STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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

THE STATE,

RESPONDENT,

V.

FABIAN LAMICHAEL GREEN,

PETITIONER

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Fabian Lamichael R. Green, Appellant.

Appellate Case No. 2017-001332

Appeal From Laurens County
Donald B. Hocker, Circuit Court Judge

Opinion No. 5659
Submitted March 5, 2019 – Filed June 26, 2019

AFFIRMED

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HILL, J.: Convicted by a jury of murder and desecration of human remains, Fabian Lamichael R. Green appeals, challenging the trial court's admission of a series of direct messages from the victim's Facebook account into evidence and the denial of his motion for a mistrial due to a bailiff's comments to a juror. Because we conclude

the Facebook messages were properly authenticated and the bailiff's misconduct did not affect the impartiality of the jury, we affirm.

I.

On the late afternoon of May 8, 2016, seventeen-year-old Edwin Diaz Charinos (Victim) left his parents' home driving a Ford Mustang and never returned. After his family filed a missing persons report, police reviewed direct messages Victim's father—who had his son's password—discovered on Victim's Facebook page. The messages were exchanged on May 7 and the afternoon of May 8 and appeared to be between Victim and a user named "Ruby Rina." Among other things, the messages revealed Ruby Rina invited Victim to her home at 108 Queens Circle in Laurens on the afternoon of May 8 for a sexual rendezvous. After reviewing the messages, officers visited 108 Queens Circle and looked for Victim's car to no avail.

On May 26, a landscaper disposing of hedge clippings in woods off Taylor Road in Clinton discovered a Ford Mustang with its doors open and what appeared to be burned human remains beside it. The landscaper called 911 and responding officers processed the scene. Investigators also returned to 108 Queens Circle, where they encountered Green and Karina Galarza, Green's sometime girlfriend. Based on discussions with Galarza, investigators obtained arrest warrants for her and Green. A search of the residence revealed blood stains and other physical evidence. Davian Holman, Green's cousin, was also identified as a suspect. He was later apprehended after being found by police asleep under Galarza's bed at the Queens Circle residence. Green, Galarza, and Holman were all charged with Victim's murder.

At Green's trial, expert evidence demonstrated the remains found in the woods matched Victim's DNA. Forensic testing conducted on a blood stain taken from 108 Queens Circle determined the odds were one in thirty-eight quadrillion that the blood belonged to someone other than Victim. The State also introduced a piece of bedding found where Victim's remains were located that appeared to be identical to bedding collected from Galarza's home.

Holman testified Galarza's Facebook name was "Ruby Rina." He stated the morning of May 8, 2016, he was at Galarza's home at 108 Queens Circle with Green and Galarza. Holman explained Green and Galarza were laughing while texting, but he could not see the screens of the cell phones and did not know who they were messaging. Later that afternoon, Victim arrived at Galarza's home. When Victim tried to leave, Holman witnessed Galarza push Victim towards her sister's room. Green then emerged from the sister's room and struck Victim several times in the

head with a hammer. Green told Holman to help him move Victim's body, which had been wrapped in bedding, into the backseat of Victim's Mustang. They drove Victim's car to the location off Taylor Road where Victim's remains were found. Holman stated Green removed Victim's body and a bucket with lighter fluid from the car. Holman testified he walked away from the car while Green sprayed the lighter fluid, so he did not see what happened to Victim's body, but he smelled smoke.

An acquaintance of Green's who lived in Clinton testified Green and Holman walked up to his house around 9:00 or 10:00 p.m. on the night of May 8, 2016. The acquaintance stated Green was carrying a bucket and looking for lighter fluid or alcohol. An autopsy found Victim's death was caused by blunt force trauma to the head, resulting from seven blows to the head with a flat, circular object consistent with the head of a hammer.

Over Green's hearsay and authentication objections, the trial court admitted printouts of the Facebook messages into evidence. The State also presented a letter Green wrote while in jail awaiting trial. In the letter, Green admitted he and "his girl" used Facebook messages to lure Victim to Galarza's home where Green hit him in the head with a hammer. Green testified the letter was false, and he had written it to intimidate inmates who had been bullying him.

After the jury deliberated for close to four hours, the trial court was alerted to questionable contact between a bailiff and a juror. While the trial court conferred with counsel about the contact, the jury reached a verdict. The trial court received the verdict in open court and sent the jury back to the jury room. The trial court then brought each juror out separately for individual questioning on the record. All denied any improper conversation with the bailiff. Bailiff Johnny Bolt testified a juror had asked him what would happen in the event of a deadlock, and he responded the judge would likely give them an *Allen*[1] charge and ask if they could stay later.

Green moved for a mistrial, asserting the bailiff's comments improperly influenced the jury. The trial court denied Green's motion and sentenced him to forty-five years' imprisonment on the murder charge and ten years' imprisonment on the desecration of human remains charge.

II.

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

We first take up Green's challenge to the admission of the Facebook messages. Green does not appeal the trial court's ruling that the messages were co-conspirator statements and, therefore, not hearsay. Instead, he zeroes in on the trial court's ruling that the messages were properly authenticated, claiming there was not enough proof to support such a finding. We review evidentiary rulings to see whether the trial court abused its discretion, meaning the ruling was based on an error of law or lacked evidence to support it. *See State v. Byers*, 392 S.C. 438, 444, 710 S.E.2d 55, 57–58 (2011).

A. The Requirement of Authentication

All evidence must be authenticated. *State v. Brown*, 424 S.C. 479, 488, 818 S.E.2d 735, 740 (2018); 2 McCormick On Evid. § 221 (7th ed. 2016) ("[I]n all jurisdictions the requirement of authentication applies to all tangible and demonstrative exhibits."). Authentication is a subspecies of relevance, for something that cannot be connected to the case carries no probative force. The trial judge acts as the authentication gatekeeper, and a party may open the gate by laying a foundation from which a reasonable juror could find the evidence is what the party claims. Rule 901(a), SCRE ("The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."). The authentication standard is not high, *Deep Keel, LLC v. Atlantic Private Equity Group., LLC*, 413 S.C. 58, 64–65, 773 S.E.2d 607, 610 (Ct. App. 2015), and a party need not rule out any possibility the evidence is not authentic. In the realm of authentication, the law, like science, is content with probabilities.

The court decides whether a reasonable jury could find the evidence authentic; therefore, the proponent need only make "a prima facie showing that the 'true author' is who the proponent claims it to be." *United States v. Davis*, 918 F.3d 397, 402 (4th Cir. 2019). Once the trial court determines the prima facie showing has been met, the evidence is admitted, and the jury decides whether to accept the evidence as genuine and, if so, what weight it carries. Rule 104(b), SCRE; *see United States v. Branch*, 970 F.2d 1368, 1370–72 (4th Cir. 1992); 5 Weinstein et al., *Weinstein's Federal Evidence* § 901.02[3] (2d ed. 2019).

Green argues the State's authentication showing fell short. He points to the potential that social media can be manipulated and the ease with which a hacker could access another's account or create a fictitious account. Green notes neither the sender nor the recipient of the messages corroborated they were authentic, and there was evidence both accounts were not secure.

Social media messages and other content may appear to pose unique authentication problems, but these problems dissolve against the framework of Rule 901, SCRE. Social media messages and content are writings, and evidence law has always viewed the authorship of writings with a skeptical eye. *See* 2 McCormick On Evidence § 221 (evidence law does not assume authorship of a writing, "[i]nstead it adopts the position that the purported signature or recital of authorship on the face of a writing is not sufficient proof of authenticity to secure the admission of the writing into evidence").

The requirement of authentication cannot be met by merely offering the writing on its own. *See Williams v. Milling-Nelson Motors, Inc.*, 209 S.C. 407, 410, 40 S.E.2d 633, 634 (1946). Something more must be set forth connecting the writing to the person the proponent claims the author to be. Rule 901, SCRE, does not care what form the writing takes, be it a letter, a telegram, a postcard, a fax, an email, a text, graffiti, a billboard, or a Facebook message. All that matters is whether it can be authenticated, for the rule was put in place to deter fraud. 2 McCormick On Evidence § 221. The vulnerability of the written word to fraud did not begin with the arrival of the internet, for history has shown a quill pen can forge as easily as a keystroke, letterhead stationery can be stolen or manipulated, documents can be tricked up, and telegrams can be sent by posers. Viewed against this history, the argument that social media should bear a heavier authentication burden because such a "modern" medium is particularly vulnerable to fraudsters may be seen for what it is: old wine in a new bottle.

B. Rule 901(b)(1), SCRE: Authentication by Personal Knowledge

Rule 901(b), SCRE, lists ten non-exclusive methods of authentication. The first method is the easiest and most direct way to authenticate a writing: having someone with personal knowledge about the writing testify the matter is what it is claimed to be. Rule 901(b)(1), SCRE. This method may be accomplished by testimony from a person who sent or received the writing. Because it is the easiest method, it is also uncommon, for the sender and the recipient are often unavailable, as here. One who witnessed the creation or signing of the writing also has the personal knowledge Rule 901(b)(1), SCRE, demands. We cannot say Holman's observation of Green and Galarza texting, without more, meets Rule 901(b)(1), SCRE.

C. Rule 901(b)(4), SCRE: Authentication by Circumstantial Evidence of Distinctive Characteristics

Most writings meet the authenticity test through Rule 901(b)(4), SCRE, which enables authentication to be proven by: "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." Courts lag behind technology for good reason. As society adapts to the digital age, courts are growing more comfortable with using circumstantial evidence to authenticate social media content. 2 McCormick On Evidence § 227; 5 Mueller & Kirkpatrick, Federal Evidence § 9.9 (4th ed. 2018) (noting most common way to authenticate social media is by evidence of distinctive characteristics); *see also* Grimm, et al., *Authentication of Social Media Evidence*, 36 Am. J. Trial Advoc. 433, 469 (2013) (Rule 901(b)(4) is "one of the most successful methods used to authenticate all evidence, including social media evidence").

Rule 901(b)(4), SCRE, meshes with prior South Carolina law, which has long endorsed authentication by circumstantial proof. *See Kershaw Cty. Bd. of Educ. v. U.S. Gypsum Co.*, 302 S.C. 390, 398, 396 S.E.2d 369, 373–74 (1990). As our supreme court explained in *State v. Hightower*, 221 S.C. 91, 105, 69 S.E.2d 363, 370 (1952):

> Like any other material fact, the genuineness of a letter may be established by circumstantial evidence if its tenor, subject-matter, and the parties between whom it purports to have passed make it fairly fit into an approved course of conduct, and manifests the probability that the subject-matter of its contents was known only to the apparent writer and the person to whom it was written . . . .

See also Singleton v. Bremar, 16 S.C.L. 201, 210 (Harp. 1824) (letter authenticated by reference to unique facts relating to writer "and her situation"). A writing may also be authenticated if it is made in reply to an earlier communication from a source known to be genuine. *See Kershaw Cty. Bd. of Educ.*, 302 S.C. at 398, 396 S.E.2d at 373–74; *Leesville Mfg. Co. v. Morgan Wood & Iron Works*, 75 S.C. 342, 344, 55 S.E. 768, 768–69 (1906); *see also* 7 Wigmore et al., *Evidence in Trials at Common Law* § 2153 at 753 (Chadbourn rev. ed. 1978). This has been termed the "reply letter doctrine"—though today it might be better called the "reply email[2] doctrine."

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[2] Although the "e" in "email" is an abbreviation for "electronic," seasoned lawyers (and many surprised litigants) would agree with the interpretation attributed to former San Francisco Mayor Willie L. Brown that the "e" in "email" stands for "evidence."

We find the content of the messages was distinctive enough that a reasonable jury could find Galarza wrote them. Numerous facts link the Facebook messages to Galarza and, consequently, Green: the use of the screen name "Ruby Rina," which Holman testified was Galarza's; reference to "Julissa" on the messages, which testimony showed was Galarza's sister's name; Ruby Rina's invitation to her home, which she stated was at 108 Queens Circle; Victim's reference to Ruby Rina as "Karina," Galarza's real first name; 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 Victim disappeared shortly after Ruby Rina invited him to 108 Queens Circle, where his blood was later discovered. Taken together, these circumstances serve as sufficient authentication to meet the low bar Rule 901(b)(4), SCRE, sets. *See United States v. Siddiqui*, 235 F.3d 1318, 1322–23 (11th Cir. 2000) (emails authenticated by circumstantial evidence related to content, including reference to defendant's nickname and facts known only to limited group); *see generally* Grimm et. al., *Authenticating Digital Evidence*, 69 Baylor L. Rev. 1 (2017).

We recognize some cases may require more technical methods to authenticate social media. Some courts have held, for example, that tracking a defendant's Facebook page and account to his email address by internet protocol (IP) evidence can satisfy authentication. *United States v. Hassan*, 742 F.3d 104, 133–34 (4th Cir. 2014); *see also United States v. Recio*, 884 F.3d 230, 236–37 (4th Cir. 2018) (Facebook messages authenticated by a certificate from a Facebook records custodian that record containing the message was made at or near the time it was transmitted, the user name on the account was defendant's, the email address included defendant's name, and over 100 pictures posted to the account depicted defendant, including one wishing the defendant happy birthday). We understand social media could also be authenticated by evidence related to hash values and metadata. *See Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 547–49 (D. Md. 2007). We express no opinion on these methods of proof.

We are aware of the debates over the "Maryland Rule" and the "Texas Rule" concerning social media authentication, *see, e.g., State v. Eleck*, 23 A.3d 818, 821–25 (Conn. App. Ct. 2011), but these labels seem to complicate the simple concept embodied in Rule 901, SCRE, and by which writings have long been authenticated. *See United States v. Farrad*, 895 F.3d 859, 879–80 (6th Cir. 2018) (treating social media evidence like any other documentary evidence for purposes of authentication "fits with common sense: it is not at all clear . . . why our rules of evidence would treat electronic photos that police stumble across on Facebook one way and physical photos that police stumble across . . . on a sidewalk a different way"); *United States*

v. Browne, 834 F.3d 403, 412 (3rd Cir. 2016) ("We hold today that it is no less proper to consider a wide range of evidence for the authentication of social media records than it is for more traditional documentary evidence."); *Parker v. State*, 85 A.3d 682 (Del. 2014) (same); *Tienda v. State*, 358 S.W.3d 633 (Tex. Crim. App. 2012) (same); *Com. v. Purdy*, 945 N.E.2d 372 (Mass. 2011); *United States v. Barnes*, 803 F.3d 209, 217–18 (5th Cir. 2015) (Facebook messages authenticated by witness who saw defendant using Facebook, and recognized his account and writing style).

We do not downplay the fraud risk surrounding social media. The internet flattened the speed of and access to the flow of written information; documents that once sat in dusty file cabinets crammed into office corners now float in the "cloud," making them susceptible to a wider range of mischief. We are persuaded the risk is one Rule 901, SCRE, contemplates and can contain. Lawyers can always argue case-specific facts bearing on this risk and attempt to convince the jury the writing is not genuine.

III.

A. Bailiff Misconduct

We next address whether the trial court abused its discretion in refusing to grant a mistrial due to the bailiff's comments. Our federal and state constitutions guarantee a criminal defendant the right to a trial by an impartial jury. U.S. Const. amend. VI; S.C. Const. art. I, §§ 3, 14. The right can be infringed when a third party makes improper contact with the jury, for the right is meaningful only if the jury remains free from outside influence, including exposure to evidence or information that has not been introduced during the trial. *Turner v. Louisiana*, 379 U.S. 466, 471–72 (1965). Wayward bailiffs can improperly influence jurors by exposing them to the very things they are supposed to guard the jury against. *See Parker v. Gladden*, 385 U.S. 363, 364–65 (1966) (Sixth Amendment violated when jurors overheard bailiff describe defendant as a "wicked fellow" who "was guilty" and if there was anything wrong with a guilty verdict, "the Supreme Court will correct it").

In the event the trial court learns of an allegedly improper contact with a juror, the procedure of *Remmer v. United States* must be followed:

> 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 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. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

Remmer v. United States, 347 U.S. 227, 229 (1954). The scope and currency of the *Remmer* presumption has split the federal circuits, but it "remains [a]live and well in the Fourth Circuit," *United States v. Lawson*, 677 F.3d 629, 642 (4th Cir. 2012), and therefore controls our approach to the Sixth Amendment issue Green raises. *See Barnes v. Joyner*, 751 F.3d 229 (4th Cir. 2014) (Section 2254 habeas action; holding North Carolina state post-conviction court contravened clearly established federal law by failing to follow *Remmer*'s rebuttable presumption approach and requirement that hearing be held on juror misconduct claim). When there is evidence of a substantive communication by a third party with a juror, the *Remmer* presumption applies, shifting the burden to the State to prove there is no reasonable possibility the improper communication influenced the verdict. *Lawson*, 677 F.3d at 642.

Mindful the bailiff's "official character . . . carries great weight with a jury," *Parker*, 385 U.S. at 365, we find the comments here triggered *Remmer*. Green claims the comments irreparably tainted the jury because the bailiff in effect delivered a defective *Allen* charge outside the courtroom, which coerced the jury into agreeing to a verdict to avoid forced deliberations.

While *Remmer* requires us to presume the bailiff's blunder prejudiced Green, we conclude the State overthrew the presumption by proving there was no reasonable possibility the comments influenced the verdict. We reach this conclusion for several reasons, paying the deference we owe to the trial court's superior position to gauge credibility in the juror misconduct context. *McGill Bros. v. Seaboard Air Line Ry.*, 75 S.C. 177, 180, 55 S.E. 216, 217 (1906). First, the trial court found no evidence the comment was communicated to anyone but the foreperson. *State v. Kelly*, 331 S.C. 132, 141–42, 502 S.E.2d 99, 104 (1998) (holding number of jurors exposed to improper communication relevant to determining whether misconduct influenced jury). Second, there is no evidence the jury was ever deadlocked or even having difficulty reaching a verdict. Third, the bailiff's comments, while astonishingly inappropriate, did not reference facts about the case and cannot be reasonably spun as an *Allen* charge; the bailiff emphasized the *court* might give them an *Allen* charge (there is no evidence the bailiff knew or conveyed what the charge included) 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. Fourth, none of the

jurors testified there was any communication with the bailiff, other than about incidental administrative matters. The trial judge took this to mean not even the foreperson perceived the bailiff's remark as worthy of attention or remembrance. Fifth, all of the jurors testified there was no extraneous influence on their verdict.[3]

This is a far cry from *State v. Cameron*, which found a bailiff's misleading response to a juror's question about sentencing options compromised the jury's impartiality because it left the impression that their verdict could not affect the trial court's sentencing discretion. 311 S.C. 204, 208, 428 S.E.2d 10, 12 (Ct. App. 1993). And it is different still from the bailiff's corruptive caution to the jury in *Blake by Adams v. Spartanburg Gen. Hosp.*, that the trial judge "did not like a hung jury, and that a hung jury places an extra burden on taxpayers." 307 S.C. 14, 16, 413 S.E.2d 816, 817 (1992). *See also Ward v. Hall*, 592 F.3d 1144, 1175–82 (11th Cir. 2010) (right to impartial jury violated by bailiff's comments to sentencing jury that life without parole sentence was not an option in death penalty case).

We commend the trial court's deft handling of this issue. Because the evidence excludes any reasonable possibility that the bailiff's misconduct influenced the jury's impartiality or its verdict, the trial court did not abuse its discretion in denying Green's mistrial motion. *Kelly*, 331 S.C. at 141–42, 502 S.E.2d at 104.

Accordingly, Green's convictions are

AFFIRMED.[4]

WILLIAMS and GEATHERS, JJ., concur.

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[3] Not before us is the issue of how far a trial court can go in questioning jurors post-verdict without crossing the bounds of Rule 606(b), SCRE. Some courts have ruled such questioning may only explore the existence and nature of the outside contact, and may not delve into its effect on the jury. *See, e.g., Haugh v. Jones & Laughlin Steel Corp.*, 949 F.2d 914, 918 (7th Cir. 1991); *Stockton v. Virginia*, 852 F.2d 740, 744 (4th Cir. 1988); *Cf. Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017) (discussing Fed. R. Evid. 606 and history of rule against impeachment of verdicts and creating exception where juror expresses racial bias against criminal defendant).

[4] We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

FABIAN LAMICHAEL GREEN,

APPELLANT

APPELLATE CASE NO. 2017-001332

Appeal from Laurens County

Donald B. Hocker, Circuit Court Judge

Opinion No. 5659

PETITION FOR REHEARING

On June 26, 2019, this Court affirmed Appellant's convictions and sentences. State v. Green, Op. No. 5659 (S.C. Ct. App. filed June 26, 2019) (Shearouse Adv. Sh. No. 26 at 22). Pursuant to Rule 221(a), SCACR, Appellant now files this petition for rehearing to request this Court rehear the matter based upon the significant points overlooked and misapprehended by this Court in arriving at its conclusion.

Improper contact between bailiff and the jury

This Court correctly held the bailiff had improper contact with the jury and that this Court must presume prejudice from the improper contact. However, this Court determined the

state overcame the presumption of prejudice because "there was no reasonable possibility the comments influenced the verdict." Appellant disputes this holding and respectfully requests this Court rehear the matter because (1) the factual findings on which this Court based its decision are not supported by the record and (2) the legal analysis contravenes controlling and persuasive authority.

This Court based its holding upon five reasons. The first was that the "trial court found no evidence the comment was communicated to anyone but the foreperson." This alleged finding could only be made after considering the testimony from the bailiffs because the jurors denied any substantive conversations with the bailiffs. However, the trial judge indicated that the jurors' responses to questioning were "controlling." The judge only permitted the questioning of the bailiffs in order to allow for "a complete record." Thus, it does not appear the trial judge considered the bailiff's testimony at all in arriving at his conclusions. Although the trial judge mentioned that he understood the Bailiff Bolt's testimony to be that he improperly communicated "just to the Forelady," the judge in no way indicated this was a factual finding or a finding on which his decision to deny the motion for mistrial was based. Thus, this Court owes no deference to any alleged finding by the trial judge that there was no evidence the comment was communicated only to the foreperson. Instead, this Court must hold the trial judge erred in determining the jurors' testimony was "controlling."

Further, the record supports a finding that Bailiff Bolt's improper comments were relayed to the entire jury panel. As will be discussed in greater detail *infra*, the fact that the jurors denied having any substantive conversations with the bailiffs raises serious concerns about the impartiality of the jury. It is undisputed that Bailiff Bolt communicated improperly with the foreperson at a minimum. However, the foreperson denied such communications when

questioned directly. The intentional concealment of the communication must be considered by this Court not as enabling the overthrow of the presumption of prejudice but as reinforcing the presumption and supporting actual prejudice. Cf. State v. Woods, 345 S.C. 583, 587-588, 550 S.E.2d 282, 284 (2001) (explaining that "[w]here a juror, without justification, fails to disclose a relationship, it may be inferred, nothing to the contrary appearing, that the juror is not impartial").

This Court claimed the second way the state overcame the presumption of prejudice was because there was no evidence the jury was ever deadlocked or even had difficulty reaching a verdict. Appellant concedes the jurors never told the judge they were deadlocked; however, Appellant respectfully disagrees with this Court's factual finding that there was no evidence the jury was ever deadlocked or had trouble reaching a verdict. Here, the jury deliberated for approximately four hours. The sheer length of the deliberations demonstrates the jury agonized over its verdict. Further, the question from the juror to the bailiff about the consequences of a deadlock provides some evidence that the jurors may have been deadlocked at some point or that there were concerns about a deadlock. Admittedly, the question posed to the bailiff does not show conclusively that the jurors were deadlocked, but to assert that the record contains "no evidence" that the jury was "ever deadlocked or even having difficulty reaching a verdict" neglects to give any weight whatsoever to the undisputed fact that a juror asked a bailiff a question about the consequences of a deadlock. The question itself must be given some weight – and considerable weight at that – when analyzing whether there was evidence that the jury was deadlocked.

Third, this Court next reasoned that "the bailiff's comments, while astonishingly inappropriate, did not reference facts about the case and cannot be reasonably spun as an Allen[1] charge." The Court's use of the phrase "reasonably spun" derisively suggests that undersigned counsel's argument at trial and on appeal lacks factual and legal support. 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.

Additionally, this Court's conclusion that "the bailiff emphasized the *court* might give them an 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, the Judge *will* give you some details on that if something happens, that you will need to write him a note and I will have to take it to him." (emphasis added). When pressed further on whether he told the jury anything about an Allen 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." (emphasis added). The testimony is a far cry from this 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.

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

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.

As a fourth reason to support affirming the trial court's denial of Appellant's mistrial motion, this Court noted that "none of the jurors testified there was any communication with the bailiff, other than about incidental administrative matters," which "[t]he trial judge took ... to mean not even the foreperson perceived the bailiff's remark as worthy of attention or remembrance." This Court erred in the same way the trial judge did – using the jurors' denial of improper communications as a basis for overcoming the presumption of prejudice rather than support for prejudice. 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. Woods, 345 S.C. at 588, 550 S.E.2d at 284. The jurors' concealment of the conversations supports Appellant's request for a mistrial.

Finally, this Court asserted that because "all of the jurors testified there was no extraneous influence on their verdict" the state overcame the presumption of prejudice. Again, this Court incorrectly considered the jurors' testimony, which concealed the improper communication as supportive of the trial judge's ruling. As explained *supra*, the jurors' concealment of the improper conversation with the bailiff and their claims that their verdict was not influenced by outside influence must be afforded no weight in favor of overcoming the presumption of prejudice. Instead, the intentional concealment weighs heavily in favor of prejudice to Appellant. Further supporting Appellant's claim on this point is the fact that the jurors were questioned *after* they returned with their verdict. Once the verdict was reached, the jurors were invested in their verdict.

The South Carolina Supreme Court has outlined the proper role for bailiffs in their interactions with jurors:

> If, during deliberation, the jury find need to review portions of the testimony or to consult the court regarding questions of law, the foreman should inform the bailiff that the jury wishes to consult with the judge. The subject matter of the jury's inquiry should not be discussed at all. The bailiff's single responsibility is to advise the court of the foreman's request. The matter is then completely in the hands of the trial judge.

Jacobs v. Am. Mut. Fire Ins. Co. of Charleston, 287 S.C. 541, 543, 340 S.E.2d 142, 143 (1986). This is so because "[t]he conduct of jurors and bailiffs must be above suspicion throughout the trial of every case." 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).

The South Carolina Supreme Court explained that 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 test is whether the verdict was solely the result of honest deliberation on the case as publicly developed at trial, or whether there is reason to suppose outside influences entered into it as a factor." Blake, 307 S.C. at 18, 413 S.E.2d at 818. In fact, "[a] bailiff's ex parte communications with deliberating jurors ... is a species of jury misconduct." Lamb v. State, 251 P.3d 700, 711 (Nev. 2011).

Contrary to this Court's legal conclusion that this case was "a far cry from State v. Cameron," 311 S.C. 204, 208, 428 S.E.2d 10, 12 (Ct. App. 1993), this case is quite similar. In

Cameron, 311 S.C. at 208, 428 S.E.2d at 12, this Court held a private communication between a bailiff and the forelady of the jury during the jury deliberations required a new trial. At the conclusion of Cameron's trial, the judge instructed the jury that if the jury found Cameron guilty, then the jury would have to determine whether to recommend mercy. Id. at 206, 428 S.E.2d at 10. Further, the judge informed the jury that if it did not recommend mercy, the judge would sentence Cameron to life, but if the jury did recommend mercy, the sentence would be left to the court's discretion. Id. During deliberations, the forelady asked the bailiff for more information regarding sentencing, particularly, sentencing if the jury recommended mercy. Id. The bailiff told the forelady that she would be glad to give the judge a note from the jury and to take the jurors back into the courtroom for further instruction; however, the bailiff added, "'This is a fair Judge, that's all I can answer you. He is a fair Judge." Id.

Cameron moved for a mistrial based on the improper communication between the bailiff and the forelady. Id. at 207, 428 S.E.2d at 11. The trial judge found "the short colloquy between the bailiff and the forelady could not have in any way influenced the jury to refuse to recommend mercy." Id. at 207, 428 S.E.2d at 12. This Court disagreed. As this Court explained, despite the trial judge's adequate instruction on the verdicts of guilty with and without mercy, the jury remained confused. Id. at 208, 428 S.E.2d at 12. "[T]he right to fix punishment or make a recommendation that would place punishment in the discretion of the court rested exclusively with the jury." Id. "The bailiff's response to the forelady, that they should not worry if they were deadlocked because the judge was fair, was misleading. It tended to lessen the jury's sense of responsibility by implying that if they rendered a verdict of guilty without mercy, the judge had some discretion in sentencing." Id. "Jurors are simply not to consider the opinions of neighbors, officials or even other juries." Id. (internal quotation omitted).

Additionally, this Court held this case was "different still" from Blake, supra. Quite the contrary, Blake is instructive and supportive of a mistrial in Appellant's case. 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." Blake, 307 S.C. at 16, 413 S.E.2d at 817. After an evidentiary hearing on the allegation, the trial judge concluded the "bailiff made improper comments to two jurors, one of whom was the foreperson, and that the comments were relayed to the remaining jurors by the foreperson on the second day of deliberations." Id. The judge granted the new trial on "'a possibility of coercive effect'" resulting from the bailiff's comments. Id.

The Court recognized that 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. Id. at 18, 413 S.E.2d at 818. However, the court explained that "in so encouraging a jury" to reach a verdict, "a trial judge has the duty to ensure that no juror feels compelled to sacrifice his conscientious convictions in order to concur in the verdict." Id. The Court agreed the bailiff's remarks were distinguishable from those the trial judge would have made in open court. Id. "The bailiff's comments were made outside the presence of the trial judge and counsel. It was a mere fortuity that the bailiff's communication was made known to the trial judge. Moreover, the bailiff's remarks were not offset by a statement that each juror should not surrender his conscientious convictions merely to reach an agreement." 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.

Likewise, the decisions of courts across the country require reversal of the trial judge and the granting of a mistrial for Appellant.

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." Immediately after submission of the case and just before the jury commenced deliberations, one of the jurors asked a deputy marshal where the defendants were staying. Id. at 718. The officer responded that he did not know about one of the defendants, but he knew the other was staying at the jail, serving a six-year sentence. Id. As the court explained, "[i]nevitably, there were minor variations in the versions of the conversation subsequently recounted by the participants and those who heard it." Id. However, the court held it was "clear that the deputy marshal improperly communicated information to members of the jury which ... informed them of the prior conviction." Id. 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.

According to the court, "[w]hen 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. In fact, the judge would not have allowed a reference to a prior conviction to have occurred in open court. Id. "When the jury was privately informed of that fact by the deputy marshal out of the presence of the court and of counsel, there was not so much as opportunity to mitigate its obviously prejudicial effect." Id.

The Arizona Supreme Court examined whether a presumption of prejudice applied where a bailiff had improper contact with the jury in Perez v. Community Hosp. of Chandler, Inc., 929 P.2d 1303 (Ariz. 1997). There were three improper contacts between the bailiff and the jury. Id. at 1305.

The first occurred when the jury asked the bailiff whether the jury could review portions of the trial testimony. Id. The bailiff told the jurors that it was not possible and they had everything necessary in order to render a verdict. Id. "The second contact was a question regarding the procedure at impasse." Id. The jurors were deadlocked and asked what would happen if they were unable to reach a decision. Id. "[T]he bailiff told the jurors that if they reported deadlock, the judge would speak to them about the problem and then send them back to deliberate until a verdict was reached." Id. The third contact occurred when the jury asked the bailiff whether signing a defense verdict form would allow a non-party to escape responsibility. Id. The bailiff told the jurors "that obtaining an answer to such a question would be time-consuming because it would have to be presented to the judge and the attorneys, so the jury should be certain they wanted to ask the question." Id.

In analyzing the prejudice question, the Arizona Court explained "[t]he fairness of trial by jury derives in substantial part from the prohibition of ex parte communication to the jury of information regarding evidence and legal standards." Id. at 1306. Ultimately, the court refused to adopt a strict rule of presumed prejudice in cases involving prohibited ex parte communications with the jury. Id. The court established "a two-prong inquiry: (1) Was there an improper communication? and (2) Was the communication prejudicial or merely harmless?" Id. The court established factors to consider: "(1) whether the communication was improper or simply involved an 'administrative detail,' (2) whether the communication, despite its impropriety, concerned an innocuous matter, (3) whether the substantive response accurately answered the question posed, (4) whether an essential right was violated, and (5) whether the nature of the communication prevents ascertainment of prejudice." Id.

The Arizona Supreme Court found "no dispute that the bailiff's actions in this case were improper." Id. The court found the jury's question about an impasse to be "significant procedural

question." Id. at 1306-1307. According to the court, "[t]he bailiff misled the jury about the process in the event of a deadlock, at least failing to inform them that questions could and should be addressed to the judge and that any impasse problem should be presented to the judge." Id. at 1307. It was improper for the bailiff to advise the jury of what would happen if an impasse were reported. Id. "Because the jurors' problem was not presented to the court, the court could not respond to or address the deadlock issue, and the attorneys were denied an opportunity to assist the deadlocked jurors during this crucial step in the trial process." Id. The court also found the bailiff's remarks about the jury's request to read trial testimony improper. Id.

Recognizing that improper comments were subject to harmless error analysis, the Arizona Supreme Court explained it would "not require the litigant to demonstrate prejudicial effect when the nature of the error makes it impossible to ascertain the degree of prejudice resulting from the substance of a communication." Id. at 1309. "Thus, prejudice can be 'conclusively presumed' when the nature of the error deprives the court of the ability to determine the extent of prejudice." Id. According to the court, a litigant is denied several essential rights when a bailiff improperly communicates with a jury: "first, to have a jury free from unauthorized intrusion; second, to have a jury protected from extraneous and inaccurate information; and finally, the right to be notified about problems with jury deliberations and to be heard with respect to the method of addressing those problems." Id. "The right to a jury trial is hollow if a court officer acts without notice to the litigants and becomes a barrier to transmittal of information from the jury and a source of misinformation or coercion to jurors." Id. at 1310.

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"); State v. Merricks, 831 So.2d 156, 160-161 (Fla. 2002) (holding a bailiff's improper communication with a jury regarding whether the jury could re-hear testimony was *per se* reversible error where the jury reached its verdict promptly after the bailiff's improper statement and the judge's general questioning of the foreperson regarding the jury's request for information did not provide specific information regarding what the jury sought); Oliver v. State, 334 A.2d 572, 573-574 (Md. Ct. Spec. App. 1975) (granting a new trial where a bailiff told the jury he did not think illegal entering and breaking and entering were different when asked by the jury); People v. Khalek, 689 N.E.2d 914, 915 (N.Y. 1997) (granting a new trial where after the court informed the jurors to cease deliberating for the evening, jurors asked a court officer to inform the judge that a verdict – not guilty on all counts – had been reached, but the officer merely repeated the judge's earlier instructions that the deliberations should cease without attempting to contact the court, requiring the jurors to be sequestered and resume deliberations the following day); 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); Mooney v. State, 990 P.2d 875, 892-893 (Okla. Crim. App. 1999) (finding a death sentence was improperly coerced where a court instructed the bailiff to return the jury to the courtroom, but the bailiff had discussions with the jury regarding its note, which altered the course of conduct by the trial judge); State v. Christensen,

the jury's verdict." Id. at 908. The court likened the bailiff's remarks to those of a trial judge that may be coercive. Id. Thus, the defendant was entitled to a new trial. Id.

Examining a similar issue, the Oklahoma Court of Criminal Appeals required a new trial based upon a bailiff informing a jury to deliberate until they reached a verdict. Farrell v. State, 512 P.2d 225, 225-226 (Okla. Crim. App. 1973). The court explained that the general rule was that "any unauthorized communication to a juror during deliberations is presumed to be prejudicial, with the burden clearly upon the State to prove defendant was not prejudiced by a violation of the [state] statute forbidding illegal communication with jurors during their deliberations." Id. at 226. The evidence indicated "the bailiff instructed the jury of her own volition that they were compelled to return a verdict." Id. The statement "was a misstatement of the law as there is no compulsion that jurors be required to return a verdict." Id. "It goes without saying that jurors are not required to be held captive in the jury room until some verdict is rendered." Id.

The South Carolina Code of Laws sets forth the procedure to follow when a jury fails to agree. Pursuant to the statute, "[w]hen a jury, after due and thorough deliberation upon any cause, returns into court without having agreed upon a verdict, the court may state anew the evidence or any part of it and explain to it anew the law applicable to the case and may send it out for further deliberation." S.C. Code Ann. § 14-7-1330. However, "if it returns a second time without having agreed upon a verdict, it shall not be sent out again without its own consent unless it shall ask from the court some further explanation of the law." Id. 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). "An Allen charge cannot be directed to the minority voters on the jury panel, but must instead be even-handed, directing both the majority and the minority to consider the other's views." Id. (citing Green, 351 S.C. at 194, 569 S.E.2d at 323). "Whether an Allen charge is unconstitutionally coercive must be judged 'in its context and under all the circumstances.'" Id. (quoting Tucker v. Catoe, 346 S.C. 483, 491, 552 S.E.2d 712, 716 (2001)); see Lowenfield v. Phelps, 484 U.S. 231, 237 (1988). "An Allen charge is an instruction advising deadlocked jurors to have deference to each other's views, that they should listen, with a disposition to be convinced, to each other's argument." State v. Lee-Grigg, 374 S.C. 388, 418 n.1, 649 S.E.2d 51, 57 n.1 (Ct. App. 2007), *aff'd*, 387 S.C. 310, 692 S.E.2d 895 (2010).

In Tucker, the South Carolina Supreme Court adopted the standard set forth by the United States Supreme Court in Lowenfield to determine whether an Allen charge is unconstitutionally coercive. In Lowenfield, the United States Supreme Court considered, among other things, the following factors: (1) whether the charge speaks specifically to the minority juror(s); (2) whether the charge includes such language as "You have got to reach a decision in this case;" (3) whether there is an inquiry into the jury's numerical division; and (4) whether the jury returns a verdict shortly after the supplemental charge. Tucker, 346 S.C. at 492, 552 S.E.2d at 716 (citing Lowenfield, 484 U.S. at 237); see also Workman, 412 S.C. at 130-131, 771 S.E.2d at 638.

"The trial judge may not indicate to or threaten the jury that they must agree, or failing to agree, they will remain in the jury room for a specified length of time." State v. Williams, 344 S.C. 260, 264, 543 S.E.2d 260, 263 (Ct. App. 2001). In order for an Allen charge to pass constitutional muster, it must remind the jurors that the verdict must be the result of each juror's own convictions, and not mere acquiescence in the conclusion of the other jurors. State v. Pulley, 216 S.C. 552, 555-557, 59 S.E.2d 155, 157-158 (1950); State v. Jones, 320 S.C. 555, 558-559, 466 S.E.2d 733, 734-735 (Ct. App. 1996); State v. Tillman, 304 S.C. 512, 521, 405 S.E.2d 607, 613 (Ct. App. 1991); State v. Hale, 284 S.C. 348, 355, 326 S.E.2d 418, 422 (Ct. App. 1985).

In Dawson, the South Carolina Supreme Court found that the following language included in the Allen charge given to the jury in that case was coercive because it "could be perceived as being directed toward the minority juror:"

> I have sometimes thought that the juror who could render less service to the Court and to the country than any other juror is the juror who says, I know what I want to do in this case and when and if everybody agrees with me, then we'll write a verdict, and we'll not write a verdict until that time.

Id. at 18-20, 572 S.E.2d at 446-447.

In State v. Simon, 126 S.C. 437, 437, 120 S.E. 230, 232-233 (1923), the South Carolina Supreme Court examined a judge's instruction to the jury regarding how long the jury would be required to deliberate. After deliberating for two hours concerning a misdemeanor receiving stolen goods charge, the jury reported to the presiding judge that it was deadlocked. Id. at 437, 120 S.E. at 232. The judge noted that it was "10 minutes of 6" when the jury made this report to the judge. Id. He provided the jurors with an envelope and directed them to continue deliberating: "[i]f you agree between now and 9:30 tomorrow morning, you can come out. If you do not agree between now and then, I can talk to you then, and, if I find you still cannot agree, I would not keep you there any longer." Id. The Court explained the general rule is that "a jury should not be informed of the

court's intention to keep them together for a specified time." Id. at 437, 120 S.E. at 233. The court found "that reasonable ground exists for the apprehension that the verdict here found was the result of the judge's ultimatum rather than the product of that concurrence of the deliberate and conscientious judgments of 12 jurors, based upon the evidence, which, in contemplation of law, the verdict of a jury is intended to represent." Id.; see also 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).

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. Appellant 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. This court'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.

This Court's reliance upon the trial judge's finding that the jurors with whom Bailiff Bolt communicated did not perceive his remarks as a communication and that their verdicts were not influenced by extraneous matters contravenes the law and common sense. As the Seventh

Circuit Court of Appeals explained, the question of coercion must not be left to the jury members as they were not equipped to determine what amounts to legal coercion. Bensinger, 492 F.2d at 239. 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.

Appellant respectfully requests rehearing on this issue regarding the significant points misapprehended and overlooked.

Authentication of Facebook messages

Appellant respectfully requests this Court rehear its decision regarding the authentication of Facebook messages pursuant to Rule 901(b)(4), SCRE.[2] 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. "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-

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

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).

When confronted with Appellant's argument that authentication of writings through social media must consider the particular risks of fraud associated with the specific medium, this court sardonically declared Appellant's argument was "old wine in a new bottle." Appellant respectfully requests this Court make clear that a trial court's authentication ruling must take into account the danger of fraudulent documents specific to the item sought to be authenticated. While this Court's attempt at simplification is admirable, oversimplification of a complicated legal matter must not stand. Recognizing that courts throughout the country struggle with the authentication of evidence derived from social media, most specifically invoking the "Maryland Rule" and the "Texas Rule," this Court refused to acknowledge the distinctive challenges posed by information gathered from social media. It may be naïve to assume that information obtained from social media is undeserving of any additional or special scrutiny, particularly in the age of "deepfakes."[3]

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,

[3] 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).

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 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).

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 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.

The Texas Court of Criminal Appeals also expressed concerns regarding authenticating electronic writings. Tienda v. State, 358 S.W.3d 633 (Tex. Crim. App. 2012). The court explained "computers can be hacked, protected passwords can be compromised, and cell phones can be purloined." Id. at 642. The court observed "[t]hat an email on its face purports to come from a certain person's email address, that the respondent in an internet chat room dialogue purports to identify himself, or that a text message emanates from a cell phone number assigned to the purported author – none of these circumstances, without more, has typically been regarded as sufficient to support a finding of authenticity." Id. at 641-642. Nevertheless, the court found the circumstantial evidence presented in the case before it sufficient to authenticate the MySpace page and information contained therein as being authored by the defendant. Id. at 642. That evidence included numerous photographs of the defendant, including his unique tattoos and distinctive eyeglasses and earring, references to a specific death, references to a specific gang, references to a particular shooting, and evidence of defendant having been on a monitor for a year and a photograph on MySpace of him wearing a monitor. Id. at 645. See also, Parker v. State, 85 A.3d 682, 688 (Del. 2014) (finding Facebook posts allegedly from the defendant authenticated where the substance of the post referenced the altercation that was the subject of the criminal charge, the post was created on the same day as the altercation occurred, and the alleged victim in the case testified to seeing the post and sharing the post).

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").

However, the Third Circuit concluded that Facebook chat logs could not authenticated under Rule 902(11), FRE, because they were not the kinds of documents properly understood as records of a regularly conducted activity under Rule 803(6), FRE. United States v. Browne, 834 F.3d 403, 409 (3rd Cir. 2016). According to the Third Circuit, "any argument to the contrary misconceives the relationship between authentication and relevance, as well as the purpose of the business records exception to the hearsay rule." Id. Evidence is relevant "only if it is what the proponent claims it is, i.e., if it is authentic." Id. The court explained that in the case before it, "the relevance of the Facebook records hinge[d] on the fact of authorship." Id. at 410. Therefore, to authenticate the messages, the government was "required to introduce enough evidence such that the jury could reasonably find, by a preponderance of the evidence that [the defendant] and the victims authored the Facebook messages at issue." Id. The records custodian affirmed "only that the communications took place as alleged between the named Facebook accounts." Id. This was not sufficient. Id.

The Third Circuit also explained the government's "theory of self-authentication" was "predicated on a misunderstanding of the business records exception." Id. The purpose of the business records exception was "to capture records that are likely accurate and reliable in content, as demonstrated by the trustworthiness of the underlying sources of information and the process by which and purposes for which that information is recorded." Id. However, Facebook

did not "purport to verify or rely on the substantive contents of the communications in the course of its business." Id. "At most, the records custodian employed by the social media platform can attest to the accuracy of only certain aspects of the communications exchanged over that platform, that is, confirmation that the depicted communications took place between certain Facebook accounts, on particular dates, or at particular times." Id. at 410-411. According to the court, that was "no more sufficient to confirm the accuracy or reliability of the contents of the Facebook chats than a postal receipt would be to attest to the accuracy or reliability of the contents of the enclosed mailed letter." Id. at 411. The court concluded "the Facebook records [were] not business records under 803(6) and thus [could not] be authenticated by way of Rule 902(11)." Id.

Next, the court considered whether the government authenticated the Facebook chats via Rule 901(a), FRE. The court explained:

> The authentication of electronically stored information in general requires consideration of the ways in which such data can be manipulated or corrupted, and the authentication of social media evidence in particular presents some special challenges because of the great ease with which a social media account may be falsified or a legitimate account may be accessed by an imposter.

Id. at 412 (internal citations omitted). Nonetheless, the Third Circuit concluded the government "provided more than adequate evidence to support the disputed Facebook records reflected online conversations that took place between" the alleged individuals "such that the jury could reasonably find the authenticity of the records by a preponderance of the evidence." Id. at 413 (internal quotations omitted). Four witnesses who participated in the Facebook chats did not identify the records, but did offer "detailed testimony about the exchanges" over Facebook. Id. The testimony "was consistent with the content of the four chat logs." Id. Three witnesses testified that "after conversing with the Button Facebook account ... they met in person with

Button – whom they were able to identify in open court as [the defendant]." Id. The court found this "powerful evidence not only establishing the accuracy of the chat logs but also linking them to [the defendant]." Id. Additionally, when the defendant spoke to the police, he made "significant concessions that served to link him to the Facebook conversations." Id. The defendant's testimony was consistent with the personal details the Facebook user provided throughout his Facebook conversations with the four witnesses. Id. at 414. Finally, the court observed the government "supported the accuracy of the chat logs by obtaining them directly from Facebook and introducing a certificate attesting to their maintenance by the company's automated systems." Id. at 414-415.

The Fifth Circuit Court of Appeals found Facebook messages and text messages properly authenticated by a witness with knowledge in United States v. Barnes, 803 F.3d 209, 217 (5th Cir. 2015). The messages were purportedly between a witness and a defendant. The witness testified she had seen the defendant use Facebook, she recognized his Facebook account, and the Facebook messages matched the defendant's manner of communicating. Id. Further, the witness testified the defendant could send text messages from his cell phone, she had spoken to the defendant on the phone number that was the source of the text messages, and the content of the text messages indicated they were from the defendant. Id. While the witness could not testify to certainty that the defendant authored the messages, the court explained that "conclusive proof of authenticity [was] not required for the admission of disputed evidence." Id.

Contrary to this Court's decision, the state failed to authenticate the Facebook messages purportedly between the deceased and the co-defendant, Karina Galarza. 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. While this Court concluded that a reference to Galarza's sister supported authentication, the message showing that someone other than the account holder for "Ruby Rina" posted messages exposed the weaknesses of the state's authentication argument.

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.

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 Appellant 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 judge's improper admission of the Facebook messages constituted reversible error, and this Court should rehear this matter based upon the significant points overlooked and misapprehended when arriving at a contrary conclusion.

In conclusion, Appellant respectfully requests rehearing regarding the issues on appeal in his case pursuant to Rule 221(a), SCACR.

Respectfully Submitted,

Susan B. Hackett

SUSAN B. HACKETT
Appellate Defender

This 11th day of July, 2019.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Laurens County

Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

FABIAN LAMICHAEL GREEN,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Samuel M. 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 11th day of July, 2019.

Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 11th day of July, 2019.

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

The South Carolina Court of Appeals

The State, Respondent,

v.

Fabian Lamichael R. Green, Appellant.

Appellate Case No. 2017-001332

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

H. Bruce Williams J.

John D. Geathers J.

D. Garrison J.

Columbia, South Carolina

cc: David Matthew Stumbo, Esquire
Alan McCrory Wilson, Esquire
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Melody Jane Brown, Esquire

FILED
July 31, 2019

W. Jeffrey Young, Esquire
The Honorable Donald B. Hocker