ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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

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S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

FABIAN LAMICHAEL GREEN,

PETITIONER

APPELLATE CASE NO. 2019-001435

BRIEF OF PETITIONER

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ISSUES PRESENTED

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

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

STATEMENT

On July 22, 2016, a Laurens County grand jury indicted Petitioner for desecration of human remains and murder. R. 640-641; R. 643-644. The state, represented by O. Warren Mowry, Jr., and James C. Todd, IV, called the case to trial before the Honorable Donald B. Hocker and a jury on May 30, 2017. R. 15. Tristan Shaffer represented Petitioner. R. 15. The jury reached its verdicts of guilty as to both counts after deliberating for approximately four hours. R. 551, ll. 7-8; R. 551, ll. 11-17; R. 551, l. 23 – R. 552, l. 13. Ultimately, Judge Hocker sentenced Petitioner to ten years imprisonment for desecration of human remains and forty-five years imprisonment for murder. R. 587, ll. 17-19. He ordered the sentences to be served concurrently. R. 587, ll. 16-17; R. 642; R. 645.

On June 12, 2017, Petitioner served his notice of appeal. On June 26, 2019, the Court of Appeals published an opinion addressing (1) Petitioner's the substantial constitutional right to a fair and impartial jury where a bailiff improperly communicated with at least one juror, and (2) a novel issue of law in this state – the authentication of Facebook messages. State v. Green, 427 S.C. 223, 830 S.E.2d 711 (Ct. App. 2019); App. 1-10. Concerning the first issue, the Court of Appeals held a bailiff improperly communicated with a juror regarding the consequences of an impasse, but the Court determined the state "overthrew the presumption of prejudice" arising from the improper communication based upon facts not supported by the record and a misapplication of controlling law. Additionally, the Court of Appeals determined the state properly authenticated Facebook messages where the state was unable to produce a participant in the conversation, a custodian of the records, or anyone with personal knowledge about the messages.

Petitioner filed a petition for rehearing on July 11, 2019. App. 11-42. Subsequently on July 31, 2019, the Court of Appeals denied the petition. App. 43.

Thereafter, Petitioner filed a petition for writ of certiorari. On January 16, 2020, this Court granted certiorari to review these matters. This brief follows.

ARGUMENT

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

Standard of review

"In criminal cases, the appellate court sits to review errors of law only." State v. Hewins, 409 S.C. 93, 102, 760 S.E.2d 814, 819 (2014). The appellate court is "bound by the trial court's factual findings unless they are clearly erroneous." Id.

A trial judge's decision denying a mistrial will be reversed on appeal if the denial amounts to an abuse of discretion. State v. Rowlands, 343 S.C. 454, 458, 539 S.E.2d 717, 719 (Ct. App. 2000). "Whether a mistrial is manifestly necessary is a fact specific inquiry. It is not a mechanically applied standard, but rather is a determination that must be made in the context of the specific difficulty facing the trial judge." Id. at 457–58, 539 S.E.2d at 719 (internal quotations and citations omitted). Although the decision to grant or deny a mistrial is within the sound discretion of the trial court, the appellate court must reverse the ruling if the decision was an abuse of discretion amounting to an error of law. State v. Dial, 405 S.C. 247, 257, 746 S.E.2d 495, 500 (Ct. App. 2013) (citing State v. Wiley, 387 S.C. 490, 495, 692 S.E.2d 560, 563 (Ct. App. 2010)). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." State v. Jennings, 394 S.C. 473, 477-478, 716 S.E.2d 91, 93 (2011).

Relevant facts

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

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

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

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

Prior to hearing from the bailiffs, Judge Hocker found the responses from the jurors were "controlling," but allowed defense counsel to question the bailiffs to allow for "a complete record." R. 569, l. 22 – R. 570, l. 7. After the bailiffs testified, defense counsel moved for a mistrial based upon improper influences. R. 580, ll. 11-25; R. 581, ll. 4-7; R. 581, ll. 11-14.

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

Discussion

"The Sixth and Fourteenth Amendments of the United States Constitution guarantee a criminal defendant a fair trial by a panel of impartial and indifferent jurors." Estelle v. Williams, 425 U.S. 501 (1976); Irvin v. Dowd, 366 U.S. 717 (1961); see also S.C. Const. art. I, §§ 3 & 14. "The jury is a central foundation of our justice system and our democracy." Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 860 (2017). "The jury is a tangible implementation of the principle that the law comes from the people." Id. "The failure to accord an accused a fair hearing violates even the minimal standards of due process." Irvin v. Dowd, 366 U.S. 717, 722 (1961).

"The evidence developed against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." Parker v. Gladden, 385 U.S. 363, 364 (1966) (internal citation and quotation omitted). "[T]he very heart of a 'fair trial' embodies a disciplined courtroom wherein an accused's fate is determined solely through the exercise of calm and informed judgment." State v. Stewart, 278 S.C. 296, 303, 295 S.E.2d 627, 631 (1982). A jury must "render its verdict free from outside influences of whatever kind and nature" and make its decision based solely on the evidence admitted during the trial. State v. Cameron, 311 S.C. 204, 207, 428 S.E.2d 10, 12 (Ct. App. 1993); see also State v. Cooper, 334 S.C. 540, 551, 514 S.E.2d 584, 590 (1999); State v. Bantan, 387 S.C. 412, 422, 692 S.E.2d 201, 206 (Ct. App. 2010). "In a criminal prosecution, the conduct of the jurors should be free from all extraneous or improper influences." State v. Kelly, 331 S.C. 132, 141, 502 S.E.2d 99, 104 (1998); see also Cooper, 334 S.C. at 551, 514 S.E.2d at 590. Conduct that affects the jury's impartiality will affect the verdict. Kelly, 331 S.C. at 141, 502 S.E.2d at 104.

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

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

Remmer v. United States, 347 U.S. 227, 229 (1954). Although the "presumption is not conclusive," "the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact was harmless to the defendant. Id. If misconduct occurred, then the trial court must determine whether the misconduct improperly influenced the jury. Bantan, 387 S.C.

at 423, 692 S.E.2d at 206. The "[r]elevant factors to be considered in determining whether outside influences have affected the jury are the number of jurors exposed, the weight of the evidence properly before the jury, and the likelihood that curative measures were effective in reducing the prejudice." State v. Kelly, 331 S.C. 132, 141-142, 502 S.E.2d 99, 104 (1998).

As an initial matter, the Court of Appeals correctly determined the improper communication between the bailiff and the jury was presumptively prejudicial to Petitioner. State v. Green, 427 S.C. 223, 236, 830 S.E.2d 711, 717 (Ct. App. 2019). There was no challenge to this portion of the Court's opinion; therefore, it is the law of the case. See Rule 242(d)(2), SCACR (stating that "[o]nly those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court"); Mazloom v. Mazloom, 392 S.C. 403, 403, 709 S.E.2d 661, 661 (2011) (refusing to address a "portion of the question" presented "because it was not raised in the petition for rehearing to the court of appeals"); Robinson v. Estate of Harris, 388 S.C. 630, 641 n.8, 698 S.E.2d 222, 228 n.8 (2010) (noting that failing to raise an issue in the petition for rehearing was a procedural bar to review); Camp v. Springs Mortgage Corp., 310 S.C. 514, 516, 426 S.E.2d 304, 305 (1993) (declining to review an issue not presented in the petition for rehearing); First Union Nat. Bank of South Carolina v. Soden, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) (explaining that "[f]ailure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal" because "[t]he unchallenged ruling, right or wrong, is the law of the case and requires affirmance").

However, the Court's determination that the state "overthrew the presumption by proving there was no reasonable possibility the comments influenced the verdict" was unsupported by the

record and contravened controlling authority. This 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). "The 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).

In a case bearing similarities to the instant matter, the Court of Appeals upheld a trial judge's grant of a new trial. See Blake, 307 S.C. at 16, 413 S.E.2d at 817. During a medical malpractice case, a bailiff "allegedly made statements to the effect that the trial judge did not like a hung jury, and that a hung jury places an extra burden on taxpayers." Id. Although the "bailiff's remarks to the jurors" raised "the same concerns with the jury about the necessity of reaching a

verdict" that a judge may raise with the jury, the bailiff's statements did not include the necessary language to "ensure that no juror feels compelled to sacrifice his conscientious convictions in order to concur in the verdict." Id. "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.

In State v. Cameron, 311 S.C. 204, 208, 428 S.E.2d 10, 12 (Ct. App. 1993), the Court of Appeals 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. The Court disagreed. As the 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).

Communications between bailiffs and jurors 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, 567 P.2d 654, 656-657 (Wash. Ct. App. 1977) (holding the appellate court could not say the bailiff's remarks had no prejudicial effect on the jury beyond a reasonable doubt where there was conflicting evidence regarding the bailiff telling the jury that rehearing testimony would take hours and was disfavored and that if the jury could not reach a verdict, then a retrial would result).

In Holmes v. United States, 284 F.2d 716, 717-718 (4th Cir. 1960), the Fourth Circuit granted a new trial "because of improper communication by a court official of prejudicial information to the jury." In response to a juror's question, a deputy marshal indicated one of the defendants was serving a six-year jail sentence. Id. at 718. The Fourth Circuit explained the "private communication of the court official to members of the jury" was an "occurrence which cannot be tolerated if the sanctity of the jury system is to be maintained." Id.

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. "When there has been such a communication, a new trial must be granted unless it clearly appears that the subject matter of the communication was harmless and could not have affected the verdict." Id. The Court found "[t]he subject matter of the communication was far from harmless" because "[n]othing had occurred at the trial to make relevant evidence of a prior conviction" of one of the defendants. Id.

Certainly, "communications" between jurors and bailiffs "concerning administrative matters may not be prejudicial," but "when communications involve matters of law, the risk of prejudice is present and communication by the bailiff to jurors on such matters is improper." State v. Floyd, 725 N.W.2d 817, 828 (Neb. 2007), *rev'd on other grounds by* State v. McCulloch, 742 N.W.2d 727 (Neb. 2007). The Nebraska Supreme Court found a bailiff's communications with a juror improper where the bailiff indicated that the deliberations would last until the jurors reached a verdict or that there was no time limit to deliberations and that jurors could be required to deliberate the rest of the week. Id. at 829. "The communication went beyond simple administrative matters." Id. The question "should have been referred to the court, and the bailiff should not have attempted to give any direct answer to the question." Id.

The court also found resulting prejudice from the improper communication. Id. The court concluded "the improper communication from the bailiff to the juror would have affected the average juror in a way that would have prejudiced [the defendant] and denied him a fair trial." Id. at 830. The court determined "the communication could have pressured the average juror to change his or her vote in order to avoid protracted deliberations." Id.; see also State v. Crowell, 594 P.2d 905, 907-908 (Wash. 1979) (finding prejudice from a bailiff's statements that a jury would be required to deliberate until they reached a verdict); Farrell v. State, 512 P.2d 225, 225-226 (Okla.

Crim. App. 1973) (finding prejudice where the bailiff instructed the jury they were compelled to return a verdict).

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. See also Perez v. Community Hosp. of Chandler, Inc., 929 P.2d 1303 (Ariz. 1997) (holding that a litigant was not required to demonstrate prejudice where a bailiff responding to a question about a deadlock because the nature of the error made it impossible to ascertain the degree of prejudice resulting from the communication).

The Washington Supreme Court concluded a bailiff's statement there were no lodgings available to the jury and that they would be required to deliberate until they reached a verdict was improper and was of a type that would prejudice a jury. State v. Crowell, 594 P.2d 905, 907-908 (Wash. 1979). The court explained "bailiff's statements here can be viewed as designed to hasten 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, this 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, this 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), this 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. This 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. This 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).

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

Court of Appeals erred in relying upon Judge Hocker's conclusion. See Green, 427 S.C. at 236, 830 S.E.2d at 717 (stating that "none of the jurors testified there was any communication with the bailiff, other than about incidental administrative matters" and the "trial judge took this to mean not even the foreperson perceived the bailiff's remark as worthy of attention or remembrance").

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. 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.

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, reluctantly, admitted to substantive conversations with the jurors. The trial judge improperly concluded the jurors "did not perceive that as a communication or something that would arise to having a communication" based solely on the fact that the jurors did not reveal the communication during their testimonies.

The questions posed to the jurors were reasonably comprehensible to the average juror such that responses about the conversations about a deadlock should have been revealed. Without question, the subject of the inquiry – questions about a deadlock – were of such a nature that the jurors' failure to respond was unreasonable. Cf. State v. Woods, 345 S.C. 583, 587-588, 550 S.E.2d 282, 284 (2001). The jurors' concealment of the conversations supports Petitioner's request for a mistrial contrary to the conclusion of the trial judge and the Court of Appeals.

As explained, the subject matter of the communication was not harmless, and it could have affected the verdict. See Remmer v. United States, 347 U.S. 227, 229 (1954) (explaining any private communication with a jury is presumptively prejudicial and the prosecution must establish that the contact was harmless to the defendant); Holmes, 284 F.2d at 718 (explaining that in order for a private communication between a court official and a member of the jury occurs, a new trial must be granted unless it clearly appears that the subject matter of the communication was harmless and could not have affected the verdict).

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

The Court of Appeals reasoned that "the bailiff's comments, while astonishingly inappropriate, did not reference facts about the case and cannot be reasonably spun as an Allen charge." Green, 427 S.C. at 236, 830 S.E.2d at 717. To the contrary, the record fully supports the argument that Bailiff Bolt's improper communication to the jury was the equivalent of a coercive Allen charge. To support its reasoning, the Court of Appeals claimed, "the bailiff emphasized the *court* might give them an 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." (emphasis in original). This is not supported by the record. According to Bailiff Bolt, when the foreperson asked about a deadlock, he said, "[W]ell, he *will* give an Allen charge, you know, because I have been doing [this] a lot, I have seen this and I just mentioned, you know, that is usually the procedure that they do. And I said, yeah, he would probably give you an Allen charge. I said, well, he *will* just give you a charge and probably want to see if, see if you can stay later, something or another, of that nature." (emphasis added). The testimony is a far cry from the court's conclusion that the bailiff emphasized that the court *might* give an Allen charge or *might* see if the jurors could stay later. Rather, the testimony was that the judge *would* give an Allen charge.

Additionally, 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.

Petitioner was denied several critical rights based upon Bailiff Bolt's improper communication with the jury: (1) the right to have the jury free from unauthorized intrusion; (2) the right to have a jury protected from extraneous and inaccurate information; and (3) the right to be notified about problems with the jury deliberations and to be heard with respect to the method of addressing those problems. See Perez, 929 P.2d at 1309.

By affirming the trial judge's failure to grant a new trial or a mistrial, the Court of Appeals permitted the "possibility of taint, criticism, [and] suspicion of impurity" to infect the

"[a]dministration of the law" due to Bailiff Bolt's improper communication with the jury, which intimated to the jury that a verdict must be reached in the case no matter how long it took to do so. See Blake, 307 S.C. at 18, 413 S.E.2d at 818. Petitioner respectfully requests this Court reverse the Court of Appeals and hold that the state failed to "overthrow the presumption of prejudice" or that Petitioner is not required to show prejudice just as the Arizona Supreme Court held in Perez v. Community Hosp. of Chandler, Inc., 929 P.2d 1303 (Ariz. 1997).

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

Standard of review

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). An abuse of discretion occurs when the decision of the trial court is based upon an error of law or upon factual findings that are without evidentiary support. Id.

Relevant facts

Pre-trial motion to suppress unauthenticated Facebook messages

Petitioner moved to suppress Facebook messages the state claimed were between Petitioner's girlfriend, Karina Galarza, and the deceased, Edwin Chirinos based upon the state's inability to authenticate the messages. R. 2, ll. 4-12; R. 16, ll. 1-3. The messages allegedly were obtained from the deceased's account. R. 2, ll. 21-22. The state claimed the father "had access to it," "downloaded those," and "made these available to law enforcement." R. 2, l. 25 – R. 3, l. 3; R. 16, ll. 22-25. Furthermore, the messages were sent from an account with the username of "Ruby Ninia [sic]," which the state called an "alias" for Galarza. R. 2, ll. 18-19. The state pointed to an address contained within the messages, which was Galarza's home. R. 3, ll. 5-9. To support its contention that "Ruby Rina" was in fact Galarza, the state claimed a witness,

Davian Holman, would testify to that fact, and that in one of the messages the deceased referred to the other person as "Karina." R. 3, ll. 15-23; R. 17, ll. 1-10.

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

The trial

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

After the deceased's body was found, the police went to the Queens Circle address, which was an address mentioned in the messages the police received from the father. R. 134, ll. 17-24. After speaking to Galarza, the police arrested her and Petitioner. R. 141, ll. 10-13. Shortly thereafter, the police also arrested Davian Holman, Petitioner's cousin. R. 141, ll. 17-23; R. 180, ll. 9-12.

Holman claimed that Galarza's "Facebook name" was "Ruby Rina." R. 181, ll. 6-7. According to Holman, on May 8, 2016, he was with Petitioner and Petitioner's girlfriend,

Galarza, at the girlfriend's home on Queens Circle. R. 182, ll. 1-12. He further claimed that Galarza and Petitioner "were on the phone texting," but he could not say to whom or what they were texting. R. 183, l. 21 – R. 184, l. 2; R. 230, ll. 9-12.

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

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

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

Discussion

The proponent of evidence must satisfy "[t]he requirement of authentication or identification as a condition precedent to admissibility." Rule 901(a), SCRE. See also State v. Brown, 424 S.C. 479, 488, 818 S.E.2d 735, 740 (2018) (stating "[i]t is black letter law that

evidence must be authenticated or identified in order to be admissible"). This requirement "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Id. While the burden is not high, the proponent must offer a satisfactory foundation to permit the jury to conclude the evidence is authentic. Deep Keel, LLC v. Atlantic Private Equity Group, LLC, 413 S.C. 58, 64-65, 773 S.E.2d 607, 610 (Ct. App. 2015) (citing United States v. Hassan, 742 F.3d 104, 133 (4th Cir. 2014)).

One way to authenticate evidence is by showing the evidence contains "distinctive characteristics and the like." Rule 901(b)(4), SCRE.[2] "Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances" may serve to authenticate evidence. Id.; see also State v. Anderson, 386 S.C. 120, 129, 687 S.E.2d 35, 39-40 (2009) (finding a master fingerprint card authenticated where an expert explained the prints on the master card were taken at a correctional facility on a specific date, and assigned a unique state identifying number). In ruling on whether the state authenticated the Facebook messages as being authored by the deceased and Galarza, the Court of Appeals oversimplified the authentication requirement of the Rules of Evidence and ignored the danger of fraud specific to the item sought to be authenticated. In fact, the Court of Appeals refused to acknowledge the distinct challenges to authentication posed by information gathered from social media. It is naïve to assume that authentication of information obtained from social media is undeserving of consideration of its great vulnerability to fraud, particularly in the age of "deepfakes."[3] One

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[2] Neither Petitioner nor the state challenged the holding by the Court of Appeals that the state could not authenticate the Facebook messages using personal knowledge pursuant to Rule 901(b)(1), SCRE. See State v. Green, 427 S.C. 223, 230, 830 S.E.2d 711, 715 (Ct. App. 2019); see also App. 5.

[3] See generally, Douglas Harris, Deepfakes: False Pornography is Here and the Law Cannot Protect You, Duke L. & Tech. Rev. 99 (2019).

commentator called authentication "the most basic and currently challenging area of admissibility for social media and other digital communications." Siri Carlson, When is a Tweet Not an Admissible Tweet? Closing the Authentication Gap in the Federal Rules of Evidence, 164 U. Pa. L. Rev. 1033, 1042 (2016) (internal quotation omitted). See also Linda Greene, Mining Metadata: The Gold Standard for Authenticating Social Media Evidence in Illinois, 68 DePaul L. Rev. 103, 103 (2018) (explaining that "authentication is arguably the biggest hurdle to admission of social media evidence" "[b]ecause it is so vulnerable to exploitation, proving who authored a communication is vital to properly authenticating social media evidence").

"[T]raditional opportunities for authentication are reduced by the lack of handwriting, the absence of a physical location of the document and the inherent anonymity provided by posting on websites." Sublet v. State, 113 A.3d 695, 659-660 (Md. 2015). In light of "[s]ocial networking material provid[ing] the fodder for civil disputes and defenses, as well as proof of violations of criminal laws," "[a]uthentication of social networking communications and postings has been and continues to be a significant issue." Id. at 660-661.

"Social media is defined as forms of electronic communication (such as Web sites for social networking or microblogging) through which users create online communities to share information, ideas, personal messages and other content." Carlson, supra, at 1038 (internal quotation omitted).

> [A] wealth of information about [a] person may be accessed, from basic information, such as the person's location at a certain time, friend and family relationships, age, marital status, or ethnic or national identification, to more intimate information such as group affiliations, political leanings, opinions, interests, personal difficulties, sexual orientation, present and past activities, future plans, romantic partners, and medical status.

Id. at 1041. However, "[c]ritical authentication questions include whether the offered evidence actually represents the social media page and whether the purported author actually created the

content." Id. at 1042-1043. "Because profiles on social media sites can easily be created and modified, forgery concerns repeatedly factor into authenticity determinations." Id. at 1043. Thus, "[f]undamental authenticity questions fuel both normative and procedural debates over how and when this evidence is sufficiently authentic and should be admitted into evidence." Id.

State court cases

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

Ultimately, 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 Sublet v. State, 113 A.3d 695 (Md. 2015); Lorraine v. Markel American Ins. Co., 241 F.R.D. 534 (D. Md. 2007) (laying out a "roadmap" for

authentication of electronically stored information).[4]

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

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

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 Appellate Court of Illinois tackled the authentication of social media evidence recently in a criminal case. On May 6, 2013, Donmarquis Jackson was shot and killed in his driveway. People v. Kent, 81 N.E.3d 578, 582 (Ill. App. Ct. 2017). The following day, "a detective took a screenshot of [a Facebook] post, which showed a photograph of someone allegedly resembling defendant and an undated post that read, 'its my way or the highway ….. leave em dead n his driveway.'" Id. The post was on a Facebook profile under the name

"Lorenzo Lukii Santos." Id. The detective had been using Facebook for about one year, and he explained that anyone could set up a profile, using an email address. Id. at 587. In fact, the detective created a profile using a fictitious name and a picture of someone other than himself in order to conduct investigations. Id. Moreover, the detective had used his fake profile to find the Facebook post at issue. Id.

The court concluded the state "offered neither direct nor circumstantial proof of authentication." Id. at 595. Kent "did not admit to creating the Facebook profile or making the post, and he was not seen composing the communication." Id. The state presented no Facebook records and failed to establish any connection between Kent and the profile's user name. Id. The court rejected the state's argument that the post was properly authenticated by evidence that Kent's nickname was "Luckii," the deceased was killed in his driveway, and the photograph resembled Kent. Id. Instead, the court found the information insufficient for authentication because the state failed to present any evidence that it was not public knowledge, which would tend to show that Kent or someone acting on his behalf was responsible for the communication. Id. "[T]here was ample testimony that the police activity drew the neighborhood's attention to the shooting, such that the information was not known by only defendant or a small group of people including defendant." Id. at 597. Additionally, the evidence, primarily the officer's testimony about his creation of a fake account, showed that "no identity verification [was] required to create a Facebook profile." Id. at 596.

Thereafter, the court provided a non-exhaustive list of methods of authentication of social media evidence. Id. at 598. These methods include:

> (1) the purported sender admits authorship, (2) the purported sender is seen composing the communication, (3) business records of an Internet service provider or cell phone company show that the communication originated from the purported sender's personal computer or cell phone under circumstances in which

> it is reasonable to believe that only the purported sender would have had access to the computer or cell phone, (4) the communication contains information that only the purported sender could be expected to know, (5) the purported sender responds to an exchange in such a way as to indicate circumstantially that he was in fact the author of the communication, or (6) other circumstances peculiar to the case may suffice to establish a prima facie showing of authenticity.

Id. Furthermore, the court found the error was not harmless beyond a reasonable doubt because the state repeatedly emphasized the Facebook evidence in its closing argument to argue it was an admission by Kent. Id. at 599.

The Louisiana Court of Appeal concluded the state failed to authenticate social media posts in State v. Smith, 192 So.3d 836 (La. Ct. App. 2016). Smith was charged with aggravated assault, and the state sought to introduce social media evidence against him. State v. Smith, 192 So.3d 836, 837 (La. Ct. App. 2016). During a pretrial hearing on Smith's motion to exclude, the trial judge determined the evidence was admissible. Id. The alleged victim of the assault showed the responding officer her cell phone, which included alleged threats received from Smith, and the state sought to introduce those messages. Id. These messages were copied or reproduced on paper, but there was no evidence as to how this occurred. Id. at 838. Additionally, the state wanted to introduce social media posts that included a photograph purportedly of Smith holding a revolver along with comments allegedly made by Smith. Id. at 837-838.

The state's witness – the officer – did not know the social media source of the text messages and photos. Id. at 838. The officer made no attempts to independently verify the sender of the messages. Id. at 839. No dates appeared on either document. Id. The state presented no evidence as to whether Smith created the account and/or profile on the social media platform or whether he had ever accessed the platform. Id. at 842. There was no evidence regarding the accessibility of the account or whether the messages possessed "unique qualities"

to assert that Smith was the author. Id. The appellate court concluded the state "presented *no evidence at all* to authenticate the purported social media posts it [sought] to introduce." Id. (emphasis in original).

The Indiana Court of Appeals held a message on a social networking site was not authenticated where a defendant failed to establish the deceased was the author of the message. Richardson v. State, 79 N.E.3d 958, 963-964 (Ind. Ct. App. 2017). The police examined a cell phone that was found with the body of the deceased. Id. at 962. On the phone, the police found a Facebook profile under the name "Bandman Trapp." Id. Using Facebook's Messenger application, the police found a conversation between Bandman Trapp and another account with the name "Little L Mike Brookside" that occurred a few days prior to the shooting. Id. According to the conversation, Bandman Trapp sent a message to Little L Mike Brookside stating, "Nah I'm boutta finesse hoodie for this strap but I need you." Id. Richardson told the court the message meant, "I'm about to rob somebody for a black gun." Id.

The officer told the judge that the Facebook account could be accessed through the phone and any other computer or telephone. Id. The officer had no idea who made the statement or composed the message. Id. Although the message appeared on the deceased's phone. the officer explained that someone could have signed on to the account on a computer or different phone, compose the message, and then the message would sync to the deceased's phone as long as the phone was signed into that account. Id.

The trial judge ruled the Facebook message was inadmissible because Richardson had failed to authenticate it. Id. In Indiana, a party "must establish only a reasonable probability that the evidence is what it is claimed to be, and may use direct or circumstantial evidence to do so." Id. The Indiana Court of Appeals affirmed the trial court's decision, explaining "Richardson did

not present any evidence describing distinctive characteristics that could connect the particular statement to [the deceased], nor did he present any other indicia of reliability establishing [the deceased] as the author of the contested statement." Id. at 963-964.

Even in Texas, where the authentication hurdle is extremely low, the court affirmed the exclusion of Facebook posts where the only evidence presented to show the identity of the authors of the posts or the author of the original post were the names and photos as shown on the accounts of the owner and posters. Dering v. State, 465 S.W.3d 668, 672 (Ct. App. Tex. 2015). During his motion to change venue, Dering sought to admit Facebook posts that "were made on a third party's account by other third parties." Id. at 670. The posts contained three pages of comments that contained inflammatory remarks about Dering. Id. The court observed that Dering did not call any of the people who purportedly made the posts and did not call the owner of the Facebook account onto which the posts were made. Id. According to the Texas court, "with respect to identity, Facebook presents an authentication concern that is twofold." Id. at 671. "First, because anyone can establish a fictitious profile under any name, the person viewing the profile has no way of knowing whether the profile is legitimate." "Second, because a person may gain access to another person's account by obtaining the user's name and password, the person viewing the communications on or from an account profile cannot be certain that the author is in fact the profile owner." Id. "Thus, the fact that an electronic communication on its face purports to originate from a certain person's social networking account is generally insufficient, standing alone, to authenticate that person was the author of the communication." Id.

Distinguishing Dering's proffer from other cases in which the courts had found social media evidence authenticated, the court noted the other cases dealt with "social media and

electronic evidence that emanate[d] from the defendant as the purported author." Id. at 672. The posts Dering sought to admit were not made by him or sent by him to anyone. "In fact, [Dering] had nothing to do with the creation or the content of the Facebook posts other than serve as the subject of the posts." Id. As mentioned, the original post was created by a third party who did not testify. Id. "There was no evidence of the authenticity of who the purported author was of any of the Facebook posts." Id. All Dering "offered in terms of authenticity were the names and photos as shown on the accounts of the owner and posters." Id. Thus, the Texas court concluded the evidence was insufficient to support a finding of authenticity. Id.

Federal court cases

One of the leading federal 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 also 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").

Application to Petitioner's case

Detection of forgery of the handwritten word is easy and certain. Colin Miller, Charles White, The Social Medium: Why the Authentication Bar Should Be Raised for Social Media Evidence, 87 Temp. L. Rev. Online 1, 6 (2014). "Conversely, it is uniquely easy to create, and difficult to detect, social media forgeries." Id.

> On most social media websites, a user can create an account by simply providing a name, home address, email address, age, sex, location, and birth date, and the fact that a user profile is entirely self-generated can lead to significant mischief and presents an interesting conundrum for law enforcement. Because fragments

> of information, either crafted under our authority or fabricated by others, are available by performing a Google search … forever, it does not take much for anyone with Internet access to create a convincing fake Facebook or Twitter profile for someone he barely knows.

Id. (internal quotations omitted). "In addition, it is exceptionally easy to hack into another person's social media account." Id. at 7.

"The problem is that," as the Court of Appeals applied, "901(b)(4) is an analog rule in a digital world." See id. One of the circumstances used pursuant to Rule 901(b)(4), SCRE, is that the offered item shows peculiar knowledge. Id. "In the 21st century, however, the extraordinary has become the ordinary, and the notion that many facts are peculiarly in the knowledge of a single person or a small group of people seems quaint." Id. at 8. "[W]e live in a brave new digital world in which 'almost nothing is private.'" Id. at 9.

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

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

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

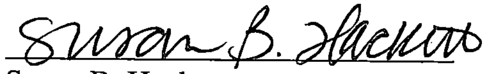
Thus, Edwin's Facebook account was unsecure *and* Ruby's Facebook account was unsecure.

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

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

CONCLUSION

Petitioner respectfully requests this Court reverse the Court of Appeals and grant Petitioner a new trial.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of February, 2020.

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,

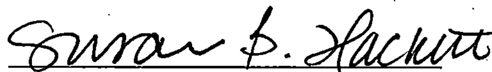
V.

FABIAN LAMICHAEL GREEN,

PETITIONER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon Samuel Bailey, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner have been served on Fabian Lamichael Green, #372509, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 24th day of February, 2020.



Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 24th day of February, 2020.

_________________________ (L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022