STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

Appeal from Laurens County
The Honorable Donald B. Hocker, Circuit Court Judge

On Petition for Writ of Certiorari to the South Carolina Court of Appeals
Opinion No. 5659 (S.C.Ct.App. filed June 26, 2019)

THE STATE,

Respondent,

v.

FABIEN LAMICHAEL GREEN,

Appellant.

Appellate Case No. 2019-001435

RETURN TO PETITION FOR WRIT OF CERTIORARI

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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 decisions 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?

(Petition, p. 2).

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

I. The Court of Appeals did not err in finding the record supported the trial judge's determination a mistrial was not warranted on the basis of the bailiff's inappropriate comments to the jury foreperson when the evidence received dispelled any reasonable probability those comments influenced either the jury's impartiality or the jury's verdict.

II. The Court of Appeals did not err in applying the standard, well-established evidence authentication rules in affirming the trial court's admission of social media messages when evidence was offered under Rule 901(b)(4), SCRE to support authentication by circumstantial evidence showing distinct connections to the victim, Petitioner's co-conspirator, and the circumstances of the crime.

STATEMENT OF THE CASE

Petitioner Fabian Green was indicted by the Laurens County grand jury in July 2016 on the charges of murder (2016-GS-30-1078) and desecration of human remains (2016-GS-30-1079). R. pp. 640-645. Tristan Shaffer, Esq., represented Green on the charges. A jury trial was held May 30th, through June 2nd, 2017, before the Honorable Donald B. Hocker. The jury found Green guilty as charged. (R. p. 553, l. 23 – p. 554, l. 9). Judge Hocker sentenced him to forty-five (45) years imprisonment. (R. p. 483, ll. 16-19). Green filed a timely Notice of Appeal.

After briefing, but without argument, the South Carolina Court of Appeals issued a published opinion affirming the conviction. (App. pp. 1-10). Green petition for rehearing on

July 11, 2019, (App. pp. 11-41), which was denied on July 31, 2019, (App. p. 43). Green then filed a petition for writ of certiorari in this Court on August 28, 2019. This return follows.

RESPONDENT'S STATEMENT OF THE FACTS

In the early evening of May 8, 2016, the victim, Edwin Diaz Charinos, received several flirtatious Facebook messages from a "Ruby Rina" soliciting him to come over to her house located at 108 Queens Circle. (R. p. 183, l. 21 – p. 184, l. 9). Ruby Rina was a nickname used by Karina Galarza, who happened to be Green's current girlfriend. (R. p. 180, l. 15 – p. 181, l. 7). The victim and Galarza had been romantically involved sometime in the past. (R. p. 355, l. 13 – p. 358, l. 24). However, the messages sent to Edwin on May 8th, were a conspiracy between Galarza and Green to lure Edwin to the house so that the couple could murder him. (R. p. 182, l. 1 – p. 189, l. 9). When Edwin arrived, Green emerged from a backroom and beat him to death with the blunt end of a claw hammer. (R. p. 185, l. 14 – 189, l. 13). Green's cousin, Davian Holman,[1] was also present. (R. p. 99, l.19- p. 101, l.11; p. 180, l. 9-12; p. 184, l.13- p. 189, l. 13).

After the murder, Green and Holman loaded Edwin's body in the back seat of Edwin's Ford Mustang and drove it out to a rural location in Lauren's county. (R. p. 131, ll. 12-20; p. 189, l. 14 – p. 193, l. 17). Once they arrived, Green removed the body from vehicle and partially set it on fire. (R. p. 193, l. 18 – 195, l. 25; p. 44, ll. 12-20). After failing to completely burn the body, Green and his cousin proceed to a nearby family member's house, Willie Williams, where they asked for lighter fluid or alcohol. (R. p. 196, l. 11 – p. 197, l. 12; 266, l. 12 – p. 271, l. 22). In the meantime, Galarza was at the house attempting to clean up the large amount of blood from the murder scene. (R. p. 191, l. 15 – p. 192, l. 3).

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[1] Testimony from trial reflects that Mr. Holman suffers from some level of intellectual disability. (R. p. 229, l. 4-18; p. 317, ll. 7-11).

After putting out a missing person report for Edwin Charinos, Law Enforcement received several cellphone screen shots from the victim's parents showing some of the Facebook messages sent to Edwin from Ruby Rina. (R. p. 129, l. 8 – p. 130, l. 15). The messages provided Law Enforcement with the 108 Queens Circle address and referenced Karina Galarza by name. (R. p. 132, l. 22 – p. 133, l. 18; p. 352, ll. 21 – 24; p. 355, l. 13 – p. 358, l. 24). On May 26th, Law Enforcement located Edwin's charred remains after receiving a phone tip from a local who had come across them. (R. p. 44, ll.12-20; p. 49, l. 4 – p. 50, l. 14; p. 94, l. 15 – p. 96, l. 14; p. 122, l. 19 – p. 126, l. 10). Law Enforcement also located the family member Green approached for lighter fluid or alcohol on May 8th, and they corroborated the unusual event. (R. p. 266, l. 12 – p. 272, l. 11; p. 299, ll. 8-10).

Law Enforcement eventually went to 108 Queens to investigate. (R. p. 141, l. 19 – p. 141, l. 7). While there they received information from Karina Galarza. (R. p. 141, l. 8). With this information Law Enforcement were able to get arrest warrants for Green and Holman. (R. p. 141, ll. 2-23). Officers arrested Holman and took him to Laurens County Sheriff Headquarters for questioning. (R. p. 198, l. 15 – p. 199, l. 25; p. 204, l. 4-16). Holman provided Law Enforcement with a detailed confession implicating Green and Galarza. (R. p. 179, l. 22 – p. 205, l. 21; p. 315, l. 8 – p. 317, l. 24). Later on, during a search of the Galarza house, SLED located blood splatter on a china cabinet near the living room couch. (R. p. 154, ll. 17-25; p. 162, l. 23 – p. 166, l. 1). This blood was later confirmed as belonging to the victim. (R. p. 379, l. 3 – p. 381, l. 8). Lastly, while Green was in jail awaiting trial, the detention center staff intercepted a letter that Green had attempted to surreptitiously forward to another inmate. (R. p. 337, l. 4 – p. 339, l. 11). In that letter Law Enforcement discovered a detailed account of the murder, including references to the Facebook messages. (R. p. 410, l. 14 – p. 413, l. 7). Thereafter, SLED, through the use of

an exemplar, were able to confirm that the handwriting as Green's. (R. p. 406, l. 1 – p. 409, l. 4). Green later confirmed during his testimony that he did write the letter, though he contended at trial that he had falsified the information "to give a sense of reality" and to encourage people to think he was "crazy" so they would "leave him alone." (R. p. 445, ll. 6-9; p. 446, ll. 1-5).

STANDARD OF REVIEW

"A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242 (b), SCACR. General reasons for granting a petition include to review a Court of Appeals decision that: (1) reflects a novel question of law; (2) included a dissent; (3) conflicts with this Court's precedent; (4) addressed a substantial constitutional right; or (5) decided a matter of federal law in a way that conflicts with federal precedent. *Id.* The foregoing list is not exclusive, and this Court may exercise its discretion in the absence of these facts. *Id.*

Standard of Review: Mistrial Motions and Evidence Rulings

A decision to grant or deny a motion for mistrial rests within the sound discretion of the trial judge, and that decision will not be disturbed on appeal absent a prejudicial abuse of discretion. *State v. Harris*, 340 S.C. 59, 63, 530 S.E.2d 626, 627-628 (2000). Similarly, "'[t]he admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.'" *State v. Hatcher*, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)).

'"An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.'" *Id.* (quoting *Pagan*, 369 S.C. at 208, 631 S.E.2d at 265).

ARGUMENT

I. The Court of Appeals did not err in finding the record supported the trial judge's determination a mistrial was not warranted on the basis of the bailiff's inappropriate comments to the jury foreperson when the evidence received dispelled any reasonable probability those comments influenced either the jury's impartiality or the jury's verdict.

Relevant Facts:

As the Court of Appeals summarized: "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." (App. p. 3). The record shows the trial judge received the jury verdict, then questioned each juror individual concerning the inappropriate communication. The judge asked the following questions:

1. "Your verdict of guilty on both charges, is that currently your verdict in this case?"
2. "Was and is your verdict based one-hundred percent on the testimony, evidence and law presented to you in this case?"
3. "Was your verdict influenced in any way, with any communication with any of the bailiffs or any third party not connected with the jury in this case?"
4. "Did you have any communication with any of the bailiffs or with any third party not a part of the jury in this case?"

(R. 555, 11. 1-5; R. 557, 11. 8-11; R. 558, 11. 12-15; R. 559, 11. 18-21; R. 560, 11. 20-23; R. 563, 11. 4-7; R. 564, 11. 3-6; R. 565, 11. 4-7; R. 567, 11. 18-21; R. 568, 11. 20-25). All the jurors affirmatively indicated that guilty on both charges was their verdict; their verdict was based one-hundred percent on the testimony, evidence, and law charged; and, that they were not influenced in any way by any improper communication. (R. p. 555, l. 1 – p. 568, l. 25). Two of the jurors indicated that they did have communication with the bailiffs, but that the communication was limited to entering and exiting the jury room and taking breaks. (R. p. 561, l. 20 – p. 562, l. 1; p. 665, l. 17 – p. 566, l. 21). Thereafter, the judge permitted Defense Counsel to question Bailiff Johnny Bolt. Mr. Bolt testified that some jurors expressed some concern about

passive aggressive acts from Appellant's family being directed toward the jurors. (R. p. 572, l. 3 – p. 573, l. 18). Counsel asked:

> Q: Did any, at any point during their deliberations did they ever mention to you that they may be deadlocked?
>
> A: No, no. But they just, the Foreman did say, what happens if we can't reach a, reach a, you know, that, we can't reach any verdict. And I said, well, 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.
>
> Q: Okay. Did you ever tell them anything about an *Allen* Charge?
>
> A: Well, I was familiar and I said, well, he will give an *Allen* charge, you know, because I have been doing 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. p. 573, l. 19 – 574, l. 11). During question, the other bailiff denied hearing Mr. Bolts' response to the juror question, and indicated that he did not witness any indication that the jury was deadlocked. (R. p. 575, l. 15 – p. 577, l. 3). Based upon Mr. Bolt's testimony, Defense Counsel moved for a mistrial. (R. p. 580, l. 4 – p. 582, l. 15). The judge concluded:

> Well, here is how I view this. First of all, certainly the existence of some communication of some sort with the Bailiffs caused me enough concern to where I immediately got the lawyers back in-chambers to, not only to explain to you guys what I understood took place, number one. And then gave you the opportunity to hear, informally in-chambers from Mr. Bolt and Mr. Easley. While it does concern me that Mr. Bolt mentioned [sic] *Allen* charge, while that concerns me and should not ever happen again, I have to take what the jurors told me that they were not influenced by any communications. So they did not perceive, and let me digress for just a moment. How I understand Mr. Bolt's statement of an *Allen* charge was just to the Forelady. I may be wrong, I wasn't back there, that is my perception. But be that as it may, the Forelady or anybody else did not perceive that as a communication or something that would arise to having a communication. And furthermore they were uninfluenced by anything outside of the testimony, evidence and law presented in this case. While again, I don't condone by any means what was, what was done or said. I don't think it rises to the level of creating prejudice to the Defendant or rising to the level that the

> drastic remedy of a mistrial should be granted. So I am going to deny your motion, Mr. Shaffer.

(R. p. 582, l. 18 – p. 583, l. 17).

The Court of Appeals correctly noted that appellate review was restricted to whether the trial judge abused his discretion in light of the evidence of record. (App. p. 8). The Court also correctly noted its deference to the trial judge's credibility determinations given his "superior position to gauge credibility in the juror misconduct context." (App. p. 9). The Court then detailed five specific points supporting the trial judge's decision:

> 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.

(App. pp. 9-10).

The Court of Appeals "commend[ed] the trial court's deft handling of this issue," and found "the evidence excludes any reasonable possibility that the bailiff's misconduct influenced the jury's impartiality or its verdict," thus, Green failed to show an abuse of discretion. (App. p. 10).

Analysis of Petition Argument:

Green concedes the Court of Appeals correctly identified the structure of review. (Petition, p. 8). He contends, however, the Court of Appeals erred in affirming the trial judge's

determination the improper communication was not prejudicial. (Petition, pp. 11-12). The record supports the Court of Appeals' opinion.

Petitioner contends essentially that the trial judge erred in finding the jurors did not perceive the communication to be something of note. (Petition, p. 12). He contends the jurors intentionally did not disclose the substantive communication while the bailiffs did; therefore, there was "intentional concealment" that supported Green's mistrial motion. (Petition, p. 12). He also argues the comments amounted to an improper, coercive charge compared to a proper charge under *Allen v. United States*, 164 U.S. 492 (1896). (App. p. 13).

"It is the duty of the trial judge to see that a jury of unbiased, fair and impartial persons is impaneled. *State v. Powers*, 331 S.C. 37, 43, 501 S.E.2d 116, 119 (1998) (citing *State v. Matthews*, 291 S.C. 339, 353 S.E.2d 444 (1986); *State v. Caldwell*, 300 S.C. 494, 388 S.E.2d 816 (1990)). Critically, a "trial judge's determination of the neutrality or impartiality of a juror should not be disturbed unless error is manifest." *DeLee v. Knight*, 266 S.C. 103, 111-12, 221 S.E.2d 844, 847 (1975) (citing *Irvin v. Dowd*, 366 U.S. 717 (1961)). Deference should be given to the trial judge's decision regarding the qualification of the jury as the trial judge is able to actually see and hear the jurors in assessing their demeanor, credibility, and impartiality. *State v. Evins,* 373 S.C. 404, 418, 645 S.E.2d 904, 911 (2007). "The findings of the trial court on questions of fact relating to the fitness of a juror are conclusive, and will not be disturbed on review unless manifestly erroneous." *State v. Maxey*, 218 S.C. 106, 110, 62 S.E.2d 100, 102 (1950).

When carefully considered, Green's argument is simply the trial judge should not have *weighed* the juror's testimony as he did. (See also Petition, p. 14, suggesting in Green's view the evidence should not have been found credible). The Court of Appeals cannot be faulted for

applying correct principles of appellate review. *See e.g., State v. Perez*, 423 S.C. 491, 499, 816 S.E.2d 550, 554 (2018), *reh'g denied* (Aug. 2, 2018) ("credibility analysis inappropriate for appellate review"); *State v. Harris*, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000) ("The trial judge is in the best position to determine the credibility of the jurors; therefore, this Court grants him broad deference on this issue."); *see also McGill Bros. v. Seaboard Air Line Ry.,* 75 S.C. 177, 55 S.E. 216, 217 (1906) ("...the reasons for refusing to interfere with the discretion of a circuit judge in matters involving the purity of the jury box and the integrity of verdicts are peculiarly strong. He is in the atmosphere of the trial, and has opportunity to estimate the character and intelligence of the jurors, as well as of the person charged with improper conversation or corrupt dealings with them.").

Here, the trial judge determined, based upon the testimony received, that only one juror was even exposed to the bailiff's statement. (*See* R. p. 582, l. 18 – p. 583, l. 17). Further, each juror confirmed they had remained impartial and that their decision was based solely upon the evidence presented at trial. The judge found the testimony to be truthful, and as to denial of "communication," he reasonably determined that the foreperson "did not perceive that as a communication or something that would arise to having a communication." (R. p. 583, ll. 4-10). *See State v. Kelly,* 331 S.C. 132, 143, 502 S.E.2d 99, 105 (1998) ("The trial judge did not find members of the jury were being untruthful. We respect this finding.").

Petitioner also contends what amounted to a coercive *Allen* charge established prejudice sufficient to warrant a mistrial. (Petition, p. 13). In particular, the Court of Appeals found this case distinguishable from *State v. Cameron*, 311 S.C. 204, 207–08, 428 S.E.2d 10, 12 (Ct. App. 1993), and *Blake by Adams v. Spartanburg Gen. Hosp.,* 307 S.C. 14, 413 S.E.2d 816 (1992). (App. p. 10). A review of those cases supports the Court of Appeals' reasoning.

Cameron concludes that a new trial should not be granted "when the subject matter of the communication was harmless and could not have affected the verdict." *State v. Cameron*, 311 S.C. 204, 207–08, 428 S.E.2d 10, 12 (Ct. App. 1993) (quoting *Holmes v. United States*, 284 F.2d 716, 718 (4th Cir.1960)) (emphasis added). It also reasons that "[t]he mere fact ... that some conversation occurred between a juror and the court official would not necessarily prejudice a defendant." *Id.* at 207–08, 428 S.E.2d at 12. It is difficult to comprehend how the bailiff's brief comment to the jury foreperson could have had any effect on the jury's guilty verdict. It was given in response to a juror's hypothetical question.[2] There is no evidence in the record that the jury had, in fact, reached an impasse. Moreover, the trial judge carefully instructed the jury that a verdict must be unanimous. *See* R. p. 549, ll. 20-22.

In *Blake*, at issue was the effect of bailiff comments to a juror that "urg[ed] the jury to reach a verdict," including "the trial judge did not like a hung jury, and that a hung jury places an extra burden on taxpayers." 307 S.C. at 16, 413 S.E.2d at 817. Here, the bailiff simply indicated the jury would be charged and the judge would address them if deadlock occurred. (App. p. 9; see also R. pp. 573-74). But again, there was no suggestion of deadlock. (See R. p. 573, ll. 19-21; p. 576, ll. 23-25).

In sum, Green asks this Court to re-evaluate credibility rulings on a record that shows a careful consideration of the evidence gathered on the bailiff communication. Green fails to show error either by the Court of Appeals or the trial judge. The petition should be denied.

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[2] *See McLain v. Gen. Motors Corp.*, 586 A.2d 647, 655 (Del. Super. Ct. 1988) (denying request for inquiry in similar circumstances after finding: "statement allegedly made by the bailiff in this case is not prejudicial. The bailiff did not comment upon the evidence or the parties. There is no suggestion that the bailiff's remark was a deliberate attempt to influence the jury's verdict or to hasten their deliberations."); *Lamb v. State*, 127 Nev. 26, 45, 251 P.3d 700, 713 (2011) (holding that bailiff's exchange with the jury, while improper, nonetheless did not carry a reasonable probability or likelihood of having influenced its verdict because it did not introduce incorrect law in the proceeding.).

II. The Court of Appeals did not err in applying the standard, well-established evidence authentication rules in affirming the trial court's admission of social media messages when evidence was offered under Rule 901(b)(4), SCRE to support authentication by circumstantial evidence showing distinct connections to the victim, Petitioner's co-conspirator, and the circumstances of the crime.

Relevant Facts:

At a pre-trial hearing, the State explained that messages were obtained from the victim's Facebook account. They were sent to the victim from an account using the alias "Ruby Rina." (R. p. 2, ll. 4-20). The State was able to gain access through the victim's father, who had acquired the victim's password. (R. p. 2, l. 25 – p. 21, l. 3). The Solicitor further testified that the messages indicated that there was a prior relationship between the victim and Karina Galarza, and that the victim had been invited to murder scene on the day of his death. (R. p. 3, ll. 4-14). The State confirmed that it had a witness that would confirm that Ruby Rina was the Facebook alias used by Karina Galarza. (R. p. 3, ll. 15-23). Further, the State would show Green's letter mentioned using Facebook to lure the victim to the murder scene. (R. p. 7, ll. 11-18).

The Defense raised a concern as to authentication as neither party to the conversation would be testifying. (R. p. 16, ll. 1-20). The State responded that it had a portion of the messages where the victim referred to the individual as Karina, and repeated that a witness would also testify that is was Karina Galarza's account. (R. p. 16, l. 22 – p. 17, l. 15).

The judge found no authentication issue. (R. p. 20, 11. 2-3). He explained that if the father testified "this was Edwin's Facebook account, I've got the password," and the State could authenticate the identity of Ruby, then the messages were authenticated, as far as the judge was concerned. (R. p. 20, 11. 3-7).

Prior to the victim's father testifying, the defense objected again to lack of proper authentication. (R. p. 114, 11. 4-6). The judge indicated that he would hold off on ruling until the State sought to move the messages into evidence. However, he expressed that he felt the

testimony from the victim's father, who had gained access to his son's Facebook account, could adequately authenticate the messages. (R. p. 114, l. 17 – p. 115, l. 7).

The deceased's father, Edwin Anibal Diaz Cruz, explained that his son had a Facebook account. (R. p. 128, 11. 12-25). The father testified that he was able to access the account after his son went missing on May 8, 2016. (R. p. 129, 11. 1-4). The father then provided law enforcement with screenshots of relevant portions of the Facebook messages he retrieved. (R. p. 129, 11. 19-23; R. 130, 11. 9-11). From this, Investigators proceeded to the Queens Circle address sent from "Ruby Rina." (R. p. 132, 1. 22 – p. 133, 1. 18; p. 134, 11. 1-8). There they found both Green and Galarza. After interviewing Galarza, Investigators attained sufficient information to arrest both of them. (R. p. 141, 11. 10-13).

Green's cousin, Holman, confirmed in his trial testimony that "Ruby Rina" was, in fact, Karina Galarza, and that Green and Galarza were dating on the day of the murder. (R. p. 180, l. 15 – p. 181, l. 7). He also testified that Galarza resided at 108 Queens Circle, and in the hours leading up to the murder the couple spent a lot of time typing and laughing on a cell phone. (R. p. 182, ll. 5-25; p. 183, l. 21 – p. 184, l. 5).

Thereafter, the State presented testimony from Investigator Walter Bentley. He testified that he gained access to the victim's Facebook account and reviewed the messages in preparation for trial. (R. p. 349, ll. 9-25). He then copied the messages to a Word Document to submit at trial. (R. p. 350, l. 21 – p. 351, l. 2). Investigator Bentley testified that he was familiar with Karina Galarza's mother, Minerva Tapia, who had assisted Bentley several times in the past with translations when he was employed with the Lauren County Sheriff's Department. He was also aware that Tapia had a daughter named Karina, and that the family resided at 108 Queens circle. (R. p. 351, l. 12 – p. 352, l. 14). After Investigator Bentley's testimony, the State sought to

introduce the substance of the Facebook messages which the judge accepted, having found them sufficiently authenticated. (R. p. 353, l. 24 – p. 354, l. 12). The judge noted Defense Counsel's prior objections. (R. p. 354, ll. 8-10). Within the messages, the victim identified the other party as Karina and was invited to 108 Queens Circle on the day of his murder. (R. p. 352, ll. 19-24; p. 358, l. 11 – p. 359, l. 13).

Towards the end of the State's case, the State introduced a letter Green had written that was intercepted and seized as contraband while he was in jail awaiting trial. (R. p. 337, l. 5 – p. 338, l. 4; p. 408, l. 24 – p. 409, l. 4). In the letter, Green acknowledges Facebook messages were used to lure the victim to the home. (R. p. 410, l. 25 – p. 411, l. 9).

The Court of Appeals found that authentication was established by circumstantial evidence such that the dictates of Rule 901(b)(4), SCRE were met. (App. p. 6). In particular, the Court resolved:

> 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 90l(b)(4), SCRE, sets.

(App. p. 7).

Analysis of Petition Argument:

Petitioner contends that there should be a greater authentication burden for electronically stored information than merely establishing account ownership. (Petition, p. 18). He contends not only that no participant to the conversations testified, but also that the evidence was not

sufficient to show "distinctive characteristics" to meet authentication demands. (Petition, p. 23). His position lacks supports.

"A party offering evidence must meet '[t]he requirement of authentication ... as a condition precedent to admissibility.'" *Deep Keel, LLC v. Atl. Private Equity Grp.*, LLC, 413 S.C. 58, 64, 773 S.E.2d 607, 610 (Ct. App. 2015) (quoting SCRE 901 (a)). "The authentication requirement 'is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.'" *Id.* Importantly, "the burden to authenticate evidence is not high and requires only that the proponent of the evidence offer a satisfactory foundation from which the jury could reasonably find the evidence is authentic." *Deep Keel, LLC*, 413 S.C. at 64, 773 S.E.2d at 610 (internal quotations omitted).

In *State v. Hightower*, this Court reviewed whether a trial judge erred in admitting an incriminating typewritten letter, signed with the typewritten initials 'WHH.' The petitioner in the case argued there was no proof of the authenticity of the typed initials. *State v. Hightower*, 221 S.C. 91, 105, 69 S.E.2d 363, 370 (1952). This Court affirmed:

> We think there is sufficient proof of the authenticity of the letter and of the identity of the writer of that letter to warrant its admission in evidence. 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,—these circumstances justify its admission.

Id.

The Court of Appeals correctly reasoned this holding is properly applied here. (See App. p. 6). Petitioner makes arguments based on speculation of whether another could have made the communications, (see Petition, pp. 23-24), but that does not defeat the circumstances noted for admissibility (nor does it somehow prohibit making those arguments to a jury). Again, the

circumstances noted support admissibility based on well-established rules of evidence. And the record supports the Court of Appeals determination "the content of the messages was distinctive enough that a reasonable jury could find Galarza wrote them." (App. p. 7).

First, Holman confirmed that "Ruby Rina" was Galarza. *See* R. p. 181, ll. 6-7. Second, "Julissa" was referenced in the message and that was Galarza's sister's name. (R. p. 535, ll. 2-5). Third, the victim referred to the other party as "Karina" and the user did not seek to deny or correct the assumption. (R. p. 352, ll. 19-24). Further, when asked for her address, Galarza provided that of her residence at 108 Queens Circle. (R. p. 358, l. 11 – p. 359, l. 13; p. 352, ll. 4-24). Fourth, references to "Ruby Rina's" boyfriend were consistent with the relationship she had with Green. (R. p. 435, l. 22- p. 436, l. 1). Fifth, the timing of the message was consistent with the crime. (R. p. 184, ll. 1-5; p. 354, l. 16- p. 359, l. 12). Sixth, victim disappeared after this invitation to 108 Queens Circle, and his blood was found there. (R. p. 379, ll. 3-11). As the Court of Appeals determined, "[t]aken together, these circumstances serve as sufficient authentication to meet the low bar Rule 901 (b)(4), SCRE, sets. (Ap. p. 7).[3]

Petitioner's arguments to non-binding precedent from other jurisdictions is inadequate to undermine applicability of Rule 901(b)(4). (See Petition, pp. 17-22). These cases are immediately distinguishable as the bulk of the arguments Petitioner keys in upon rest on the question of authentication by account ownership. As demonstrated, the State presented

[3] As it did in its brief before the Court of Appeals, Respondent also asserts that even if improperly admitted, admission of the messages could only have been harmless. Error "is harmless where ... guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached." *State v. Collins*, 409 S.C. 524, 538, 763 S.E.2d 22, 29-30 (2014), *reh'g denied* (Sept. 24, 2014). The State presented Green's graphic letter admitting the murder; Holman's testimony describing the murder and the actions to destroy the body; Willie's Williams' testimony on Green's search for lighter fluid or alcohol, and the DNA evidence found at the scene linked victim to the murder scene. The evidence presented by the State was overwhelming and supported the verdict that Green murdered the victim at his girlfriend's house, moved his body to a nearby rural area, and then attempted to burn the victim's remains.

significantly more evidence than a simple profile printout to support "Ruby Rina's" true identity. Petitioner has also failed to adequately address other evidence of record which is critical in authentication and/or a harmless error analysis. *See Com. v. Williams*, 456 Mass. 857, 926 N.E.2d 1162 (2010) (concluding that admission of improperly authenticated contents of social networking Internet website messages did not create a substantial likelihood of a miscarriage of justice in first-degree murder trial, where content of messages was rendered insignificant by testimony of two witnesses who identified defendant as the shooter and corroborative testimony of other witnesses.); *United States v. Vayner*, 769 F.3d 125, 132 (2d Cir. 2014) (finding lack of authentication establishing account holder when government failed to present *any supporting evidence* other party's VK page which included name, photograph, and some details about his life consistent.) (emphasis added). *See also Tienda v. State*, 358 S.W.3d 633, 647 (Tex. Crim. App. 2012) ("Because there was sufficient *circumstantial evidence* to support a finding that the exhibits were what they purported to be—MySpace pages the contents of which the appellant was responsible for—we affirm the trial judge and the court of appeals which had both concluded the same.") (emphasis added); *United States v. Barnes*, 803 F.3d 209, 217 (5th Cir. 2015) ("The Government laid sufficient foundation regarding Holsen's Facebook and text messages. Holsen testified that she had seen Hall use Facebook, she recognized his Facebook account, and the Facebook messages matched Hall's manner of communicating . . . Regardless, any potential error in admitting the text and Facebook messages was harmless. . . *the content of the messages was largely duplicative of what Holsen and numerous other witnesses testified to directly.*") (emphasis added). Instead, he rests on what appears to be argument raising a mere possibility of doubt rather than addressing the standard for authentication as explained in

Hightower, supra, or the overwhelming evidence of guilt. (See Petition, p. 23-24). Green's reliance on the non-binding cases and the possibility of doubt for authentication is misplaced.

Petitioner has failed to show either factual or legal error by the Court of Appeals or by the trial judge. The petition should be denied.

CONCLUSION

For all of the foregoing reasons, the petition should be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT[4]

October 7, 2019

[4] Respondents acknowledge the work of Samuel M. Bailey, formerly an Assistant Attorney General who had been assigned this matter while it was pending in the Court of Appeals. Portions of that work are substantially incorporated herein.

RECEIVED
OCT 10 2019
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from Laurens County
The Honorable Donald B. Hocker, Circuit Court Judge

On Petition for Writ of Certiorari to the South Carolina Court of Appeals
Opinion No. 5659 (S.C.Ct.App. filed June 26, 2019)

THE STATE,

Respondent,

v.

FABIEN LAMICHAEL GREEN,

Petitioner.

Appellate Case No. 2019-001435

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the Return to Petition for Writ of Certiorari on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to: Susan B. Hackett, Esquire, Office of Appellate Defense, P.O. Box 11589, Columbia, South Carolina, 29211

I further certify that all parties required by Rule to be served have been served.

This 7th day of October, 2019.

ANGELA BENNETT
Administrative Coordinator

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
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ALAN WILSON
ATTORNEY GENERAL

October 7, 2019

RECEIVED
OCT 10 2019
S.C. SUPREME COURT

The Honorable Daniel S. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, South Carolina 29211

Re: The State v. Fabien LaMichael Green
Appellate Case No: 2019-001435

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the *Return to Petition for Writ of Certiorari* along with proof of service in the above-referenced case.

Sincerely,

Angela Bennett
Legal Assistant to Melody J. Brown
Senior Assistant Deputy Attorney General
S.C. Bar No: 14244

MJB/ab
Enclosures

cc: Susan B. Hackett, Esquire
The Honorable Jenny A. Kitchings
Victim Advocacy Division