STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Laurens County
Donald B. Hocker, Circuit Court Judge

ORIGINAL

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S.C. SUPREME COURT

Opinion No. 5659 (S.C. Ct. App. filed June 26, 2019)

2016-GS-30-01078

THE STATE,

RESPONDENT,

V.

FABIAN LAMICHAEL GREEN,

PETITIONER

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 July 31, 2019. App. 43.

QUESTIONS PRESENTED

I. Did the Court of Appeals err by holding the state "overthrew the presumption of prejudice" created by a juror asking a bailiff about the consequences of an impasse and the bailiff informing the juror that the judge would issue an *Allen* charge and require jurors to continue to deliberate where the factual findings on which the Court based its decision were not supported by the record and the Court's legal analysis contravened controlling authority?

II. **Did the trial judge err in permitting the state to introduce messages allegedly obtained from the deceased's Facebook account where the state failed to authenticate the messages?

STATEMENT OF THE CASE

On June 26, 2019, the Court of Appeals published an opinion addressing a substantial constitutional issue – the right to a fair and impartial jury – and a novel issue of law in this state – the authentication of Facebook messages. State v. Green, Op. No. 5659 (S.C. Ct. App. filed June 26, 2019) (Shearouse Adv. Sh. No. 26 at 22); App. 1-10. Concerning the first issue, the Court of Appeals held a bailiff improperly communicated with a juror regarding the consequences of an impasse, but the Court determined the state "overthrew the presumption of prejudice" arising from the improper communication based upon facts not supported by the record and a misapplication of controlling case law. Additionally, the Court of Appeals ruled upon a novel and controversial issue of law by determining the state properly authenticated Facebook messages where the state was unable to produce a participant in the conversation, a custodian of the records, or anyone with personal knowledge about the messages. This Court should grant certiorari to review these matters.

Pre-trial motion to suppress unauthenticated Facebook messages

On July 22, 2016, a Laurens County grand jury indicted Petitioner for desecration of human remains and murder. R. 640-641; 643-644. The state, represented by O. Warren Mowry, Jr., and James C. Todd, IV, called the case to trial before the Honorable Donald B. Hocker and a jury on May 30, 2017. R. 15. Tristan Shaffer represented Petitioner. R. 15.

Petitioner moved to suppress Facebook messages the state claimed were between Petitioner's girlfriend, Karina Galarza, and the deceased, Edwin Chirinos based upon the state's inability to authenticate the messages. R. 2, ll. 4-12; R. 16, ll. 1-3. The messages allegedly were obtained from the deceased's account. R. 2, ll. 21-22. The state claimed the father "had access to it," "downloaded those," and "made these available to law enforcement." R. 2, l. 25 – R. 3, l.

3; R. 16, ll. 22-25. Furthermore, the messages were sent from an account with the username of "Ruby Ninia [sic]," which the state called an "alias" for Galarza. R. 2, ll. 18-19. The state pointed to an address contained within the messages, which was Galarza's home. R. 3, ll. 5-9. To support its contention that "Ruby Rina" was in fact Galarza, the state claimed a witness, Davian Holman, would testify to that fact, and that in one of the messages the deceased referred to the other person as "Karina." R. 3, ll. 15-23; R. 17, ll. 1-10.

Counsel explained that the deceased's father was not a party to the conversation, and, in fact, no party to the alleged conversation would be called to testify. R. 16, ll. 3-7; R. 16, ll. 10-12. Counsel argued the state was unable to authenticate the messages because the state did not have a party to the conversation or a person in charge of recordkeeping. R. 17, l. 22 – R. 18, l. 2. Further, counsel explained there had been no evidence presented as to the accuracy of the information or the completeness of the information. R. 18, ll. 2-9.

The trial

According to the deceased's father, Edwin Anibal Diaz Cruz, his son, Edwin Diaz Chirinos, had a Facebook account. R. 128, ll. 12-25. The father claimed he could access the deceased's Facebook account after the deceased went missing on May 8, 2016. R. 129, ll. 1-4. Allegedly, he was able to retrieve his Facebook messages and turned that information over to law enforcement. R. 129, ll. 8-13. Specifically, the father provided law enforcement with a screenshot of part of the Facebook messages he retrieved. R. 129, ll. 19-23; R. 130, ll. 9-11; State's Exhibit #61.

After the deceased's body was found, the police went to the Queens Circle address, which was an address mentioned in the messages the police received from the father. R. 134, ll. 17-24. After speaking to Galarza, the police arrested her and Petitioner. R. 141, ll. 10-13.

Shortly thereafter, the police also arrested Davian Holman, Petitioner's cousin. R. 141, ll. 17-23; R. 180, ll. 9-12.

Holman claimed that Galarza's "Facebook name" was "Ruby Rina." R. 181, ll. 6-7. According to Holman, on May 8, 2016, he was with Petitioner and Petitioner's girlfriend, Galarza, at the girlfriend's home on Queens Circle. R. 182, ll. 1-12. He further claimed that Galarza and Petitioner "were on the phone texting," but he could not say to whom or what they were texting. R. 183, l. 21 – R. 184, l. 2; R. 230, ll. 9-12.

The solicitor's investigator, Walter Bentley, learned about the Facebook messages upon reviewing the file prepared by the police when he was assisting the solicitor in getting ready for trial. R. 349, ll. 9-25. He had "a screen shot ... of some of the communication which further peaked [sic] [his] interest in wanting to look at those messages." R. 350, ll. 2-10; State's Exhibit #61. Regarding how he retrieved the Facebook messages from the deceased's account, Bentley explained:

> I was able to speak with [the deceased]'s family. His father, mother and an uncle who speaks some English. They were able to provide me with the email address which is what's used as a user name on Facebook. And also, they provided me with the password for the account. I used the information provided and I logged into the account and began looking for the messages that coordinated with the screen shot I had already viewed.

R. 350, ll. 11-20. What Bentley obtained "was quite lengthy so [he] just selected all the text and copied it into a word document to allow [him] to be able to actually print." R. 350, l. 21 – R. 351, l. 1. Bentley explained that although the actual messages he saw had date and time stamps, those "did not show up" when he copied and pasted the messages into the word document. R. 358, l. 25 – R. 359, l. 6; cf. State's Exhibit #61 and State's Exhibit #70. Over defense counsel's objection, the judge permitted the Facebook messages to be admitted into evidence. R. 354, ll. 9-10; State's Exhibit #61; State's Exhibit #70.

Jury deliberations & verdict – improper communications

During the deliberations, the judge learned of improper communications between the bailiffs and the jury. R. 551, ll. 7-12. While the judge discussed the matter with the lawyers in his chambers, the jury reached a verdict after deliberating for approximately four hours. R. 551, ll. 7-8; R. 551, ll. 11-17; R. 551, l. 23 – R. 552, l. 13. After the jury returned its verdicts of guilty as to both counts, the judge examined the jurors individually. R. 553, l. 23 – R. 568, l. 25.

Most of the jurors claimed there were *no* communications with any of the bailiffs. R. 555, ll. 1-5; R. 557, ll. 8-11; R. 558, ll. 12-15; R. 559, ll. 18-21; R. 560, ll. 20-23; R. 563, ll. 4-7; R. 564, ll. 3-6; R. 565, ll. 4-7; R. 567, ll. 18-21; R. 568, ll. 20-23. Others insisted all communications were not about the case. R. 561, ll. 20-23; R. 566, ll. 5-11.

On the other hand, two bailiffs revealed there had been at least one substantive conversation between at least one juror and a bailiff. The foreperson of the jury asked Johnny Bolt, a bailiff, what would happen if the jury could not reach a unanimous verdict. R. 573, ll. 19-23. Initially, Bolt claimed an innocuous response. R. 573, l. 23 – R. 574, l. 1. However, when pressed further on whether he told the jury anything about an Allen[1] charge, Bolt explained that he was familiar with the process and said, "[W]ell, he will give an Allen charge, you know, because I have been doing [this] a lot, I have seen this and I just mentioned, you know, that is usually the procedure that they do. And I said, yeah, he would probably give you an Allen charge. I said, well, he will just give you a charge and probably want to see if, see if you can stay later, something or another, of that nature." R. 574, ll. 2-11; R. 574, l. 22 – R. 575, l. 3.

Prior to hearing from the bailiffs, Judge Hocker found the responses from the jurors were "controlling," but allowed defense counsel to question the bailiffs to allow for "a complete

[1] Allen v. United States, 164 U.S. 492 (1896).

record." R. 569, l. 22 – R. 570, l. 7. After the bailiffs testified, defense counsel moved for a mistrial based upon improper influences. R. 580, ll. 11-25; R. 581, ll. 4-7; R. 581, ll. 11-14.

The judge explained that while he was concerned that Bolt "mentioned Allen charge," and that such "should not ever happen again," he also considered the jurors' statements that "they were not influenced by any communications." R. 582, l. 25 – R. 583, l. 3. Judge Hocker understood Bolt's testimony to be that he communicated regarding the Allen charge "just to the Forelady." R. 583, ll. 4-6. Further, the judge understood the jurors "did not perceive that as a communication or something that would arise to having a communication." R. 583, ll. 7-10. The jurors indicated "they were uninfluenced by anything outside of the testimony, evidence and law presented in this case." R. 583, ll. 10-12. The judge did not "condone by any means what was, what was done or said," but he did not "think it [rose] to the level of creating prejudice to [Petitioner] or [rose] to the level that the drastic remedy of a mistrial should be granted." R. 583, ll. 12-17.

Ultimately, Judge Hocker sentenced Petitioner to ten years imprisonment for desecration of human remains and forty-five years imprisonment for murder. R. 587, ll. 17-19. He ordered the sentences to be served concurrently. R. 587, ll. 16-17; R. 642; 645.

Direct appeal

On June 12, 2017, Petitioner served his notice of appeal. On June 26, 2019, the Court of Appeals affirmed Petitioner's convictions and sentences in a published opinion. State v. Green, Op. No. 5659 (S.C. Ct. App. filed June 26, 2019) (Shearouse Adv. Sh. No. 26 at 22); App. 1-10. Petitioner filed a petition for rehearing on July 11, 2019. App. 11-42. Subsequently on July 31, 2019, the Court of Appeals denied the petition. App. 43. This petition for writ of certiorari follows.

ARGUMENT

I. The Court of Appeals erred by holding the state "overthrew the presumption of prejudice" created by a juror asking a bailiff about the consequences of an impasse and the bailiff informing the juror that the judge would issue an *Allen* charge and require jurors to continue to deliberate where the factual findings on which the Court based its decision were not supported by the record and the Court's legal analysis contravened controlling authority.

As an initial matter, the Court of Appeals correctly determined the improper communication between the bailiff and the jury was presumptively prejudicial to Petitioner. However, the Court's determination that the state "overthrew the presumption by proving there was no reasonable possibility the comments influenced the verdict" was unsupported by the record and contravened controlling authority.

When an issue concerning improper juror conduct arises, the trial court first must make a factual determination as to whether juror misconduct occurred. Bantan, 387 S.C. at 423, 692 S.E.2d at 206 (citing State v. Zeigler, 364 S.C. 94, 109, 610 S.E.2d 859, 867 (Ct. App. 2005)).

> In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in the pursuance of known rules of the court and the instructions and directions of the court made during the trial with full knowledge of the parties.

Remmer v. United States, 347 U.S. 227, 229 (1954). Although the "presumption is not conclusive," "the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact was harmless to the defendant. Id. If misconduct occurred, then the trial court must determine whether the misconduct improperly influenced the jury. Bantan, 387 S.C. at 423, 692 S.E.2d at 206. The "[r]elevant factors to be considered in determining whether outside influences have affected the jury are the number of jurors exposed, the weight of the evidence

properly before the jury, and the likelihood that curative measures were effective in reducing the prejudice." State v. Kelly, 331 S.C. 132, 141-142, 502 S.E.2d 99, 104 (1998).

"The conduct of jurors and bailiffs must be above suspicion throughout the trial of every case." Jacobs v. Am. Mut. Fire Ins. Co. of Charleston, 287 S.C. 541, 543, 340 S.E.2d 142, 143 (1986).Id. "A bailiff or other person in charge must limit his communications with the jury and avoid all comments concerning the case." Blake by Adams v. Spartanburg General Hosp., 307 S.C. 14, 18, 413 S.E.2d 816, 818 (1992). After all, "the official character of the bailiff – as an officer of the court as well as the state – beyond question carries great weight with a jury." Parker, 385 U.S. at 470. Therefore, courts must give a bailiff's statements to a jury very close scrutiny in terms of accuracy and potential for coercion when challenged as improper. Ward v. Hall, 592 F.3d 1144, 1181 (11th Cir. 2010). "Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear." Mattox v. United States, 146 U.S. 140, 150 (1892); see also, Barnes v. Joyner, 751 F.3d 229, 240 (4th Cir. 2014).[2]

[2] Communications between bailiffs outside the presence of the prosecutor, the defendant, defense counsel, and the judge are fraught with the potential for prejudice. See e.g., United States ex rel. Tobe v. Bensinger, 492 F.2d 232, 238 (7th Cir. 1974) (affirming a grant of habeas relief where there was conflicting evidence in the record regarding whether the bailiff told the jurors to deliberate until a verdict was reached, finding the communication akin to an Allen charge, but without an admonition that no juror should relinquish his conscientiously held convictions to join a majority verdict, and rejecting the individual jurors indication of voluntary verdicts where jury members "are not empowered to determine what amounts to legal coercion"); People v. Rukaj, 506 N.Y.S.2d 677, 677 (N.Y. App. Div. 1986) (remanding for a new trial where a court officer told a juror that if the jury could not reach a verdict, the jury would be sequestered for the weekend and could be sequestered for as long as five or six weeks before a mistrial would be declared); State v. Christensen, 567 P.2d 654, 656-657 (Wash. Ct. App. 1977) (holding the appellate court could not say the bailiff's remarks had no prejudicial effect on the jury beyond a reasonable doubt where there was conflicting evidence regarding the bailiff telling the jury that rehearing testimony would take hours and was disfavored and that if the jury could not reach a verdict, then a retrial would result).

In a case bearing similarities to the instant matter, this Court upheld a trial judge's grant of a new trial. See Blake, 307 S.C. at 16, 413 S.E.2d at 817. During a medical malpractice case, a bailiff "allegedly made statements to the effect that the trial judge did not like a hung jury, and that a hung jury places an extra burden on taxpayers." Id. Although the "bailiff's remarks to the jurors" raised "the same concerns with the jury about the necessity of reaching a verdict" that a judge may raise with the jury, the bailiff's statements did not include the necessary language to "ensure that no juror feels compelled to sacrifice his conscientious convictions in order to concur in the verdict." Id. Setting aside the jury's verdict was proper because "[a]dministration of the law should be above any possibility of taint, criticism, or suspicion of impurity." Id.

In Holmes v. United States, 284 F.2d 716, 717-718 (4th Cir. 1960), the Fourth Circuit granted a new trial "because of improper communication by a court official of prejudicial information to the jury." In response to a juror's question, a deputy marshal indicated one of the defendants was serving a six-year jail sentence. Id. at 718. The Fourth Circuit explained the "private communication of the court official to members of the jury" was an "occurrence which cannot be tolerated if the sanctity of the jury system is to be maintained." Id. "When there has been such a communication, a new trial must be granted unless it clearly appears that the subject matter of the communication was harmless and could not have affected the verdict." Id. The Court found "[t]he subject matter of the communication was far from harmless" because "[n]othing had occurred at the trial to make relevant evidence of a prior conviction" of one of the defendants." Id.

Certainly, "communications" between jurors and bailiffs "concerning administrative matters may not be prejudicial," but "when communications involve matters of law, the risk of prejudice is present and communication by the bailiff to jurors on such matters is improper." State v. Floyd, 725 N.W.2d 817, 828 (Neb. 2007), *rev'd on other grounds by* State v. McCulloch, 742 N.W.2d 727

(Neb. 2007). The Nebraska Supreme Court found a bailiff's communications with a juror improper where the bailiff indicated that the deliberations would last until the jurors reached a verdict or that there was no time limit to deliberations and that jurors could be required to deliberate the rest of the week. Id. at 829. "The communication went beyond simple administrative matters." Id. The question "should have been referred to the court, and the bailiff should not have attempted to give any direct answer to the question." Id. The court also found resulting prejudice from the improper communication. Id. The court concluded "the improper communication from the bailiff to the juror would have affected the average juror in a way that would have prejudiced [the defendant] and denied him a fair trial." Id. at 830. The court determined "the communication could have pressured the average juror to change his or her vote in order to avoid protracted deliberations." Id.; see also State v. Crowell, 594 P.2d 905, 907-908 (Wash. 1979) (finding prejudice from a bailiff's statements that a jury would be required to deliberate until they reached a verdict); Farrell v. State, 512 P.2d 225, 225-226 (Okla. Crim. App. 1973) (finding prejudice where the bailiff instructed the jury they were compelled to return a verdict); Perez v. Community Hosp. of Chandler, Inc., 929 P.2d 1303 (Ariz. 1997) (holding that a litigant was not required to demonstrate prejudice where a bailiff responding to a question about a deadlock because the nature of the error made it impossible to ascertain the degree of prejudice resulting from the communication).

Bailiff Bolt acted improperly when he communicated to the jury that if the jury were unable to reach a verdict, then the judge would issue an Allen charge and request the jury to continue to deliberate. Judge Hocker found the communication occurred and explained that he was concerned about Bailiff Bolt's conduct. Judge Hocker admonished Bailiff Bolt that it "should not ever happen again." However, Judge Hocker concluded the improper communication was not prejudicial because the jurors did not perceive Bailiff Bolt's improper

comment as a communication. This was legal error and the Court of Appeals erred in relying upon Judge Hocker's conclusion. The subject matter of the communication was not harmless, and it could have affected the verdict. See Remmer v. United States, 347 U.S. 227, 229 (1954) (explaining any private communication with a jury is presumptively prejudicial and the prosecution must establish that the contact was harmless to the defendant); Holmes, 284 F.2d at 718 (explaining that in order for a private communication between a court official and a member of the jury occurs, a new trial must be granted unless it clearly appears that the subject matter of the communication was harmless and could not have affected the verdict). When the jurors were asked directly if there were communications during the trial with any of the bailiffs, most of the jurors denied any communications at all, which is unbelievable in light of the relationship the bailiffs have with the jurors by the nature of the bailiff's jobs. Some jurors admitted there were communications, but insisted those were not about the case. Two jurors – Byers and Pace – admitted there were communications with the bailiffs, but stated those concerned a break for a walk and logistics. Yet two bailiffs, quite reluctantly, admitted to substantive conversations with the jurors.

The trial judge improperly concluded the jurors "did not perceive that as a communication or something that would arise to having a communication" based solely on the fact that the jurors did not reveal the communication during their testimonies. The questions posed to the jurors were reasonably comprehensible to the average juror such that responses about the conversations about a deadlock should have been revealed. Without question, the subject of the inquiry – questions about a deadlock – were of such a nature that the jurors' failure to respond was unreasonable. Cf. State v. Woods, 345 S.C. 583, 587-588, 550 S.E.2d 282, 284 (2001). The jurors' concealment of the conversations supports Petitioner's request for a mistrial.

Bailiff Bolt's improper communication to the jury was the equivalent of a coercive Allen charge.[3] On its face, Bailiff Bolt's improper communication intimated that the jury must reach a verdict. In other words, the jury was left with the impression that it would be required to deliberate for as long as necessary to render a verdict. Of course, this is simply incorrect. Additionally, Bailiff Bolt's improper communication had the coercive effect of an unconstitutional Allen charge because it failed to ensure that no juror felt compelled to sacrifice his conscientious convictions in order to concur in a verdict. The subject matter of the communication – what would happen if the jury could not reach a unanimous verdict – was not a simple administrative matter or an innocuous matter. Instead, it concerned substantial rights of the defendant.

The Court of Appeals reasoned that "the bailiff's comments, while astonishingly inappropriate, did not reference facts about the case and cannot be reasonably spun as an Allen charge." To the contrary, the record fully supports the argument that Bailiff Bolt's improper communication to the jury was the equivalent of a coercive Allen charge. To support its reasoning, the Court of Appeals claimed "the bailiff emphasized the *court* might give them an

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[3] The South Carolina Code of Laws sets forth the procedure to follow when a jury fails to agree. S.C. Code Ann. § 14-7-1330. The purpose of the statute is to give the jury the right to indicate to the court its view as to when time for due and thorough deliberation has elapsed. State v. Simon, 126 S.C. 437, ___, 120 S.E. 230, 232 (1923). Further, the statute "is intended 'to prevent forced verdicts, and to prevent undue severity of jury service.'" State v. Barnes, 402 S.C. 135, 139, 739 S.E.2d 629, 631 (2013) (quoting State v. Freely, 105 S.C. 243, 89 S.E. 643 (1916)). Verdicts must be the result of calm and deliberate reflection, not coercion. State v. Kelley, 45 S.C. 659, 24 S.E. 45, 47 (1896). "The trial judge has the duty to urge, but not coerce a jury to reach a verdict." Dawson v. State, 352 S.C. 15, 20, 572 S.E.2d 445, 447 (2002) (citing Green v. State, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002)); see also Workman v. State, 412 S.C. 128, 130, 771 S.E.2d 636, 638 (2015); Tucker v. Catoe, 346 S.C. 483, 491, 552 S.E.2d 712, 716 (2001); Lowenfield v. Phelps, 484 U.S. 231, 237 (1988); State v. Pulley, 216 S.C. 552, 555-557, 59 S.E.2d 155, 157-158 (1950); State v. Simon, 126 S.C. 437, 437, 120 S.E. 230, 232-233 (1923); Rowland v. Harris, 218 S.C. 42, 44-46, 61 S.E.2d 397, 398-399 (1950) (ordering a new trial where the judge's instructions indicated the jury would have to deliberate the entire weekend unless it could reach a verdict earlier).

Allen charge ... in the event of a deadlock, and the *court* might 'see if you can stay later," which suggested an invitation rather than a coercive command" is not supported by the record. (emphasis in original). According to Bailiff Bolt, when the foreperson asked about a deadlock, he said, "[W]ell, he *will* give an Allen charge, you know, because I have been doing [this] a lot, I have seen this and I just mentioned, you know, that is usually the procedure that they do. And I said, yeah, he would probably give you an Allen charge. I said, well, he *will* just give you a charge and probably want to see if, see if you can stay later, something or another, of that nature." (emphasis added). The testimony is a far cry from the court's conclusion that the bailiff emphasized that the court *might* give an Allen charge or *might* see if the jurors could stay later. Rather, the testimony was that the judge *would* give an Allen charge.

Petitioner was denied several critical rights based upon Bailiff Bolt's improper communication with the jury: (1) the right to have the jury free from unauthorized intrusion; (2) the right to have a jury protected from extraneous and inaccurate information; and (3) the right to be notified about problems with the jury deliberations and to be heard with respect to the method of addressing those problems. See Perez, 929 P.2d at 1309. Judge Hocker's reliance upon the jurors' testimony that their verdicts were not influenced by improper communications was misplaced. First, the jurors denied the improper communication occurred at all, which cast considerable doubt on their credibility. The jurors who denied any communications at all, which would have included innocuous details, such as locations of restrooms and descriptions for entering and exiting the courthouse, that undoubtedly occurred, lacked all credibility. Judge Hocker's factual finding that the improper communication with Bailiff Bolt in fact occurred demonstrates his finding that the jurors lacked credibility in this regard.

Although Judge Hocker indicated that the jurors with whom Bailiff Bolt communicated

did not perceive his remarks as a communication, the factual finding that the communication occurred cannot be disputed and was an implicit finding that the jurors lacked credibility. Second, the question of coercion must not be left to the jury members as they were not equipped to determine what amounts to legal coercion. See Tobe v. Bensinger, 492 F.2d 232, 239 (7th Cir. 1974). Furthermore, any argument that Bailiff Bolt's improper communications were not directed to the jurors in the minority must fail because "any influence which emphasizes the importance of agreement to the exclusion of the dictates of conscience is coercive and prejudicial." See Bensinger, 492 F.2d at 239.

By affirming the trial judge's failure to grant a new trial or a mistrial, the Court of Appeals permitted the "possibility of taint, criticism, [and] suspicion of impurity" to infect the "[a]dministration of the law" due to Bailiff Bolt's improper communication with the jury, which intimated to the jury that a verdict must be reached in the case no matter how long it took to do so. See Blake, 307 S.C. at 18, 413 S.E.2d at 818.

II. In addressing this novel issue of whether the state failed to authenticate Facebook messages, the Court of Appeals (1) misconstrued the issue on appeal as requesting the Court require "a heavier authentication burden" for materials obtained from social media where Petitioner requested only that the authentication burden include consideration of the media from which the information was obtained, and (2) erred in holding the state authenticated the Facebook messages where the state failed to present any evidence that the document was what the state purported it to be.

The proponent of evidence must satisfy "[t]he requirement of authentication or identification as a condition precedent to admissibility." Rule 901(a), SCRE. 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)).

One way to authenticate evidence is by showing the evidence contains "distinctive characteristics and the like." Rule 901(b)(4), SCRE.[4] "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) (finding a master fingerprint card authenticated where an expert explained the prints on the master card were taken at a correctional facility on a specific date, and assigned a unique state identifying number). In ruling on whether the state authenticated the Facebook messages as being authored by the deceased and Galarza, the Court of Appeals oversimplified the

[4] Petitioner does not challenge the Court's holding that the state could not authenticate the Facebook messages pursuant to Rule 901(b)(1), SCRE.

authentication requirement of the Rules of Evidence and ignored the danger of fraudulent documents specific to the item sought to be authenticated. In fact, the Court of Appeals refused to acknowledge the distinct challenges to authentication posed by information gathered from social media. It is naïve to assume that authentication of information obtained from social media is undeserving of consideration of its great vulnerability to fraud, particularly in the age of "deepfakes."[5]

Examining an authentication issue related to a social networking post, the Maryland Court of Appeals delved into how social networking sites work – and do not work. Griffin v. State, 19 A.3d 415, 420-421 (Md. 2011). Particularly, the court recognized that "anyone can create a fictitious account and masquerade under another person's name or can gain access to another's account by obtaining the user's username and password." Id. at 421. "The potential for fabricating or tampering with electronically stored information on a social networking site, thus poses significant challenges from the standpoint of authentication of printouts of the site." Id. at 422.

The court found a printout of a MySpace page was not authenticated. Id. at 423-424. The court explained the "picture of [the individual], coupled with her birth date and location, were not sufficient 'distinctive characteristics' on a MySpace profile to authenticate its printout, given the prospect that someone other than [the individual] could have not only created the site, but also posted the ... comment." Id. at 424. According to the court, "the potential for abuse and manipulation of a social networking site by someone other than its purported creator and/or

[5] See generally, Douglas Harris, Deepfakes: False Pornography is Here and the Law Cannot Protect You, Duke L. & Tech. Rev. 99 (2019) (discussing "deepfakes" in the context of pornography and explaining the ease with which someone can create and publish videos of individuals' faces superimposed on the bodies of porn stars in porn videos).

user" requires "a greater degree of authentication than merely identifying the date of birth of the creator and her visage in a photograph on the site" when what is offered is "a printout of an image from such a site." Id.. See also Lorraine v. Markel American Ins. Co., 241 F.R.D. 534 (D. Md. 2007) (laying out a "roadmap" for authentication of electronically stored information).[6]

The Mississippi Supreme Court explained "[t]he authentication of social media poses unique issues regarding what is required to make a prima facie showing that the matter is what the proponent claims." Smith v. State, 136 So.3d 424, 432 (Miss. 2014). "Creating a Facebook account is easy." Id. "Not only can anyone create a profile and masquerade as another person, but such a risk is amplified when a person creates a real profile without the realization that third parties can 'mine their personal data.'" Id. "Friends and strangers alike may have 'access to family photos, intimate details about one's likes and dislikes, hobbies, employer details, and other personal information,' and, consequently, 'the desire to share information with one's friends may also expose users to unknown third parties who may misuse their information.'" Id.

Tremendous concerns over authentication exist due to the ease of fabricating and tampering with electronically stored information. Id. at 432-433. Therefore, the mere fact that an electronic communication purports to originate from a certain person's account is insufficient to authenticate that person as the author of the communications. Id. at 433. "[S]omething more than simply a name and small, blurry photograph" is needed to identify the Facebook account as belonging to the purported user. Id.

The court held the state failed to provide sufficient evidence that the Facebook messages were from the defendant because the only information tying the account to the defendant was the

[6] The Court of Appeals characterized the "Maryland Rule" governing social media authentication as complicating "the simple concept embodied in Rule 901" and disregarded the well-reasoned and thorough decisions of the Maryland courts and the other states that follow Maryland.

name and a "very small, grainy, low-quality photograph." Id. at 434. "No other identifying information from the Facebook profile, such as date of birth, interests, hometown, or the like was provided." Id. Despite the defendant's girlfriend's testimony the defendant sent the messages to her, the court found this was not sufficient. Id. The court explained the state "utterly failed to provide any information as to the basis of her purported knowledge." Id.

The Supreme Judicial Court of Massachusetts held a trial court erred in permitting the prosecution to introduce messages sent via MySpace. Com. v. Williams, 926 N.E.2d 1162, 1172 (Mass. 2010). A witness testified that she received MySpace messages from the defendant's brother telling her not to testify against the defendant. Id. The witness explained the account showed a picture of the brother and showed the user's name was "doit4it." Id. According to the court, the contents of the messages indicated the sender was familiar with the witness and the pending criminal cases against the defendant and wanted to keep the witness from testifying. Id. The court explained there "was insufficient evidence to authenticate the messages." Id. There was no testimony regarding how secure the web page was or who could access the web page. Id. "While the foundational testimony established that the messages were sent by someone with access to [brother]'s MySpace Web page, it did not identify the person who actually sent the communication." Id. at 1172-1173.

The Appellate Court of Connecticut concluded a defendant failed to authenticate authorship of electronic messages sent to him purportedly from a state's witness using Facebook. State v. Eleck, 23 A.3d 818, 820-824 (Conn. App. Ct. 2011). After the witness provided damaging testimony against the defendant, he sought to impeach her credibility by asking if she had spoken with the defendant." Id. at 820. The witness admitted to seeing the defendant, but claimed she had not spoken to him "in person, by telephone or by computer." Id. Counsel

showed the witness a printout of an exchange of electronic messages between the defendant's Facebook account and another account bearing her name. Id. She identified the user name on the account as hers, but denied sending the messages. Id. She also claimed that someone had "hacked" into her Facebook account and changed her password rendering her no longer able to access the account. Id. The defendant testified that he downloaded and printed the exchange of messages from his computer. Id. at 821. He testified that he recognized the user name as belonging to the witness and that the user name's profile contained photographs and other entries identifying the witness as the account holder. Id.

Although the court found the witness's testimony about the "hacking" "dubious," particularly considering the messages were sent prior to the alleged hacking, the court noted the testimony highlighted "the general lack of security of the medium and raise[d] an issue as to whether a third party may have sent the messages" using the witness's account. Id. at 824. The court determined "that the fact that [the witness] held and managed the account did not provide a sufficient foundation for admitting the printout, and it was incumbent on the defendant, as the proponent, to advance other foundational proof to authenticate the proffered messages did, in fact, come from [the witness] and not simply from her Facebook account." Id. The court also found the content of the messages too vague to support the defendant's position that circumstantial evidence established the witness as the author. Id. The messages did not "reflect distinct information that only [the witness] would have possessed regarding the defendant or the character of their relationship." Id.

One of the leading cases concerning the authentication of social media postings is United States v. Vayner, 769 F.3d 125 (2nd Cir. 2014). The district court permitted the government to introduce a profile page from a Russian social networking site, which was similar to Facebook.

Id. at 127. A Special Agent with the State Department's Diplomatic Security Service identified the printout from VK.com as "from 'the Russian equivalent of Facebook,' and noted that the page purported to be the profile of 'Alexander Zhiltsov' (an alternate spelling of Zhyltsou's name), and that it contained a photograph of Zhyltsou." Id. at 128. The agent noted that under the heading for "contact information," the profile listed "'Azmadeuz' as 'Zhiltsov's' address on Skype. Id. Additionally, the page showed that "Zhiltsov" worked at Martex International and Cyber Heaven, which were places where the state's key witness indicated the defendant worked. Id. The agent admitted he had only a "'cursory familiarity' with VK, had never used the site except to view this single page, and did not know whether any identity verification was required in order for a user to create an account on the site." Id. at 128-129.

The Second Circuit held the district court abused its discretion by admitting the VK web page because the government failed to authenticate the document. Id. at 131. The court explained that information about Zhyltsou appeared on the VK page, including his name, photograph, and details about his life that were consistent with the state's key witness. Id. at 132. However, the government presented "no evidence that Zhyltsou himself had created the page or was responsible for its contents." Id. "[T]he mere fact that a page with Zhyltsou's name and photograph happened to exist on the Internet at the time of Special Agent Cline's testimony does not permit a reasonable conclusion that this page was created by the defendant or on his behalf." Id. While distinctive characteristics of a document alone may provide circumstantial evidence sufficient for authentication, all of the information on the VK page tying it to Zhyltsou was also known by the state's key witness, and probably many others, "some of whom may have had reasons to create a profile page falsely attributed to the defendant." Id. Except for the VK page itself, "no evidence in the record suggested that Zhyltsou even had a VK profile page, much

less that the page in question was that page." Id. at 132-133. The government failed to present any evidence that identification verification was necessary to create such a page with VK, which may have helped determine whether the page actually belonged to Zhyltsou. Id. at 133.

The Fourth Circuit Court of Appeals recently addressed authentication of Facebook pages. United States v. Hassan, 742 F.3d 104, 132-133 (4th Cir. 2014). The Fourth Circuit affirmed the trial court's ruling that the Facebook pages "were self-authenticating under Federal Rule of Evidence 902(11)." Id. Although South Carolina does not have a Rule 902(11) in its Rules of Evidence, nor does it have any equivalent, the discussion of how the Fourth Circuit analyzed the issue is instructive because the court also addressed authentication under Rule 901(a), FRE, which is similar to South Carolina's authentication rule.

Specifically, "Rule 902(11) authorizes the admission in evidence of records that satisfy the requirements of Rule 803(6)(A)-(C), 'as shown by a certification of the custodian ... that complies with a federal statute or a rule prescribed by the Supreme Court.'" Id. at 133. After explaining that the government had satisfied Rule 902(11), FRE, by provision of a certification of the records custodian of Facebook, and that the documents were self-authenticating, the district court and the Fourth Circuit required the government to prove the Facebook pages were linked to the defendants, pursuant to Rule 901, FRE. Id. at 132-133. Both the district court and the Fourth Circuit found Rule 901(a), FRE, satisfied by "tracking the Facebook pages and Facebook accounts" to the defendants' "mailing and email addresses via internet protocol addresses." Id. at 133. See also United States v. Recio, 884 F.3d 230, 236-237 (4th Cir. 2018)(finding a Facebook post authenticated where the government presented "a certification by a Facebook records custodian, showing that the Facebook record containing the post was made 'at or near the time the information was transmitted by the Facebook user,'" the user name

associated with the account was the defendant's, one of four email addresses associated with the account included the defendant's full name, more than one hundred photos of the defendant were posted to the account, and one of the photos posted to the timeline was accompanied by text wishing the defendant a "happy birthday").

The state failed to authenticate the Facebook messages purportedly between the deceased and the co-defendant, Karina Galarza. Without question, no witness with knowledge testified that the printout produced by the state or the screenshot were what the state purported those documents to be – an online conversation between the deceased and Karina Galarza. None of the witnesses who testified were parties to the conversations. None of the witnesses who testified were aware of the conversations when the conversations were allegedly taking place. None of the witnesses who testified could say who the participants of the conversations were or the subject matter of the conversations.

Additionally, the state failed to authenticate the messages based upon distinctive characteristics. The messages were between "Edwin" and "Ruby." The deceased's father testified that the screenshot he produced to law enforcement was from the Facebook account he accessed that purportedly belonged to his son, but he did not, and likely could not, identify the additional Facebook messages produced by the state. The very fact that the deceased's father was aware of his son's username and password – and based upon Bentley's testimony, the mother and uncle were aware of those items as well – defeated any argument the state could have made regarding the security of the Facebook messages.

The messages purportedly written by "Ruby" were not connected to Galarza despite Holman's testimony that Galarza's name on Facebook was Ruby Rina. There are undoubtedly many people using the name Ruby or Ruby Rina on Facebook. The state could not prove, or lay

any foundational evidence, that the messages from "Ruby" were authored by Galarza. In fact, the messages revealed that someone other than Ruby was accessing the account – "Man my stupid ass sister put that sit. 100." See Court's Exhibit #2 at 9/18/2014 at 6:58 p.m. The Court of Appeals put stock in the fact that the Facebook messages referred to "Julissa," which was Galarza's sister's name. In the court's view, the mention of Julissa helped to authenticate the messages. To the contrary, the messages revealed that someone else – possibly Julissa – was accessing the account and posting messages, pretending to be "Ruby."

Thus, Edwin's Facebook account was unsecure *and* Ruby's Facebook account was unsecure.

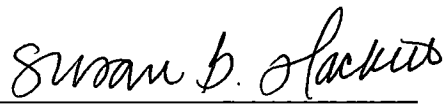
Bentley testified that the document he produced was altered from the original. He indicated that the Facebook messages he saw online included date and time stamps, but when he "cut and pasted" those messages from Facebook and put them into a Word document, the date and time stamps disappeared. Therefore, the document submitted by the state as the Facebook messages was not the actual messages or even a "fair and accurate" representation of the messages. Bentley altered the messages, and it was the altered messages the state sought to introduce.

As evident by the state's closing argument, the Facebook messages were critical to the state's case. The prejudice deriving from the improper admission of those messages cannot be overstated. The state used the Facebook messages to allege Petitioner and Galarza lured the deceased to Galarza's residence so that they could kill him. The state used the Facebook messages to prove malice and criminal intent, critical elements of the murder charge. The Court of Appeals erred by holding the Facebook messages were authenticated – a novel issue in South Carolina.

CONCLUSION

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

Respectfully Submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of August, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Laurens County
Donald B. Hocker, Circuit Court Judge

Opinion No. 5659 (S.C. Ct. App. filed June 26, 2019)
2016-GS-30-01078

THE STATE,

RESPONDENT,

V.

FABIAN LAMICHAEL GREEN,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on Samuel Bailey, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Fabian Lamichael Green, #372509, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 28th day of August, 2019.

Susan B. Hackett
Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 28th day of August, 2019.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: October 26, 2019