACTS

On October 11, 2015, Alice Tollison was found strangled to death in her home. (R. p. 147, line 18–p. 148, line 2.) Her eight-year-old great-granddaughter, G.F., was also found at the scene, after being tied up and left by the assailant. (R. p. 147, line 18–p. 148, line 2, p. 150, lines 6–18, p. 154, lines 15–21, p. 159, lines 22–24.)

G.F. met with Investigator Joe Clarke at the hospital that evening and gave him a description of her assailant. (R. p. 369, line 22–p. 370, line 5.) The next day, G.F. met with Investigator Clarke again at the Assessment and Resource Center, wherein she was provided a photograph lineup in which Petitioner was depicted along with five other African-American men.

(R. p. 371, lines 3–8, State Ex. 30.) Their interaction was recorded by video. (R. p. 27, lines 17–24, State Ex. 31.)

The video recording reflects that when presenting the photograph lineup to G.F., Investigator Clarke told her that "I'm going to show you some pictures, okay. . . . I want you to help me and see if you can see the bad man who did this to your grandmomma." (State Ex. 31.) G.F. referenced the photograph of Petitioner by stating, "Number three looks kind of like him." (State Ex. 31.) She then commented that she "couldn't really remember if he had facial hair or not." (State Ex. 31.) Investigator Clarke then asked, "Okay, and you feel pretty confident about that?" (State Ex. 31.) While G.F. responded "yes," it is unclear whether she was affirmatively responding to the facial hair comment or the initial remarks about photograph number three. (State Ex. 31.) G.F. subsequently pointed to a photograph and said, "That one kind of looks like my janitor." (State Ex. 31.) Investigator Clarke then turned over the page of photographs so G.F. could no longer see them. (State Ex. 31.) As Investigator Clarke left the room, G.F. asked him, "You're going to try to catch someone who looks like that? But it's probably not exactly because that isn't exactly . . . ." (State Ex. 31.) She appeared to be mid-sentence when Investigator Clarke interrupted her, and she was not given a chance to finish her statement.

Prior to trial, the court conducted a hearing pursuant to *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375 (1972), to determine whether G.F.'s photograph lineup identification of Petitioner would be admitted and also whether G.F. would be permitted at trial to identify Petitioner to the jury as the assailant. (R. p. 17, lines 13–18, p. 117, lines 12–17.) G.F. was asked if Petitioner, present in the courtroom, was the same man from the photograph lineup. (R. p. 46, lines 10–25.) After watching the video recording of the lineup identification procedure, Judge McMahon ruled that these identifications would be allowed. (R. p. 27, lines 17–24, State Ex. 31.) At trial, G.F.'s

photograph lineup identification was admitted. (R. p. 165, line 23–p. 169, line 18, p. 372, line 15–p. 372, line 2, State Ex. 30.) G.F. explained that during the lineup she was asked to "point out the person who [she] -- who looked most like him," and that she tried to choose "which one scare[d her] and which one look[ed] like him." (R. p. 168, line 21–p. 169, line 1.) G.F. also identified Petitioner as the assailant in the courtroom during her testimony at trial. (R. p. 169, line 20–p. 170, line 12.)

The same day G.F. participated in the photograph lineup identification, the Richland County Police matched certain fingerprints from the crime scene to a fingerprint card that was attributed to Petitioner from the State of New Jersey's Automated Fingerprint Identification System ("AFIS") database. (R. p. 371, lines 6–19, p. 204, lines 11–19, p. 208, lines 1–10.) After his arrest, the police fingerprinted Petitioner through Livescan software. (R. p. 225, lines 8–17.) At trial, the State presented testimony from latent print analysis expert Investigator Trisha Odom, who conducted fingerprint analyses comparing the latent prints collected from the crime scene and the New Jersey fingerprint card. (R. p. 197, line 25–p. 196, line 5, p. 202, lines 10–21, p. 224 lines, 1–14.) Defense counsel objected to the introduction of all fingerprint evidence because the fingerprint card from the New Jersey database was never authenticated in accordance with South Carolina law. (R. p. 203, line 18–p. 205, line 2.) During an in-camera session, Investigator Odom admitted that she did not know the minimum compliance thresholds for every state in order to place prints into their respective databases. (R. p. 220, line 21–p. 221, line 22.) Nevertheless, the court overruled defense counsel's argument that the New Jersey prints had not been authenticated and ultimately admitted the fingerprint evidence. (R. p. 243, lines 12–17.)

A search warrant was obtained following Petitioner's arrest, and a gun was found in the home where Petitioner was residing. (R. p. 314, lines 11–13, p. 314, line 25–p. 316, line 5.) At

trial, G.F. testified that the assailant had a pistol that was "gold and rusty." (R. p. 146, line 24–p. 147, line 14.) The State elicited detailed testimony about the recovered gun as well. Investigator Michael Beeler testified that the recovered gun was an unloaded ".32 caliber Smith & Wesson handgun." (R. p. 351, line 24–p. 352, line 3.) During his testimony, the court admitted "the handgun . . . as well as six unfired cartridges" into evidence. (R. p. 352, lines 19–25.)

After the entry of the recovered gun into evidence and the testimony describing the gun, defense counsel objected to the subsequent testimony of Investigator David Collins, who was offered by the State to opine on the operational capabilities of the recovered firearm. (R. p. 357, line 23–p. 358, line 5.) The court overruled the objection, finding that whether the firearm was "capable of expelling a projectile through explosion. . . . is an essential element of pointing and presenting." (R. p. 360, lines 16–22.) The court further stated that such testimony would also be relevant to finding whether Petitioner was armed with a deadly weapon during the robbery. (R. p. 359, line 21–p. 360, line 4.) In addition to testifying about the operational capabilities of the recovered firearm, Investigator Collins testified it was "somewhat worn and the finish [was] in bad condition." (R. p. 357, lines 9–11.)

Defense counsel also objected to the use of the alias "Abdul Muslim" in the indictments and at trial. (R. p. 426, line 2–p. 437, line 14, p. 441, line 11–p. 443, line 19, p. 444, lines 4–10, p. 446, lines 7–20, p. 447, lines 8–16, p. 3, lines 5–10, Motion to Strike, Ex. 1.) The alias was read to the jury pool as part of the indictments and referenced during jury voir dire. (R. p. 4, line 19–p. 16, line 7.) During the trial, the State presented testimony that DNA from the crime scene matched to an "Abdul Muslim" with the national identification number 220688PA. (R. p. 378, line 2–p. 379, line 9.) Previous testimony indicated that Petitioner's national identification number

was 220688PA, and another State witness testified that she knew Petitioner as "Abdul." (R. p. 225, lines 10–13, p. 321, line 23–p. 322, line 3.)

Prior to jury selection, defense counsel requested, on the record, that Petitioner's shackles be removed to prevent any prejudice from the jury. (R. p. 2, lines 8–22.) Defense counsel noted that Petitioner had been well-behaved in his prior court appearances related to this case, and he noted that Petitioner's shackles would be visible to potential jurors seated in the first two rows of the gallery. (*Id.*) The trial court denied this request without explanation. (*Id.*)

At trial, the State introduced two color photographs taken during Ms. Tollison's autopsy that depicted the front and back of her dissected scalp pulled away from her skull to reveal bruising underneath. (R. p. 292, lines 4–10, p. 294, line 22–p.295, line 11, State Exs. 14 and 15.) Defense counsel objected to the introduction of these photographs under Rule 403, SCRE, because Ms. Tollison's cause of death was strangulation, and the photographs lacked any probative value. (R. p. 292, line 13–p. 293, line 10, p. 295, line 20–p. 296, line 9.) The color autopsy photographs also risked undue prejudice based on their gruesome nature. (*Id.*)

SUMMARY OF REASONS TO GRANT CERTIORARI

The Court should grant certiorari because substantial constitutional issues and federal questions are involved, and the decision of the Court of Appeals is in conflict with a prior decision of this Court as well as prior decisions of the United States Supreme Court. *See* SCACR, Rule 242(b). First, the trial court and Court of Appeals erred in refusing to follow the settled and governing decisions of this Court regarding the appropriate authentication and admissibility of fingerprint cards, *Anderson*, 386 S.C. at 120, 687 S.E.2d at 35. The lower courts also erroneously ignored United States Supreme Court precedent by admitting improper identification evidence. *Foster*, 394 U.S. at 443, 89 S.Ct. at 1129. The Court of Appeals further erroneously held that the

trial court's denial of Petitioner's request to have his shackles removed during the jury selection phase was harmless error, despite United States Supreme Court precedent that refers to visible shackling of criminal defendants as "inherently prejudicial," *Holbrook,* 475 U.S. at 568–69, 106 S.Ct. at 1345–46.

This Court should also grant certiorari because the Court of Appeals' decision that the trial court's error in allowing the expert testimony regarding the operational capabilities of the recovered handgun was harmless is a clear violation of Petitioner's due process rights. The Court of Appeals' decisions that the trial court did not err in allowing the use of Petitioner's alias "Abdul Muslim" in the indictments and at trial and in admitting gruesome autopsy dissection photographs of the witness affirmed prejudicial decisions of the trial court that also impacted Petitioner's constitutionally protected rights to a fair trial. This Court should remedy these errors by granting certiorari in this matter. *See* SCACR, Rule 242(b).

ARGUMENT

I. The Court of Appeals 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 of Appeals erred in affirming the trial court's admission of fingerprint evidence without the proper authentication required by South Carolina Rule of Evidence 901. The Court of Appeals concluded that the trial court properly admitted the New Jersey fingerprint card under Rule 901(b)(3), SCRE. *Heyward*, Op. No. 5776, at 42. In order to reach this conclusion, the Court of Appeals overlooked the requirements for fingerprint authentication set forth in *Anderson*, 386 S.C. at 120, 687 S.E.2d at 35, in favor of a novel authentication method for fingerprints that is inconsistent with established South Carolina law.

Specifically, the Court of Appeals concluded that the State's fingerprint expert's comparison of Petitioner'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 was sufficient to authenticate the New Jersey fingerprints obtained through AFIS pursuant to Rule 901(b)(3), SCRE. *Heyward*, Op. No. 5776, at 42. No other South Carolina case cites Rule 901(b)(3) for the authentication of fingerprints.[2] Instead, South Carolina's seminal case on fingerprint authentication is *Anderson*, 386 S.C. at 120, 687 S.E.2d at 35.

It is well established under South Carolina law that fingerprint evidence must be authenticated in order to be admissible at trial. *See, e.g., State v. Rich*, 293 S.C. 172, 359 S.E.2d 281 (1987) (reversing conviction based on trial court's failure to authenticate fingerprint comparison prior to its admission); Rule 901(a), SCRE ("The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."). Such authentication requires "evidence as to when and by whom the [fingerprint] card was made and that the prints on the card were in fact those of this defendant." *Rich*, 293 S.C. at 174, 359 S.E.2d at 282 (citation omitted). In *Anderson*, this Court also required testimony regarding how one's fingerprints were taken, including testimony that a known fingerprint card was taken at a correctional facility on a certain date, in order to meet the authentication requirement of Rule 901, SCRE. 386 S.C. at 128–29, 131–32, 687 S.E.2d at 39–40, 41.

Critically, the fingerprint expert in *Anderson* 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.

[2] 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 because the State's fingerprint expert failed to use the scientifically accepted and peer reviewed ACE-V methodology to reliably authenticate the New Jersey fingerprints, *Heyward*, Op. No. 5776, at 42, and her admitted use of a simple pattern comparison was insufficient.

Id. at 128, 687 S.E.2d at 39–40. As the Court of Appeals recognized, there was no such testimony at Petitioner's trial. *Heyward*, Op. No. 5776, at 41 ("[W]e agree the State failed to establish when and where the N.J. Fingerprints were taken . . ."). Accordingly, the Court of Appeals overlooked the State's admitted failure to meet the requirements of *Anderson* when finding that the New Jersey fingerprint card was nevertheless authenticated.

In its Return to Mr. Heyward's Petition for Rehearing, the State argued that this Court "explicitly acknowledged" in *Anderson* that expert testimony can be used to authenticate fingerprint cards, and, therefore, Investigator Odom's testimony was sufficient to authenticate the New Jersey fingerprint cards. (Appendix Volume III, at p. 677.) However, the State's characterization of this Court's decision in *Anderson* is overly broad and incorrect. This Court's holding in *Anderson* does not propose that any "expert" can authenticate fingerprint cards, even if the expert is lacking certain foundational knowledge about the fingerprints, including when and where the fingerprints were collected. In fact, this Court articulated quite the opposite—in *Anderson*, this Court only found the burden of authentication satisfied where the fingerprint expert provided "testimony which substantiated the process used in obtaining and maintaining the fingerprint card." 386 at 128, 687 S.E.2d at 39. No such testimony exists in Petitioner's case, and, as such, the investigator's authentication of the New Jersey fingerprint card was impermissible under South Carolina law.

Finally, the admission of the improperly authenticated New Jersey fingerprints was not harmless error. 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

Court of Appeals erred in holding that the trial court properly admitted the New Jersey fingerprint card and that the fingerprint card was properly authenticated, and this error was not harmless.

The Court of Appeals' decision is not consistent with longstanding South Carolina case law and precedent of this Court, and for these reasons, this Court should grant certiorari to correct this error.

II. The Court of Appeals 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.

The Court of Appeals affirmed the admissibility of evidence and testimony regarding G.F.'s so-called "identification" of Petitioner during a photograph lineup and G.F.'s subsequent identification of Petitioner at trial. *See Heyward*, Op. No. 5776, at 40. The Court of Appeals' decision to affirm the trial court's erroneous admission of this evidence is in direct violation of United States Supreme Court precedent, *Foster v. California*, 394 U.S. at 443, 89 S.Ct. at 1129.

The Court of Appeals did not even address the binding precedent of *Foster* in its Opinion, despite the fact that Petitioner's argument largely rested on *Foster*, which held that a process that began with an inability to make any identification and 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.'" *Id*. In *Foster*, a victim was given three opportunities to identify his assailant prior to the trial. *Id.* at 441–43, 89 S.Ct. at 1128–29. First, he viewed a physical line-up of three men. *Id.* at 441, 89 S.Ct. at 1128. "After seeing this lineup, [the victim] could not positively identify [the defendant] as the robber. He 'thought' he was the man, but he was not sure." *Id.* Next, the victim had a one-to-one sit-down with the defendant but he "still was uncertain whether [the defendant] was one of the robbers." *Id.* Finally, the victim later viewed a physical

lineup of five men, and the defendant was the only person in this second lineup that had been included in the original lineup. *Id.* at 441–42, 89 S.Ct. at 1128. At this point, the victim "was 'convinced' [the defendant] was the man." *Id.* at 442, 89 S.Ct. at 1128. The victim later positively identified the defendant at trial. *Id.*

The *Foster* Court held that this identification procedure "made it all but inevitable that [the victim] would identify [the defendant] whether or not he was in fact 'the man.'" *Id.* at 443, 89 S.Ct. at 1129. The victim began by being unable to make any identification, changed to a tentative identification, and ultimately came to a definite identification as a result of the police effectively repeatedly telling the witness that the defendant was the assailant. *Id.* at 441–43, 89 S.Ct. at 1128–29. The *Foster* Court found that this was a compelling example of unfair lineup procedures and held that the procedures violated the defendant's right to due process. *Id.*

Similarly, in Petitioner's case, G.F. was presented with three opportunities to make an identification of her assailant: (1) during the initial photograph lineup, (2) at the pre-trial hearing regarding the admissibility of the initial photograph lineup, and (3) at the trial itself. When presented with six pictures during the initial photograph lineup, G.F. indicated that the photograph of Petitioner looked "kind of" like her assailant but advised that it was "not exactly" him. (State Ex. 31.) At the pre-trial hearing, G.F. identified Petitioner in the courtroom as the person she saw in the photograph lineup, but she did not identify Petitioner as the assailant. (R. p. 46, lines 10–25.) Finally, during the trial, G.F. testified that she was sure Petitioner was her assailant. (R. p. 165, line 9–p. 170, line 25.) This succession of events caused the final identification at trial to be virtually inevitable. Because the identification procedure was so unduly suggestive, unreliable, and conducive to irreparable misidentification, the initial "identification" and the subsequent identification at trial should not have been admitted.

Like the evolving identification in *Foster*, G.F.'s positive identification at trial was surely influenced by the suggestive nature of the initial photograph lineup, her repeated exposure to Petitioner's photograph, and the fact that Petitioner was the only one from the photograph lineup who was before her when she made her definite identification in court after Petitioner had been charged and was on trial for the crimes. The identification ultimately came about as a result of the State effectively repeatedly telling G.F., only eight years old at the time of the incident, that Petitioner was the "bad man." The identification procedure was, therefore, unduly suggestive, resulting in an inherently unreliable identification. The resulting likelihood of misidentification violates Petitioner's right to due process because "there is a reasonable possibility that the [improper identification] might have contributed to the conviction." *Thompson v. Leeke*, 756 F.2d 314, 316 (4th Cir. 1985) (citing *Fahy v. Connecticut*, 375 U.S. 85, 86–87, 84 S.Ct. 229, 230–231 (1963)). As a result, the Court of Appeals should have determined that the trial court committed reversible error in admitting the testimony and evidence regarding the initial photograph lineup and G.F.'s in-court identification of Petitioner at trial.

However, the Court of Appeals overlooked or misapprehended the suggestive nature of the photograph lineup itself and affirmed the trial court's admission of the identification evidence and testimony. The Court of Appeals accorded undue weight to G.F.'s purported ability to appreciate the nuance and importance of Investigator Clarke's use of the word "if" to telepath to G.F. that she did not have to choose someone from the lineup. This overlooks the reality that G.F. 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 G.F. with no option but to choose one of the photographs. 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 G.F. that she should pick one of the photographs and thereby created an unduly suggestive lineup procedure.

Moreover, the Court of Appeals overlooked or misapprehended Petitioner's argument that the overall identification process was unduly suggestive as evidenced by G.F.'s evolving level of certainty at each stage of the process. The Court of Appeals stated that "[n]othing in the record indicates G.F. 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. However, Petitioner argues that the process of seeing Petitioner's picture in the photograph lineup, to seeing the photograph lineup again, along with Petitioner in person, at the pre-trial *Neil v. Biggers* hearing, followed by seeing Petitioner again at trial, was an unduly suggestive process that inevitably caused her certainty to evolve and increase with each subsequent exposure to Petitioner.

Instead of addressing the *Foster* decision, the Court of Appeals relied primarily on its own decision in *State v. Washington*, 323 S.C. 106, 473 S.E.2d 479 (Ct. App. 1996), to find that G.F.'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 percent 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 percent 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 G.F. initially indicated only that Petitioner'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 Petitioner was her assailant. This is a much more drastic evolution of a victim's identification than the 1 percent increase in certainty between the identification opportunities that caused the *Washington* court such concern. The Court of Appeals overlooked this important distinction when relying on *Washington*.

The Court of Appeals noted in its Opinion 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."[3] *Heyward*, Op. No. 5776, at 38 n.4. 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 Petitioner's position. In *Patler* neither of the witnesses were allowed to make a positive, in-court identification at trial. *Id.* 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." *Id.* 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

[3] 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).

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, G.F., a susceptible eight-year-old child, was allowed to do exactly that—conclude at trial that Petitioner was her assailant despite the unconstitutionally suggestive identification procedure to which she had been exposed.

There are grave constitutional implications to consider in reviewing the Court of Appeals' affirmation of this identification evidence in order to ensure that criminal defendants receive the fair trial, to which they are guaranteed in this country. The Innocence Project, a national organization committed to exonerating wrongly-convicted individuals and reforming the criminal justice system, reports that mistaken eyewitness identifications are the leading factor in wrongful convictions.[4] The Innocence Project specifically notes that misidentifications often result from identification administrators providing "unintentional cues" to eyewitnesses about which person to identify as the perpetrator.[5] Additionally, "a witness's confidence can be particularly susceptible to influence by information provided to the witness after the identification process . . . [t]herefore it is critically important to capture an eyewitness's level of confidence at the point in time that the identification is made."[6] This Court should grant certiorari to reverse the Court of Appeals' decision affirming the trial court's admission of the so-called "identification" of Petitioner made by an eight-year-old child when she herself expressed that Petitioner was not her

[4] *About*, Innocence Project, https://www.innocenceproject.org/about/ (last visited Feb. 26, 2021).
[5] *Eyewitness Identification Reform*, Innocence Project, http://www.innocenceproject.org/eyewitness-identification-reform (last visited Feb. 26, 2021).
[6] *Id.*

assailant at the time of the identification. For all of these reasons, this Court should grant certiorari to correct this error.

III. The Court of Appeals erred in finding the trial court's erroneous denial of Petitioner's request to remove his shackles during jury selection was harmless.

The Court of Appeals erred in finding that the trial court's erroneous denial of Petitioner's request to remove his shackles during jury selection was harmless because Petitioner was not prejudiced. *Heyward*, Op. No. 5776, at 50. The Court of Appeals' conclusion that the trial court's denial of Petitioner's request to remove his shackles was harmless is in direct opposition to binding precedent of the United States Supreme Court finding shackling to be "inherently prejudicial." *Holbrook,* 475 U.S. at 568–69, 106 S.Ct. at 1345–46.

The Court of Appeals did appropriately conclude that the trial court abused its discretion in refusing to allow Petitioner to appear in court without shackles. Prior to jury selection, defense counsel requested that Petitioner's shackles be removed to prevent any prejudice from the jury. (R. p. 2, lines 8–22.) Defense counsel noted both that Petitioner had been well-behaved on his three prior court appearances and that any potential jurors in the first two rows of the gallery would certainly see Petitioner's shackling. (*Id*.) The trial court denied this request without any explanation. (R. p. 2, line 23.) The Court of Appeals agreed with Petitioner's argument that the trial court abused its discretion in denying Petitioner's request to remove his shackles because the trial court failed to properly exercise its discretion and there was no evidence of a security concern that would outweigh the prejudice to Mr. Heyward of appearing before potential jurors in shackles. *Heyward*, Op. No. 5776, at 50.

However, in a paradoxical conclusion, the Court of Appeals determined this erroneous denial of Petitioner's request to have his shackles removed was harmless because Petitioner "was not prejudiced." *Id.* at 51. In reaching this conclusion, the Court of Appeals misapprehended the

United States Supreme Court decisions of *Holbrook*, 475 U.S. at 560, 106 S.Ct. at 1340, and *Deck v. Missouri,* 544 U.S. 622, 125 S.Ct. 2007 (2005).

The Court of Appeals specifically stated in the Opinion that in *Deck*, 544 U.S. at 622, 125 S.Ct. at 2007, the State of Missouri's "argument failed to take into account the Supreme Court's statement in *Holbrook v. Flynn* that shackling is 'inherently prejudicial.'" *Heyward*, Op. No. 5776, at 50 (citations omitted). Yet, in Petitioner's case, the Court of Appeals also failed to consider this statement by the United States Supreme Court and properly conclude that the trial court's admitted abuse of discretion in refusing to grant Petitioner's request to remove his shackles was not harmless.

The Court of Appeals also mistakenly refused to apply the burden-shifting required by *Deck*, 544 U.S. at 622, 125 S.Ct. at 2007, because, as the Court of Appeals incorrectly concluded, "it is not obvious from the record that the shackles were observed." *Heyward*, Op. No. 5776, at 52. However, it <u>*is*</u> obvious from the record in this case that the shackles were observed. Importantly, in *Deck*, the record upon which the United States 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. *Deck*, 544 U.S. at 634, 125 S.Ct. at 2015. Specifically, Deck's attorney objected "because of the fact that Mr. Deck is shackled in front of the jury . . . ." *Id.* (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, Petitioner's attorney's objections were sufficient to establish that his leg shackles were visible. On the record, Petitioner's trial counsel objected to Petitioner'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 Petitioner's shackles was the very basis for the objection. Accordingly, the Court of Appeals overlooked that the record here establishes just what the record in *Deck* established—that Petitioner's shackles worn during jury selection were visible.

The Court of Appeals also refused to apply the burden-shifting required by *Deck* on the basis that although Petitioner 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 Petitioner's trial could or did see the shackles. *Heyward*, Op. No. 5776, at 53–54. However, again, the Court of Appeals 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, the Court of Appeals overlooked that this is not a proper basis upon which to refuse to apply the burden-shifting required by *Deck*. As such, because Petitioner was forced to wear shackles, admittedly without adequate justification, which the record establishes were visible during jury selection, Petitioner "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).

The Court of Appeals attempted to skirt the burden-shifting requirements of *Deck* by relying on its decision in *State v. Johnson,* 422 S.C. 439, 812 S.E.2d 739 (Ct. App. 2018). The Court of Appeals' reliance on *State v. Johnson* to conclude that the heightened standard in *Deck* does not apply to Petitioner's case is misguided. *Heyward*, Op. No. 5776, at 52–54. In *State v. Johnson*, the defendant was being brought from the police car parked outside into the courthouse in handcuffs, and the record failed to demonstrate whether any juror happened to see this procession. 422 S.C. at 458, 812 S.E.2d at 749. This is a completely different scenario from Petitioner's situation where the record clearly establishes that he was shackled while inside the

courtroom directly in front of rows of 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." *Id.* 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). The Court of Appeals overlooked this significant distinction from the *Johnson* case and should not have relied thereon.

The Court of Appeals' decision is not consistent with United States Supreme Court precedent and erroneously relies on decisions from this Court that are factually inapplicable, and for these reasons, this Court should grant certiorari to correct this error.

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

The Court of Appeals erroneously concluded that the trial court's error in allowing expert opinion testimony regarding the operational capabilities of the firearm recovered from Petioner's home was harmless. *Heyward*, Op. No. 5776, at 45. This error was not harmless because such testimony was irrelevant, needlessly cumulative, and unduly prejudicial to Petitioner.

At trial, the State offered Investigator David Collins as an expert in firearms and tool marks examination and identification and elicited testimony from him regarding whether the firearm recovered from Petitioner's residence was operational. (Tr. pp. 885:24–897:11.) Defense counsel objected to Investigator Collins' testimony because the operational capabilities of the recovered firearm were not relevant to the offenses with which Petitioner was charged, and the testimony was needlessly cumulative considering the other evidence introduced by the State, including the firearm itself. (Tr. pp. 886:23–888:7.) The trial court overruled the objection. (Tr. pp. 888:18–890:4.) Although the trial court acknowledged previous testimony already established that it was,

in fact, a firearm, the trial court ruled that the operational capability of the firearm was relevant to the charges of armed robbery and pointing and presenting. (*Id.*)

The Court of Appeals rightfully agreed with Petitioner's argument and held that the trial court abused its discretion in allowing expert testimony about the operational capabilities of the firearm because the evidence was not relevant to Petitioner's charges. *Heyward*, Op. No. 5776, at 45. Despite this finding, the Court of Appeals concluded that this erroneous admission of expert testimony was harmless. *Id.* at 46.

However, the trial court's error in admitting this testimony was not harmless. In fact the admission of this testimony was particularly prejudicial because it allowed needlessly cumulative testimony, which the State used in an effort to paint Petitioner in a bad light and tie him to the crime scene. 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 Petitioner'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 Petitioner's residence to the one described by G.F. (*See* R. p. 419, lines 6–23.) Because this testimony should never have been admitted and caused Petitioner significant prejudice, this Court should grant certiorari to correct this error.

V. The Court of Appeals erred in affirming the trial court's allowance of Petitioner's alias "Abdul Muslim" for use in the indictments and at trial.

The Court of Appeals erred in concluding that Petitioner's alias "Abdul Muslim" was necessary to connect the DNA from the crime scene to Petitioner because the DNA matched to "Abdul Muslim" in a national database. *Heyward*, Op. No. 5776, at 46–47. In doing so, the Court of Appeals failed to address that this DNA match also included the national identification number 220688PA. (R. p. 378, line 2–p. 379, line 9), which was the national identification number assigned

to Petitioner. Because the jury heard testimony regarding the matching identification number, the use of the alias was unnecessary. (R. p. 255, lines 10–13.) Thus, there was no probative value in using Petitioner'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 Petitioner 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 Petitioner's motion to strike the alias, the jury repeatedly heard Petitioner 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 Petitioner's motion to strike demonstrating the prejudice associated with the State's use of Petitioner'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.[7] Because Petitioner's alias should have been stricken from the indictment and from use at trial, this Court should grant certiorari to rectify this error.

[7] The Court of Appeals also made two incorrect assertions about the allowance of the alias. First, the Court of Appeals stated that the State's use of Petitioner's alias would not have been error because Petitioner did not renew his motion to strike the alias at trial. *Heyward*, Op. No. 5776, at 47 n.9. However, this is not accurate. Petitioner's trial counsel did renew the motion to strike at the beginning of trial. (R. p. 45, lines 5–8). Secondly, the Court of Appeals characterized Petitioner's counsel as having 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.

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

The Court of Appeals erred in affirming the trial court's admission of gruesome autopsy dissection photographs of the victim's internal head injuries. The Court of Appeals erred in finding that the photographs were not unduly prejudicial, despite this Court's precedent of holding as such. *See Heyward*, Op. No. 5776, at 50. This Court has expressed a "growing concern" over the admission of gruesome autopsy photographs. *State v. Torres*, 390 S.C. 618, 624, 703 S.E.2d 226, 229 (2010). Furthermore, this Court 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). As such, the Court of Appeals should have followed the precedent of this Court and reversed the trial court's decision to admit the gruesome autopsy photographs because the prejudice caused by the admission of these gruesome autopsy photographs outweighed any evidentiary value.

Furthermore, for their overwhelming prejudicial impact, the photographs offer relatively little evidentiary value; as such, the Court of Appeals erred in affirming the trial court's admission of gruesome autopsy photographs on the basis that the photographs were probative of the issue of malice. *See Heyward*, Op. No. 5776, at 49. "Photographs 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." *Torres*, 390 S.C. at 623, 703 S.E.2d at 228 (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.").

The Court of Appeals 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." *Torres*, 390 S.C. at 623, 703 S.E.2d at 228. The extent and nature of the victim's injuries were sufficiently explained by Dr. Durso's testimony, and the Court of Appeals erred in affirming the trial's court erroneous decision to admit the photographs. As such, this Court should grant certiorari to correct this error.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari and reverse the Court of Appeals' erroneous decision, which is in direct conflict with decisions of this Court and the United States Supreme Court.

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Respectfully submitted,

K&L GATES, LLP

s/Tara C. Sullivan
Jennifer H. Thiem
Tara C. Sullivan
J. Whitney McGreevy
M. Claire Flowers
134 Meeting Street, Suite 500
Charleston, SC 29401
jennifer.thiem@klgates.com
tara.sullivan@klgates.com
whit.mcgreevy@klgates.com
claire.flowers@klgates.com
Telephone: (843) 579-5600
Facsimile: (843) 579-5601

Robert M. Dudek
Chief Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, SC 29201-3332
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Attorneys for Petitioner James Heyward

March 4, 2021