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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY

Steven H. John, Circuit Court Judge

Appellate Case No. 2021-001498

The State, ...Respondent,

v.

Tommy Lee Benton, ...Petitioner.

BRIEF OF PETITIONER

R. Walker Humphrey, II
WILLOUGHBY & HOEFER, P.A.
133 River Landing Drive, Suite 200
Charleston, South Carolina 29492
(843) 619-4426

Robert M. Dudek
Chief Appellate Defender
SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE
1330 Lady Street, Suite 401
Columbia, South Carolina 29201
(803) 734-1330

Attorneys for Petitioner

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QUESTIONS PRESENTED

I. Did the Court of Appeals err in holding that the circuit court exercised sound discretion when granting a mistrial for Benton's failure to formally respond to a Rule 5(e)(1), SCRCrimP, alibi request, where the State did not provide the information required for Benton to respond, he otherwise disclosed his alibi to the State, and the circuit court failed to consider less drastic alternatives to a mistrial?

II. Did the Court of Appeals exceed Rule 220(c), SCACR, thereby violating Benton's due process rights, by affirming the admission of text and Facebook messages under an additional sustaining ground without notice to Benton when that ground was not raised to or ruled upon by the circuit court, not argued by the State in its brief, not referenced during oral argument, and not developed in or supported by the record?

III. Did the Court of Appeals err in holding the circuit court was within its discretion to admit victim body photographs solely to corroborate substantial undisputed evidence of malice, where such photographs are inadmissible when they show facts which otherwise have been established by competent evidence and the State only used them to inflame the jury?

INTRODUCTION

This Court should reverse the Court of Appeals for its failure to properly apply fundamental principles of law in three respects.

First, the Court of Appeals erred in holding that the circuit court exercised sound discretion when declaring a mistrial during Petitioner Tommy Lee Benton's first trial. The circuit court declared a mistrial because Benton did not provide a formal response to the State's Rule 5(e)(1), SCRCrimP, alibi request. The circuit court and the Court of Appeals incorrectly held that the State triggered Benton's disclosure obligation under Rule 5(e)(1)'s plain language, and neither court considered Benton's voluntary alibi disclosure or obvious alternatives to a mistrial. Manifest necessity for the mistrial did not exist, and retrying Benton violated his Double Jeopardy rights.

Second, the Court of Appeals exceeded the limits of additional sustaining grounds under Rule 220(c), SCACR. The court correctly held that the circuit court erred in authenticating over 1,000 text and Facebook messages solely because they were downloaded from Benton's and a co-defendant's phones. But the Court of Appeals *sua sponte* held that the messages nevertheless were authenticated by their content—a theory which no party raised to either the circuit court or the Court of Appeals, which the Court of Appeals did not raise during oral argument, which is a discretionary determination that is not within an appellate court's power to make, and which is not found in or supported by the record. The Court of Appeals should have stopped at holding the circuit court erred and not generated this additional sustaining ground.

Third, the Court of Appeals and the circuit court failed to apply this Court's well-established standard for admitting victim body photographs. This Court has held for decades that such photographs must be relevant to substantiate or prove specific disputed facts. A court cannot admit victim body photographs if they merely corroborate undisputed facts. The Court of Appeals

nevertheless affirmed the admission of gruesome photographs of a burned body simply because they corroborated uncontested facts proven by other evidence. Moreover, the Court of Appeals never addressed the State's use of the photographs at trial. The State did not even use them for corroboration—instead, it improperly used them to inflame the jury by asking Benton's co-defendant if the gruesome injuries were "worth $1500."

Benton therefore respectfully requests that this Court reverse the Court of Appeals, vacate his convictions under the Double Jeopardy clause, and remand for entry of an order dismissing his indictments and releasing him from custody. If this Court finds no Double Jeopardy violation, it alternatively should reserve and remand for a new trial because the circuit court abused its discretion in admitting the text and Facebook messages and the victim body photographs.

STATEMENT OF THE CASE

Mitchell Cheatham, Douglas Thomas, and Garland Rose confessed to murdering C.B. Smith, burgling his home and store, and burning his home and store in April 2014. (R. p. 71, line 2–p. 75, line 21; p. 80, line 2–p. 86, line 11; pp. 450–57). Benton was indicted for Smith's murder on April 21, 2016, and for two counts of first-degree burglary, one count of first-degree arson, and one count of third-degree arson on October 20, 2016. (R. pp. 363–72).

All charges were called for a jury trial before the Honorable Steven H. John on July 17, 2017. The jury was sworn the next day. (R. p. 29, lines 4–10). The State objected during opening statements to Benton's use of an alibi because Benton did not serve a written response to a pre-indictment alibi request pursuant Rule 5(e)(1), SCRCrimP. (R. p. 37, line 22–p. 38, line 2). Benton argued the State did not first provide formal written notice of the time of each offense as required by Rule 5(e)(1) and he nevertheless disclosed his alibi. (R. p. 38, line 5–p. 40, line 24; p. 50, line 21–p. 52, line 10). The trial court found that the State complied with Rule 5(e)(1) but Benton did

not, and it *sua sponte* declared a mistrial. (R. pp. 4–5; p. 41, line 20–p. 43, line 20; p. 54, line 21–p. 55, line 8).

Judge John called a second jury trial on December 4, 2017. Benton timely moved to dismiss all charges under the Double Jeopardy clause because the mistrial was improvidently granted. (R. p. 62, line 18–p. 63, line 24). The trial court reaffirmed its prior ruling and denied Benton's motion. (R. p. 64, line 8–p. 65, line 23). During trial, Benton objected to the admission of text and Facebook messages allegedly sent by or to him without specific proof that they were, in fact, sent by or to him. (R. p. 27, line 15–p. 28, line 19; p. 144, line 22–p. 145, line 21; p. 164, line 8–p. 165, line 10). Benton further objected to the introduction of three victim body photographs under Rule 403, SCRE, because they were gruesome and did not demonstrate any disputed facts. (R. p. 107, line 1–p. 109, line 21; p. 110, line 21–p. 111, line 11). The trial court overruled these objections. (R. p. 107, line 1–p. 109, line 21; p. 110, line 21–p. 111, line 11; p. 147, line 5–p. 148, line 17; p. 158, lines 8–25; p. 166, lines 11–15).

The jury convicted Benton on all counts on December 8, 2017. (R. p. 294, line 20–p. 295, line 11). Benton filed and served a notice of appeal on December 14, 2017. On October 13, 2021, the Court of Appeals affirmed Benton's convictions in a published opinion. (App. pp. 1–13). Benton petitioned for rehearing on November 4, 2021, which the Court of Appeals denied on November 18, 2021. (App. pp. 14–37). Benton petitioned for a writ of certiorari to the Court of Appeals on December 20, 2021. This Court granted the petition on September 7, 2022.

STATEMENT OF FACTS

I. The State knew Benton's alibi for a series of crimes others admitted committing.

Mitchell Cheatham, Garland Rose, and Douglas Thomas carried out a crime spree that ended in C.B. Smith being burned alive while handcuffed in a chair. It began on April 18, 2014,

when Cheatham and Rose broke into Smith's home in Aynor and stole money. (R. pp. 450–51). Cheatham and Thomas then broke into Smith's store in Aynor on April 26, 2014 and burned it down after finding no money. (R. p. 71, line 2–p. 75, line 21; p. 452). Cheatham returned to Smith's home with Thomas on April 29, 2014, entered it while armed, took what money they could find, tied up and handcuffed Smith, beat him, and set his home on fire with him still bound inside. (R. p. 80, line 2–p. 86, line 11; pp. 453–457). Smith died in the fire. (R. p. 162, lines 3–5).

Cheatham, Rose, and Thomas admitted to these atrocities and claimed Benton participated in them. (R. p. 71, line 2–p. 75, line 21; p. 80, line 2–p. 86, line 11; pp. 450–457). However, Benton was with family in North Carolina during each attack perpetrated by Cheatham and the others. (R. p. 299, line 11–p. 301, line 11; p. 302, line 17–p. 304, line 4; p. 305, line 14–p. 308, line 6, p. 309, lines 3–24; p. 310, line 5–p. 315, line 17). The State ultimately indicted Benton in April and October 2016. (R. pp. 363–72). The indictments do not state the time the alleged offenses occurred.

Before securing any indictments, the State served Benton with one Rule 5(e)(1) Mutual Reciprocal Disclosure Request requesting his alibi for the April 29 murder only. (R. p. 510). The State did not request an alibi for any other offense occurring on any other date. Rule 5(e)(1) provides:

> Upon written request of the prosecution stating the time, date and place at which the alleged offense occurred, the defendant shall serve within ten days, or at such time as the court may direct, upon the prosecution a written notice of his intention to offer an alibi defense. The notice shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi.

Despite Rule 5(e)(1)'s unambiguous requirement, the State's request did not include the time Benton allegedly murdered Smith or reference any documents that did.[1] While Benton did not formally respond to the alibi request, he otherwise disclosed his alibi to the State prior to trial. (R. p. 38, lines 3–18; p. 39, lines 6–12; p. 40, lines 14–19). Investigators also interviewed two alibi witnesses—his mother and his uncle's ex-girlfriend—and had another—his step-father—in an interrogation room. (R. p. 317, line 17–p. 318, line 13; p. 328, line 23–p. 329, line 17; p. 339, line 13–p. 340, line 2). At a March 2017 pre-trial hearing, Benton explained he would not contest the crimes committed against Smith because "[t]he defense in this case is that Mr. Benton didn't do it, didn't participate in it." (R. p. 11, lines 13–23, p. 12, lines 18–22). By the time of trial, two of Benton's attorneys had discussed his alibi and which witnesses supported it, including one subpoenaed by the State, with Assistant Solicitor Lauree Richardson. (R. p. 38, line 5–p. 40, line 24). Richardson did not dispute that claim. A different Assistant Solicitor claimed no discussions took place but conceded he was aware of at least some witnesses supporting Benton's alibi. (R. p. 38, line 20–p. 39, line 1).

II. Benton's first trial ended in an improvidently granted mistrial.

Benton's first jury was sworn on July 18, 2017. (R. p. 29, lines 4–10). The court set aside two weeks for trial. (R. p. 25, line 19–p. 26, line 23).

Benton previewed his alibi in his opening statement. (R. p. 35, line 1–p. 37, line 4). The State objected and asked that the court strike the alibi because Benton had not served a formal

[1] Thomas never signed a written statement, and Cheatham's statement is silent on time. (R. pp. 453–457). Investigators questioned Benton's mother about his whereabouts at 5:30 a.m. on April 29 (R. p. 318, lines 8–13), while their internal records state fire units were dispatched beginning at 2:48 a.m. and the coroner estimated time of death as 2:30 a.m. (R. pp. 464, 496). There is no statement as to when anyone broke into Smith's home or started the fire. The arrest warrant claimed the murder occurred at "at approximately 0230 hours" on April 29. (R. p. 361).

written notice pursuant to Rule 5(e)(1). (R. p. 37, line 22–p. 38, line 2). In response, Benton detailed his open discussions with the State regarding his alibi. (R. p. 38, line 5–p. 40, line 24). As he put it, "[alibi has] always been the defense in this case." (R. p. 38, line 11).

The trial court spoke with counsel in chambers. (R. p. 41, lines 3–7). That conversation was not immediately placed on the record, but Benton later explained that he argued during the first trial that there was no justification for a mistrial. (R. p. 63, lines 16–18). The trial court ultimately declared a mistrial over Benton's objection. The court wrongly believed that the indictment and "the Court's notice," which was not identified, provided the requisite written statement of the time, date, and place to trigger Benton's disclosure obligation. (R. p. 41, line 20–p. 42, line 1; p. 43, lines 16–20). The court considered only two alternatives to a mistrial—striking Benton's alibi in full or allowing him to present it in full—and found both would be unfair. (R. p. 42, lines 5–p. 43, line 3). These options were illusory, as the court suggested it would have granted a mistrial even if the State agreed Benton could present his witnesses. (R. p. 5).

The court held a hearing the next day on the proper interpretation of Rule 5(e)(1). Benton reminded the court that the indictments do not state the time the charged offenses were allegedly committed. (R. p. 50, line 21). He further explained that an affirmative statement from the prosecution as to time is necessary to prevent prosecution witnesses from molding their testimony to defeat an alibi. (R. p. 51, line 18–p. 52, line 10). The State did not address that concern. Instead, it argued for the first time that notice of time had been given through documents that were not statements of the prosecution and were not cited in the alibi request: the arrest warrants, police reports, fire reports, and voluntary statements. (R. p. 52, lines 12–22). There is no evidence these documents were produced to Benton with or before the alibi request. The court nevertheless found

them sufficient to comply with the State's Rule 5(e)(1) obligation. (R. p. 54, line 21–55, line 8). The court reiterated these conclusions in a written order declaring a mistrial. (R. pp. 4–5).

III. The circuit court held Benton's second trial over his objection and received inadmissible messages and photographs into evidence.

Benton's second trial began on December 4, 2017. Prior to the second jury's swearing, Benton moved to dismiss his charges under the Double Jeopardy Clause because the original mistrial was unjustified. (R. p. 62, line 18–p. 63, line 24). The court "reaffirm[ed] and reiterate[d]" its prior rulings and denied the motion. (R. p. 64, line 8–p. 65, line 23).

At trial, the State principally relied on testimony from Thomas and Cheatham, cell phone data, and crime scene photographs. Thomas and Cheatham are admitted murderers, arsonists, and burglars who offered testimony in exchange for sentencing consideration from the State. (R. p. 92, line 11–p. 93, line 12; p. 94, lines 5–15; p. 268, line 17–p. 269, line 20; p. 274, line 18–p. 275, line 5). Multiple witnesses, including one called by the State, testified Cheatham is untrustworthy and not to be believed even when under oath. *E.g.*, (R. p. 216, lines 7–15) (testimony of State's witness Kaitlin Rose); (R. p. 315, line 22–p. 316, line 25) (testimony of Benton's mother); (R. p. 333, line 20–p. 334, line 3) (testimony of character witness Steven Bielinski). Benton reviews the cell phone and photographic evidence below.

Foundational Evidence for Text and Internet Messages

Aside from Cheatham testifying that Benton left his cell phone in the car during the April 26 events, (R. p. 270, line 22–p. 273, line 20), there is no evidence Benton had his phone during these crimes. As noted below, possession of Benton's phone was expressly disputed. The State nevertheless relied on the location of his phone in relation to the crime scenes. (R. p. 192, line 2–p. 207, line 7). The State also offered into evidence every text and Facebook message from Benton and Cheatham's phones—over 1,000 messages from March 20, 2014, to May 2, 2014—regardless

of their connection to the alleged offenses.[2] (R. pp. 373–449). Benton objected to the absence of authenticating evidence confirming the author of each message. (R. p. 27, line 15–p. 28, line 19; p. 144, line 22–p. 145, line 21; p. 164, line 8–p. 165, line 10; pp. 418–449). The court initially agreed the State would lay this foundation. (R. p. 146, line 15–p. 147, line 20). But the court retreated and required the State to only identify the phone from which the messages came. (R. p. 147, line 5–p. 148, line 17; p. 158, lines 8–22; p. 166, lines 11–15). The circuit court found all messages authentic on this basis and admitted them subject only to specific objections to some of their contents.[3] (R. p. 147, line 5–p. 148, line 17; p. 158, lines 8–25; p. 166, lines 11–15).

While the State did not attempt to otherwise authenticate the messages, the record incidentally contains sufficient evidence to authenticate a few. For instance, Cheatham authenticated three exchanges with Benton consisting of 25 individual messages:

> (1) a message from Cheatham on April 29, 2014, stating, "Bro apparently cb was murdered?? I heard he died in a fire but cops are saying there is evidence that it was murder," a response from Benton of, "I saw that when garland told me. Apparently he died holding a gun at the front door trying to get out?" and a link from Cheatham to a news story about the fire, (R. p. 258, line 11–p. 259, line 17; p. 425, lines 183–88);
>
> (2) an exchange between Cheatham and Benton from April 9, 2014, nearly three weeks before the fatal attack on Smith, discussing obtaining weapons for an

[2] State's Exhibit 71 is a compilation of State's Exhibits 69 and 70, which are documents generated by Verizon containing text message data associated with Benton's phone number. (R. p. 142, line 11–p., 143, line 25; p. 155, lines 10–19; p. 156, lines 7–12; p. 157, lines 19–23). Because Exhibits 69 and 70 total 510 pages and the pertinent information is duplicated in Exhibit 71, Benton only designated Exhibit 71 to conserve resources and offered to supplement the record with Exhibits 69 and 70 if necessary. (Final Br. of Appellant at 11 n.3). State's Exhibits 72 and 76 are data extractions from Cheatham's and Benton's phones containing text and internet messages. (R. p. 149, line 24–p. 150, line 4; p. 153, line 24–p. 154, line 8; pp. 462-93). Benton's authenticity objection applied to the messages contained in these five exhibits.

[3] The Court of Appeals observed that "[t]he record on appeal does not contain the entire trial discussion regarding the admission of the text messages." (App. p. 7 n.3). The record contains the entire discussion regarding authenticity. Consistent with Rule 209(b), SCACR, it does not include every objection on other grounds to individual messages which were not raised on appeal.

> unidentified crime that Cheatham claimed was the attack on Smith, (R. p. 260, lines 15–25; p. 447); and
>
> (3) another Facebook Messenger exchange on April 9 about being "on the same page" with a plan for Cheatham to hold a gun while Benton makes someone talk, who Cheatham claimed was Smith. (R. p. 261, lines 11–22; p. 448).

Kaitlin Rose, Garland Rose's widow, identified one message she personally sent from Benton's phone on an unknown date. (R. p. 216, line 23–p. 219, line 9). Finally, Benton's stepfather confirmed that Benton's mother sent a message observing someone tried breaking into Benton's truck on the evening of April 29. (R. p. 327, lines 23–25; *see also* p. 394, line 562). No witness authenticated any other message allegedly sent to or received from Benton or Cheatham.

Specific authentication of each message was critical because Benton disputed possession of and access to his phone. His mother and great-grandmother testified that Cheatham had Benton's phone the night of Smith's murder. (R. p. 312, line 17–p. 315, line 10; p. 331, line 20–p. 332, line 5). Cheatham admitted to accessing Benton's phone on at least one occasion during the April 26 arson and burglary. (R. p. 270, line 22–p. 273, line 20). As noted, Kaitlin Rose sent messages from Benton's phone. (R. p. 216, line 23–p. 219, line 9). And she only denied that Garland borrowed Benton's phone "for long periods of time"; she did not claim he never borrowed it. (R. p. 215, lines 7–9).

Victim Body Photographs

At trial, the court admitted thirty-nine photographs of the scene following the April 29 fire without objection. (R. p. 113, lines 8–19; p. 115, lines 6–22; p. 119, line 21–p. 120, line 10; p. 122, line 11–p. 127, line 4; p. 132, line 17–p. 133, line 5; p. 141, lines 4–11; State's Exs. 16–53, 57). At issue here are three photographs showing Smith's burned remains. State's Exhibit 54 depicts Smith's charred body with his intestines and other organs falling out, State's Exhibit 55 shows the same but from a slight distance, and State's Exhibit 56 depicts Smith's detached, dried up, and

burned arm with handcuffs still attached. The original photographs were transmitted from the Court of Appeals to this Court on September 9, 2022.

Benton argued pre-trial that the photographs have no probative value because the facts and manner of Smith's death were not contested and the photographs would only inflame the jury. (R. p. 11, line 13–p. 12, line 25; p. 19, line 18–p. 21, line 7). The State responded that Exhibit 54 (then marked as Exhibit 5) showed Smith's body as it was found by the fire department, Exhibit 55 (then marked as Exhibit 10) depicted where Smith's body was in relation to the rest of the scene, and Exhibit 56 (Exhibit 7 for the hearing) showed that Smith's handcuffs were still closed and his hands bound (R. p. 15, lines 10–20; p. 17 line 23–p. 19, line 1). The trial court declined to rule on their admissibility at that time. (R. p. 23, lines 14–19). At trial, the court admitted these photographs over Benton's renewed objection solely because they were accurate depictions of the crime scene. (R. p. 107, line 1–p. 109, line 21); *see also* (R. p. 110, line 21–p. 111, line 11) (correcting the exhibit numbering). The State's witnesses testified to the facts shown in the photographs without objection and without reference to them. *E.g.*, (R. p. 104, line 21–p. 106, line 15; p. 114, line 19–p. 115, line 1; p. 131, lines 20–24; p. 159, line 25–p. 160, line 21). Benton never contested anything they depict.

The State ultimately did not use these images to corroborate other evidence or show the scene. Instead it showed State's Exhibit 54, the picture of Smith's burned body with internal organs spilling out, to Cheatham and asked, "Was that worth $1500?" (R. p. 262, lines 17–18). When Cheatham said no, the Solicitor inquired, "Who did that, Mitchell?" (R. p. 262, line 20). Cheatham responded, "Me and Tommy did." (R. p. 262, line 21).

* * *

The jury convicted Benton of murder, first-degree arson, third-degree arson, and two counts of first-degree burglary. (R. p. 294, line 20–p. 295, line 11). The court sentenced Benton to life imprisonment without the possibility of parole for murder, life imprisonment for first-degree burglary, thirty years' imprisonment for first-degree arson, and fifteen years' imprisonment for third-degree arson. (R. p. 296, line 18–p. 297, line 13). The Court of Appeals affirmed Benton's convictions and denied his petition for rehearing. (App. pp. 1–13; pp. 36–37). This Court thereafter granted certiorari to review the Court of Appeals' decision.

STANDARD OF REVIEW

Appellate courts review the grant of a mistrial for an abuse of discretion. *State v. Council*, 335 S.C. 1, 12, 515 S.E.2d 508, 514 (1999). The Double Jeopardy Clause adds an additional layer to this standard. *See Arizona v. Washington*, 434 U.S. 497, 514 (1978) (holding the great deference given to the trial court "does not, of course, end the inquiry" because "a constitutionally protected interest is inevitably affected by any mistrial decision"). The trial court must engage in a "scrupulous exercise of judicial discretion" when granting a mistrial. *United States v. Jorn*, 400 U.S. 470, 485 (1971). "[R]eviewing courts have an obligation to satisfy themselves that, in the words of Mr. Justice Story, the trial judge exercised 'sound discretion' in declaring a mistrial." *Arizona*, 434 U.S. at 514. Any doubt as to the propriety of a mistrial must be resolved in favor of the defendant. *State v. Rowlands*, 343 S.C. 454, 458, 539 S.E.2d 717, 719 (Ct. App. 2000) (citing *Downum v. United States*, 372 U.S. 734, 738 (1963)). This Court therefore accords less deference to the trial court on this issue than under an ordinary abuse of discretion standard.

While the United States Supreme Court has not defined what constitutes the exercise of sound discretion, *Renico v. Lett*, 559 U.S. 766, 778–79 (2010), various federal circuit courts have. For example, the Fourth Circuit first determines whether the trial court "rationally could conclude

that the grant of the mistrial was compelled by manifest necessity or whether the ends of public justice demanded that one be granted on the peculiar facts presented." *Gilliam v. Foster*, 75 F.3d 881, 894 (4th Cir. 1996). It also considers whether the trial court "acted precipitately," "expressed a concern regarding the possible double jeopardy consequences of an erroneous declaration of a mistrial," "heard extensive argument on the appropriateness" of a mistrial, and "gave appropriate consideration to alternatives less drastic than granting a mistrial." *Id.* at 895. Reviewing courts must pay attention to the particular problem facing the trial court which declared the mistrial. *State v. Baum*, 355 S.C. 209, 214, 584 S.E.2d 419, 422 (Ct. App. 2003).

The trial court's decision to admit evidence is reviewed under the traditional abuse of discretion standard. *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 434, 673 S.E.2d 448, 457 (2009). This occurs when the ruling is based on an error of law or the court's factual conclusions lack evidentiary support. *Id.*

ARGUMENT

I. The Court of Appeals erred in holding that the circuit court exercised sound discretion when finding manifest necessity existed for a mistrial.

"No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend V; *see also* S.C. Const. art. I, § 12. The Double Jeopardy Clause prohibits the State from prosecuting a defendant for the same offense following acquittal, conviction, or an improvidently granted mistrial. *State v. Parker*, 391 S.C. 606, 612, 707 S.E.2d 799, 801 (2011).

The Court of Appeals excused the State's failure to comply with Rule 5(e)(1)'s plain language while admitting that including a specific statement of the time the offense occurred may be the "better practice," because that requirement is "overly technical" as Benton "clearly knew the time and place of the events set forth in the indictments because his counsel came to the initial

trial with four alibi witnesses ready to testify." (App. pp. 6–7). The court did not establish a similar corollary rule for Benton, whereby strict compliance by him would be overly technical because the State clearly knew his alibi. The court also held that the circuit court properly "considered the alternatives available to avoid a mistrial and properly examined the potential prejudice to each party likely to result." (App. p. 7). From this, the Court of Appeals held the circuit court exercised sound discretion in declaring a mistrial and Benton's second trial did not violate his Double Jeopardy rights. (App. pp. 6–7).

As explained below, manifest necessity did not exist for two independent reasons: (1) Benton did not violate Rule 5(e)(1), and (2) the courts below failed to consider obvious mistrial alternatives. This Court should reverse the Court of Appeals, vacate Benton's convictions, and remand for dismissal of his indictments and his discharge from custody.

A. Only mistrials required by manifest necessity can justify retrying a defendant.

A trial ending in a mistrial may commence again only where there was a "manifest necessity" for the mistrial. *State v. Robinson*, 360 S.C. 187, 193, 600 S.E.2d 100, 103 (Ct. App. 2004). Manifest necessity means trial judges cannot "foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings." *Jorn*, 400 U.S. at 485. There must be "so great a need to discharge the jury that 'the ends of public justice would otherwise be defeated.'" *United States v. Hanno*, 21 F.3d 42, 46 (4th Cir. 1994) (quoting *Jorn*, 400 U.S. at 482). Manifest necessity must exist even when the prosecution did not request a mistrial or when the error of either counsel brings about the issue. *United States v. Sloan*, 36 F.3d 386, 395 (4th Cir. 1994) (citing *Jorn*, 400 U.S. at 490).

The burden of establishing manifest necessity rests solely on the prosecution. *Arizona*, 434 U.S. at 505; *see also State v. Van Sant*, 198 Conn. 369, 381 n.11, 503 A.2d 557, 563 n.11 (1986)

(finding the trial court's offer for the defense to make a record "commendable" but agreeing with the defendant that "the burden of demonstrating manifest necessity for a mistrial to avoid the double jeopardy bar was entirely on the state"). The prosecution must ensure the record is complete if it wishes to re-try the defendant, even if the trial court declares a mistrial *sua sponte*. *United States v. Bonas*, 344 F.3d 945, 951 (9th Cir. 2003). It is not the defendant's burden to insist on a better record. *Id.*

B. Manifest necessity did not exist because the State did not comply with Rule 5(e)(1) and because Benton voluntarily disclosed his alibi.

The rules for interpreting statutes apply to court rules. *Green ex rel. Green v. Lewis Truck Lines, Inc.*, 314 S.C. 303, 304, 443 S.E.2d 906, 907 (1994) (per curiam). There is no need to resort to statutory interpretation where a statute's language is clear and explicit. *Hodges v. Rainey*, 341 S.C. 79, 87, 533 S.E.2d 578, 582 (2000). "[A] court cannot rewrite the statute and inject matters into it which are not" in the statute's language. *Id.* Likewise, courts must read a statute so that "no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (quotation omitted). Interpretation of a statute is a question of law. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

Rule 5(e)(1) unambiguously provides that "[u]pon *written request of the prosecution stating the* ***time***, ***date*** *and place at which the alleged offense occurred*, the defendant shall serve within ten days, or at such time as the court may direct, upon the prosecution a written notice of his intention to offer an alibi defense." (emphasis added). The request must state the time with specificity. *United States v. Bickman*, 491 F. Supp. 277, 279 (E.D. Pa. 1980); *see also State v. Anderson*, 18 S.W.3d 11, 15 (Mo. Ct. App. 2000) ("The request need not state the exact moment of the crime. However the drafters of the rule thought such specification was of sufficient

importance to warrant that it be a specific requirement." (internal citations omitted)).[4] Without this specificity, a defendant is unable to meet his reciprocal obligation to provide detailed alibi information. *United States v. Ponzo*, No. 97-40009-NMG-5, 2012 WL 2990765, at *1 (D. Mass. July 19, 2012). The term "alleged offense" refers to conduct alleged in an indictment. *United States v. Gilbert*, 188 F.R.D. 176, 178 (D. Mass. 1999). Allowing the prosecution to request alibis for unindicted offenses "could cause much mischief." *Id*.

Incorporating other documents into an alibi request by express reference may satisfy the State's obligation if those documents expressly state the time, date, and place of the offense. *Id*. But the mere production—not incorporation—of discovery or other materials containing the required information is insufficient. *United States v. Saa*, 859 F.2d 1067, 1071 (2d Cir. 1988). First, it is not a statement *by the prosecution* as to where and when the offense was committed. *Id.* Second, it flips the rule by requiring that defendants bear the burden of sifting out references to time in potentially voluminous and conflicting material to divine the prosecution's belief, whereas Rule 5 places the burden on the State to declare time, date, and place with specificity. Third, this approach undermines the goal of mutual disclosure. "[S]ince an alibi derives its potency as a defense from the fact that it involves the physical impossibility of the accused's guilt, a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all." *State v. Robbins*, 275 S.C. 373, 376, 271 S.E.2d 319, 320 (1980) (quoting 21 Am. Jur. 2d *Criminal Law* § 136). The specific time the prosecution contends the offense was committed is an essential

[4] This Court has looked to federal criminal rules for guidance when interpreting our rules. *E.g., State v. Miller*, 289 S.C. 316, 317, 345 S.E.2d 489, 490 (1986). Rule 12.1(a)(1), Fed. R. Crim. P., provides in pertinent part, "[a]n attorney for the government may request in writing that the defendant notify an attorney for the government of any intended alibi defense. The request must state the time, date, and place of the alleged offense." Missouri employs a similar rule conditioning the defense's obligation to disclose alibi evidence on the prosecution delivering a request that "specifies the place, date, and time of the crime charged." Mo. Sup. Ct. R. 25.05.

component of an alibi. Without an affirmative position of the prosecution as to when the crime occurred, defendants cannot meaningfully disclose an alibi defense.

A Rule 5(e)(1) written statement from the prosecution stating the time, date, and place of the alleged offense is a condition precedent to a defendant's obligation to disclose his alibi. *See Alexander's Land Co. v. M & M & K Corp.*, 390 S.C. 582, 596, 703 S.E.2d 207, 214 (2010) (holding a condition precedent is "an act which must occur before performance by the other party is due"). The express requirement of the rule cannot be "overly technical." The circuit court and Court of Appeals were not at liberty to read the requirement out of the rule or make it an optional "better practice." It is undisputed that the written request did not include a statement as to time, did not incorporate any documents which state time, and pre-dated Benton's indictments. And even assuming the State's document production could satisfy Rule 5(e)(1), the State has not demonstrated that Benton received those documents before it served the alibi request. The State's failure to fully satisfy this condition precedent means Benton "may raise an alibi defense at trial to which the Government, though surprised, may not object." *Bickman*, 491 F. Supp. at 279. Manifest necessity therefore did not exist.

The Court of Appeals compounded the circuit court's error of excusing the State's non-compliance because Benton otherwise knew the time of the alleged offense by failing to excuse Benton because the State otherwise knew about his alibi. *Cf. State v. Pare*, 253 Conn. 611, 622, 755 A.2d 180, 187 (2000) (holding rules of criminal procedure are strictly construed against the state unless doing so would frustrate legislative intent). The State knew of Benton's alibi from interviews with witnesses (R. p. 317, line 17–p. 318, line 13; p. 328, line 23–p. 329, line 17; p. 339, line 13–p. 340, line 2), Benton's disclosure on the record of his intent to present an alibi (R. p. 11, lines 13–23), and conversations with Benton's trial counsel (R. p. 38, lines 5–18; p. 39, lines

6–12, p. 40, lines 14–24). Benton acted in good faith and openly discussed his alibi with the State, but it is arguable whether the State acted in good faith by knowing Benton's alibi in advance yet still objecting to it at trial. The Court of Appeals' failure to evenly apply its reading of Rule 5(e)(1) created an imbalance affording the State "a more favorable opportunity to convict" which is subject to "the strictest scrutiny" under the Double Jeopardy clause, *Arizona*, 434 U.S. at 508; *Downum*, 372 U.S. at 736; did not serve "the ends of public justice," *Jorn*, 400 U.S. at 485; and did not resolve any doubts about the propriety of a mistrial in Benton's favor, *Rowlands*, 343 S.C. at 458, 539 S.E.2d at 719. Our courts cannot grant the State more favorable treatment than a defendant to the detriment of the defendant's fundamental constitutional rights.

The Court of Appeals therefore erred in holding the circuit court exercised sound discretion in finding that manifest necessity existed for the mistrial and denying Benton's motion to dismiss.

C. Manifest necessity did not exist because the circuit court did not consider obvious alternatives to a mistrial.

The "critical inquiry" for manifest necessity is the availability of less drastic alternatives. *United States v. Shafer*, 987 F.2d 1054, 1057 (4th Cir. 1993). "If alternatives existed, then society's interest in 'fair trials designed to end in just judgments' was not in conflict with the defendant's right to have the case submitted to the jury." *Id.* (quoting *United States v. Perez,* 22 U.S. (9 Wheat.) 579, 579–80 (1824)); *see also Ex parte Bruce*, 112 S.W.3d 635, 640 (Tex. App. 2003) ("Before granting a mistrial on the grounds of manifest necessity, a trial court must determine whether alternative courses of action are available and, if so, choose one that is less drastic than a mistrial."); *Cornish v. State*, 272 Md. 312, 320, 322 A.2d 880, 886 (1974) ("[A] retrial is barred by the Fifth Amendment where reasonable alternatives to a mistrial, such as continuance, are feasible and could cure the problem."). If less drastic viable alternatives existed, then by definition

there was no manifest necessity for a mistrial, even if the court correctly interpreted and applied Rule 5(e)(1).

This case involves crimes occurring on April 18, April 26, and April 29, 2014. The State only requested an alibi for April 29. (R. p. 510). It did not request an alibi for April 18 or April 26, and Benton therefore had no obligation to disclose one. Benton presented three alibi witnesses for April 29 at trial: his mother, whom police interviewed (R. p. 310, line 5–p. 315, line 17; p. 317, line 17–p. 318, line 13); his stepfather, whom police could have interviewed but chose not to (R. p. 324, line 17–p. 326, line 14; p. 328, line 23–p. 329, line 17); and his great-grandmother, the only alibi witness for that date whom police did not interview or have in a room to interview (R. p. 330, line 24–p. 332, line 25). His great-grandmother therefore was the only "new" witness, and she simply corroborated his mother's testimony. (*Compare* R. p. 310, line 5–p. 315, line 17, *with* R. p. 330, line 24–p. 332, line 25).

Assuming *arguendo* that Benton was required to disclose his alibi for that day and did not properly do so, the circuit court only needed to consider alternatives to accommodate these witnesses. *See Baum*, 355 S.C. at 214, 584 S.E.2d at 422 (holding manifest necessity must be determined with "attention to the particular problem confronting the trial judge"). The circuit court considered just two alternatives: excluding all Benton's alibi witnesses, which it believed was unfair to Benton, or allowing all to testify, which it believed was unfair to the State. (R. p. 5; p. 41, line 12–p. 43, line 3). The Court of Appeals affirmed and likewise never considered other options. (App. pp. 6–7).

Both the circuit court and the Court of Appeals overlooked viable alternatives to accommodate Benton's alibi for April 29 instead of granting a mistrial. Rule 5(g), SCRCrimP, allows a court to waive the rule's requirements for good cause, which existed here because Benton

did not act in bad faith and had already disclosed much, if not all, of his alibi information. Alternatively, a brief continuance could have been granted for the State to investigate Benton's alibi for April 29. The court set aside two weeks for a trial which only took four days, giving the State ample time to discover any additional alibi information for April 29 it did not already have, while protecting Benton's right to have his case heard by his first jury. (R. p. 25, line 19–p. 26, line 23). The court also could have allowed testimony from witnesses already known to or interviewed by investigators.

Without considering these alternatives, the circuit court could not exercise sound discretion to find that manifest necessity or "the ends of public justice" compelled a mistrial even if it properly applied Rule 5(e)(1), which it did not. *See Gilliam*, 75 F.3d at 894. The Court of Appeals' opinion suffers from the same error.

D. The improvidently granted mistrial prejudiced Mr. Benton.

The Double Jeopardy Clause exists to ensure "the imposition of the adjudicatory gauntlet only once when one is accused of a crime." *State v. Kirby*, 269 S.C. 25, 27, 236 S.E.2d 33, 34 (1977).

> The reasons why this "valued right" merits constitutional protection are worthy of repetition. Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.

Arizona, 434 U.S. at 503–05. The only prejudice required for a Double Jeopardy violation is the loss of the first properly sworn jury. *Sloan*, 36 F.3d at 395. A defendant need not show any further prejudice.

The Court of Appeals therefore incorrectly held that "Benton suffered no prejudice upon the granting of the mistrial because he was able to present his alibi witnesses at the subsequent trial." (App. pp. 6–7). Benton suffered the exact prejudice the Double Jeopardy clause exists to prevent when he was subjected to a second trial. Benton respectfully requests that this Court reverse the Court of Appeals, vacate his convictions, and remand for entry of an order dismissing his indictments and discharging him from custody.

II. The Court of Appeals erred in affirming the authentication of Benton's and Cheatham's text messages based on insufficient circumstantial evidence.

The Court of Appeals agreed that the circuit court erred in authenticating the text and Facebook messages solely because they came from Benton's and Cheatham's phones. (App. pp. 9–10). As an additional sustaining ground pursuant to Rule 220(c), SCACR, the Court of Appeals held that the timing and content of 35 messages (constituting nine discreet conversations) sent on seven days nevertheless authenticated the remaining 1,000 sent over 44 days. (App. pp. 10–11; *see also* R. p. 216, line 23–p. 219, line 9; p. 374, line 38; p. 377, lines 138–40; p. 379, lines 188 and 197; p. 389, line 427, p. 393, line 535; p. 394, line 462; p. 425, lines 183–88; p. 447–48). While the court acknowledged that authentication of Benton's alleged Facebook messages was "more problematic," it held any error was harmless because some (but not all) messages were cumulative to Cheatham's testimony. (App. p. 11).

The Court of Appeals erred in two separate respects. First, it erred by affirming on a discretionary issue of which Benton had no notice and which does not appear in the record. Second, the Court of Appeals' decision was wrong on its merits.

A. The Court of Appeals exceeded Rule 220(c) by affirming without notice on a discretionary additional sustaining ground which does not appear in the record.

Ordinarily, a respondent may raise any reason appearing in the record as a basis to affirm the ruling below, even if it was not raised to and ruled upon by the circuit court. *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000). But *I'On* did not "dilute the important principle that all parties should raise all necessary issues and arguments to the lower court and attempt to obtain a ruling." *Id.* at 421, 526 S.E.2d at 724. It therefore is "unfair or unwise to resolve a case on a ground never mentioned by the respondent prior to appeal," and "the appellate court is likely to ignore" that ground. *Id.*; *see also Alexander v. Houston*, 403 S.C. 615, 620 n.4, 744 S.E.2d 517, 520 n.4 (2013) ("[W]e are reticent to invoke an alternative sustaining ground where the ground is not raised in the appellate brief. Invoking an additional sustaining ground under such circumstances would generally be unfair to an unaware appellant.").

This Court has not specified when it becomes unfair and unwise for an appellate court to affirm using an unpreserved additional sustaining ground. Courts elsewhere have provided sound limitations which balance the policy behind finality of judgments and judicial economy, the rights of appellants, and the proper function of an appellate court. Benton respectfully requests that this Court adopt these limitations. Criminal cases pose a heightened need for such limitations, where a ground that was never raised to or ruled upon by the trial court, and therefore never defended against by the accused, can be used to affirm a conviction and sentence of imprisonment. *See State v. Mabe*, 306 S.C. 355, 358, 412 S.E.2d 386, 388 (1991) ("Due process requires that a criminal defendant be afforded a meaningful opportunity to present a complete defense."); *see also State v. Lagerquist*, 254 S.C. 501, 506, 176 S.E.2d 141, 143 (1970) (holding criminal defendants have due process rights on appeal).

First, the additional sustaining ground must be "within the power of the appellate court to formulate." *Silver v. Greater Baltimore Med. Ctr., Inc.*, 248 Md. App. 666, 719, 243 A.3d 576, 607 (Ct. Spec. App. 2020) (quoting *City of Frederick v. Pickett*, 392 Md. 411, 424, 897 A.2d 228, 236 (2006)). An appellate court can answer questions of law. *See Fabian v. Lindsay*, 410 S.C. 475, 482, 765 S.E.2d 132, 136 (2014). An appellate court in this State sitting in equity can make findings of fact. *See Lewis v. Lewis*, 392 S.C. 381, 385–86, 709 S.E.2d 650, 651–52 (2011). But some matters are committed to trial courts and are not within an appellate court's authority, such as making findings of fact in cases at law and making discretionary determinations like the admission of evidence. *See State v. Commander*, 396 S.C. 254, 262, 721 S.E.2d 413, 417 (2011); *Jordan v. Holt*, 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005).

Unpreserved discretionary issues therefore cannot serve as additional sustaining grounds. *E.g.*, *Silver*, 248 Md. App. at 719, 243 A.3d at 607; *City of Kodiak v. Kodiak Pub. Broad. Corp.*, 426 P.3d 1089, 1096 (Alaska 2018); *Wagner v. Strickland*, 908 So. 2d 549, 551 n.1 (Fla. Ct. App. 2005). Reaching them for the first time on appeal raises several problems. For example, how can the appellate court be certain that the trial judge would have exercised his or her discretion in a particular way? What standard does the appellate court apply—does it exercise discretion in the first instance, does it find that trial court would not have abused its discretion had it hypothetically made the same determination as the appellate court, or must it find that ruling the other way would have been an abuse of discretion? What happens when courts could reach different conclusions without abusing discretion? If the Court of Appeals decides this issue first, does this Court review for abuse of discretion by the Court of Appeals, decide the issue itself *de novo*, or also decide whether a contrary ruling by a trial court would amount to an abuse of discretion? These and many

other unanswered questions underscore the error in using an unpreserved inherently discretionary issue as an additional sustaining ground.

Second, due process requires that the appellant have both notice of and an opportunity to be heard on the additional sustaining ground. *See Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008); *see also Kaufman v. Kaufman*, 133 N.Y.S.3d 54, 86 (App. Div. 2020) ("It would not be appropriate for us to decide this appeal on a distinct ground that we winkled out wholly on our own, without affording the parties notice and an opportunity to be heard." (citations and quotations omitted)); *Ala. Psychiatric Servs., P.C. v. 412 S. Court Street, LLC*, 81 So. 3d 1239, 1249 (Ala. 2011) (holding that an additional sustaining ground is improper "where due-process constraints require some notice at the trial level, which was omitted, of the basis which would otherwise support an affirmance"); *cf. Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 540 n.2, 725 S.E.2d 693, 698 n.2 (2012) (holding that a general request to affirm under Rule 220(c), SCACR, constitutes abandonment of any additional sustaining grounds); *I'On*, 338 S.C. at 420, 526 S.E.2d at 723 (holding a respondent thus abandons an additional sustaining ground by failing to raise the issue in its brief). The appellant therefore must have some notice—whether at trial, from the respondent's brief, from the appellate court, or by operation of law because it is an issue on which the appellant bears the burden—of a ground for affirmance. Only then can the appellant build a sufficient record demonstrating error and be meaningfully heard on that ground. *See First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 515 (1994) (noting the appellant bears the burden of showing error and prejudice).

Third, and dovetailing with the notice requirement, the additional sustaining ground must sufficiently appear in the record. *See* Rule 220(c), SCACR. While this Court has not had the

occasion to define what "appear in the record" means, other courts have developed a three-part test:

> [I]f the question presented is not purely one of law, then the evidentiary record must be sufficient to support the proffered alternative basis for affirmance. That requires: (1) that the facts of record be sufficient to support the alternative basis for affirmance; (2) that the trial court's ruling be consistent with the view of the evidence under the alternative basis for affirmance; and (3) that the record materially be the same one that would have been developed had the prevailing party raised the alternative basis for affirmance below. In other words, even if the record contains evidence sufficient to support an alternative basis for affirmance, if the losing party might have created a different record below had the prevailing party raised that issue, and that record could affect the disposition of the issue, then we will not consider the alternative basis for affirmance.

Outdoor Media Dimensions Inc. v. State, 331 Or. 634, 659–60, 20 P.3d 180, 195–96 (2001); *accord Prancing Antelope I, LLC v. Saratoga Inn Overlook Homeowners Ass'n, Inc.*, 478 P.3d 1171, 1182 (Wyo. 2021); 5 Am. Jur. 2d *Appellate Review* § 630; *cf. State v. Hoskins*, 165 Idaho 217, 239–40 443 P.3d 231, 225–26 (2019) (refusing to consider an unpreserved additional sustaining ground because "the record suggests that the proceedings developed in such a way that [the appellant] had neither the incentive nor the opportunity to present evidence or argument" on that issue).

None of these criteria was met in this case. The additional sustaining ground cited by the Court of Appeals, whether sufficient circumstantial evidence existed to authenticate the text and Facebook messages, is a discretionary matter firmly committed to the trial courts. *See Commander*, 396 S.C. at 262, 721 S.E.2d at 417. Furthermore, the issue was never raised to the circuit court, in briefing before the Court of Appeals, or during oral argument. The complete absence of any notice that 44 days' worth of over 1,000 messages could be authenticated by the content of just 35 messages/nine conversations prevented Benton from making a record or being heard before the circuit court or on appeal regarding this argument. This deprived Benton of due process. Finally,

and relatedly, this issue is not a ground which appears in the record. There are insufficient facts in the record supporting the authentication of over 1,000 messages, the trial court's narrow reliance on phone ownership is inconsistent with the Court of Appeals' holding that the messages' inherent characteristics and content authenticated them, and the record necessary to support the circumstantial evidence ground is far more expansive than the record developed on the narrow issue the circuit court decided. For each of these reasons, the Court of Appeals erred in using circumstantial evidence as an additional sustaining ground. This Court therefore should vacate this portion of the Court of Appeals' opinion and remand for a new trial.

B. The Court of Appeals erred in holding there is sufficient evidence to authenticate over 1,000 text and Facebook messages.

Alternatively, the Court of Appeals erred on the merits of its additional sustaining ground. Authentication is a condition precedent to the admissibility of documentary evidence. Rule 901(a), SCRE. It requires evidence "sufficient to support a finding that the matter in question is what the proponent claims." *Id.* While the burden is not high, the proponent of the evidence still must offer a satisfactory foundation. *Deep Keel, LLC v. Atl. Private Equity Grp., Inc.*, 413 S.C. 58, 64–65, 773 S.E.2d 607, 610 (Ct. App. 2015). Authenticating text and internet messages requires some proof of authorship. (App. p. 9). The proponent of the messages may satisfy its burden through direct or circumstantial evidence. *Winburn v. Minn. Mut. Life Ins. Co.*, 261 S.C. 568, 576–77, 201 S.E.2d 372, 376 (1973). The Court of Appeals correctly held that the mere fact a message was downloaded from a particular phone does not meet that burden. (App. pp. 9–10 ("We acknowledge the circuit court erred in stating that the fact the messages were sent from Benton's phone provided sufficient proof to establish Benton authored them—the authentication of text and social media messages requires more than proving mere ownership of the device from which messages originated.").

Benton agrees there is sufficient evidence to authenticate 27 messages/five conversations. (*See* discussion *supra* at 9–10). The Court of Appeals, on its own accord, held there was sufficient evidence to authenticate eight more messages sent between April 26 and April 28. (App. Pp. 10–11 (referencing R. p. 374, line 38; p. 377, lines 138–40; p. 379, lines 188 and 197; p. 389, line 427, p. 393, line 535)). The court's strained analysis with respect to these eight messages was wrong.[5] But even assuming it was correct, the Court of Appeals erroneously catapulted without explanation to conclusion that 35 messages/nine conversations in total were sufficient to authenticate the over 1,000 messages sent when others had access to and sent messages from Benton's phone. In the end, the court simply repackaged and repeated the circuit court's error by holding these over 1,000 messages were authentic simply because they came from a phone associated with Benton.

The Court of Appeals also excused any error in admitting Facebook messages as harmless because the messages were cumulative to Cheatham's testimony that he and Benton began planning the crimes in late March and early April. (App. p. 11). Error is harmless only when it appears beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Tapp*, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012). The improper admission of evidence is harmless when it is "*merely cumulative* to other evidence." *State v. McLeod*, 362 S.C. 73, 82–83, 606 S.E.2d

[5] The court's analysis was as follows: (1) some messages use generic phrases when texting Benton's girlfriend (who did not testify) during times he did not dispute possession of his phone; (2) some messages use similar phrases when texting his girlfriend's number during the "days leading up to" when Benton did not dispute possession; (3) the messages to his girlfriend during those days therefore are authentic; (4) messages allegedly relating to the crimes were sent "during this same period," which could be hours before or after Benton allegedly texted his girlfriend; (5) these additional messages allegedly concerning the crimes are therefore authentic. (App. pp. 10–11). The record fails to support the Court of Appeals' conclusion. The messages with Benton's girlfriend do not prove authorship of the messages to others—particularly messages sent hours later, such as "Meet us at 501" and the reference to "CB's furniture outlet" between 3:37 and 3:41 a.m. on April 26, the night Cheatham admitted to having Benton's phone "[f]or a couple of minutes." (R. p. 273, lines 3–20; p. 377, lines 138–40).

215, 220 (Ct. App. 2004) (emphasis added). The circuit court received into evidence dozens of Facebook messages pre- and post-dating the crimes that went far beyond the isolated planning references Cheatham identified and thus were not "merely cumulative" of Cheatham's planning testimony. (R. pp. 445–449). The Court of Appeals also did not find, nor could it find, beyond a reasonable doubt that these messages did not contribute to the verdict.

The Court of Appeals therefore erred in finding sufficient evidence to authenticate all the text and Facebook messages the circuit court received into evidence. Should no Double Jeopardy violation be found, this Could should reverse and remand for a new trial.

III. The Court of Appeals misstated and misapplied the standard for admitting victim body photographs to demonstrate guilt.

The circuit court admitted three photographs over Benton's objection: one showing Smith's charred body and ruptured abdomen (State's Exhibit 54), another showing the same but from a little farther away (State's Exhibit 55), and a third showing Smith's shriveled, detached arm with handcuffs still attached (State's Exhibit 56). The State proved all facts depicted in the pictures via the testimony of multiple disinterested witnesses and physical evidence. (R. p. 80, line 2–p. 86, line 11; p. 104, line 21–p. 106, line 15; p. 112, line 10–p. 116, line 19; p. 117, line 2–p. 120, line 10; p. 121, line 7–p. 140, line 9; p. 159, line 11–p. 163, line 23). Benton did not dispute those facts or object to this other proof. He thus objected to these photographs as unduly prejudicial due their facially graphic nature and minimal probative value considering this other evidence, but the circuit court overruled his objections. (R. p. 11, line 13–p. 12, line 25; p. 19, line 18–p. 21, line 7; p. 107, line 1–p. 109, line 21, p. 110, line 21–p. 111, line 11). The Court of Appeals held the circuit court did not err because the photographs showed malice by corroborating Cheatham's undisputed testimony that he and Benton left Smith handcuffed when they set his mobile home on fire. (App.

pp. 12–13). In doing so, the Court of Appeals, like the circuit court, applied the wrong legal standard.

Otherwise relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE. Photographs of murder victims should be excluded during a trial on guilt "where the facts they are intended to show have been fully established by competent testimony." *State v. Kornahrens*, 290 S.C. 281, 288–89, 350 S.E.2d 180, 185 (1986); *State v. Middleton*, 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986) (holding crime scene photographs lose their evidentiary value where they depict information that is stipulated to or "not really at issue"). The simple fact that they corroborate other evidence does not automatically render them admissible to prove guilt.[6] *See State v. Gray*, 408 S.C. 601, 613, 759 S.E.2d 160, 166–67 (Ct. App. 2014); *see also 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.").

Rather, victim photographs used to show guilt are admissible to prove or corroborate *specific disputed facts* in the case. *E.g.*, *State v. Holder*, 382 S.C. 278, 290–91, 676 S.E.2d 690, 697 (2009) (finding autopsy photographs admissible where the pathologist testified they were necessary to assist jurors without medical training in understanding the victim's injuries and it would have been difficult for the defendant to ignore the injuries); *State v. Tucker*, 324 S.C. 155, 167, 478 S.E.2d 260, 266–67 (1996) (affirming admission of photographs in guilt phase where they were used to contradict the defendant's assertion that the killing was accidental or the result of a faulty weapon); *State v. Livingston*, 282 S.C. 1, 6, 317 S.E.2d 129, 132 (1984) (holding

[6] This is in contrast to introducing photographs during the sentencing phase of a capital trial, where "[t]he purpose . . . is to permit the introduction of evidence . . . which ordinarily would be inadmissible in the guilt phase." *Kornahrens*, 290 S.C. at 289, 350 S.E.2d at 185.

photographs corroborated testimony of a witness whose memory was challenged by the defense); *State v. Hawes*, 423 S.C. 118, 131, 813 S.E.2d 513, 520 (Ct. App. 2018) (holding photographs showing "extreme nature of this killing" were probative of malice and thus admissible); *State v. Thompson*, 420 S.C. 192, 214–15, 802 S.E.2d 623, 634–35 (Ct. App. 2017) (affirming admission of autopsy photographs necessary to help understand testimony regarding nature of injuries and defendant's awareness of injuries); *Gray*, 408 S.C. at 609, 759 S.E.2d at 164 (allowing autopsy photographs where it "was important for the jury to see the nature and location of these injuries in order to understand the witnesses' testimony about the fights and the pathologists' testimony about the injuries"); *State v. Martucci*, 380 S.C. 232, 250, 669 S.E.2d 598, 608 (Ct. App. 2008) (finding the pictures were necessary to show injuries were inconsistent with accidental injury or play); *State v. Ward*, 374 S.C. 606, 613, 649 S.E.2d 145, 149 (Ct. App. 2007) (affirming admission of photographs of graze gunshot wound to rebut defense arguments about the angle of the shot).

The Court of Appeals did not cite or apply this standard. Instead, it simply held that "[i]f the photograph serves to corroborate testimony, it is not an abuse of discretion to admit it." (App. p. 12 (quoting *Collins*, 409 S.C. at 534, 763 S.E.2d at 27). The quoted statement is from the *Collins* minority. A majority of the *Collins* Court found the photographs to be inadmissible despite their corroborative value and their demonstration of an element of the offense. *Collins*, 409 S.C. at 539, 763 S.E.2d at 30 (Kittredge, J., concurring in result (joined by Hearn, J.)); *id.* at 540, 763 S.E.2d at 30 (Pleicones, J., dissenting). Benton recognizes that this Court on occasion has stated that a circuit court does not abuse its discretion when admitting victim photographs which "serve[] to corroborate testimony." *E.g., Holder*, 382 S.C. at 290, 676 S.E.2d at 697; *State v. Nance*, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996). Tracing the history of this language leads back to this

Court's decision in *Middleton.* A full review of the operative portion of that case confirms that mere corroboration is not enough to admit such photographs:

> Although photographs may be used to corroborate other evidence, it is well-established that photographs calculated to arouse the sympathies and prejudices of the jury are to be excluded if they are irrelevant or unnecessary to the issues at trial. Appellant's counsel offered to stipulate to any relevant information contained in the photographs, and it is clear the information was not really at issue. Furthermore, the testimony of the forensic pathologist negated any arguable evidentiary value of the photographs. The prejudice created by the photographs clearly outweighed any evidentiary value.

Middleton, 288 S.C. at 24, 339 S.E.2d at 693 (internal citations omitted).

The photographs here did not prove or corroborate any disputed facts. The Court of Appeals held the photographs of Smith's burned body, ruptured abdomen, and shriveled and detached arm (State Exhibits 54, 55, and 56) were admissible to show malice because they corroborate Cheatham's testimony that Smith was restrained with handcuffs and left that way when his house was set on fire. (App. pp. 12–13). Two photographs—State's Exhibits 54 and 55—do not show Smith restrained by handcuffs. Only State's Exhibit 56 shows a pair of handcuffs attached to Smith's charred and detached arm. Multiple witnesses, including investigators and the pathologist, otherwise established that Smith was left handcuffed and established any other circumstances which demonstrate malice without relying on these photographs.[7] (R. p. 80, line 2–p. 86, line 11; p. 104, line 21–p. 106, line 15; p. 112, line 10–p. 116, line 19; p. 117, line 2–p. 120, line 10; p. 121, line 7–p. 140, line 9; p. 159, line 11–p. 163, line 23). These three photographs showing post-mortem injuries therefore were not necessary to prove malice. The State admitted

[7] Malice is "the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong." *In re Tracy B*, 391 S.C. 51, 69, 704 S.E.2d 71, 80 (Ct. App. 2010) (quoting *State v. Kelsey*, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998)). It does not require ill-will toward the victim. Rather, it requires "a general malignant recklessness of the lives and safety of others, or a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief." *Id*. (quoting *State v. Mouzon*, 231 S.C. 655, 662, 99 S.E.2d 672, 675–76 (1957)).

as much in its brief to the Court of Appeals. (Final Br. of Resp't at 27 ("At worst, the photographs were cumulative to the other evidence . . . .")).

Moreover, the State abandoned any pretense of corroboration when it asked Cheatham if Smith's ruptured abdomen and exposed internal organs were "worth $1500." (R. p. 262, lines 17–18). This Court has become increasingly weary of Solicitors seeking to admit unnecessary gruesome crime scene and autopsy photographs. In *State v. Torres*, the Court went out of its way to admonish Solicitors who "push[] the envelope of admissibility" with such photographs. 390 S.C. 618, 624, 703 S.E.2d 226, 229 (2010). The State pushed too far here despite this Court's clear admonition.

The Court of Appeals therefore erred in holding that the circuit court did not abuse its discretion when admitting the photographs, and should no Double Jeopardy violation be found, this Court should reverse and remand for a new trial.

CONCLUSION

For the reasons set forth above, this Court should hold that Benton's retrial violated the Double Jeopardy Clause of both the United States and South Carolina Constitutions, reverse the Court of Appeals, vacate his convictions, and remand for entry of an order dismissing his indictments and releasing him from custody. If this Court holds that there was manifest necessity for the mistrial, this Court alternatively should reverse and remand for a new trial because the trial court abused its discretion in admitting the text and Facebook messages and the victim body photographs.

[Signature page follows]

Respectfully submitted,

/s/ R. Walker Humphrey, II

R. Walker Humphrey, II
WILLOUGHBY & HOEFER, P.A.
133 River Landing Drive, Suite 200
Charleston, South Carolina 29492
(843) 619-4426

Robert M. Dudek
Chief Appellate Defender
SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE
1330 Lady Street, Suite 401
Columbia, South Carolina 29201
(803) 734-1330

Attorneys for Petitioner

Charleston, South Carolina
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