THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY

R. Knox McMahon, Circuit Court Judge

Supreme Court Case No. 2021-000122

Appellate Case No. 2017-001542

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S.C. SUPREME COURT

The State, ...Respondent,

v.

James Heyward, ...Petitioner.

REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI

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Pursuant to Rule 242 of the South Carolina Appellate Court Rules, Petitioner James Heyward ("Petitioner" or "Mr. Heyward") hereby replies to the Respondent's Return to Petition for a Writ of Certiorari ("Return"). Petitioner maintains that this Court should grant certiorari to rectify the errors of the Court of Appeals as set forth herein.

ARGUMENT

I. The Court of Appeals departed from established South Carolina law 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.

Respondent argues that the Court of Appeals properly relied upon *State v. Anderson*, 386 S.C. 120, 687 S.E.2d 35 (2009), and South Carolina Rule of Evidence 901(b)(3) in admitting the New Jersey fingerprint card and related testimony and, therefore, certiorari is not warranted. (Return at 8.) However, Respondent overlooks that the Court of Appeals ignored the requirements for fingerprint authentication set forth in *Anderson* in favor of a novel authentication method for fingerprints that is inconsistent with South Carolina law and the requirements set forth in *Anderson*. The Court of Appeals' departure from established South Carolina Supreme Court precedent in this matter warrants certiorari.

Petitioner does not dispute that according to South Carolina Supreme Court precedent, expert testimony can be a proper means of authenticating fingerprint cards. However, this Court's holding in *Anderson* requires that the expert demonstrate certain foundational knowledge to authenticate the fingerprint cards. *Id.* at 128, 687 S.E.2d at 39 ("[A]uthentication . . . 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.") (emphasis added by the Court) (internal citations omitted). The State admittedly failed to meet the requirements of *Anderson* because it failed to establish when and where the New Jersey Fingerprints were taken. *State v. Heyward*, Op. No. 5776 (S.C. Ct. App. filed October 14, 2020) (Shearouse Adv. Sh. No. 40 at 32, 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.

Instead of relying on *Anderson*, South Carolina's seminal case on fingerprint authentication, the Court of Appeals departed from precedent of this Court and relied on Rule 901(b)(3) in admitting the New Jersey fingerprint card and related testimony. This departure from *Anderson* is not supported by other binding authority, as no other South Carolina case cites Rule 901(b)(3) for the authentication of fingerprints. As such, the Court of Appeals' reliance on this novel authentication method for fingerprints is not consistent with longstanding South Carolina case law and precedent of this Court.

In its Return, Respondent cites to the abuse of discretion standard: "'an abuse of discretion occurs when the trial court's ruling is based on an error of law,' or when the ruling lacks factual support in the record." (Return at 9 (citing *State v. Cope*, 405 S.C. 317, 335, 748 S.E.2d 194, 203 (2013); *Wilder v. State,* 388 S.C. 282, 285, 696 S.E.2d 587, 588 (2010)).) The Court of Appeals erred in affirming the trial court's admission of the New Jersey fingerprint card and related testimony, which was an abuse of discretion, because the admission of the New Jersey fingerprint card was inconsistent with South Carolina Supreme Court precedent and its admission lacked the requisite factual foundation. As such, this Court should grant certiorari on this issue.

II. The Court of Appeals ignored United States Supreme Court precedent by 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 its Return, Respondent characterizes the "first issue" with respect to the out-of-court photograph lineup as involving G.F.'s comment that one of photographs in the lineup looked kind of like her school janitor. (Return at 10.) Respondent argues that the record is clear that G.F. was

not suggesting the janitor look-alike had anything to do with the crimes at issue. (*Id.*) Respondent's argument is misguided, however, as Petitioner did not mention this particular comment at all in its argument in its Petition for Certiorari and has never argued that G.F. pointing out the janitor look-alike in the photograph lineup implied that individual was her assailant. Instead, Petitioner's references in its briefing before the Court of Appeals to G.F.'s comment regarding the janitor look-alike in the photograph lineup supported Petitioner's argument that the photograph lineup was unduly suggestive in the manner in which it was conducted. Specifically, Investigator Clarke hurriedly accepted G.F.'s non-identification as though it were a certain identification. After G.F. stated that "Number three looks **kind of** like him," she subsequently pointed out another photograph and said he "**kind of** looks like my janitor," which resulted in Investigator Clarke quickly turning over the page of photographs so G.F. could no longer see or comment of any of the photographs. (State's Ex. 31.) (emphasis added). Investigator Clarke also interrupted G.F. when she asked if he would "try to catch someone who looks like that . . . because **that isn't exactly** . . ." (State's Ex. 31.) (emphasis added). In short, G.F. never indicated that Petitioner was actually the assailant at the photograph lineup, and Investigator Clarke's attempts to prevent her from any further explication rendered the photograph lineup procedure an unduly suggestive one and the so-called identification should not have been admitted.

Respondent next argues that G.F.'s identification of Petitioner in the out-of-court photograph lineup was "confident" and that "[h]er testimony at the *Neil v. Biggers* hearing likewise confirmed her confidence in the selection." (Return at 11.) However, G.F.'s identification of Petitioner during the out-of-court photograph lineup and subsequent *Neil v. Biggers* hearing was not confident and did not come close to reaching the "99 percent" certainty the victim expressed during the out-of-court photograph lineup in *State v. Washington*, 323 S.C. 106, 108, 473 S.E.2d

479, 480 (Ct. App. 1996). As noted above, during the out-of-court photograph lineup, G.F. referenced the photograph of Petitioner and stated, "Number three looks **kind of** like him." (State Ex. 31.) (emphasis added.) G.F. 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.) (emphasis added.) While G.F. responded "yes," it is unclear whether she was affirmatively responding to the facial hair comment or to Investigator Clarke's question regarding her level of confidence. (State Ex. 31.) As such, G.F's identification of Petitioner during the out-of-court photograph lineup cannot be characterized as even "pretty confident." This level of uncertainty is not sufficient to support the admission of the out-of-court photograph lineup in light of *State v. Washington*. 323 S.C. at 111, 473 S.E.2d at 481 (noting that even a one percent level of uncertainty "cause[d] [the Court of Appeals] some concern").

Respondent also argues that the out-of-court identification was not presented in an unduly suggestive manner and that the circumstances surrounding the photographic lineup would not have swayed G.F. toward a selection. (Return at 11.) However, G.F's age and the recent trauma she experienced before being presented with the lineup must not be overlooked. As an eight-year old child, G.F. was unable to appreciate the nuance and importance of Investigator Clarke's use of the word "if" to suggest that she did not have to choose someone from the lineup. 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, Respondent and the Court of Appeals overlooked or misapprehended Petitioner's argument that the overall identification process was also unduly suggestive as evidenced by G.F.'s evolving level of certainty at each stage of the process. Respondent

characterizes G.F.'s identification of Petitioner as "confident." (Return at 11.) However, the only clear indication G.F. gave when presented with Petitioner's picture in the photograph lineup was that she was *not* confident in her identification. G.F.'s confidence only evolved after seeing the photograph lineup picture again, along with Petitioner in person, at the pre-trial *Neil v. Biggers* hearing (where she merely identified Petitioner in the courtroom as being the same person she saw in the photograph lineup) and seeing Petitioner again at trial (when she testified that she was sure Petitioner was her assailant). As such, the entire identification process was unduly suggestive which inevitably caused her certainty to evolve and increase over time with each subsequent exposure to Petitioner.

Furthermore, Respondent misrepresents Petitioner's argument regarding the unduly suggestive nature of the overall identification process. In the Return, Respondent states, "[t]here 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." (Return at 13.) Petitioner has never contended that the other persons included in the photograph lineup needed to be present in the courtroom at trial. Rather, Petitioner's argument on appeal, and at present, is that the entire identification process was unduly suggestive because G.F. was repeatedly exposed to Petitioner's likeness in the photograph lineup (where she was anything but certain), at the *Neil v. Biggers* hearing (where she merely confirmed that Petitioner was the same person as the individual in the selected photograph), and again at trial (where she was finally "certain" that Petitioner was her assailant), and, as one would expect, her level of certainty increased with each exposure.

Respondent also argues in the Return that "a discussion of *Foster v. California*, 394 U.S. 440, 89 S.Ct. 1127 (1969), was unnecessary" because of its "complete lack of factual relevance" to Petitioner's case and, therefore, the Court of Appeals' failure to address this binding precedent

of the Supreme Court of the United States was appropriate. (Return at 13.) However, Respondent is in error, and the Court of Appeals should have addressed *Foster v. California*, upon which the majority of Petitioner's argument was based. Petitioner's case and *Foster v. California* involve almost identical factual circumstances. 394 U.S. at 440, 89 S.Ct. at 1127. In both cases, the only witness was presented with an initial lineup of alleged perpetrators, the witness expressed doubt about identifying the correct perpetrator in the initial lineup, and only after subsequent exposures to one individual present in the initial lineup, did the witness become "certain" that the one individual who had been repeatedly exposed to the witness committed the crime. *Id.* at 441–42, 89 S. Ct. at 1128. As such, *Foster* is directly applicable to Petitioner's case and should not have been ignored by the Court of Appeals. For these reasons, this Court should grant certiorari to rectify the Court of Appeals' error in accordance with binding precedent from the Supreme Court of the United States.

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

Respondent argues that there is no record evidence that Petitioner's shackles were visible to the jury and, thus, the heightened standard in *Deck v. Missouri*, 544 U.S. 622, 124 S.Ct. 2007 (2005), does not apply to Petitioner's case. (Return at 13.) However, it is obvious from the record in this case that Petitioner's shackles were visible. In *Deck*, it was established that the jury had seen the defendant's shackles based entirely on the defense counsel's objection. 544 U.S. at 634, 125 S.Ct. at 2015. Likewise, the record here establishes that Petitioner's shackles were visible because Petitioner's trial counsel objected to the shackling on that very basis. (R. p. 39, lines 8–22.) Accordingly, Respondent and 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. 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. *Id.* at 635, 124 S. Ct. at 2015 (citing *Holbrook v. Flynn,* 475 U.S. 560, 568, 106 S.Ct. 1340, 1345 (1986)).

Respondent also argues that the Court of Appeals' reliance on *State v. Johnson* in reaching its conclusion that the heightened standard in *Deck* does not apply to Petitioner's case is appropriate. (Return at 14.) However, the factual scenario in *State v. Johnson,* 422 S.C. 439, 812 S.E.2d 739 (Ct. App. 2018), where the defendant was being brought from the police car outside into the courthouse in handcuffs—and it was not clear whether any of the jurors saw this procession—differs completely from Petitioner's situation where the record clearly establishes that he was shackled while inside the courtroom directly in front of the rows of his potential jurors. The Court of Appeals ignored this significant distinction from the *Johnson* case and should not have relied thereon. As such, this Court should grant certiorari to rectify this error of the Court of Appeals, which is in direct contravention to precedent of the Supreme Court of the United States.

In its Return, Respondent fails to acknowledge the language of the Supreme Court of the United States in *Holbrook,* 475 U.S. at 568–69, 106 S.Ct. at 1345–46, which states that shackling is "inherently prejudicial." The Court of Appeals noted this language in its Opinion below, stating that in *Deck vs. Missouri*, 544 U.S. 622, 124 S.Ct. 2007 (2005), 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). In his Petition for a Writ of Certiorari, Petitioner is doing exactly that—urging this Court to take into account the United States Supreme Court's statement that shackling is inherently prejudicial. Because the trial

court's error is inherently prejudicial to Petitioner, this Court should grant certiorari to reverse the Court of Appeals' holding that this error is harmless.

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.

Respondent argues that Petitioner failed to demonstrate that he was actually prejudiced by the trial court's erroneous admission of expert opinion testimony regarding the operational capabilities of the firearm recovered from Petitioner's home. (Return at 14.) The admission of this testimony was not harmless. The wrongful admission of Investigator Collins' testimony about the operational capabilities of the firearm allowed the State to hammer, yet again, on the fact that a gun was found in Petitioner's residence, unduly prejudicing the jury against him. Respondent argues that the State could have relied on other evidence during closing to convince the jury of Petitioner's guilt. (Return at 15.) However, the State relied *solely* on this expert testimony to connect the gun found at Appellant's residence to the one described by G.F. (*See* R. p. 419, lines 6–23.) This testimony, which should never have been admitted, was used to paint Petitioner in a bad light and tie him to the crime scene, clearly prejudicing Petitioner. Because this testimony should never have been admitted and caused Petitioner significant prejudice, this Court should grant certiorari to reverse the Court of Appeals' holding that this error is harmless.

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.

Respondent argues that Petitioner's alias "Adbul Muslim" was pertinent to DNA evidence, as that was the name the DNA evidence was linked to in the CODIS system. (Return at 16.) However, Respondent and the Court of Appeals ignored the fact that the CODIS identification number 220688PA could have been used instead (R. p. 255, lines 10–13;.R. p. 378, line 2–p. 379, line 9). As such, 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 also 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.)

Respondent argues that Petitioner's argument concerning the prejudice created by the alias due to religious bias is "based entirely upon speculation." (Return at 16.) However, the prejudice associated with the State's use of Petitioner's alias is supported by evidence. 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.) Moreover, the State contrasted the Islamic connotation of Petitioner's alias with repeated testimony regarding the victim's Christian beliefs during trial (R. p. 139, lines 13-23; R. 193, Line 17-p.194, line 11; p. 195, line 8-p. 196, line 7; p. 355, line 23). The use of the alias was unnecessary, prejudicial, and in violation of Appellant's rights to due process. As such, this Court should grant certiorari to rectify this error.

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.

Respondent argues that the gruesome autopsy photographs are admissible to establish malice and corroborate Dr. Durso's testimony regarding the nature of the victim's injuries. (Return at 17.) However, "[p]hotographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant *or* not necessary to substantiate material facts or conditions." *State v. Torres*, 390 S.C. 618, 623, 703 S.E.2d 226, 228 (2010) (emphasis added). Respondent fails to address Petitioner's argument that these gruesome autopsy photographs were not necessary to substantiate malice here or corroborate Dr. Durso's testimony, as 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 photographs were unnecessary and should not have been admitted. Furthermore, the prejudice caused by the admission of these gruesome autopsy photographs outweighed any evidentiary value, and the Court of Appeals erred in affirming their admission by the trial court. 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 Supreme Court of the United States.

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Respectfully submitted,

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