THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY

Steven H. John, Circuit Court Judge

Appellate Case No. 2017-002553

The State, ...Respondent,

v.

Tommy Lee Benton, ...Appellant.

FINAL REPLY BRIEF OF APPELLANT

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INTRODUCTION

The State's brief is an exercise in omission. At almost every turn, the State fails to counter the most relevant, pertinent, and controlling arguments Mr. Benton advanced. The arguments the State opted to not contest are, in large part, dispositive and compel reversal. Those ancillary points it does raise rest on a misreading of the record, a misapplication of the law, and a misdirection of Mr. Benton's arguments. For the reasons explained herein and in Mr. Benton's opening brief, this Court should reverse and vacate Mr. Benton's convictions under the Double Jeopardy Clause or, in the alternative, reverse and remand for a new trial due to the trial court's prejudicial evidentiary errors.[1]

ARGUMENT

I. The State Does Not Contest It Failed to Comply with Rule 5(e)(1), SCRCrimP, and Does Not Contest Other Material Arguments that Compel the Conclusion that Manifest Necessity for the Mistrial Did Not Exist.

The State does not challenge, refute, or otherwise disagree with the majority of Mr. Benton's Double Jeopardy arguments, including most critically that the State did not provide the requisite written notice of the date, time, and place of each offense for which it sought alibi information. This and the numerous other uncontested arguments require holding that there was no manifest necessity for the mistrial and that the trial court failed to exercise sound discretion. The State's efforts to avoid this result through a series of side arguments are unavailing. This Court therefore should reverse the trial court's denial of Mr. Benton's motion to dismiss under the Double Jeopardy Clause and vacate his convictions.

[1] Rather than dispute the State's factual presentation point by point, Mr. Benton defers to the Record on Appeal for an accurate account of what was said during Mr. Benton's two trials.

A. The State effectively concedes its failure to comply with Rule 5(e)(1), the trial court's failure to consider reasonable and viable alternatives to a mistrial, that it knew of Mr. Benton's alibi defense and the identity of at least some alibi witnesses, that it bears the burden of proving manifest necessity, and that the trial court must exercise a heightened sound discretion.

A central premise of Mr. Benton's argument that the trial court should have dismissed the charges against him is that manifest necessity did not exist for a mistrial because the State failed to comply with its antecedent obligation under Rule 5(e)(1) to trigger Mr. Benton's duty to disclose his alibi defense. At no point does the State argue that it satisfied this obligation. It is now uncontested that the State failed to do so. This, in and of itself, is sufficient to constitute an abuse of discretion and warrants reversal of the trial court's denial of Mr. Benton's motion to dismiss.

The State instead submits that because Mr. Benton had an alibi, he should have disclosed it regardless. (Final Br. of Resp't ("Resp't's Br.") at 15-16.) The State would impose an affirmative obligation upon all criminal defendants to disclose their alibis irrespective of whether the State first complies with Rule 5(e)(1). This renders Rule 5(e)(1)'s explicit directive that the State *first* provide detailed information regarding the offense before the defense has any obligation to respond superfluous. Rule 5(e)(1), SCRCrimP ("*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.") (emphasis added); *see also CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (holding courts must read a statute so that "no word, clause, sentence, or part shall be rendered surplusage, or superfluous"). This Court should not

accept the State's invitation to read operative and material language out of Rule 5(e)(1) in order to give the State a pass so Mr. Benton can remain in jail for rest of his life.[2]

The State also concedes a number of other core arguments Mr. Benton makes. It agrees that it bears the burden of proving the existence of manifest necessity, (*id.* at 11), agrees it knew of at least some of Mr. Benton's alibi witnesses, (*id.* at 9), agrees the trial court's decision is subject to a heightened "sound discretion" standard, (*id.* at 8), and does not contest Mr. Benton's representation that the State previously was aware Mr. Benton intended to present an alibi defense, (*see id.* at 9).

Neither does the State refute Mr. Benton's assertion that the trial court failed to consider other reasonable alternatives to a mistrial, including whether good cause existed to excuse any non-compliance pursuant to Rule 5(g), SCRCrimP, a brief continuance to allow the State to investigate Mr. Benton's alibi, or excluding only those witnesses of whom the State was unaware. The list of available options was not "slim," as the State claims. (*See id.* at 14.) Nor does it dispute that the Sixth Amendment prohibits exclusion of his witnesses, thereby taking one of the only two options the trial court weighed off the table. The State simply advances three equally untenable arguments to excuse the trial court's admitted inaction on these alternatives.

First, it suggests Rule 5(e)(4)'s language permitting a trial court to exclude undisclosed alibi witnesses supersedes a criminal defendant's Sixth Amendment's right to call favorable

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[2] Adoption of the State's rule presents an even more troubling concern. A defendant who responds to a defective alibi request from the prosecution cannot enforce the prosecution's reciprocal obligation to disclose its alibi rebuttal witnesses. *United States v. Ponzo*, No. CRIM. 97-40009-NMG-5, 2012 WL 2990765, at *1 (D. Mass. July 19, 2012). Under the State's view, Mr. Benton must turn over his alibi information but the State would have no obligation to respond in kind. In his opening brief, Mr. Benton also explained the practical difficulties of requiring defendants to provide alibi information in response to vague requests from the prosecution. (Final Br. of Appellant ("Appellant's Br.") at 25-26.) The State did not dispute any of this.

witnesses. (*Id.* at 16.) Under the Supremacy Clause, this is, quite pointedly, false. *See Priester v. Cromer*, 401 S.C. 38, 43, 736 S.E.2d 249, 252 (2012) ("[A]ny state law that conflicts with federal law is 'without effect.'") (quoting *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992)).

Second, the State excuses the trial court's failure to fully 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."[3] (Resp't's Br. at 16.) The State admits too much. The problem is that the trial court's failure to fully examine the propriety of a continuance, and answer the very questions the State claims are unanswered, prevented the court from considering a continuance (or any other alternative) in a meaningful way. In turn, this Court cannot evaluate the viability of a continuance (or any other alternative) and whether the trial court exercised sound discretion. *See United States v. Shafer*, 987 F.2d 1054, 1057 (4th Cir. 1993) (noting that the "critical inquiry" into whether manifest necessity exists is whether less drastic alternatives are available). The State thus concedes that it did not make a sufficient record to demonstrate a continuance (or any other alternative) was not practical and, by extension, to demonstrate the existence of manifest necessity.

Third, the State blithely contends "the absence of manifest necessity is not shown by creativity of possible other scenarios." (Resp't's Br. at 16-17.) This is not a case of "creative" possible solutions. It is the trial court's failure to consider some of the most obvious, reasonable alternatives to a mistrial.

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[3] The trial court set aside two weeks to try a case that ultimately took five days. *See* **(R. p. 25, line 19-p. 26, line 23).** Whether this extra time could have been used by the State to investigate Mr. Benton's known alibi is a critical question the trial court should have investigated. It made no such inquiry or investigation, which constitutes an abuse of discretion under the standard mandating it.

These concessions and omissions are dispositive. The State did not comply with its triggering obligation under Rule 5(e)(1), the State otherwise knew Mr. Benton intended to present an alibi defense, the State was aware of at least some of Mr. Benton's alibi witnesses, and the trial court did not consider reasonable and viable alternatives to a mistrial. These conclusively establish the absence of manifest necessity. *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)). The State should not be permitted to now challenge the core arguments Mr. Benton raised. *See Cannon v. Ga. Attorney Gen.'s Office*, 397 S.C. 541, 546, 725 S.E.2d 698, 701 (2012) (citing *Hurst v. Sumter Cnty.*, 189 S.C. 376, 1 S.E.2d 238 (1939) (noting the general rule in civil cases that issues must be raised at the earliest opportunity, or they will be considered waived)).

B. Mr. Benton objected to the trial court's mistrial declaration.

The State puts most of its eggs in the basket of Mr. Benton allegedly not objecting, and thereby consenting, to the trial court's declaration of a mistrial, thus foreclosing his ability to challenge it on appeal. The State has waived this argument. It also rests on an incomplete reading of the record and, regardless, emanates from the State's failure to cite the proper standard for objecting to a mistrial declaration.

"Failure to object to the introduction of evidence at the time the evidence is offered constitutes a waiver of the right to have that issue considered on appeal." *Holroyd v. Requa*, 361 S.C. 43, 60, 603 S.E.2d 417, 426 (Ct. App. 2004). When Mr. Benton moved for dismissal of his charges under the Double Jeopardy Clause, trial counsel explained, "*the position we took* [at the first trial], we're making it now, *was that there no justification for the mistrial* in that case." **(R. p. 63, lines 16-18)** (emphasis added). The State never objected to or disputed trial counsel's

representation that he communicated his objection to the mistrial during the first trial. The record is closed and unchallenged in this regard. The State consequently has waived any ability to refute it. Neither does this argument constitute an additional sustaining ground under Rule 220(c), SCACR, because the basis for it—the lack of an objection by Mr. Benton—does not appear in the record. *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000); *see also id.* at 421, 526 S.E.2d at 724 (holding it is "unfair or unwise to resolve a case on a ground never mentioned by the respondent prior to appeal").

In any event, the State's argument fails on the merits. Mr. Benton squarely objected to the underlying grounds for the mistrial. It is beyond dispute that, prior to the trial court's declaration, he 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 trial court then spoke with counsel in chambers before declaring a mistrial. **(R. p. 41, lines 3-7).** Citing this, 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 16.) And as noted above, trial counsel later explained, without objection or contradiction by the State or the trial court, 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, Mr. Benton expressed his continuing objection to the mistrial declaration.[4] **(R. p. 49, line 4-p. 52, line 10).** There is no basis to claim Mr. Benton consented to a mistrial being entered against him.

[4] Mr. Benton's arguments also reflect the shifting position of the trial court. Initially, the court found the indictments and the court's "notice" sufficiently stated the time of the offense. **(R. p. 43, lines 16-20).** Because that is not true, the trial court changed course the next day and relied on discovery materials produced by the State which were not referenced in the request, including police reports, fire reports, a coroner's report, and the statements of co-defendants. **(R. p. 54, line 21-p. 55, line 8).** The evidence likewise was insufficient. (*See* Appellant's Br. at 5-6, 24 n. 8.)

Even if the Court were to hold these repeated objections were insufficient under State law, Mr. Benton satisfied well-established constitutional law on objecting to a mistrial for Double Jeopardy purposes. The State's claim that Mr. 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). 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).

The record shows Mr. Benton objected to the justification for a mistrial at the time it was declared. At the very least, he opposed the underlying basis for the mistrial—that he failed to comply with Rule 5(e)(1)—before and after the declaration. Even if the State were correct that Mr. Benton failed to object, which it is not, the totality of the circumstances does not show any such silence is "tantamount to consent." *See Gantley*, 172 F.3d at 429. Mr. Benton desired to proceed with his trial but was denied that right. Resolving all doubts in favor of Mr. Benton's liberty, as this Court is required to do, this Court should reach the merits of Mr. Benton's Double Jeopardy claim.

C. The State's remaining arguments are meritless.

The State's remaining collateral arguments to avoid the Double Jeopardy Clause are equally without merit.

First, the State repeatedly argues Mr. Benton brought about the mistrial.[5] This revisionist history ignores the State's now uncontested failure to satisfy its preliminary obligations under Rule 5(e)(1). "Under the Rule,[6] the Government must trigger the alibi defense discovery procedures. If

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[5] Similarly, the State claims Mr. Benton's counsel "confessed error." (Resp't's Br. at 14.) Not true. Trial counsel conceded only that he did not provide a response to the State's alibi request. But this was only "error" if the State complied with its initial obligations under Rule 5(e)(1), which it did not.

[6] This refers to Rule 12.1, Fed. R. Crim. P., the substantively identical federal counterpart to our Rule 5(e) for these purposes.

they do not, 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). The State sent just one Mutual Reciprocal Disclosure request to Mr. Benton, and it pertained only to Mr. Smith's April 29, 2014 murder. **(R. p. 510).** This notice was legally insufficient to trigger Mr. Benton's reciprocal obligation for a number of independent reasons that the State does not challenge, including:

- The State sent this request before indicting Mr. Benton for *any* offense. *See United States v. Ducran*, 639 F. Supp. 2d 127, 128 (D. Mass. 2009) (holding a request for alibi disclosure can only relate to indicted offenses).
- This request stated the date and place of the offense, but not the time. *See* Rule 5(e)(1), SCRCrimP (requiring a written statement as to time).
- The State did not attach or incorporate by reference *any* documents, yet alone any which provide the time of Mr. Smith's murder. *See United States v. Saa*, 859 F.2d 1067, 1071 (2d Cir. 1988) (finding the general production of discovery or other materials containing the required information, which are not cited in the disclosure request, is insufficient).
- State did not send a request for any other offense committed on any other date. Thus, there was no operative request for any other alibi of his.

This Court cannot countenance the State's continued efforts to blame Mr. Benton for not doing something he was not required to do.

Second, the State submits Mr. Benton's arguments are "inconsistent" and evince a purported "fatal variance in position." (Resp't's Br. at 15-16.) In its view, Mr. Benton cannot argue that he was prepared to present an alibi defense but the State did not sufficiently state the date, time, and place of the offense in its request. (*Id.* at 15). This misses the point entirely. Under

Rule 5(e)(1), Mr. Benton had no obligation to disclose his alibi unless and until the State, in writing, provided him the date, time, and place of each offense. *See Bickman*, 491 F. Supp. at 279. The State never did this. As a result, the State has no right to the evidence Mr. Benton gathered in anticipation of what he thought the State would argue (which was somewhat a shot in the dark, as explained on Pages 5-6 and in Footnote 8 on Page 24 of Mr. Benton's opening brief). There is nothing inconsistent or fatal about preparing a defense one is not obligated to disclose.

Third, the State glibly writes that Mr. Benton "quibbled over the notice he had of the exact time and sought clarification," and then faults Mr. Benton for not seeking clarification before his first trial. (Resp't's Br. at 15.) Respectfully, this was not a "quibble." It was a fundamental failing of the State to follow the Rules of Criminal Procedure, a failing the State foisted upon Mr. Benton in order to exact an advantage at trial in violation of his Constitutional rights. Mr. Benton had no duty to seek clarification earlier and correct the State's error. This is particularly true where the State knew Mr. Benton would present an alibi defense and knew the identity least some of his alibi witnesses. The State cannot claim that Mr. Benton hid the ball when it failed to properly ask for this information despite its actual knowledge of the same.

Fourth, the State suggests Mr. Benton should have sought review of the trial court's mistrial ruling via either federal habeas proceedings or interlocutory appellate review. (Resp't's Br. at 10-11.) The grant of a mistrial and subsequent denial of a motion to dismiss are not immediately appealable. *State v. Miller*, 289 S.C. 426, 426-27, 346 S.E.2d 705, 705-06 (1986). "In South Carolina, a criminal defendant may not appeal until [a] sentence has been imposed." *Id.* at 705, 346 S.E.2d at 705. To be sure, our Supreme Court recognized these additional avenues are available. *State v. Rearick*, 417 S.C. 391, 405, 790 S.E.2d 192, 199-200 (2016). But they are not required. The traditional rule that the denial of a motion to dismiss under Double Jeopardy is not

immediately appealable remains. *Id.* at 403-05, 790 S.E.2d at 198-99. There is no procedural impediment to this Court reviewing the trial court's Double Jeopardy ruling.[7]

In sum, the trial court committed an error of law in its interpretation of Rule 5(e)(1). Furthermore, there is no evidence to support the trial court's conclusion that the State complied with the rule, either as it is phrased or as the trial court interpreted it. The State does not dispute either point. By forcing Mr. Benton to disclose a defense he did not have to disclose, and then mistrying his case for his phantom failure to do so, the trial court declared a mistrial in order afford the State a more favorable opportunity convict. This subjects the mistrial to "the strictest scrutiny." *Arizona v. Washington*, 434 U.S. 497, 508 (1978); *see also Downum*, 372 U.S. at 736. The "ends of justice" were defeated, not served, by the declaration. The trial court therefore failed to exercise sound discretion and should be reversed.

II. The State Does Not Contest It Failed to Satisfy the Standard to Establish Authenticity of Mr. Benton's Alleged Text and Internet Messages.

If the Court is inclined to reach Mr. Benton's evidentiary arguments, which will be unnecessary if it vacates his convictions under Double Jeopardy, the Court should at a minimum reverse and remand because the State does not challenge the legal framework Mr. Benton advanced and does not claim it satisfied these requirements. Mr. Benton turns first to the over 1,000 text and internet messages the trial court admitted in bulk.

A. Mr. Benton fully preserved this issue for review.

The State makes a hollow threshold preservation argument, claiming only that it "is questionable that the argument on authentication is before the Court." (Resp't's Br. at 18 n. 4.) There is no question: the issue is fully preserved. The State instead ignores the fundamental

[7] While the State also notes that Mr. Benton moved to dismiss the charges under Double Jeopardy "[a]fter selection of a jury," (Resp't's Br. at 10), the jury was not sworn until after the trial court denied the motion, **(R. p. 66, line 17-p. 67, line 3)**.

difference between authentication and ultimate admissibility. There simply is no basis to claim Mr. Benton failed to preserve his authenticity challenge.

Authenticity is a condition precedent to admissibility. Rule 901(a), SCRE. But an authenticated document still must satisfy the remaining Rules of Evidence in order to be admitted. *Id.* Note ("Even when evidence is properly authenticated, it must still be admissible under the other rules of evidence."); *see also Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1190, 1222 (E.D. Pa. 1980), *modified on other grounds*, 723 F.2d 283 (3d Cir. 1983) ("[T]he notion of authentication is a narrow one, akin to the notion of genuineness. The other foundation requirements should not be simply subsumed under the authenticity terminology, but should remain analytically distinct.").

Upon the State's attempt to introduce the exhibits containing Mr. Benton's text and internet messages, Mr. 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 trial court overruled his objection. **(R. p. 147, line 5-p. 148, line 17).** Having lost that objection, Mr. Benton *later* recognized some individual messages likely were now otherwise admissible, *e.g.*, **(R. p. 341, lines 2-3)**, while objecting to others 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.") In no way did Mr. Benton waive or fail to preserve his earlier objection to authenticity that was fully raised to and ruled upon by the trial court.

B. The State concedes it must present evidence corroborating authorship to authenticate text and internet messages.

There are no published decisions in South Carolina delineating the evidence required to authenticate text or internet messages. In his opening brief to this Court, Mr. Benton noted that nearly every single jurisdiction to consider this question requires proof beyond simply to whom the cell phone belonged. (Appellant's Br. at 31-32 (collecting cases).) There must be "some corroboration of authorship, whether direct or circumstantial." *Commonwealth v. Koch*, 630 Pa. 374, 389, 106 A.3d 705, 714 (2014). Such is needed to "bridge the logical gap and permit a proper inference that the purported author sent the message." *Butler v. State*, 459 S.W.3d 595, 602 (Tex. Cim. App. 2015). "[C]omputers can be hacked, protected passwords can be compromised, and cell phones can be purloined." *Tienda v. State*, 358 S.W.3d 633, 641 (Tex. Crim. App. 2012). A cell phone number (or a Facebook account, for that matter) therefore "does not necessarily establish the identity of the user at a particular moment in time with the same definitiveness that fingerprints, signatures, photographs, or DNA may established the perpetrator of a crime." *Butler*, 459 S.W.3d at 601.

The State takes no exception to this legal requirement and at one point even relies on the Pennsylvania Supreme Court's *Koch* decision. (Resp't's Br. at 20-21.) This Court accordingly should apply this rule here and recognize it as consistent with South Carolina law. *See* Rule 901(b)(6), SCRE (permitting the authentication of a telephone conversation via proof that the call was made through a number assigned to a particular person *and* that particular person was on the phone). Because the trial court failed to apply this standard, it committed an error of law and thus abused its discretion in admitting these messages into evidence.

C. The State does not cite to any evidence corroborating authorship of almost every message it claims Mr. Benton sent or received.

The State cites no evidence corroborating the authorship of any text or internet message that is the subject of this appeal. What collateral evidence the State does cite is legally insufficient to carry the day. As explained below, it is immaterial that the State incidentally authenticated three other text messages involving Mr. Benton, Mr. Benton possessed his phone at some other points in time outside of these crimes, Mr. Benton's stepfather turned Mr. Benton's phone over to police, or the text messages contain information connecting him to the crimes. None of those, in isolation or combination, can authenticate the remaining 1,000 messages admitted into evidence.

The State begins by arguing that the three authenticated exchanges between Mr. Benton and Mr. Cheatham—two exchanges some nine days before the first crime against Mr. Smith containing alleged planning references, and one exchange after all of the crimes wherein both individuals expressed surprise at learning Mr. Smith had been murdered—are "a line of communication between two co-conspirators" that apparently serves to authenticate all messages between them. (Resp't's Br. at 19.) This is another argument the State did not raise below and should be precluded from raising now. Moreover, these brief isolated exchanges cannot authenticate an entire weeks-long discourse between Mr. Benton and Mr. Cheatham, including messages allegedly demonstrating Mr. Benton's involvement in a murder of which both he and Mr. Cheatham expressed ignorance in the authenticated messages. And they certainly cannot authenticate messages purportedly sent between Mr. Benton and a host of other individuals.

Next, the State argues that Mr. Benton "misconstrues the testimony" in claiming the record shows he did not have his phone at various points during these crimes. (*Id.* at 19-20.) The State says nothing about the testimony from Mr. Benton's mother and grandmother that Mr. Cheatham had Mr. 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). Neither does the State dispute Ms. Rose's testimony that she had sent messages from Mr. Benton's phone, **(R. p. 216, line 23-p. 219, line 9)**, or that Mr. Cheatham "went into" Mr. Benton's phone "for a couple of minutes" during one of the incidents in question, **(R. p. 273, lines 7-20).** In his opening brief, Mr. Benton correctly noted this testimony demonstrates "Mr. Benton therefore was not in exclusive possession of his phone, and neither was the phone entirely secure." (Appellant's Br. at 13.) This faithfully recounts the evidence, not misconstrues it.[8] The dispute over possession makes corroboration of authorship that much more critical to authenticate his alleged text messages.

The State make two additional arguments on the merits of authenticity that bear mentioning. It emphasizes that Mr. Benton's stepfather turned Mr. Benton's phone over to the police. (*E.g.*, Resp't's Br. at 7, 20.) Mr. Benton has never contended the phone is not his. But this evidence is legally insufficient to establish authenticity under the correct and uncontested legal framework. The State asks this Court to make the same improper inference courts throughout this country have admonished: that merely tying a message to a particular phone (or Facebook account) without more is enough. The law rightly requires more. The State then argues that the messages are authentic because they contain information allegedly "connecting" Mr. Benton to the crimes. (*Id.* at 20.) This is not, cannot, and should not be the rule. If it were, the requirement for authenticity would vanish.

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[8] The State once again makes a meritless waiver argument, asserting this issue "appears at one point to be conceded away in a statement that he admitted possession of his phone" and citing to representations by trial counsel that Mr. Benton did not dispute possession of his phone *the day after Mr. Smith's murder*. (Resp't's Br. at 19-20.) This in no way waives or undermines his argument, based on the evidence at trial, that there were times during the alleged commission of these crimes that he did not have his phone and others sent messages from it.

This Court therefore should find the trial court abused its discretion not only by applying the incorrect legal standard (which the State does not dispute on appeal), but also by finding sufficient evidence to authenticate over 1,000 text and internet messages allegedly sent by or to Mr. Benton.

D. The trial court's error was not harmless beyond a reasonable doubt.

The State closes by arguing any error in admitting the messages was harmless because they are cumulative of testimony given by Mr. Benton's co-defendants. (Resp't's Br. at 21.) For a ruling to constitute harmless error, this Court must be able to say 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); *Roberts v. State*, 408 S.C. 123, 135, 757 S.E.2d 744, 751 (Ct. App. 2014). The State's case rested on three legs: (1) the testimony of Mr. Benton's co-defendants, each of whom was an admitted criminal testifying with the hope of sentencing consideration and whose credibility no one would vouch for[9]; (2) the location of Mr. Benton's cell phone, the possession of which was contested; and (3) the text and internet messages. Without the messages, the State only has the testimony of untrustworthy felons and the location of a phone of which Mr. Benton disputed possession to connect Mr. Benton to this case. This Court cannot say Mr. Benton's guilty verdict was "surely unattributable to the error" of admitting these messages. *Roberts*, 408 S.C. at 135, 757 S.E.2d at 751. The trial court's error therefore was not harmless.

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[9] *E.g.*, **(R. p. 92, line 11-p. 93, line 12; p. 94, lines 5-15; p. 216, lines 7-15; p. 268, line 17-p. 269, line 20; p. 274, line 18-p. 275, line 5; p. 315, line 22-p. 316, line 25; p. 333, line 20-p. 334, line 3).**

III. The State Does Not Contest the Proper Standard for Admissibility of Crime Scene Photographs During the Guilt Phase of a Non-Capital Trial, Confuses Relevance and Rule 403, SCRE, and Concedes the Photographs are Cumulative.

In significant part, the State recasts Mr. Benton's Rule 403, SCRE, challenge as one based on relevance. (*See* Resp't's Br. at 25-26.) The State then uses its strawman to claim that Mr. Benton "does not rely on the proper test for admissibility." (*Id.* at 26.) There is no room for interpretation. Mr. Benton's argument is that State's Exhibits 54, 55, and 56 are unduly prejudicial under Rule 403. This Court should reject the State's rewriting of the issue so it can take down a point Mr. Benton did not raise.

South Carolina law has a well-established framework for determining the admissibility of crime-scene photographs under Rule 403. The driving factor is whether the photographs are being admitted in the sentencing phase of a capital trial, where the scope of probative value is "much broader," *State v. Torres*, 390 S.C. 618, 623, 703 S.E.2d 226, 229 (2010), and "[t]he purpose . . . is to permit the introduction of evidence . . . 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). Whereas in the guilt phase of a non-capital trial, "photographs of murder victims should be excluded where the facts they are intended to show have been fully established by competent testimony." *Id.* at 288-89, 350 S.E.2d at 185; *see also State v. Middleton*, 288 S.C. 21, 24, 339 S.E.2d 692, 692 (1986) (holding crime scene photographs lose their evidentiary value where they depict information that is stipulated to or "not really at issue"). The State does not argue South Carolina law provides otherwise but instead relies on potentially inconsistent out-of-state authority.[10] (*See* Resp't's Br.

[10] These cases are readily distinguishable on their facts as well, for in each the court noted the various facts in issue to which the photographs pertained. *McKibbins v. State*, 293 Ga. 843, 852-53, 750 S.E.2d 314, 322 (2013); *Commonwealth v. Robinson*, 581 Pa. 154, 226-27, 864 A.2d 460, 503 (2004). As explained herein, these photographs do not depict any disputed facts.

at 23-24.) Because the trial court failed to apply this standard, it committed an error of law that commands reversal.

Because this case concerns the guilt phase of a non-capital trial, the Court must view the admission of these photographs through this narrow lens of whether they show facts that have "been fully established by competent testimony." *Kornahrens*, 290 S.C. at 289, 350 S.E.2d at 185. The State proffers only two uses of the photographs. First, it claims they were necessary to prove malice, which Mr. Benton never admitted. (Resp't's Br. at 22-23, 25 n. 4, 26.) This argument is not preserved, as the only justification the State gave at trial—and thus the only purpose for which the trial court admitted the photographs—was that they established the crime scene. **(R. p. 15, line 10-p. 19, line 1; p. 107, line 1-p. 109, line 21)**; *see also* **(R. p. 110, line 21-p. 111, line 11)** (correcting the numbering of these exhibits). In any event, it is true Mr. Benton did not confess. But neither did he challenge the facts or circumstances surrounding the murder, including that whoever committed it acted with malice. His defense was an alibi defense. These photographs did not connect Mr. Benton to the murder in any way. Neither were they needed to prove malice; the testimony of the State's witnesses and the other photographs admitted were more than sufficient to establish that element of the offense.

Second, the State asserts the photographs were necessary to corroborate the testimony of Mr. Benton's co-defendants, whom Mr. Benton claims "are not worthy of belief." (Resp't's Br. at 24-25.) This is yet another argument the State did not raise at trial and which is not preserved. And it too is without merit. While the State is silent on what in the co-defendants' testimony these pictures corroborate, it generally argues they substantiate "witness testimony on how the scene was presented, including handcuffing the victim and the fact he was alive when they set him on

fire, and the autopsy findings." (*Id.* at 24.) Mr. Benton did not contest a single one of these facts in his alibi defense.

The record also corroborates them elsewhere, as the State readily admits. (*Id.* at 27 ("At worst, the photographs were cumulative to the other evidence, *i.e.*, the testimony on the condition of the body and the crime scene, and, specifically, other photographs of the crime scene showing different portions of the crime scene which were admitted without objection.").) Multiple police officers testified as to how the crime scene was presented, including that Mr. 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 fully depict the crime scene as well, **(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 Mr. 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 or objection from Mr. Benton. **(R. p. 159, line 11-p. 163, line 23).**

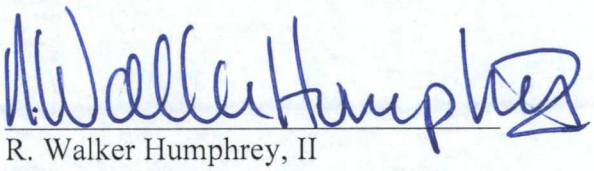
These photographs were not necessary to prove a single fact or corroborate anything to which Mr. Benton's co-defendants testified. The State used them only to gild the lily and inflame the passions of the jury. In asking Mr. Cheatham if Mr. Smith's ruptured abdomen with his internal organs spilling out was "worth $1500," the State abandoned any pretense of corroboration. *See* **(R. p. 262, lines 17-18).** Our Supreme Court has expressed diminishing tolerance for Solicitors pushing the envelope with gruesome photographs. *State v. Collins*, 409 S.C. 524, 539, 763 S.E.2d 22, 30 (2014) (Kittredge, J., concurring in result (joined by Hearn, J.); *id.* at 540, 763 S.E.2d at 30 (Pleicones, J., dissenting); *Torres*, 390 S.C. at 624, 703 S.E.2d at 229. In this case, the State pushed too far.

The trial court therefore abused its discretion in admitting State's Exhibit 54, 55, and 56, and this Court should remand for a new trial. *See Tapp*, 398 S.C. at 389, 728 S.E.2d at 475 (holding error is harmless only when the court can say beyond a reasonable doubt that the error did not contribute to the verdict).

CONCLUSION

For the reasons set forth above and in Mr. Benton's opening brief, this Court should reverse Mr. Benton's convictions as his re-trial violated the Double Jeopardy Clause of both the United States and South Carolina Constitutions. In the alternative, this Court should reverse and remand for a new trial based on the trial court's erroneous introduction of evidence.

Respectfully submitted,



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