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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.

REPLY 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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INTRODUCTION

The State fails to address most of the issues on which this Court granted certiorari and which Benton briefed. For example, this Court granted certiorari to review whether the State properly requested Petitioner Tommy Lee Benton's alibi pursuant to Rule 5(e)(1), SCRCrimP. The State does not argue that it complied with the rule. This Court granted certiorari to review the Court of Appeals' holding that the State need not strictly comply with Rule 5(e)(1) while Benton must strictly comply. The State does not defend that holding. This Court granted certiorari to determine whether the circuit court adequately considered alternatives to a mistrial. The State does not argue the circuit court considered the viable alternatives Benton identified. This Court granted certiorari to determine the limits on affirming under Rule 220(c), SCACR, and whether the Court of Appeals exceeded those limits. The State does not address those arguments. And this Court also granted certiorari to review whether circumstantial evidence can authenticate the text and Facebook messages at issue, but the State does not show how it can. While the State does present other arguments in its brief, its collateral points are meritless and cannot overcome the unopposed principal arguments pending before this Court.

Benton therefore presents substantial bases to reverse the Court of Appeals and either remand for vacatur of his convictions and his release from imprisonment under the Double Jeopardy clause or, if the Court affirms on Double Jeopardy, to remand for a new trial based on the circuit court's error in admitting over 1,000 unauthenticated text and Facebook messages. As to the one issue the State arguably addresses directly, the admission of gruesome victim body photographs, this Court should reverse and remand because the State misstates this Court's established framework for admitting such photographs, overlooks the substantial undisputed evidence otherwise proving what they depict, and miscasts the State's use of them at trial.

ARGUMENT

I. The State Does Not Oppose Benton's Dispositive Arguments Confirming the Absence of Manifest Necessity for the Mistrial.

The State does not refute Benton's core arguments that his re-trial violated the Double Jeopardy clause because the State did not comply with its triggering obligation under Rule 5(e)(1), SCRCrimP,[1] the State otherwise knew Benton intended to present an alibi defense and knew at least some of Benton's alibi witnesses, and the circuit court did not consider reasonable and viable alternatives to a mistrial. These points conclusively establish the absence of manifest necessity to declare a mistrial on the ground that Benton did not provide a formal disclosure of his alibi. *See United States v. Hanno*, 21 F.3d 42, 46 (4th Cir. 1994) (defining manifest necessity as "so great a need to discharge the jury that 'the ends of ends of public justice would otherwise be defeated'") (quoting *United States v. Jorn*, 400 U.S. 470, 482 (1971)); *see also State v. Rowlands*, 343 S.C. 454, 458, 539 S.E.2d 717, 719 (Ct. App. 2000) (holding that any doubt as to the propriety of a mistrial must be resolved in favor of the defendant).

For the reasons explained below, the State's efforts to avoid this conclusion through a series of side arguments are unavailing. This Court therefore should reverse the circuit court's denial of Benton's motion to dismiss under the Double Jeopardy clause, vacate his convictions, and remand for entry of an order dismissing his indictments and releasing him from custody.

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[1] Under Rule 5(e)(1), a defendant must disclose his alibi only after receiving a "written request of the prosecution stating the time, date and place at which the alleged offense occurred." If the State does not provide such a request, "then the defendant may raise an alibi defense at trial to which the Government, though surprised, may not object." *United States v. Bickman*, 491 F. Supp. 277, 279 (E.D. Pa. 1980).

A. Benton objected to the declaration of a mistrial.

The State suggests Benton did not object to, and thereby consented to, the declaration of a mistrial, thus foreclosing his ability to challenge it on appeal. (Resp't's Br. at 11, 15). The State's cursory argument is legally and factually wrong.

The State's claim that Benton impliedly consented to the mistrial "is not lightly to be indulged." *United States v. Toribio-Lugo*, 376 F.3d 33, 40 (1st Cir. 2004). A criminal defendant opposing a mistrial need only "mak[e] 'known to the court the action which the party desires the court to take or the party's objection to the action of the court and the grounds therefor.'" *Washington v. Jarvis*, 137 F. App'x 543, 554 (4th Cir. 2005) (quoting *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 174 (1988)). Whether the defendant did so is to be determined by the totality of the circumstances. *Id.* at 552. Requiring a talismanic utterance or that a defendant "*explicitly* express an objection" is an unreasonable application of clearly established United States Supreme Court precedent. *Id.* at 554.

Even the absence of an objection is not dispositive, for "a defendant's failure to object to a mistrial implies consent thereto only if the sum of the surrounding circumstances positively indicates this silence was tantamount to consent." *United States v. Gantley*, 172 F.3d 422, 429 (6th Cir. 1999); *see also Washington*, 137 F. App'x at 552 ("Therefore, while it is indeed possible for a court to infer consent based on a defendant's simple silence, it may only do so if the totality of the circumstances justifies such a finding."). Silence must evidence a "deliberate election" by the defendant to forgo his right to have his first jury decide his case. *United States v. Brewley*, 382 F. App'x 232, 236 (3d Cir. 2010) (quoting *United States v. Scott*, 437 U.S. 82, 93 (1978)).

Any doubts regarding whether a defendant has consented to a mistrial are to be resolved "in favor of the liberty of the citizen" and against a finding of consent. *Washington*, 137 F. App'x

at 552 (quoting *Downum v. United States*, 372 U.S. 734, 738 (1963)); *see also Brewley*, 382 F. App'x at 237 (requiring that close cases of consent be resolved in favor of the defendant and the court "must proceed with caution in inferring consent from counsel's failure to object") (internal citations and quotations omitted). The Court must "indulge every reasonable presumption against waiver." *Washington*, 137 F. App'x at 553 (quoting *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937)). Arguments made after a mistrial declaration can provide a defendant "some support in the record for his present claim that he disagreed with the need for a mistrial." *Camden v. Circuit Court of Second Judicial Circuit, Crawford Cnty., Ill.*, 892 F.2d 610, 617 (7th Cir. 1989).

Benton staunchly opposed the underlying basis for the mistrial. The circuit court declared a mistrial because Benton did not provide a formal written disclosure of his alibi pursuant to Rule 5(e)(1). (R. pp. 4–5; p. 41, line 12–p. 45, line 3). Prior to the mistrial declaration, Benton opposed the State's efforts to exclude his alibi witnesses for his alleged failure to comply with Rule 5(e)(1). (R. p. 38, line 5–p. 41, line 2). The circuit court then spoke with counsel in chambers before declaring a mistrial. (R. p. 41, lines 3–7). Citing this discussion, the State claims that any "suggestion the mistrial was made without input from defense counsel is contradicted by the record." (Resp't's Br. at 14). As trial counsel later explained, that "the position we took" during the first trial "was that there was no justification for a mistrial." (R. p. 63, lines 16–18). The day after the mistrial, Benton expressed his continuing objection to the mistrial declaration. (R. p. 49, line 4–p. 52, line 10). Even if the record supported the State's assertion that Benton failed to object, which it does not, the totality of the circumstances does not show that the claimed silence was "tantamount to consent." Benton desired to proceed with his trial but was denied that right. There is no basis to claim Benton consented to a mistrial being entered against him. Resolving all

doubts in favor of Benton's liberty, as this Court is required to do, this Court should reach the merits of Benton's Double Jeopardy claim.

B. It is undisputed that the State did not comply with Rule 5(e)(1)'s plain language.

Benton argued the State failed to trigger his obligation to disclose his alibi under Rule 5(e)(1) principally because it improperly served its alibi request before it indicted Benton, *United States v. Ducran*, 639 F. Supp. 2d 127, 128 (D. Mass. 2009), and the alibi request did not specify when the murder occurred or expressly incorporate by reference documents stating the time, *United States v. Saa*, 859 F.2d 1067, 1071 (2d Cir. 1988); *United States v. Gilbert*, 188 F.R.D. 176, 178 (D. Mass. 1999). And assuming *arguendo* the Court of Appeals correctly excused the State's failure to comply with the rule as "overly technical" (App. p. 7), it was error to then demand strict compliance of Benton instead of affording him the same lenity. The State does not—and cannot—dispute these controlling points of law and fact raised in Benton's opening brief confirming there was no manifest necessary for a mistrial.

The State instead believes Benton should have either sought clarification from the State as to the time or disclosed his alibi regardless. (Resp't's Br. at 12–13). Rule 5(e)(1) places the burden to state time solely on the prosecution, and a defendant not voluntarily doing the State's job is not manifest necessity for a mistrial. Moreover, the State concedes it knew Benton intended to present an alibi; it just did not know *all* the supporting witnesses.[2] (Resp't's Br. at 13); *see also* (R. p. 11, lines 13–23; p. 12, lines 18–22; p. 38, line 5–p. 40, line 24 (trial counsel detailing his disclosures of Benton's alibi)). The State just as well could have asked for clarification from Benton if that is the standard. The State further claims there is a "fatal variance" in Benton's position that the State

[2] The Court may recall that the State only requested an alibi for Smith's murder and the only "new" witness for that night was Benton's great-grandmother. (Pet'r's Br. at 19; R. p. 510).

did not sufficiently state the time of the offense but Benton nevertheless asserted an alibi for trial. (Resp't's Br. at 13). The State's failure to provide a specific time in its request required that Benton present a comprehensive alibi covering the entire evening as opposed to just 2:30 a.m., when C.B. Smith was murdered. *E.g.*, (R. p. 309, line 25–p. 315, line 17); *see also* (R. p. 299, line 11–p. 301, line 11; p. 335, line 3–p. 336, line 13 (comprehensive alibi for April 18); p. 302, line 17–p. 304, line 4; p. 305, line 14–p. 308, line 6; p. 309, lines 3–24; p. 336, line 14–p. 338, line 22 (comprehensive alibi for April 26)). There is nothing inconsistent about preparing a defense one is not obligated to disclose. Finally, the State repeats the Court of Appeals' holding that Benton was not prejudiced because his trial was "only" delayed for five months and he ultimately presented his alibi. (Resp't's Br. at 15). The State ignores the established precedent Benton cited in his opening brief holding that the mere termination of the first trial is sufficient prejudice. *E.g., Arizona v. Washington*, 434 U.S. 497, 503–05 (1978); *United States v. Sloan*, 36 F.3d 386, 395 (4th Cir. 1994); *State v. Kirby*, 269 S.C. 25, 27, 236 S.E.2d 33, 34 (1977).

In the end, it is undisputed that the State failed to comply with Rule 5(e)(1) by not specifying the time of the offense, the State knew Benton intended to present an alibi defense and at least some of his supporting witnesses, and the Court of Appeals improperly required Benton to strictly comply despite excusing the State's failure to do so. Nothing the State advances here overcomes this record. Manifest necessity therefore did not exist.

C. It is undisputed that the circuit court did not consider the obvious mistrial alternatives Benton identified.

The State acknowledges the circuit court failed to consider other reasonable alternatives to a mistrial, including a brief continuance to allow the State to investigate Benton's alibi.[3] *See*

[3] The State does not address Benton's argument that the circuit court also failed to consider whether good cause existed to excuse any non-compliance pursuant to Rule 5(g), SCRCrimP.

(Resp't's Br. at 14). Though the State suggests that "the absence of manifest necessity is not shown by creating of [*sic*] possible other scenarios" (*id.*), this is not a case of "creating" possible solutions. It is the circuit court's failure to consider the most obvious alternative to a mistrial in this case. Without considering it, the circuit court could not exercise sound discretion to find that manifest necessity or "the ends of public justice" compelled a mistrial. *See Gilliam v. Foster*, 75 F.3d 881, 894 (4th Cir. 1996).

The State excuses the circuit court's failure to consider a continuance because "it would be difficult to discuss that which was not known to the State" and "[t]he State would have little input as to what time would be necessary for the investigation." (Resp't's Br. at 14). The State admits too much. That those questions are unanswered proves the circuit court did not explore the viability of a continuance and did not engage in "a thoughtful consideration of the clearly available alternatives[] and a deliberate thoughtful decision on the rights of the defendant," as the State suggests. (*Id.*). The State therefore failed to make a record demonstrating the impracticality of a continuance and, by extension, demonstrating manifest necessity. *See Arizona*, 434 U.S. at 505 ("[T]he prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar."); *United States v. Bonas*, 344 F.3d 945, 951 (9th Cir. 2003) ("It was not the defendant's burden to insist that the district court make a better record supporting its grant of a mistrial. . . . [I]f the government wished to retain the right to retry the defendant before another jury, it had both the duty and the incentive to ensure that the court's finding of manifest necessity was supported by evidence in the record.").

A continuance would have been a straightforward solution had the circuit court considered it. The State only requested an alibi for the April 29 murder (R. p. 510), and Benton's great-grandmother (who simply corroborated Benton's mother's testimony) was the only potentially

"new" alibi witness for that day. Because the circuit court set aside two weeks for a trial that took four days, there would have been no issue with a brief continuance for the State to speak with her and conduct any follow-up investigation. (R. p. 25, line 19–p. 26, line 23). The State could have accomplished that over a lunch break. But the State *never* contacted Benton's great-grandmother after she was disclosed, and it *never* asked Benton's other alibi witnesses about his whereabouts at 2:30 a.m. on April 29, which is when the State alleges Smith was murdered. (R. p. 318, lines 2–13; p. 329, lines 5–17; Supp. R. p. 2, lines 2–7). The State's failure to investigate Benton's alibi even after the mistrial fully dispels the State's claim that proceeding with the first trial was unfair and manifest necessity existed.

Even if this Court holds that Benton had to disclose his alibi pursuant to Rule 5(e)(1) but failed to do so, it should still reverse because the circuit court did not consider obvious alternatives to the mistrial.

II. The State Does Not Oppose Benton's Primary Arguments Showing the Court of Appeals Erred in Authenticating the Text and Facebook Messages.

A. The Court of Appeals exceeded Rule 220(c) by affirming on a discretionary ground no one raised at trial or on appeal.

Benton devoted a substantial portion of his opening brief to the novel question of what limits exist on an appellate court's ability to affirm on any basis appearing in the record pursuant to Rule 220(c), SCACR. The circuit court authenticated over 1,000 text and Facebook messages solely because the State identified which phones they were downloaded from. (R. p. 147, line 5–p. 148, line 17). The State perplexingly claims that the Court of Appeals held this was error with respect to the Facebook messages but not with respect to the text messages. (Resp't's Br. at 16–17). The Court of Appeals unambiguously held the circuit court erred in authenticating all messages on this basis. (App. pp. 9–10 ("We acknowledge the circuit court erred in stating that the fact the messages were downloaded 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.") (emphasis added). At issue here is the Court of Appeals' holding that, notwithstanding this error, the messages were authenticated by their content.[4] (App. pp. 10–11). No party argued this basis before the circuit court or the Court of Appeals.

Benton urged this Court to define when it becomes "unfair or unwise" to affirm on an unpreserved ground, offered a proposed framework, and demonstrated how the Court of Appeals exceeded these limits by affirming the authentication of over 1,000 text and Facebook messages from Benton and his co-defendant Mitchell Cheatham on a fact-specific, discretionary basis which no party or court had raised. (Pet'r's Br. at 22–26). The State does not address the question raised by Benton and accepted by this Court; it summarily declares that appellate courts may affirm under Rule 220(c) and goes no further. (Resp't's Br. at 16–17). This Court should adopt Benton's proposed framework and hold that the Court of Appeals exceed those limits for the reason Benton set forth in his opening brief.

B. The record is devoid of support for the Court of Appeals' holding that circumstantial evidence can authenticate the text and Facebook messages.

1. Benton preserved his authenticity objection.

The State makes a hollow argument that it "is questionable that the argument on authentication is properly before the Court" because "the basic objection appeared to rest more on

[4] The Court of Appeals admitted that authenticating the Facebook messages was "more problematic." (App. p. 11). The court did not expressly determine whether sufficient circumstantial evidence exists to authenticate them, but it held that any error was harmless. (*Id.* (finding harmless error only "[t]o the extent the admission of the Facebook messages was erroneous . . . .").

more prejudicial than probative rather than lack of authentication." (Resp't's Br. at 19 n.5). There is no question: Benton's authentication objection is fully preserved.

Authenticity is a condition precedent to admissibility. Rule 901(a), SCRE. But an authenticated document still must satisfy the remaining Rules of Evidence to be admitted. *Id.* Note ("Even when evidence is properly authenticated, it must still be admissible under the other rules of evidence.") (citing *State v. Jeffcoat*, 279 S.C. 167, 303 S.E.2d 885 (1983)). When the State sought to introduce the exhibits containing Benton's text and Facebook messages, Benton objected on the ground that the State needed to introduce sufficient evidence to prove what the messages purport to be—*i.e.*, authenticity. (R. p. 144, line 22–p. 145, line 21). The circuit court overruled his objection. (R. p. 147, line 5–p. 148, line 17). Having lost that objection, Benton *later* recognized some individual messages likely were now otherwise admissible, *e.g.*, (R. p. 341, lines 2–3), while others were objectionable on relevance and Rule 403, SCRE, grounds, *e.g.*, (R. p. 348, line 9–p. 349, line 14). He was not required to keep repeating his authenticity objection. *See State v. Williams*, 405 S.C. 263, 280, 747 S.E.2d 194, 203 (Ct. App. 2013) ("[O]nce the trial court has ruled on an objection, counsel does not need to object every time the issue arises.") Benton in no way waived or failed to preserve his earlier objection to authenticity that was fully raised to and ruled upon by the circuit court.

2. The State does not identify any evidence authenticating over 1,000 text and Facebook messages.

Benton argued that the Court of Appeals erred in authenticating eight messages based on circumstantial evidence, and regardless, that the court erred in holding these messages plus the 27 others Benton agreed are authentic could not authenticate the remaining over 1,000 messages sent over 44 days which the court admitted. (Pet'r's Br. at 8–10, 26–28). The State does not show how the eight messages can be authenticated by their content and characteristics, and it does not address

the Court of Appeals' error in using them as a springboard to authenticate over 1,000 others. The State instead makes four different arguments in support of authentication, each of which is meritless.

First, the State argues that the messages are authentic as "a line of communication between co-conspirators [Benton and Cheatham] at the relevant time of their concerted action against the victim." (Resp't's Br. at 20). The State does not explain how this demonstrates authenticity. Regardless, at most this would authenticate the messages between Benton and Cheatham. It would not authenticate the hundreds of other messages the circuit court admitted.

Second, the State disputes Benton's argument that others had possession of his phone. The State first asserts that this issue "appears at one point to be conceded away in a statement that he admitted possession of his phone." (Resp't's Br. at 20). As support for this claim, the State cites representations by trial counsel that Benton did not dispute possession of his phone *the day after Smith's murder*. (*Id.* (citing R. p. 342, lines 18–20)). This in no way waives or undermines Benton's argument, based on the evidence at trial, that there were times before and during the commission of these crimes that he did not have his phone and others sent messages from it. This evidence showed that Cheatham had Benton's phone the night of the murder (R. p. 312, line 17–p. 315, line 10; p. 331, line 20–p. 332, line 5), that a co-defendant's wife sent messages from Benton's phone (R. p. 216, line 23–p. 219, line 9), and that Cheatham "went into" Benton's phone "for a couple of minutes" during one of the incidents (R. p. 273, lines 7–20).[5]

[5] The State narrowly disputes whether Benton's phone was "taken." (Resp't's Br. at 20). But Cheatham's admission that he "went into" Benton's phone during one of the crimes—when some of the messages at issue were sent—is enough to dispute possession and control over the phone at or near the relevant time.

Third, the State submits that proof of the phone's ownership—namely, that Benton's stepfather provided it to police—is authenticating evidence. (Resp't's Br. at 20). Benton never contended that the phone was not his. The State's argument here simply repackages what the Court of Appeals correctly held was error: mere proof of a phone's ownership is not sufficient to authenticate text and social media messages sent from it. (App. p. 10).

Fourth, the State argues that the messages are authenticate because they contain relevant evidence. (Resp't's Br. at 21). Authentication is an independent requirement for documentary evidence. *See* Rule 901, SCRE Note ("Even when evidence is properly authenticated, it must still be admissible under the other rules of evidence."). There fact that a document is relevant does not mean it is authentic.

In sum, the State does not support the authentication of the text and Facebook messages. If this Court reaches the merits of this question, it should reverse and remand for a new trial.

C. Admission of the text and Facebook messages was not harmless error.

The State makes three arguments that admission of the unauthenticated text and Facebook messages was harmless error. This Court should reject each of them.

First, the State submits that the Court of Appeals correctly held that admission of the Facebook messages was harmless because they were cumulative to Cheatham's testimony that he and Benton began planning the crimes in late March and early April. (Resp't's Br. at 18; App. p. 11). As Benton noted in his opening brief, and as the State does not dispute here, 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. (R. pp. 445–449). The Facebook messages thus were not "merely cumulative" of Cheatham's planning testimony.

Second, the State argues the text and Facebook messages were merely cumulative to testimony from Benton's co-defendants that Benton participated in the crimes. (Resp't's Br. at 21). The testimony from interested co-defendants, each of whom was an admitted criminal testifying with the hope of sentencing consideration,[6] is not merely cumulative to messages which purport to be admissions by Benton regarding his involvement in the crimes.

Third, the State argues that the admission of any text and Facebook messages was harmless because there otherwise "was sufficient evidence for a conviction." (Resp't's Br. at 18–19). Harmless error requires substantially more—the defendant's guilt must have been "*conclusively* proven by *competent evidence* such that *no other rational conclusion can be reached.*" *State v. Byrant*, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006) (emphasis added). The State's proof of Benton's involvement rested on three legs: (1) the self-interested testimony of Benton's co-defendants; (2) the location of Benton's cell phone, the possession of which was contested; and (3) the text and Facebook messages. Without the messages, the State only had the testimony of untrustworthy felons and the location of a phone of which Benton disputed possession to connect Benton to this case. This evidence does not constitute conclusive proof by competent evidence such that no other rational conclusion could be reached.

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[6] The State generically observes that "[c]o-defendant's [sic] Douglas Thomas and Mitchell Cheatham without promise of leniency both testified for the state." (Resp't's Br. at 18). Both are admitted murderers, arsonists, and burglars who, while not expressly offered leniency prior to testifying, expected 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). No witness vouched for their credibility, including a prosecution witness who agreed Cheatham should not be trusted even when under oath. *E.g.*, (R. p. 216, lines 7–15; 315, line 22–p. 316, line 25; p. 333, line 20–p. 334, line 3).

III. The State Misstates the Standard for Admitting Victim Body Photographs and Ignores Substantial Undisputed Corroborating Evidence.

The final issue before this Court is the circuit court's admission of three victim photographs: one showing Smith's charred body and ruptured abdomen (State's Ex. 54), another showing the same but from a little farther away (State's Ex. 55), and a third showing Smith's shriveled, detached arm with handcuffs still attached (State's Ex. 56).

Nearly 40 years ago, this Court held that 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). "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." *State v. Middleton*, 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986) (internal citations omitted). Where the defendant offers to stipulate to the information shown in such pictures, and witnesses otherwise describe what is depicted, the pictures' prejudicial effect outweighs any probative value. *Id.*

The State's opposition is built on its erroneous belief that mere corroboration, even of undisputed facts, nevertheless is enough to render murder victim body photographs admissible. (Resp't's Br. at 23). The State largely relies on general case law regarding the admissibility of evidence and inapposite out-of-state cases. The few South Carolina guilt phase body-photograph cases it cites actually support reversal. For example, the State fails to provide context for this Court's occasional statement that "if the offered photograph serves to corroborate testimony it is not an abuse of discretion to admit it." *E.g.*, (Resp't's Br. at 29 (quoting *State v. Holder*, 382 S.C. 278, 290, 676 S.E.2d 690, 697 (2009))). That language originated in this Court's decision in *Middleton*, which held that victim photographs are inadmissible if they demonstrate something

that "was not really at issue" and proven by other evidence. *Middleton*, 288 S.C. at 24, 339 S.E.2d at 693. And the photographs in the cases cited by the State were admissible to prove or corroborate specific facts at issue.[7] *See Holder*, 382 S.C. at 290–91, 676 S.E.2d at 697 (finding autopsy photographs admissible where the pathologist testified they were necessary to assist jurors without medical training in understanding the victim's injuries and that it would have been difficult for defendant to ignore the injuries); *State v. Gray*, 408 S.C. 601, 609–16, 759 S.E.2d 160, 164–68 (Ct. App. 2014) (detailing the disputed issues about which the photographs were probative and recounting the testimony explaining how they would assist the jury); *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 the defense of accidental injury or play).

A majority of this Court in *State v. Collins*, 409 S.C. 524, 763 S.E.2d 22 (2014), held the circuit court abused its discretion in admitting the photographs despite their alleged corroborating value. *Id*. 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). The State attempts to avoid *Collins* by claiming Benton "failed to state as to why this Court ruled as such." (Resp't's Br. at 27). It asserts that this Court held the photographs were admitted to inflame the passions of the jury, that Justice Kittredge recognized there may be some instances where such photographs are admissible, and that the

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[7] The State also cites three death penalty cases, *State v. Torres*, 390 S.C. 618, 703 S.E.2d 226 (2010), *State v. Nance*, 320 S.C. 501, 466 S.E.2d 349 (1996), and *State v. Edwards*, 194 S.C. 410, 10 S.E.2d 587 (1940), as generally supporting admission of such photographs for mere corroboration. While *Edwards* preceded the bifurcation of capital cases into guilt and penalty phases, the scope of probative value is "much broader" in the sentencing phase of a capital murder trial. *Torres*, 390 S.C. at 623, 703 S.E.2d at 229. "The purpose of the bifurcated proceeding in a capital case is to permit the introduction of evidence in the sentencing proceeding which ordinarily would not be admissible in the guilt phase." *State v. Kornahrens*, 290 S.C. 281, 289, 350 S.E.2d 180, 185 (1986). Even then, the *Torres* Court went out of its way to admonish Solicitors who "push[] the envelope of admissibility" with these photographs. *Torres*, 390 S.C. at 624, 703 S.E.2d at 229.

offenses in *Collins* did not require proof of malice. (*Id.*). These assertions are of no moment. The State offered the photographs here solely to inflame the passions of jury, as demonstrated by the State's use of its Exhibit 54—which shows post-mortem injures and not whether Smith was handcuffed—to ask Cheatham if Smith's injuries were "worth $1500" and "[w]ho did that." (R. p. 262, lines 17–21). Next, Justice Kittredge correctly wrote that these photographs *may* be admissible, but the question is whether they are admissible *in this case*. Finally, the State argued in *Collins* (as it does here) that the photographs were "material to the elements of the offenses charged and corroborative of other evidence." *Collins*, 409 S.C. at 530, 763 S.E.2d at 25. It is immaterial that malice was not one of the elements. This Court ultimately held the photographs were inadmissible even though they established the offenses' elements. *Id.* 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). The State's attempt to distinguish *Collins* is unavailing.

The State proved and corroborated malice and the other facts the State identifies through several witnesses, dozens of crime scene photographs, and physical evidence. The State claims the photographs were necessary to corroborate Cheatham's testimony that Smith was handcuffed before the fire (Resp't's Br. at 22, 25), how Smith was murdered (*id.* at 24), how the crime scene was presented (*id.* at 25), that Smith was alive when he was set on fire (*id.*), and the autopsy findings (*id.*). Multiple police officers testified as to how the crime scene was presented, including that Smith was handcuffed, *e.g.*, (R. 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), and the other thirty-nine photographs admitted without objection fully depict the crime scene, (State's Exs. 16–53, 57). The charred handcuffs were admitted into evidence. (R. p. 133, lines 8–16). The photographs do not show that Smith was alive at the time of the fire, but nevertheless the medical examiner freely testified that

he was. (R. p. 161, lines 8–15). The medical examiner further explained his autopsy findings without any reference to these pictures (which were not autopsy photographs) or an objection from Benton. (R. p. 159, line 11–p. 163, line 23). The State thus fully demonstrated malice without the three photographs. *See In re Tracy B*, 391 S.C. 51, 69, 704 S.E.2d 71, 80 (Ct. App. 2010) (holding malice is "the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong") (quoting *State v. Kelsey*, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998)). Showing a picture of burned body with intestines spilling out, which occurred *after* Smith was already dead, and asking Cheatham whether those injuries were "worth $1500" did not prove Benton's alleged state of mind at the time. *See* (Resp't's Br. at 26 n.6 (incorrectly claiming Cheatham's testimony that "[me] and Tommy" burned Smith "goes to shared malice"). It only served to improperly appeal to the jury's passions.

The Court of Appeals therefore erred in holding that the circuit court did not abuse its discretion when admitting the three victim body 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 and in Benton's opening brief, this Court should hold that Benton's retrial violated the Double Jeopardy clause, 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 circuit 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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