STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to the Court of Appeals
Appeal from Greenwood County
Frank R. Addy, Jr., Circuit Court Judge

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Opinion No. 5951 (S.C. Ct. App. filed November 23, 2022)

Lower Court Case No. 2018-GS-24-00829; 00830

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THE STATE,

RESPONDENT,

V.

XZARIERA OKEVIS GRAY

PETITIONER.

APPELLATE CASE NO. 2023-000253

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# PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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## CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on January 23, 2023. App. 32-33.

## QUESTIONS PRESENTED

I. Did the Court of Appeals err by holding the state presented a witness with personal knowledge in order to authenticate a video where the witness did not observe the actual event captured on video, and therefore, the witness could not testify that the video was a fair and accurate depiction of the event? Although not addressed by the Court of Appeals, did the state also fail to present substantial circumstantial evidence to satisfy Rule 901(b)(4), SCRE, and fail to present evidence describing the process or system used to produce the video to satisfy Rule 901(b)(9), SCRE?

II. Did the Court of Appeals erroneously hold that it was not an abuse of discretion to deny Petitioner's motion for a new trial without a hearing where the jury deliberated for over ten consecutive hours during which they received only one meal and subsequently discovered evidence showed that at least one member of the jury believed not only that a verdict must be rendered, but that a verdict had to be rendered that day?

## STATEMENT OF THE CASE

On May 4, 2018, a Greenwood County grand jury indicted Petitioner for murder and possession of a weapon during the commission of a violent crime. R. 540-541; R. 543-542. The state, represented by Joshua Thomas and Carson Penney, called the case to trial before the Honorable Frank R. Addy and a jury on May 6-9, 2019. R. 1. Janna Nelson and Shane Goranson represented Petitioner. R. 1.[1] The jury found Petitioner guilty as charged. R. 515, l. 19 – R. 516, l. 2. Due to the late hour, the judge deferred sentencing until May 14, 2019. R. 517, l. 7-11; R. 518, ll. 1 – R. 519, l. 5. On that date, the judge sentenced Petitioner to thirty years imprisonment for murder and to five consecutive years imprisonment for the weapon. R. 524, ll. 14-25; R. 542; R. 545. On May 23, 2019, Petitioner filed a motion for new trial based upon improper external juror influences and requested a hearing on the motion. R. 534. On June 21, 2019, the judge denied the motion, refusing to hold a hearing. R. 538.

On July 2, 2019, Petitioner served his notice of appeal. The Court of Appeals remanded Petitioner's case to the circuit court to make specific findings regarding the Protection of Persons and Property Act.[2] State v. Gray, Op. No. 5951 (S.C. Ct. App. filed Nov. 23, 2022) (Howard Adv. Sh. No. 41 at 34); App. 1-12. The Court also affirmed (1) the trial court's admission of a surveillance video and (2) the denial of Petitioner's motion for a new trial without a hearing. Id. Pursuant to Rule 221(a), SCACR Petitioner filed a petition for rehearing. App. 13-21. The state filed a return on December 19, 2022. App. 23-31. Subsequently, on January 23, 2023, the Court denied the petition for rehearing. App. 32-33. This petition for writ of certiorari follows.

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[1] Prior to trial, Petitioner filed a motion to dismiss pursuant to the Protection for Persons and Property Act. R. 530. After the jury was selected, the judge presided over a hearing on Petitioner's motion to dismiss. R. 4, ll. 18-21. The judge denied the request. R. 77, l. 23 – R. 80, l. 8.

[2] See S.C. Code Ann. §§ 16-11-410 to -450 (2015).

## ARGUMENT

I. The Court of Appeals erroneously held the state presented a witness with personal knowledge in order to authenticate a video where the witness did not observe the actual event captured on video, and therefore, the witness could not testify that the video was a fair and accurate depiction of the event. Although not addressed by the Court of Appeals, the state also failed to present substantial circumstantial evidence to satisfy Rule 901(b)(4), SCRE, and failed to present evidence describing the process or system used to produce the video to satisfy Rule 901(b)(9), SCRE.

**Relevant facts**

Defense counsel moved in limine to prohibit the introduction of the video from Jeovani Vacquec's home. R. 81, l. 22 – R. 83, l. 3.[3] Vacquec lived near where the shooting occurred and had multiple cameras installed around the exterior of his home. R. 32, ll. 3-20. The cameras all fed back to one central monitor. R. 32, ll. 21-23. Vacquec claimed the cameras were working on August 26, 2017, and he was certain of this because he checked them "every two days." R. 32, ll. 8-15. Vacquec allowed the police to look at his recordings. R. 34, ll. 16-20. Despite his claimed conscientious checking of the cameras to ensure they were working, Vacquec never set the date and time on them. R. 36, l. 23 – R. 37, l. 2. In short, he never set up the recording device properly.

[3] During the hearing regarding immunity, the state sought to admit into evidence a video recording of the alleged encounter. Defense counsel objected to the admission of the video because "the time stamp on the video [did] not match the alleged time of the incident." R. 35, ll. 1-3. Further, defense counsel argued that Jeovani Vacquec was not "actually watching this occur on the monitors as it occurred" and he had no way of knowing what time it occurred. R. 37, ll. 10-14. Noting Vacquec testified he did not set the time when he set up the cameras, the trial judge determined the "question of the time stamp would go to the weight as opposed to the admissibility." R. 37, ll. 17-18. Thus, the trial judge found Vacquec "authenticated the videos that were taken at his residence." R. 37, ll. 18-20. He allowed the video to admitted for the hearing. R. 37, ll. 21-23.

Defense counsel argued Vacquec had not properly authenticated the video because (1) "the time stamp does not match the actual time of the incident [and] Mr. Vacquec was not any kind of personal witness to what was going on" and (2) he was not "sitting at his monitor watching as this occurred" so that he could "correlate it with a gunshot he heard." R. 82, ll. 12-15. Additionally, due to the low quality of the video, defense counsel argued the video was inadmissible pursuant to Rule 403, SCRE because the jury would be invited to speculate as to what occurred. R. 82, l. 22 – R. 83, l. 3.

Admitting that Vacquec had no personal knowledge that the video was an accurate depiction of what occurred, the state argued to introduce the video under "the silent witness theory." R. 83, ll. 10-16. Pursuant to this theory, "if you have a surveillance video or something like that," the evidence is admissible. R. 83, ll. 10-12. The state argued for admissibility pursuant to Rule 901(b)(4), SCRE, regarding distinctive characteristics of the evidence or Rule 901(b)(9), SCRE, regarding the process or system used to produce the video. R. 83, ll. 14-16. However, the state conceded there was "no real case law in South Carolina" on the subject. R. 83, ll. 13-14. Turning to counsel's argument regarding Rule 403, SCRE, the state agreed the quality of the video was low making it difficult to tell what was transpiring, but the state argued that "some of the action" was visible. R. 83, l. 24 – R. 84, l. 2.

The judge overruled defense counsel's objections. R. 85, ll. 15-16. The judge opined, "A picture's worth a thousand words, so to speak." R. 85, ll. 16-17. The judge acknowledged that Vacquec was able to testify that the video equipment was his, he installed it, and he ran it. R. 85, ll. 17-19. Regarding the time stamp, the judge found Vacquec "cleared that up in the sense that he didn't mess with the time stamp when he installed the equipment." R. 85, ll. 20-23. Regarding

the objection pursuant to Rule 403, SCRE, the judge found the video depicted "relevant or potentially relevant information in this particular case." R. 86, ll. 10-14.

Vacquec then told the jurors that he had eight cameras around his property, which he checked "pretty regularly to make sure they were working." R. 95, ll. 4-8; R. 95, ll. 23-25; R. 96, ll. 10-11 (stating he checked "it" every week, which was different than his in camera testimony). The cameras constantly recorded, but every "like two or three months," the recordings "erase[d]" and started over. R. 96, ll. 12-16. When Vacquec bought the cameras, he "just hook[ed] it up," without adjusting the date and time. R. 97, ll. 1-5.

When the police arrived, Vacquec did not pay attention to what the officer wanted. R. 97, ll. 22-25. The officer downloaded the video to a USB drive. R. 98, ll. 6-13. Vacquec identified State's Exhibit #2 as surveillance footage from a camera at his home. R. 98, ll. 14-25.[4] Vacquec admitted he was not present at the scene shown on the footage, and therefore, he had no idea what was going on. R. 100, l. 19 – R. 101, l. 5. Additionally, Vacquec was not watching the monitor at the time of the shooting. R. 101, ll. 13-15.

Recognizing its weak case against Petitioner based upon its witnesses, the state relied heavily upon the video in its closing argument. The state claimed the video showed "three people coming off the steps of that house, of them over here, two of them over where, a shot, and then somebody running away." R. 418, ll. 13-16. While that was all the video showed, the solicitor claimed it was "enough." R. 418, ll. 16-18. The video, while "not the best video in the world" was "just clear enough to show you what you need to know." R. 437, ll. 1-2. The state claimed the video showed "a scuffle, 30 to 45 seconds in that front yard." R. 435, ll. 12-16. He told the

[4] When the state offered the video into evidence during the trial, defense counsel renewed her objection, which the trial judge overruled. R. 99, ll. 12-15.

jurors there was "[a] fight between two people grasping ahold of each other, trying their hardest to get - - to fight for their lives." R. 435, ll. 18-20; R. 436, ll. 5-9. In the video, the solicitor pointed to "one person here" and "two people walk by here," then he noted "[o]ne person, two people, three people, five to six feet apart, gunshot, [Meatball] falls down." R. 437, ll. 4-9. The solicitor played the video numerous times during his closing argument. R. 436, ll. 16-18; R. 437, l. 3; R. 437, ll. 10-12; R. 438, ll. 17-18.

According to the solicitor, the video discredited Petitioner because it allegedly showed someone standing next to Petitioner. R. 439, ll. 10-11. He claimed the video showed Petitioner firing the gun, but not "falling backwards," not "running away," and "not locked up with anybody rolling, tussling, pushing, grabbing." R. 439, ll. 15-17. To counter the defense theory that the state's witnesses were merely parroting a rumor in the community, the solicitor told the jurors that "what's not a rumor is this surveillance video." R. 474, ll. 8-9. He continued, "They say a picture is worth a thousand words. A video's got to be worth something more than that. You're going to get to watch the video, take it back there with you." R. 474, ll. 9-12.

While deliberating the jury requested to see the video again and again. The jury wanted portions played repeatedly and requested to see portions paused. R. 498, ll. 13-16; R. 500, ll. 22-24; R. 502, ll. 3-19; R. 503, ll. 4-7; R. 503, l. 15 – R. 504, l. 7; R. 509, ll. 1-9; R. 512, ll. 2-12; R. 525; R. 526; R. 528. Eventually, the judge provided the jurors with a laptop for them to use to watch the video at their leisure. R. 512, ll. 8-12. Over ten hours after the jury started its deliberations, it returned with its verdicts. R. 514, l. 23 – R. 515, l. 2.

**Discussion**

***Authentication***

The proponent of evidence must satisfy "[t]he requirement of authentication or

identification as a condition precedent to admissibility." Rule 901(a), SCRE. See also State v. Brown, 424 S.C. 479, 488, 818 S.E.2d 735, 740 (2018) (stating "[i]t is black letter law that evidence must be authenticated or identified in order to be admissible"). This requirement "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Id. While the burden is not high, the proponent must offer a satisfactory foundation to permit the jury to conclude the evidence is authentic. Deep Keel, LLC v. Atlantic Private Equity Group, LLC, 413 S.C. 58, 64-65, 773 S.E.2d 607, 610 (Ct. App. 2015) (citing United States v. Hassan, 742 F.3d 104, 133 (4th Cir. 2014)).

As video evidence becomes ubiquitous in trial courts, it is imperative for the bench and bar to have guidance on how to authenticate video evidence. Other jurisdictions have adopted the "silent witness" theory of authentication pursuant to Rule 901(b)(9), SCRE, which the state argued at trial. Although not addressed by the Court of Appeals, this case presents an opportunity for this Court to determine whether South Carolina permits authentication pursuant to this method. Petitioner respectfully requests this Court grant certiorari to answer the important question presented. See Rule 242(b), SCACR.

The Florida District Court of Appeal adopted the silent witness theory and created a five-part test for authentication. Wagner v. State, 707 So.2d 827, 831 (Fla. Dist. Ct. App. 1998).[5] The Court held photographic evidence may be admitted pursuant to the silent witness theory if a trial

[5] The Indiana Court of Appeals explained that "[i]n order to authenticate videos or photographs using the silent-witness theory, there must be evidence describing the process or system that produced the videos or photographs and showing that the process or system produced an accurate result." McFall v. State, 71 N.E.3d 383, 388 (Ind. Ct. App. 2017). "The requirements are 'rather strict.'" Id. "[T]he proponent must show that the photograph or video was not altered in any significant respect, and the date the photograph or video was taken must be established when relevant." Id.

judge determined it to be reliable after considering the following five factors: (1) evidence establishing the time and date of the photographic evidence; (2) any evidence of editing or tampering; (3) the operating condition and capability of the equipment producing the photographic evidence as it relates to the accuracy and reliability of the photographic product; (4) the procedure employed as it relates to the preparation, testing, operation, and security of the equipment used to produce the photographic product, including the security of the product itself; and (5) testimony identifying the relevant participants depicted in the photographic evidence. Id.

Similarly, the Supreme Court of Alabama instituted a seven-prong test when a litigant invokes the silent witness theory of authentication. Ex Parte Fuller, 620 So.2d 675, 678 (Ala. 1993). The party must (1) show that the device or process or mechanism that produced the item being offered as evidence was capable of recording what a witness would have seen or heard had a witness been present at the scene or event recorded; (2) show that the operator of the device or process or mechanism was competent; (3) establish the authenticity and correctness of the resulting recording, photograph, videotape, etc.; (4) show that no changes, additions, or deletions were made; (5) show the manner in which the recording, photograph, videotape, etc., was preserved, (6) identify the speakers or persons pictured, and (7) in criminal cases, show that any statement made in the recording, tape, etc., was voluntarily made without any kind of coercion or improper inducement. Id.

Petitioner urges this Court to adopt one of these tests to clarify for the bench and bar how to authenticate evidence pursuant to Rule 901(b)(9), SCRE. At a minimum, here, the state failed to present evidence to satisfy the language of the rule because the state presented no witness or other evidence to describe the video recording system or that the system produced an accurate result. Vacquec did not even know the name brand of the video system. He was unable to describe

how the system worked in even the most rudimentary of terms. Vacquec's testimony that he checked the camera's "pretty regularly" to ensure they worked was not sufficient to establish personal knowledge that the video showed what the state claimed. He was not even sure how long the video recorder saved the recordings, testifying it erased every few months. Most importantly, he was unable to say if or how the system produced an accurate result as required by the plain language of Rule 901(b)(9), SCRE. Vacquec's testimony could not satisfy the plain language of Rule 901(b)(9), SCRE, despite the state's urging for the trial court to admit the evidence through a silent witness theory. See State v. Brown, 424 S.C. 479, 818 S.E.2d 735 (2018).

One of the most common ways for the proponent to authenticate evidence is through the testimony of a witness with knowledge that the "matter is what it is claimed to be." See Rule 901(b)(1), SCRE. Oddly, despite the state's concession at trial that no witness could say the contents of the video were what the state purported them to be, the Court of Appeals held "[t]he state authenticated the surveillance video with Vacquec's personal knowledge" because he "testified he owned and operated the security system that recorded the video." State v. Gray, Op. No. 5951 (S.C. Ct. App. filed Nov. 23, 2022) (Howard Adv. Sh. No. 41 at 34); App. 1-12. The Court also referred to Vacquec's testimony that "the camera that recorded the video faced Gray Street" and the "time stamp on the video was incorrect because he did not set the correct date or time when he set up the security system." Id. Holding Vacquec's failure to contemporaneously watch the monitor or be present at the scene of the shooting as irrelevant, the Court held Vacquec's "personal knowledge sufficiently authenticated the video." Id.

Yet, this could not be irrelevant as it would be the way for a witness to testify that a video recording is a fair and accurate depiction of what it is purported to be. Vacquec did not have personal knowledge sufficient to lay a foundation from which a reasonable juror could find the

evidence was what the state claimed where he was not present at the scene shown on the video and was not watching the monitor at the time of the shooting.

While not addressed by the Court of Appeals, the state also failed to authenticate the video through another common method – showing the evidence contains "distinctive characteristics and the like." See Rule 901(b)(4), SCRE. "Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances" may serve to authenticate evidence. Id.; see also State v. Anderson, 386 S.C. 120, 129, 687 S.E.2d 35, 39-40 (2009).

The Court of Appeals recently held the state authenticated social media messages through circumstantial evidence despite neither the sender nor the recipient testifying where the state presented

> [n]umerous facts linking the Facebook messages to [co-defendant] and, consequently, Green: the use of the screen name 'Ruby Rina,' which [a witness] testified was [co-defendant]'s; reference to 'Julissa' on the messages, which testimony showed was [co-defendant]'s sister's name; Ruby Rina's invitation to her home, which she stated was at 108 Queens Circle; [the deceased]'s reference to Ruby Rina as [co-defendant] ...; comments throughout the messages about Ruby Rina's erstwhile boyfriend that were consistent with her relationship with Green; the timing of the messages; and the tragic fact that [deceased] disappeared shortly after Ruby Rina invited him to 108 Queens Circle, where his blood was later discovered.

State v. Green, 427 S.C. 223, 233, 830 S.E.2d 711, 715-716 (Ct. App. 2019), aff'd as modified, 342 S.C. 97, 851 S.E.2d 440 (2020). Here, the state failed to present circumstantial evidence to authenticate the surveillance video. While Vacquec testified to the location and its general view, he was unable to provide any additional circumstantial evidence to establish the video was from the morning in question or was accurately recorded. The state simply failed to provide the judge with circumstantial evidence sufficient to authenticate the video pursuant to Rule 901(b)(4), SCRE.

***Rule 403***

All relevant evidence is generally admissible. Rule 402, SCRE. "Evidence which is not relevant is not admissible." Id. Even relevant evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Rule 403, SCRE. A determination on the admissibility of relevant evidence requires consideration of the evidence's probative value, the danger of unfair prejudice and potential to confuse or mislead the jury posed by the evidence, and the balancing of those two.

"'Probative' means '[t]ending to prove or disprove.'" State v. Gray, 408 S.C. 601, 609, 759 S.E.2d 160, 165 (Ct. App. 2014). "'Probative value' is the measure of the importance of that tendency to the outcome of a case." Id. at 610, 759 S.E.2d at 165. The probative value of evidence is directly related to the how important that evidence is in assisting the jury in rendering a verdict. Id. Thus, when analyzing the probative value of evidence, the court must consider the importance of the evidence as it relates to the issues presented in the case. State v. Lee, 399 S.C. 521, 528, 732 S.E.2d 225, 228 (Ct. App. 2012).

After determining the probative value of the evidence, the court must next evaluate the danger of unfair prejudice presented by the evidence and the propensity of the evidence to confuse or mislead the jury. "The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case." State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001). "'Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest [a] decision on an improper basis.'" State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir. 1993)). "The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder

into declaring guilt on a ground different from proof specific to the offense charged." Old Chief v. United States, 519 U.S. 172, 180 (1997). "Rule 403 only requires suppression of evidence that results in unfair prejudice – prejudice that damages an opponent for reasons other than its probative value, for instance, an appeal to emotion." United States v. Mohr, 318 F.3d 613, 619-620 (4th Cir. 2003).

Very little case law exists in South Carolina regarding the aspects of Rule 403, SCRE, concerning confusing and misleading the jury. In Wilson v. Rivers, 357 S.C. 447, 453-454, 593 S.E.2d 603, 606 (2004), this Court held it was error to exclude the testimony of a biomechanics expert based on a contention that the testimony would be confusing. The defendant sought to introduce the testimony of an expert in the field of biomechanics to refute the plaintiff's claims. Id. at 450, 593 S.E.2d at 604. This Court held the testimony would not have been confusing to the jury because the expert considered the "damage to the car," "depositions, medical records, photographs, impact tests, and the accident report in reaching his conclusion." Id. at 453, 593 S.E.2d at 606. See also State v. Lyles, 379 S.C. 328, 340, 665 S.E.2d 201, 207 (Ct. App. 2008) (holding evidence "potentially insinuating a key witness for the state is a drug dealer and drugs were present next to the victim" could "cloud the issues"); Kennedy v. Griffin, 358 S.C. 122, 128-129, 595 S.E.2d 248, 251 (Ct. App. 2004) (holding "evidence of the mere presence of marijuana, without further indication of impairment, could mislead the jury").

Once a court has determined the probative value and the danger of unfair prejudice of the evidence, the court must balance the two. State v. Dial, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013). When juxtaposing the prejudicial effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case. State v. Collins, 409 S.C. 524, 534, 763 S.E.2d 22, 27-28 (2014) (citing State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008)). Only after balancing the probative value and the danger of unfair prejudice may

the court determine if the danger of unfair prejudice outweighs the probative value of the proffered evidence as required by Rule 403, SCRE.

The probative value of the video was very low despite the Court of Appeals' contention that it provided an alternative perspective of the shooting that was objective and neutral and contradicted some of Petitioner's testimony. While it purported to show the actual shooting, which would be highly probative, the quality of the video showed it was of very little probative value. Even the Court of Appeals admitted the quality of the video made it difficult to discern what happened. The low quality of the video contributed to how it was misleading and confusing. The scene was very dark and the camera was too far away to allow the viewer to identify anyone. The scene showed an unknown number of unidentified people moving in unknown directions for unknown reasons. The state interpreted the video for the jury based upon its view of the facts without any actual evidentiary support. This danger of confusing and misleading the jury combined with the danger of unfair prejudice substantially outweighed any probative value of the dark, grainy video. The jury's repeated viewing of the video did not lessen the potential for confusion as the Court of Appeals claimed. Instead, it demonstrated that there was confusion regarding what exactly the video depicted. When balanced against the low probative value offered, the video should have been excluded. The video was confusing, misleading, and posed an unreasonably high degree of unfair prejudice to Petitioner.

Admission of the video could hardly be deemed harmless in light of the state's heavy reliance upon its interpretation of the video during closing argument and the jury's repeated viewing of the video during its ten-and-one-half hour deliberations. The state had very little evidence of malice against Petitioner. While Petitioner admitted to shooting Meatball, the state could present no witness who actually saw the shooting. Therefore, the state relied solely on its interpretation of the video to claim Petitioner's version of events was not accurate, and therefore, Petitioner acted with malice. The

state argued to the jury that the video called into question Petitioner's testimony regarding how the shooting occurred.

II. The Court of Appeals erroneously held that it was not an abuse of discretion to deny Petitioner's motion for a new trial without a hearing where the jury deliberated for over ten consecutive hours during which they received only one meal and subsequently discovered evidence showed that at least one member of the jury believed not only that a verdict must be rendered, but that a verdict had to be rendered that day.

**Relevant facts**

The jury began deliberating at 12:40 p.m. on May 9, 2019. R. 498, l. 13. Prior to sending the jury out to deliberate, the trial judge informed them that lunch had been ordered from Chick-fil-a and would arrive in about one hour. R. 498, ll. 12-18. Over the course of its deliberations, the jurors asked multiple questions, primarily concerned with watching the video. R. 498, l. 19 – R. 512, l. 24; R. 525-529. At one point, the jury requested a "high school level explanation of the difference between murder and voluntary manslaughter." R. 504, ll. 19-21; R. 527. Close to 6 p.m., the judge noted that there was a "problem" because "some jurors [were] concerned about kids at home." R. 509, ll. 23-24. He indicated he would allow them a phone call to check on them. R. 509, ll. 24-25; R. 511, ll. 10-18.

When it was almost 9 p.m., the jurors requested to use the phone again and a smoke break. R. 513, ll. 7-8; R. 529. Further, the jury indicated they were "pretty deadlocked at 10:2." R. 529; R. 513, ll. 9-10. Judge Addy gave the jurors the option of returning on Monday to resume deliberations. R. 513, l. 24 – R. 514, l. 8. He told them there was "no set limitation on jury deliberations." R. 514, ll. 11-12. He explained that it was entirely within the jury's deliberation "[h]owever long [they] deliberate[d]." R. 514, ll. 12-13. At 10:50 p.m., after deliberating for nearly 11 hours, the jury returned with its verdicts. R. 514, l. 23.

Notably, Judge Addy offered to "entertain any motions to delay sentencing because quite candidly [his] blood sugar [was] dangerously low." R. 517, ll. 7-9. He remarked that the same may be true of the jurors. R. 517, ll. 9-10. He "want[ed] to be at the top of [his] game" for purposes of sentencing. R. 517, ll. 10-11. He told the lawyers that he "would feel better about [his] faculties if [he] was not as fatigued and tired." R. 518, ll. 1-3. He thought he "would be more attentive to everything" at a later date. R. 518, ll. 3-5.

On May 23, 2019, Petitioner filed a motion for new trial. R. 534. In the motion, Petitioner noted the jury deliberated for approximately 10.5 hours. R. 534. Further, when the jury sent a note to the judge at 9 p.m., indicating they were "pretty deadlocked at 10-2," the judge inquired whether the jury wanted to resume deliberations or return on Monday in light of the following day, Friday, being a state holiday. R. 534. Two hours later, the jury returned with a verdict, having received no dinner during their deliberations. R. 534. After the trial, Petitioner found a social media post by one of the jurors indicating she had been in court for fourteen hours and "just couldn't leave without a verdict." R. 534. This evidenced the pressure placed on the jurors to reach a verdict. R. 534. Petitioner requested a hearing on the motion and individual voir dire of the jurors on the matter. R. 534.

On June 21, 2019, Judge Addy issued an order denying the motion and refusing to hold a hearing on the motion for a new trial. R. 538. In the order, the judge noted that the jury did not indicate they were deadlocked; rather, the jurors "were struggling to reach a verdict." R. 538. There was no mention of the note stating the jurors were "pretty deadlocked 10:2."

After noting that "under Rule 606, the inquiry suggested by [Petitioner] would likely be improper in that it would cause the jurors to reveal the subject matter of their deliberations," the

judge concluded the social media post by one of the jurors did "not cause the Court sufficient concern to warrant the drastic step of questioning all twelve (12) jurors." R. 538.

Regarding the jurors not eating dinner, the judge noted that a late lunch had already been provided and the jury room "was stocked with crackers, snacks, and drinks." R. 538. In a footnote, the judge stated, "Out of solidarity, I did not eat supper either, nor partake of any snacks." R. 538. The judge neglected to note his own statements following the verdict that his blood sugar was low and he was fatigued such that he wanted to defer sentencing until he could be at the top of his game.

**Discussion**

The South Carolina Rules of Evidence provide:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, **except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror**. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Rule, 606(b) SCRE (emphasis added).

Petitioner requested a hearing on his motion for a new trial to permit the questioning of jurors regarding (1) the impact of the length of the deliberations on their ability to deliberate, (2) the impact of the lack of nourishment on their ability to deliberate; and (3) what their understanding of whether a verdict had to be rendered was and any impact any misunderstandings may have had on the verdict. Contrary to the Court of Appeals opinion, this inquiry is permitted under Rule

606(b), SCRE because it would not cause the jurors to reveal the subject matter of their deliberations. Instead, it falls under the exception to the rule that allows inquiry of the jurors solely on external factors that may have resulted in their feeling coerced.

In State v. Hunter, this Court found a juror's testimony regarding her feelings of intimidation during deliberations was proper and investigation into the matter was necessary. 320 S.C. 85, 88, 463 S.E.2d 314, 316 (1995). In Hunter the allegations concerned the influence of racial prejudice on the verdict. Id. In an *in camera* hearing the juror testified to that there were three situations in the jury room that "intimidated [her] and forced her to change her verdict from not guilty to guilty." Id. at 87, 463 S.E.2d 315. This Court stated that "[n]ormally, courts should not intrude into the privacy of the jury room to scrutinize how jurors reached their verdict." Id. at 88, 463 S.E.2d 316. However, the Court reasoned that "[w]hen an extraneous influence is alleged, juror testimony can normally be used." Id. If the alleged misconduct is internal, courts are more strict and allegations involving internal misconduct is competent only when necessary to ensure due process. Id. Ultimately this Court did not find that juror conduct denied Hunter a fair trial. Id. at 89, 463 S.E.2d 316.

In State v. Franklin, the Court of Appeals stated "generally, juror testimony is inadmissible to impeach a jury verdict." 341 S.C. 555, 560, 534 S.E.2d 716, 719 (Ct. App. 2000) (citing State v. Hunter, 320 S.C. 85, 463 S.E.2d 314 (1995). However, juror testimony or affidavits are admissible to prove an allegation of extraneous information or influence. Id. (juror testimony may normally be used when an extraneous influence is alleged); Rule 606(b), SCRE (testimony or affidavit of juror is admissible to demonstrate that outside prejudicial information was brought to jury's attention or that outside influence was placed on any juror). Id.

In Franklin a juror alleged, in an affidavit, that she was coerced to change her verdict through gender bias and discrimination. The juror's affidavit contained four allegations of harassment by her fellow jurors which caused her to change her vote to guilty. Id. at 561, 534, S.E.2d 718. Ultimately the court found that the nature of the allegations did not "implicate due process" and found no further inquiry was necessary and a new trial was not warranted. Id. at 562, 534 S.E2d 720.

Franklin and Hunter demonstrate instances where it was necessary and proper for jurors to be questioned as to *internal misconduct* that may have impacted their deliberations. While ultimately the verdicts were upheld in both cases a hearing was granted to inquire of the jurors regarding those instances. Here, the inquiry is regarding any *external* influences on the jury's ability to deliberate. A hearing was necessary in this case to uncover whether the length of deliberations, lack of food, and unclear instruction by the judge regarding whether they had to reach a verdict that day impacted the jury's deliberation. If a hearing were granted the court could consider and rule on any Rule 606 objections of the state as to specific questions of jurors.

"Generally, juror testimony may not be the basis for impeaching a jury verdict." State v. Pittman, 373 S.C. 527, 555–56, 647 S.E.2d 144, 158–59 (2007). "However, this rule is relaxed where there are allegations of external influence." Id. "The trial court may exercise broad discretion in assessing the prejudicial effect of an allegation of juror misconduct due to an external influence." Id. "The trial court should consider three factors when making this determination: (1) the number of jurors exposed, (2) the weight of the evidence properly before the jury, and (3) the likelihood that curative measures were effective in reducing the prejudice." Id. "The trial court's finding will not be disturbed absent an abuse of discretion." Id.

In this case the jury deliberated for over ten hours and received only one meal. After receiving the verdict, the trial judge indicated his blood sugar was low and he was fatigued. He candidly told the parties he would prefer not to go forward with sentencing that evening because he was not at the "top of his game" due to his lack of food and his lack of rest. The same was true for the jurors. The true impact of the length of the deliberations coupled with the lack of food and the imprecise instructions regarding rendering a verdict was unknown until Petitioner discovered a social media post from a juror showing the juror believed it was necessary to render a verdict and it had to be rendered that day.

The above referenced social media post was the after discovered evidence which led to Petitioner's request for a hearing on his motion for a new trial under Rule 29(b) of the Rules of Criminal Procedure. Pursuant to Rule 29(b) of the Rules of Criminal Procedure, a motion for a new trial based on after-discovered evidence must be made within one year after the date of actual discovery of the evidence. A motion for a new trial based on after-discovered evidence must be granted if the evidence "(1) is such that it would probably change the result if a new trial were granted; (2) has been discovered since the trial; (3) could not in the exercise of due diligence have been discovered prior to trial; (4) is material; and (5) is not merely cumulative or impeaching." State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009) (citing State v. Spann, 334 S.C. 618, 619-620, 513 S.E.2d 98, 99 (1999)).

The "general rule is that newly discovered evidence which 'merely impeaches or contradicts the testimony of a witness at the trial' affords no sufficient grounds for a new trial." State v. Strickland, 201 S.C. 170, 170, 22 S.E.2d 417, 418 (1942). However, "there may be exceptional cases warranting a new trial on merely cumulative or impeaching testimony." Id.

When the newly discovered evidence is "so directly applicable to the main point involved that it would be a denial of justice to refuse the motion," the general rule must not apply. Id.

Petitioner respectfully requests a hearing on his motion for new trial to permit the questioning of jurors regarding (1) the impact of the length of the deliberations on their ability to deliberate, (2) impact of the lack of nourishment on their ability to deliberate; and (3) what their understanding of whether a verdict had to be rendered was and the impact any misunderstandings may have had on the verdict. Had the true impact of the length of the deliberations without food and the vague instructions been known, there is a reasonable probability that it would have changed the verdict. The social media post was discovered after the trial and could not have been discovered prior to trial because it did not exist until after trial. The information contained within the post was not merely impeaching or cumulative to any other information available at trial and was not known at the time of trial. Considering the prima facie case Petitioner respectfully requests this Court grant certiorari to review the trial court's erroneous denial of a hearing on his motion for new trial.

## CONCLUSION

Petitioner respectfully requests this Court issue the writ of certiorari and order full briefing on the issues presented.

Respectfully Submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

Sarah E. Shipe
Appellate Defender

ATTORNEYS FOR PETITIONER

This 6th day of March, 2023.

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Appeal from Greenwood County
Frank R. Addy, Jr., Circuit Court Judge

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Opinion No. 5951 (S.C. Ct. App. filed November 23, 2022)

Lower Court Case No. 2018-GS-24-00829; 00830

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THE STATE,

RESPONDENT,

V.

XZARIERA OKEVIS GRAY

PETITIONER.

APPELLATE CASE NO. 2019-001109

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CERTIFICATE OF SERVICE

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Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the petition for writ of certiorari to the Court of Appeals and appendix in the above-referenced case has been served upon Melody J. Brown, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), which is mbrown@scag.gov; the South Carolina Court of Appeals; and on Xzariera Okevis Gray, #325069, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067, this 6th day of March, 2023.

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