

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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**Apr 15 2021**

APPEAL FROM RICHLAND COUNTY  
R. Knox McMahon, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2021-000122

THE STATE.....Respondent,

v.

JAMES HEYWARD.....Appellant.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## **PETITIONER'S QUESTIONS PRESENTED**

- I. 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 New Jersey fingerprint card was not properly authenticated pursuant to this Court's clear precedent?
- II. 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?
- III. 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?
- IV. Did the Court of Appeals wrongly conclude that the trial court's erroneous allowance of expert opinion testimony about the operational capabilities of the gun found at Appellant's residence was harmless?
- V. 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?
- VI. 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?

## STATEMENT OF THE CASE

In October of 2016, a Richland County Grand Jury indicted Petitioner, James Heyward, aka Abdul Muslim, for two counts of armed robbery, assault and battery in the first degree, burglary in the first degree, two counts of kidnapping, murder, pointing and presenting a firearm, and unlawful possession of a firearm. (App. p. 480-488). Petitioner proceeded to a jury trial on July 26, 2017, before the Honorable R. Knox McMahan. Petitioner was represented by Steve Krzyston, Esquire, Alicia Goode, Esquire, and Adam Ruffin, Esquire. (App. p. 1). Assistant Solicitors Luck Campbell, Joanna McDuffie, and Nicole Simpson, of the Fifth Circuit Solicitor's Office, represented the State. (App. p. 1).

The jury found Petitioner guilty as indicted. (App. p. 425, line 2 – p. 426, line 3). Judge McMahan sentenced Petitioner to consecutive terms of life imprisonment for murder and burglary. He then sentenced Petitioner to a concurrent term of thirty years for armed robbery, a consecutive term of thirty years for the kidnapping of the child, a consecutive term of ten years for assault and battery, two concurrent terms of five years for pointing and presenting a firearm, and unlawful possession of a firearm. (App. p. 427, line 3 – p. 428, line 10).

Petitioner filed a timely notice of appeal on July 11, 2017. Attorneys Tara C. Sullivan, Esquire and Chief Appellate Defender Robert M. Dudek filed his Final Brief of Appellant on February 21, 2019. The State filed its Final Brief of Respondent on February 21, 2019. Appellate counsel likewise filed its Final Reply Brief on behalf of Petitioner on February 21, 2019. The Court of Appeals heard oral argument on February 6, 2020.

The Court of Appeals found harmless error in two of Petitioner's questions presented, found no error in the remaining five questions presented, and affirmed Petitioner's convictions and sentencing in its October 14, 2020, Opinion: *State v. Heyward*, 432 S.C. 296, 852 S.E.2d 452 (Ct.

App. 2020), reh'g denied (Jan. 15, 2021). (App. p. 636-657). Appellate counsel filed a Petition for Writ of Certiorari on behalf of Petitioner on March 4, 2021. This Return follows.

### STATEMENT OF FACTS

On October 11, 2015, law enforcement responded to a 911 call which was believed to be a burglary in progress. Upon arrival at the property they found Alice Tollison (Victim) strangled to death in her home and her eight-year-old granddaughter, Gwyn, (Granddaughter) with her hands and feet still bound. (App. p. 132, line 13 – p. 139, line 5).

At trial, Granddaughter testified as to how the home invasion and murder took place. She testified she would attend church with Victim every Sunday when her mother dropped her off before work. (App. p. 144, line 16 – p. 145, line 8). After church on October 11<sup>th</sup> they were watching some television when someone knocked on the door. (App. p. 148, line 7 – 15). Victim left the room to open the door, which led to the carport. (App. p. 149, lines 5 - 18). After a few minutes, Granddaughter went into the kitchen to get her toys from the kitchen table. (App. p. 149, line 20 – p. 150, line 17). When she walked into the kitchen, she saw Petitioner carrying a duffel bag and Victim sitting at the kitchen table. Petitioner told Granddaughter to sit, and he then demanded money from Victim. (App. p. 150, line 18 – p. 151, line 9). Victim told Petitioner she did not have any money. Petitioner then removed a gun from his bag and set it on the table, rolled up his sleeve, and made Granddaughter watch as he strangled Victim. (App. p. 151, line 13 – p. 153, line 2). Granddaughter described the gun as gold and rusty, “and it had two spots for bullets,” which she later clarified as “two spots where it shoots out.” (App. p. 152, lines 3-14; p. 183, line 6 – 9).

After he killed Victim, Petitioner carried Granddaughter to a closet, told her to sit in there, and closed the door. (App. p. 153, lines 17-19). Petitioner told Granddaughter that Victim was

sleeping, though she knew he was lying. (App. p. 153, line 23 – p. 154, line 7). Granddaughter heard Petitioner rummaging through rooms in the house before returning to the closet, moving her to another room, and then tying her hands and feet with telephone wire and a wire from the wall. (App. p. 154, line 17 – p. 156, line 13). Granddaughter testified she struggled to free herself for approximately thirty minutes before falling asleep. (App. p. 157, lines 1-15). When she awoke, Granddaughter was able to struggle her way into the kitchen and call 911. (App. p. 157, line 18- p. 159, line 21).

Granddaughter recalled the Assessment and Resource Center interview the day after the murder wherein she described the attacker. (App. p. 168, line 2 – p. 169, line 4). At that time investigators had already developed Petitioner as a suspect in the case based upon finding his fingerprints at the scene. (App. p. 27, lines 5-12). Development of the case continued by way of presenting a photographic lineup to Granddaughter for consideration. During that photographic lineup, Granddaughter selected the number 3 picture, which was Petitioner's photograph. (App. p. 377-378).

During the *Neil v. Biggers* hearing, testimony and evidence was introduced as to the presentation and results of this photographic lineup. Petitioner's photograph was placed into a six man photographic lineup generated by SLED computer software. (App. p. 27, line 13 through p. 23, line 7). Investigator Clarke testified that he reviewed the selections to ensure there was no suggestiveness in the lineup and the selection of photos in the lineup were consistent in appearance. (App. p. 28, lines 8-20). The photographic lineup was video recorded and played for the court at hearing. (App. p. 32, lines 21-24). Investigator Clarke told Granddaughter that she was brave and then asked her to be brave again and look at the lineup. He instructed her to "see if you can see the man that did this to your grandmother and to you." (App. p. 337, lines 2-6; p. 73, lines 3-12;

p. 30, lines 3-10; p. 117, lines 6). In doing so, Granddaughter circled number three and wrote her name beside it. (App., p. 30, lines 4-25).

Granddaughter was not informed of Petitioner's inclusion in the lineup nor was she instructed that she had to make a selection from the pictures provided. To the contrary, she testified to her own understanding that she would not have made a selection if she had not identified a photograph that looked like the assailant. (App. p. 49, lines 2-22). Granddaughter testified that she identified a photograph that looked like the assailant, she recognized him, just seeing the photograph frightened her, and she circled it and wrote her name beside it. (App. p. 49, line 23 – p. 50, line 4; p. 51, lines 10-12; p. 173, lines 8-15; p. 31, line 1 – p. 32, line 6). She further testified that she was sure of her selection. (App. p. 50, lines 5-7). She testified in the same way before the jury at trial. (App. p. 170, line 16 – 175, line 25). This photographic lineup was presented only once to Granddaughter prior to the *Neil v. Biggers* hearing where her in-court identification was then made.

At the time of the murder, Petitioner was renting some rooms in the home of Mattie Canzater. (App. p. 321, line 3 – p. 323, line 20). Canzater also knew Petitioner to go by the names of Abdul and Rasheed. (App. p. 326, line 23 – p. 327, line 8). Days before the murder took place Victim had offered to loan Canzater some tables to use at an upcoming yard sale, so Canzater asked Petitioner to help her pick up the tables from Victim's house the Friday before the murder. (App. p. 326, lines 2-15). Canzater and Petitioner pulled into the carport to retrieve the tables, but neither went inside the house. (App. p. 328, line 16 – p. 329, line 5).

Canzater said the following day, Saturday, she and Petitioner had an argument about his use of her property and Petitioner told Canzater he would be moving out within a week. (App. p. 334, line 1 – p. 336, line 4). The next morning, Canzater went to church and when she arrived

home, Petitioner was not in the house. Canzater testified that when Petitioner later returned to her home, he was carrying a large trash bag. (App. p. 336, line 5 – p. 338, line 25). Petitioner was also wearing clothes matching the description of the suspect. (App. p. 343, lines 2-23). When Canzater heard about Victim's murder she suspected Petitioner was the perpetrator and confronted him in her home. When Canzater asked Petitioner where he was at the time of the murder, he said he went for a walk to clear his head. Canzater noted that after their confrontation ended Petitioner shaved his head and face. (App. p. 344, line 9 – p. 347, line 13).

Police later found a Smith and Wesson .32 caliber revolver in a closet in Petitioner's room during a search of Canzater's home following his arrest on the Tuesday after the murder. (App. p. 355, line 13 – p. 358, line 15). Several days after Petitioner was arrested, he called his wife from jail, and his wife told him she reported a false tip to Crimestoppers to accuse someone else of the murder to divert attention away from Petitioner. (App. p. 418, line 6 – p. 419, line 21).

Crime scene investigators dusted the storm door and entry door to the kitchen from the carport for fingerprints and were able to collect latent prints from the interior side of the storm door, from the entry door on the alarm keypad, a water bottle from the kitchen table, a jewelry box, and other items in the home. (App. p. 193, line 16 – p. 194, line 14; p. 196, lines 6-13; p. 129, line 5 – p. 130, line 13). The victim's neck was swabbed for DNA, along with an abraded area of her chin. (App. p. 283, lines 12-17). The technician took the fingernail scrapings from the victim's hands. (App. p. 287, lines 5-14). Investigative efforts found a match for Petitioner's crime scene prints via the AFIS national database. (App. p. 221-222). Petitioner's DNA was found under Victim's fingernails, from the swab on her neck, and from a swab of a draft stopper found around Victim's neck. (App. p. 388, line 13 – p. 390, line 2).

Victim had multiple injuries to her neck and chin area. The pathologist said the markings

were consistent with more than just an arm around Victim’s neck. (App. p. 293, lines 12-25). The fractures of the bones and the amount of hemorrhage “buried deep within the neck” indicated the use of force stronger than that of just a ligature. (App. p. 293, lines 21-25). Victim also had multiple injuries from blunt force trauma around her head. (App. p. 296, lines 11-22). The pathologist said these injuries were consistent with being struck several times or thrown against a wall or floor. (App. p. 307, line 1 – 308 line 8). Victim suffered fractures to the cartilage in her neck, as well as a fractured hyoid bone. (App. p. 306, lines 5-21). The cause of death was strangulation. (R. p. 311, line 1 – p. 313, lines 24).

### **STANDARD OF REVIEW**

“A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons.” Rule 242(b), SCACR. The South Carolina Appellate Court Rules set forth a nonexclusive list of the circumstances in which review may be granted. Therein, Rule 242(b) continues: “[t]he following, while neither controlling nor fully measuring the Supreme Court’s discretion or power to grant review in general, indicate the character of reasons which will be considered:

- (1) Where there are novel questions of law.
- (2) Where there is a dissent in the decision of the Court of Appeals.
- (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
- (4) Where substantial constitutional issues are directly involved.
- (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.” Rule 242(b), SCACR.

## ARGUMENT

### **I. The Court of Appeals did not err in affirming the trial court's admission of the New Jersey database fingerprint card as properly authenticated evidence.**

The Court of Appeals correctly found that the trial court committed no error in admitting the N.J. Fingerprints as properly authenticated evidence. Certiorari in this matter is not warranted.

The Court of Appeals was correct to affirm the trial court's admission of the N.J. Prints as properly authenticated evidence. The Court of Appeals found that this ruling was proper under both the precedent set forth in *State v. Anderson* as well as Rule 901(b)(3). (App. p. 644-646). In *Anderson* our South Carolina Supreme Court explicitly acknowledged that expert testimony could be used to authenticate fingerprint cards. As such, the expert testimony offered at trial was sufficient to authenticate the N.J. Prints in question. The record supports its conclusion. The Booking Prints were admitted without objection to authentication, and the testimony from Investigator Odom demonstrated that they were a match to the N.J. Prints. As such, the N.J. Prints were properly authenticated by comparison under Rule 901(b)(3). Petitioner has failed to identify any error of law concerning the authentication and admission of the N.J. Prints.

Three sets of fingers prints were discussed at trial: fingerprints found at the crime scene (Crime Scene Prints), New Jersey database fingerprints (N.J. Prints), and the fingerprints taken of Petitioner at his booking (Booking Prints). Police discovered the Crime Scene Prints and submitted them into a national database known as the Integrated Automated Fingerprint Identification System (AFIS). In doing so they received a match in the AFIS database to the N.J. Prints, along with an associated FBI number for the prints and the corresponding name for the prints, James Heyward. Expert witness Investigator Odom performed a comparison of the N.J. Prints to the Crime Scene Prints and concluded that they were a match. She also conducted a "pattern comparison" between the N.J. Prints and the Booking Prints and concluded without doubt that the

prints were from the same person. (App. p. 229-231). After hearing the proffered testimony of Investigator Odom, the N.J. Prints were admitted by the trial court as properly authenticated under Rule 901. (App. p. 229-248).

South Carolina Rule of Evidence 901(a) states that “[t]he 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. Rule 901(a), SCRE. Subpart (b) then provides an explicitly non-exclusive list of examples in which authentication can be established. Rule 901(b), SCRE. “The authentication standard is not high, *Deep Keel, LLC v. Atlantic Private Equity Group, LLC*, 413 S.C. 58, 64–65, 773 S.E.2d 607, 610 (Ct. App. 2015), and a party need not rule out any possibility the evidence is not authentic. In the realm of authentication, the law, like science, is content with probabilities.” *State v. Green*, 427 S.C. 223, 230, 830 S.E.2d 711, 714 (Ct. App. 2019), reh'g denied (July 31, 2019), cert. granted (Jan. 16, 2020), aff'd as modified, 432 S.C. 97, 851 S.E.2d 440 (2020). “The [a]dmission of evidence falls within the trial court’s discretion and will not be disturbed on appeal absent abuse of that discretion.” *State v. Colf*, 337 S.C. 622, 625, 525 S.E.2d 246, 247 - 248 (2000). “An abuse of discretion occurs when the trial court’s ruling is based on an error of law,” *State v. Cope*, 405 S.C. 317, 335, 748 S.E.2d 194, 203 (2013), or when the ruling lacks factual support in the record, *Wilder v. State*, 388 S.C. 282, 285, 696 S.E.2d 587, 588 (2010).

The Court of Appeals was correct to find no abuse of discretion on the part of the trial court and affirm Petitioner’s convictions and sentencing. Petitioner has failed to demonstrate any basis for which certiorari should be granted.

**II. The Court of Appeals properly found that the admission of testimony by the trial court concerning Granddaughter’s out-of-court identification and in-court identification of Petitioner was not an abuse of discretion.**

Certiorari review is not warranted as this is an ordinary application of the law governing the admission of out-of-court and in-court identifications. The Court of Appeals correctly affirmed the trial court’s decision wherein the record supports the findings of the Court of Appeals and the conclusion that there was no abuse of discretion.

*a) The Out-of-Court Photographic Lineup*

The Court of Appeals was correct to affirm the admission of the out-of-court photographic lineup. (App., p. 640-642). “The [a]dmission of evidence falls within the trial court’s discretion and will not be disturbed on appeal absent abuse of that discretion.” *State v. Colf*, 337 S.C. 622, 625, 525 S.E.2d 246, 247 - 248 (2000). “An abuse of discretion occurs when the trial court’s ruling is based on an error of law,” *State v. Cope*, 405 S.C. 317, 335, 748 S.E.2d 194, 203 (2013), or when the ruling lacks factual support in the record, *Wilder v. State*, 388 S.C. 282, 285, 696 S.E.2d 587, 588 (2010).

The Court of Appeals considered both of Petitioner’s concerns regarding the out-of-court lineup’s admissibility and correctly found neither argument meritorious in light of existing case law. (App. p. 640-642). The first issue involves Granddaughter’s offhand comment that one of the pictures in the lineup looked kind of like her school janitor. The record is clear that Granddaughter was not suggesting his picture had anything to do with the assailant or her selection from the photographic lineup. Investigator Clarke made sure of this by addressing the comment and confirming that her selection of number three looked like the assailant who killed her grandmother and the janitor was not involved. (App. p. 31, line 6 – p. 32, line 4; p. 50, lines 4-15). The Court of Appeals noted this exchange and correctly found no meritorious basis to the argument.

The Court of Appeals also addressed the exchange that took place after Granddaughter made her number 3 selection wherein Granddaughter stated that “You’re going to try and catch someone who looks like that . . . but it’s probably not exactly because that isn’t exactly . . .” This brief exchange was also addressed and Granddaughter maintained that she felt confident in her selection, and that number 3 looked like the assailant. Her testimony at the *Neil v. Biggers* hearing likewise confirmed her confidence in the selection. (App. p. 58, lines 2-17).

The Court of Appeals correctly pointed out that while there may be room to argue about the degree of certainty Granddaughter expressed in her initial selection, certainty is not required for the admissibility of an out-of-court identification. In reliance upon *State v. Washington*, 323 S.C. 106, 473 S.E.2d 479 (Ct. App. 1996), the Court of Appeals noted that certainty is not required for the proper admission of witness identifications because the jury has the opportunity to observe the testifying witness and judge for themselves the credibility of the witness alongside the certainty or uncertainty of the witness’s identification. Consistent with the record, the Court of Appeals found that Granddaughter selected number 3 because it looked like assailant and frightened her. As Granddaughter testified to her identification and was fully cross-examined on the issue, the jury had the opportunity to evaluate the credibility of that testimony. The Court of Appeals was correct to conclude that there is no error on the part of the trial court for the admission of Granddaughter’s out-of-court identification at trial.

Likewise, the Court of Appeals was correct in finding the out-of-court identification was not unduly suggestive, unreliable, or conducive to irreparable misidentification. (App. p. 642-644) The Court of Appeals correctly identified the two prongs for evaluation of suggestiveness: 1) unnecessarily suggestive police procedures and 2) strength of reliability of the identification. *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). The Court likewise correctly noted

that its inquiry ends if the first prong cannot be met. *State v. Dukes*, 404 S.C. 553, 557, 745 S.E.2d 137, 129 (Ct. App. 2013).

Consistent with the record, the Court of Appeals found that Investigator Clarke instructed Granddaughter to make a selection “if” she could see the assailant amongst the photographs. The Court of Appeals likewise found that while Investigator Clarke did not expressly inform Granddaughter that she did not have to make a selection, a procedure not required by existing case law, Granddaughter’s own testimony demonstrated that she fully understood that she was not obligated to make a selection if none of the pictures resembled the assailant. The Court of Appeals rightly concluded that there was no undue suggestiveness in the police procedures used to conduct the photographic lineup.

As set forth above there is no basis for error on the part of the Court of Appeals concerning the admissibility of the out-of-court identification made by Granddaughter. Thus, certiorari is unwarranted.

*b) The In-Court Identification*

The Court of Appeals found no basis in the record supporting the alleged “repeated exposure” to Petitioner’s photograph, nor law that requires other individuals from the photographic lineup be present in the courtroom for a subsequent in-court identification. Petitioner has failed to demonstrate a basis for certiorari. (App. p. 644).

In review of the record the Court of Appeals correctly found no indication that Granddaughter was repeatedly exposed to Petitioner’s photograph. She was shown the lineup at the time of her selection of Petitioner as number 3 the day after the murder and did not view it again until the *Neil v. Biggers* hearing. As such, the Court of Appeals found no merit in Petitioner’s argument that Granddaughter’s identification was inappropriately reinforced. In the complete lack

of factual relevance, an explicit mention or discussion of *Foster v. California* was unnecessary to properly dispose of Petitioner's argument. There is likewise no legal authority which instructs or requires the presence of other photographic lineup participants at trial in order to properly admit an in-court identification.

Finding no basis for support of either argument, the Court of Appeals was correct to affirm the trial court's decisions to admit the in-court identification of Petitioner at trial. Petitioner has failed to demonstrate error and has therefore failed demonstrate a basis for certiorari.

**III. The Court of Appeals correctly concluded that the trial court's error in denying Petitioner's motion to remove his ankle shackles during trial was harmless in light of fact that there is no evidence demonstrating his ankle restraints were visible to the jury.**

The Court of Appeals exercised sound legal reasoning in finding only harmless error for the trial court's failure to exercise discretion in denying Petitioner's motion to remove his ankle shackles. Petitioner is unable to demonstrate prejudice resulting from the shackles due to the lack of record proof that the shackles were actually visible to the jury, and as such there was no basis to overturn his convictions and sentencing. Petitioner cannot identify any evidence of error on the part of the Court of Appeals in reaching this conclusion and therefore certiorari should be denied.

The Constitution protects from visible shackling unless justified by a substantial state interest, such as courtroom security. *Holbrook v. Flynn*, 475 U.S. 560, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986); *Deck v. Missouri*, 544 U.S. 622, 633, 125 S. Ct. 2007, 2014, 161 L. Ed. 2d 953 (2005). The Court of Appeals correctly relied upon these holdings and correctly found that any error in the denial of the motion was harmless because Petitioner failed to demonstrate prejudice. The precedent set forth in *Deck* clearly dictates that a defendant need not show prejudice when a court denies the removal of "*shackles that will be seen by the jury*", absent adequate justification. *Id.* at 636 (emphasis added). In the case at hand, there is no evidence within the record to

demonstrate that any juror saw Petitioner's shackles and the Court of Appeals was correct to rely upon this distinction in *Deck*.

By comparison, the Court of Appeals likened this case to its prior decision in *State v. Johnson*, wherein it upheld the denial of a motion for mistrial for lack of any evidence that a member of the jury had actually seen the shackled defendant when ushered by police officers into the courthouse. (App. p. 655). The Court of Appeals gave further support to its ruling by noting that other jurisdictions around the country have held similarly that the heightened *Deck* standard does not apply absent evidence that a juror actually observed the defendant in restraints. (App. p. 655, n. 12).

As such, Petitioner has failed to demonstrate an error of law in the Court of Appeals' decision and certiorari is unwarranted in this matter.

**IV. The Court of Appeals did not err in finding harmless error in the trial court's decision to permit expert opinion testimony about the operational capabilities of the gun found at Petitioner's residence.**

The ruling of the Court of Appeals was proper. Petitioner has failed to demonstrate prejudice resulting from inclusion of expert testimony as to the operational capability of the gun and thus the finding of harmless error was proper in light of the overwhelming evidence of guilt. Certiorari is unwarranted.

This Court of Appeals ruling was proper as to Petitioner's fourth issue. (App. p. 646-648). Petitioner's crimes did not involve the functional ability of the gun. Instead, the gun served a vital purpose as significant evidence establishing the identity of Petitioner – the gun found in his possession matched the unique description provided by Granddaughter. Nevertheless, expert testimony was admitted by the trial court for purposes of proving that Appellant pointed and presented a firearm and that Petitioner was armed with a deadly weapon during a robbery. The

Court of Appeals reasoned that such a purpose was unnecessary given the language of the statutes in question. The Court of Appeals concluded that it would be contrary to legislative intent to find that evidence of the firearm's ability to propel a projectile is required while also denoting that an unloaded firearm satisfies the statutory requirements for pointing and presenting a firearm under S.C. Code of Laws § 16-23-410. The Court of Appeals concluded that it is likewise an untenable conclusion to suggest that evidence of functionality is required when § 16-11-330(A) indicates that even being armed with the representation of a deadly weapon is sufficient to constitute armed robbery. Thus, with the purposes for the expert testimony removed, the admission of the evidence constituted an abuse of discretion by the trial court.

However, the Court of Appeals correctly found that such evidence was harmless. (App. p. 648). The conclusion of harmless error was properly reached given the overwhelming evidence of guilt before the jury, which included: 1) Granddaughter's identification; 2) fingerprint matches from the crime scene; 3) DNA matches from the crime scene and victim; 4) the unique character of the gun being identified by Granddaughter and found at Petitioner's residence; 5) evidence of matching clothes worn by Petitioner to Granddaughter's description; 6) a prior and recent instance of Petitioner meeting victim outside her home; and 7) the Petitioner's change of his own appearance soon after the crime. Indeed, the Court of Appeals is correct to find that evidence of the gun's functionality would not have impacted the jury in light of the overwhelming evidence of guilt against Petitioner.

With the abundance of evidence before the jury the Court of Appeals properly concluded that irrelevant testimony as to the functionality of a gun, when functionality was not a disputed matter for any element of crime, ultimately was harmless as it fails to establish prejudice against

Petitioner at trial. Petitioner has failed to demonstrate an error on the part of the Court of Appeals and therefore certiorari should be denied.

**V. The Court of Appeals did not err in affirming the trial court's allowance of Petitioner's alias "Abdul Muslim" for use in the indictments and at trial.**

There is no error on the part of the Court of Appeals in affirming the trial court's decision to deny the motion to strike any reference to Appellant's alias, Abdul Muslim. Petitioner's alias was key to the case and Petitioner could not demonstrate prejudice stemming from the alias. (App. p. 648-650). Certiorari should be denied.

It is well settled that a motion to strike is addressed to the sound discretion of the trial court. *Totaro v. Turner*, 273 S.C. 134, 135, 254 S.E.2d 800, 801 (1979). The Court of Appeals correctly relied upon *United States v. Clark*, 541 F.2d 1016, 1018 (4th Cir. 1976) in reviewing the trial court's decision to permit the Abdul Muslim alias. The 4<sup>th</sup> Circuit in *Clark* noted that an improperly admitted alias can be addressed "if the prosecution either fails to offer proof relating to the alias or the alias, although proven, holds no relationship to the acts charged, a motion to strike may be renewed, the alias stricken and an appropriate instruction given to the jury." *Id.* While such a remedy is available where necessary, the Court of Appeals found that trial court was correct to deny the motion to strike. In the case at hand Appellant's alias was pertinent to the DNA evidence, as Abdul Muslim was the name under which the DNA evidence was identified in the CODIS system. That same CODIS system information linked Abdul Muslim to the matching fingerprints belonging to James Heyward. The State also presented evidence that Canzater knew Petitioner to go by the name Abdul. (App. p. 434-435; p. 326-327).

In light of the connecting evidence, the Court of Appeals correctly concluded that the State had satisfied the need for introduction of the Abdul Muslim alias. Petitioner's argument appears to be based entirely upon speculation and not actual prejudice. Petitioner has failed to identify any

error by the Court of Appeals in affirming the trial court's decision to permit the alias at trial. Certiorari should therefore be denied.

**VI. This court did not err in its ruling that the autopsy photographs were properly admitted at trial.**

The Court of Appeals was correct in finding no error on the part of the trial court for the admission of victim's autopsy photographs. Certiorari should be denied.

"The [a]dmission of evidence falls within the trial court's discretion and will not be disturbed on appeal absent abuse of that discretion." *State v. Colf*, 337 S.C. 622, 625, 525 S.E.2d 246, 247 - 248 (2000). "An abuse of discretion occurs when the trial court's ruling is based on an error of law," *State v. Cope*, 405 S.C. 317, 335, 748 S.E.2d 194, 203 (2013), or when the ruling lacks factual support in the record, *Wilder v. State*, 388 S.C. 282, 285, 696 S.E.2d 587, 588 (2010).

The Court of Appeals correctly noted that relevancy, materiality, and admissibility of photographs are matters within the sound discretion of the trial court and that a trial court's ruling on the comparative prejudice and probative value from such photographs should only be disturbed in exceptional circumstances. (App. p. 650-651 (citing *State v. Nance*, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996); *State v. Collins*, 409 S.C. 524, 534, 763 S.E.2d 22, 28 (2014)). The Court of Appeals likewise properly cited to authority that supported the admission of autopsy photographs for the purposes of supporting the element of malice as well as the corroboration of the medical examiner's testimony. (App. p. 651 (citing *State v. Hawes*, 423 S.C. 118, 130-31, 813 S.E.2d 513, 519-20 (Ct. App. 2018); *State v. Gray*, 408 S.C. 601, 612-16, 759 S.E.2d 160, 166-68 (Ct. App. 2014)). The case at hand established admissibility of the photos for both the element of malice and to corroborate the testimony of Dr. Durso at trial.

This was a particularly brutal murder and the pictures were the best demonstrative means of conveying that brutality and the malice that accompanied it. While Granddaughter witnessed

the initial attack, she was not able to witness the entire crime and the State's theory argued that Appellant returned to Victim to finish her off once the child was restrained in the closet. The photographs in question demonstrated the malice that accompanied the entirety of the crime. The Court of Appeals correctly concluded that such a basis for admission is in harmony with existing case law and found that these photos corroborated the medical findings provided by Dr. Durso. As such, there was no abuse of discretion on the part of the trial court in admitting the contested photographs.

The Court of Appeals' reasoning and legal basis for affirming the trial court's decision was well-founded and proper. Certiorari should therefore be denied.

### **CONCLUSION**

For all the foregoing reasons, it is respectfully submitted that certiorari be denied in this matter.

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