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**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Spartanburg County

Honorable R. Keith Kelly, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

DAVID VIRON LEWIS GARRETT,

APPELLANT.

APPELLATE CASE NO. 2020-001183

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INITIAL BRIEF OF APPELLANT

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## **STATEMENT OF ISSUE ON APPEAL**

Did the sentencing judge abuse his discretion by admitting nearly one hundred and fifty gruesome colored photographs of the decedent's body taken before and during autopsy where the probative value of the photographs was substantially outweighed by the danger of unfair prejudice in violation of Rule 403, SCRE, and only served to inflame the emotions of the trial judge who was resentencing Appellant for murder and first degree burglary pursuant to Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014)?

## STATEMENT OF THE CASE

A Spartanburg County Grand Jury indicted Appellant on November 20, 2007 for murder, armed robbery, and first degree burglary. R. \* (Indictments). On February 24, 2009, Appellant pled guilty as indicted before the Honorable J. Derham Cole. Tr. 1 (February 24, 2009). Solicitor Harold (“Trey”) Gowdy, III and Deputy Solicitor Barry Barnette represented the state. Tr. 1 (February 24, 2009). Richard Whelchel represented Appellant. Tr. 1 (February 24, 2009). Judge Cole sentenced Appellant to current terms of life without parole for murder and first degree burglary, and thirty years for armed robbery. Tr. 31, l. 24 – 32, l. 11 (February 24, 2009).

On July 8, 2016, Appellant filed a motion for resentencing pursuant to Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014). R. \* (Motion for Resentencing). The state filed a return to this motion on March 21, 2017. R. \* (Return to Defendant’s Motion for Resentencing). An evidentiary hearing was held on January 8, 2020 before the Honorable R. Keith Kelly. Tr. 1 (January 8, 2020). Solicitor Barry Barnette represented the state. Tr. 1 (January 8, 2020). Clay Allen represented Appellant. Tr. 1 (January 8, 2020).

A subsequent resentencing hearing was held on July 30, 2020 before Judge Kelly. Tr. 1 (July 30, 2020). Solicitor Barry Barnette represented the state. Tr. 1 (July 30, 2020). Clay Allen and Michael Morin represented Appellant. Tr. 1 (July 30, 2020). Judge Kelly resented Appellant to forty-five years for murder. Tr. 6, ll. 13-14 (July 30, 2020).

On August 7, 2020, Appellant filed a Motion for Reconsideration and also requested he be resentenced for first degree burglary. R. \* (Motion for Reconsideration of Sentence). The state filed a Return to Defendant’s Motion for Reconsideration on August 12, 2020. R. \* (Return to Defendant’s Motion for Reconsideration). A hearing on the motion was held on August 20, 2020 before Judge Kelly. Tr. 1 (August 20, 2020). Solicitor Barry Barnette represented the state.

Tr. 1 (August 20, 2020). Michael Morin represented Appellant. Tr. 1 (August 20, 2020). Judge Kelly resentenced Appellant to twenty years for first degree burglary. Tr. 8, ll. 13-14 (August 20, 2020). However, he denied Appellant's motion to reconsider the forty-five year sentence previously imposed for murder. Tr. 8, ll. 15-19 (August 20, 2020).

This appeal follows.

## **STANDARD OF REVIEW**

“The relevance, materiality, and admissibility of photographs are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion.” State v. Torres, 390 S.C. 618, 622-623, 703 S.E.2d 226, 228 (2010) (quoting State v. Shuler, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003)) (internal quotation marks omitted). In exercising its discretion on a Rule 403, SCRE, objection to the admissibility of autopsy photographs, the trial court must balance the unfair prejudice of graphic photographs against their probative value. State v. Gray, 408 S.C. 601, 608-609, 759 S.E.2d 160, 164 (Ct. App. 2014) (citing State v. Dial, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013)).

## ARGUMENT

The sentencing judge abused his discretion by admitting nearly one hundred and fifty gruesome colored photographs of the decedent's body taken before and during autopsy where the probative value of the photographs was substantially outweighed by the danger of unfair prejudice in violation of Rule 403, SCRE, and only served to inflame the emotions of the trial judge who was resentencing Appellant for murder and first degree burglary pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014).

### **Relevant Facts**

The state alleged Appellant murdered his eighty-one year old neighbor, Margaret Seay, during the late morning hours of May 30, 2007 when Appellant was just seventeen years old. The state maintained Appellant entered Seay's home with the intent to rob her and ultimately stabbed her forty-five times with a knife. Seay survived for several hours but died at the hospital during surgery. Tr. 18, ll. 1-15 (February 24, 2009). After Appellant's mother found incriminating evidence in his bedroom and notified law enforcement, Appellant confessed and wrote an apology letter to the decedent. Tr. 18, l. 15 – 19, l. 6 (February 24, 2009). The decedent's blood was found on Appellant's clothing and his fingerprints were found in her carport. Tr. 19, ll. 7-8 (February 24, 2009). Appellant fully cooperated with law enforcement and told them where they could find the knife used in the killing. Tr. 19, ll. 8-12 (February 24, 2009).

The state did not oppose Appellant's motion for resentencing recognizing he was entitled to resentencing pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014) because he was sentenced to life without parole for crimes he committed as a juvenile. R. \* (Return to Defendant's Motion for Resentencing). During the evidentiary hearing before Judge Kelly,

Appellant presented the testimony of Kara Richards-Baker, a mitigation investigator, and Dr. Leonard Mulbry, a forensic psychiatrist. Richards examined Appellant's childhood up until the time of the crime. She reviewed his medical records, school records, and records from the Department of Social Services (DSS) pertaining to the family. She also spoke to numerous family members, teachers, counselors, and social workers about Appellant. Tr. 48, l. 17 – 50, l. 8 (January 8, 2020). She described Appellant's troubled upbringing and often neglectful environment. Tr. 50, l. 13 – 75, l. 24 (January 8, 2020). Dr. Mulbry evaluated Appellant as to the five factors outlined by our Supreme Court in Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014) and described his findings. Tr. 85, l. 2 – 109, l. 14 (January 8, 2020).

The state did not present any witnesses. Instead, it entered fourteen exhibits into evidence, including the Spartanburg County Sheriff's Office case file. See R. \* (State's Exhibit No. 11). The case file, which was marked as State's Exhibit No. 11, included approximately one hundred and thirty-nine photographs of the decedent taken during autopsy, including some that showed dissection of the body. See R. \* (State's Exhibit No. 11). Appellant objected to the admission of these photographs pursuant to Rule 403, SCRE. Defense counsel argued the photographs were "shocking" and designed to appeal to the judge's "reactions" and "shock the conscious of the Court." Tr. 21, l. 12 – 21, l. 2 (January 8, 2020). He further asserted that the photographs "serve no useful purpose." Citing to State v. Torres, 390 S.C. 618, 622-623, 703 S.E.2d 226, 228 (2010), counsel maintained that there are limits on the admissibility of photographs even during a sentencing proceeding. He emphasized that in Torres, our Supreme Court gave a "sternly worded warning to the Bench and the Bar" concerning the admissibility of such photographs. Tr. 21, l. 3 – 22, l. 1 (January 8, 2020).

The solicitor contended that he sought to introduce the autopsy photographs to demonstrate the “seriousness of the crime, how shocking it was.” Tr. 23, ll. 14-20 (January 8, 2020). However, given the defense objection, he offered to admit the photographs in black and white as opposed to color. Tr. 22, l. 21 – 23, l. 1 (January 8, 2020); Tr. 23, ll. 21-22 (January 8, 2020).

The sentencing judge admitted the entirety of State’s Exhibit No. 11 over Appellant’s objection. He emphasized that the court was “sitting without a jury” and maintained he could “separate” himself “from the emotion and apply the facts and law of this case.” Tr. 24, ll. 2-9 (January 8, 2020). The judge did not accept the state’s offer to admit the photographs in black and white.

## **Discussion**

The sentencing judge abused his discretion by admitting all one hundred and thirty-nine colored photographs of the decedent’s body taken during autopsy because the probative value of the horrific photographs was substantially outweighed by the danger of unfair prejudice in violation of Rule 403, SCRE, and only served to inflame the emotions of the sentencing judge. The judge wholly failed to exercise his discretion as evidenced, in part, by his refusal of the solicitor’s offer to admit the photographs in black and white.

“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.” State v. Torres, 390 S.C. 618, 623, 703 S.E.2d 226, 228 (2010) (citing State v. Brazell, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997)) (emphasis added). “Under Rule 403, SCRE, ‘evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.’” Id. (quoting Rule 403, SCRE). “To be classified as unfairly prejudicial, photographs must have a

‘tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.’” Id. at 623, 703 S.E.2d at 228-229 (quoting State v. Franklin, 318 S.C. 47, 55, 456 S.E.2d 357, 361 (1995)).

In Torres, the state offered several autopsy photographs into evidence during the sentencing phase of Torres’s capital murder trial. Id. at 623, 703 S.E.2d at 229. The pathologist who conducted the autopsy used the photographs during his testimony to illustrate the number of injuries, the location of the injuries, and the manner in which the injuries were committed. Id. at 624, 703 S.E.2d at 229. Torres argued on appeal that the trial judge should have excluded the autopsy photographs because they were more prejudicial than probative in violation of Rule 403, SCRE, and only served to inflame the emotions of the jury. Id. at 623, 703 S.E.2d at 228. Our Supreme Court disagreed. The Court emphasized that autopsy photographs may be presented to the jury in an effort to show the circumstances of the crime and the character of the defendant. Id. at 623, 703 S.E.2d at 229 (citing State v. Rosemond, 335 S.C. 593, 597, 518 S.E.2d 588, 590 (1999)). The Court concluded that “[t]he net effect of the photographs was to show what Torres did to the [decedents], which goes straight to circumstances of the crime.” Id. at 624, 703 S.E.2d at 229. Additionally, the Court held the trial judge exercised his discretion by excluding three of the state’s photographs, including an autopsy dissection photograph, ruling they were duplicative and prejudicial. Id.

At the conclusion of its opinion, the Supreme Court emphasized that the photographs admitted in Torres were “at the outer limits of what our law permits a jury to consider.” Id. It further “strongly encouraged all solicitors to refrain from pushing the envelope on [the] admissibility” of such horrific photographs. Id.

In State v. Collins, 409 S.C. 524, 763 S.E.2d 22 (2014), our Supreme Court held the trial judge did not abuse his discretion in admitting seven photographs of the decedent taken by the pathologist before autopsy. Collins was convicted of involuntary manslaughter and three counts of owning a dangerous animal causing injury to a person after a ten year old boy was killed and partially eaten by his dogs. Id. at 528, 763 S.E.2d at 24. “According to the forensic pathologist, the boy suffered a tremendous number of bite marks on his legs and had extensive loss of skin and soft tissue on his upper body and his face, including his ears and nose, which were completely eaten away by the dogs. Areas of the boy’s chest and his arm had also been eaten, exposing the bone. The boy’s jugular vein on the left side was torn in half, causing significant blood loss leading to his death.” Id. at 529, 763 S.E.2d at 25 (internal quotation marks omitted).

In order to support its assertions about the dangerous propensities of the dogs, the manner and extent of the attack, and Collins’s criminal negligence, the state offered a group of photographs taken of the boy by the pathologist. Id. at 532, 763 S.E.2d at 27. Our Supreme Court held it was not an abuse of discretion to admit the photographs because the evidence was “probative, *corroborative*, and *material* in establishing the elements of the offenses charged.” Id. at 535, 763 S.E.2d at 28 (emphasis added). In holding the probative value of the evidence outweighed the danger of unfair prejudice, the Court emphasized that “the photos were taken *before* the autopsy was conducted as a means to document the extent and nature of the victim’s injuries. Thus, they show the unaltered condition of the victim, not any additional wounds that could have been made to the body by the pathologist in performing his examination.” Id. at 536, 763 S.E.2d at 28-29 (emphasis in original).

In State v. Gray, 408 S.C. 601, 759 S.E.2d 160 (2014), this Court held the trial judge did not abuse his discretion in admitting eleven autopsy photographs, eight taken before autopsy and

three taken during autopsy. Gray was convicted of murder and first degree lynching. Id. at 604, 759 S.E.2d at 162. The decedent was severely beaten during the course of two fights. Gray was only involved in the second fight. Id. The state maintained Gray “swept [the decedent’s] feet out from under him causing him to fall and hit his head on the ground.” Id. at 606, 759 S.E.2d at 163 (internal quotation marks omitted). According to the state, Gray then repeatedly kicked the decedent while he was on the ground. Gray’s sister also kicked the decedent and struck him several times with a metal chair. Id. The decedent remained on the ground during the altercation and did not defend himself. Id.

This Court held that the eight photographs taken *before* autopsy “posed little, if any, danger of unfair prejudice” since they merely showed the decedent’s external injuries and contained “no blood or gory anatomical details.” Id. at 609, 759 S.E.2d at 164 (emphasis added). The Court maintained that it was important for the jury to see the nature and location of the injuries in order to understand the witnesses’ testimony about the fights and the pathologists’ testimony about the decedent’s injuries. Id.

The other three photographs taken *during* autopsy showed the decedent’s exposed skull and brain. Id. at 609, 759 S.E.2d at 165 (emphasis added). The state’s pathologist testified that these photographs depicted the cause of death, which was a closed head injury due to blunt force trauma, in a manner that he could not diagram. Id. at 611-612, 759 S.E.2d at 165-166. This Court found the pathologist’s testimony in which he utilized the photographs increased the probative value of the evidence. Id. at 612, 759 S.E.2d at 166. The Court also emphasized that Gray and his codefendant each retained their own pathologist to testify at trial. Id. at 613, 759 S.E.2d at 167. The pathologist Gray retained theorized that the decedent suffered fatal injuries during the first fight in which Gray was not involved. Id. The Court held the autopsy

photographs were probative because they aided the state in proving the fatal brain injury occurred during the second fight and because they were important to the state's ability to establish malice, an element of murder. Id. at 613-614, 759 S.E.2d at 167.

Consequently, the Court concluded the trial judge did not abuse his discretion in admitting the three photographs taken during autopsy because their "high probative value" outweighed the "moderate" danger of unfair prejudice. Id. 617-618, 759 S.E.2d at 169.

In this case, the sentencing judge wholly failed to exercise any discretion before he admitted the entirety of State's Exhibit No. 11, which included approximately one hundred and thirty-nine horrific photographs taken by the pathologist *both before and during autopsy*. Some of the photographs showed the dissection of the body and were especially gruesome. The judge immediately dismissed the grounds for the objection maintaining he could "separate" himself "from the emotion" and properly apply the facts and law to the case. See Tr. 24, ll. 2-9 (January 8, 2020). Significantly, he made no inquiries as to what the nearly one hundred and fifty photographs showed, how they were material, and why so many were necessary to the state's case. He blindly admitted all, even rejecting the state's offer to admit the photographs in black and white.

There was little, if any, probative value of the photographs. The photographs were not "necessary to substantiate material facts or conditions" as required by our case law. See Torres, 390 S.C. at 623, 703 S.E.2d at 228. The state had already submitted the autopsy report drafted by the pathologist, which included his findings and a diagram of the decedent's body. See R. \* (State's Exhibit No. 9). This diagram, which the solicitor referred to as the "stab chart," indicated the number and location of the stab wounds and other injuries to the body. Tr. 23, ll.

14-15 (January 8, 2020); See R. \* (State’s Exhibit No. 9). Significantly, the defense did not dispute the number or type of injuries the decedent sustained or the cause and manner of death.

The photographs also did not serve to corroborate other evidence in the case unlike the photographs admitted in Torres, Collins, and Gray. The autopsy photographs in those cases were used by the respective pathologists to support their testimony and better explain their findings. This greatly enhanced the probative value of the photographs in those cases. Here, the state did not present any testimony, and no explanation as to what the photographs showed or supported was given. As the solicitor admitted, he sought to introduce the photographs merely to demonstrate “how shocking it [the crime] was.” Tr. 23, ll. 14-20 (January 8, 2020).

In addition to having little to no probative value, the photographs were unfairly prejudicial because they appealed to the sentencing judge’s emotions and tended to suggest a decision on an improper basis due to their gruesome and horrific nature. Even the solicitor conceded below that he sought to introduce the photographs to show the judge “how *shocking* it [the crime] was.” Tr. 23, ll. 14-20 (January 8, 2020) (emphasis added). It is obvious that the solicitor intended to shock the judge’s conscience and obtain a longer sentence at all costs.

It is difficult to look at even one of the photographs, let alone nearly one hundred and fifty, which became increasingly gruesome and disturbing as the autopsy progressed and the body was dissected. Even though Appellant was sentenced by a judge alone without a jury, the judge is only human, and his emotions can be improperly appealed to the same as any jury’s. It is clear that the danger of unfair prejudice caused by the photographs in this case substantially outweighed any probative value they made have had.

Because the sentencing judge abused his discretion in admitting nearly one hundred and fifty horrific photographs of the decedent taken before and during autopsy, this Court should

reverse Appellant's sentence for murder and first degree burglary and remand for a new sentencing hearing.

**CONCLUSION**

Based on the foregoing argument, Appellant respectfully requests this Court reverse his sentence for murder and first degree burglary and remand for a new sentencing hearing.

Respectfully submitted,

s/ Lara M. Caudy \_\_\_\_\_  
Lara M. Caudy  
Appellate Defender

ATTORNEY FOR APPELLANT

This 15th day of March, 2021.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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CERTIFICATE OF SERVICE

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Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency" dated March 20, 2020, the undersigned hereby certifies a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case have been served upon Melody J. Brown, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and a copy of the Initial Brief of Appellant and Designation of Matter have been served upon David Viron Lewis Garrett, #333334, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 15th day of March, 2021.

s/ Lara M. Caudy  
Lara M. Caudy  
Appellate Defender

ATTORNEY FOR APPELLANT