(5)

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY

Steven H. John, Circuit Court Judge

Appellate Case No. 2017-002553

The State, ...Respondent,

v.

Tommy Lee Benton, ...Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial court violate Mr. Benton's protection against Double Jeopardy by retrying his case after granting a mistrial on the ground that Mr. Benton did not provide formal written notice of his alibi defense, where he was not required to disclose that information because the State did not first identify in writing the time he allegedly committed the offenses, the trial court inadequately considered whether alternatives to a mistrial existed, and the trial court failed to exercise sound discretion in finding manifest necessity for a mistrial?

II. Did the trial court abuse its discretion by admitting into evidence text and internet messages allegedly sent or received by Mr. Benton and Mr. Cheatham where there was no evidence these individuals actually sent or received them and where Mr. Benton did not have exclusive possession of his cell phone?

III. Did the trial court abuse its discretion by admitting into evidence unduly prejudicial and gruesome crime scene photographs that had no probative value where Mr. Benton only put forth an alibi defense, he did not challenge the facts or circumstances of the underlying crimes, and the photographs were not necessary to prove any fact in issue?

STATEMENT OF THE CASE

Mitchell Cheatham, Douglas Thomas, and Garland Rose confessed to the murder of C.B. Smith, the burglary of his home and store, and the burning of his home and store in April 2014. Appellant Tommy Lee Benton was indicted for Mr. Smith's murder on April 21, 2016. On October 20, 2016, he was indicted for two counts of first degree burglary, one count of first degree arson, and one count of third degree arson, all related to Mr. Smith.

Mr. Benton lodged an alibi defense to these charges, contending he was with his friends and family in North Carolina during the commission of each crime. Prior to indicting Mr. Benton, the State served a Mutual Reciprocal Disclosure Request seeking information on his alibi. The request related solely to then-unindicted murder allegations and did not state a time the offense occurred. There is no record of Mr. Benton providing a formal written response to this solitary request.

All of these charges were called for a jury trial before the Honorable Steven H. John on July 17, 2017. The jury was sworn the next day. The State objected during opening statements to Mr. Benton's use of an alibi defense on the ground that Mr. Benton did not provide the response required by Rule 5(e)(1), SCRCrimP, to the State's Mutual Reciprocal Disclosure Request. Mr. Benton opposed the objection, arguing the State did not first provide formal written notice of the time of each offense pursuant to Rule 5(e)(1). The trial court disagreed with Mr. Benton and *sua sponte* declared a mistrial on July 18, 2017. The court thereafter entered a written order declaring a mistrial on July 26, 2017.

The second jury trial of these charges was called before Judge John on December 4, 2017. Prior to the swearing of the second jury, Mr. Benton moved to dismiss the charges on Double Jeopardy grounds because the mistrial was improvidently granted. The trial court reaffirmed its

prior ruling and denied Mr. Benton's motion. During trial, Mr. Benton objected to the admission of any text messages allegedly sent by or to him without a specific foundation that they were, in fact, sent by or to him. Mr. Benton further objected to the introduction of three crime scene photographs under Rule 403, SCRE, as being inflammatory due to their gruesome nature and the fact that Mr. Benton, putting forward an alibi defense, did not contest the facts of the underlying crimes. The trial court overruled these objections and admitted these items into evidence.

The jury convicted Mr. Benton of all counts on December 8, 2017. Mr. Benton filed and served a timely notice of appeal on December 14, 2017.

STATEMENT OF FACTS

The basic facts of the underlying crimes were not disputed. Mitchell Cheatham and Garland Rose admitted they broke into C.B. Smith's home in Aynor, South Carolina, on April 18, 2014, armed with a shotgun and while Mr. Smith was home, and stole money. **(R. pp. 450-51).** Mr. Cheatham and Douglas Thomas admitted to breaking into Mr. Smith's store in Aynor on April 26, 2014, and setting the store on fire after finding no money inside. **(R. p. 71, line 2-p. 75, line 21; p. 452).** Mr. Cheatham and Mr. Thomas further admitted they returned to Aynor on April 29, 2014, entered Mr. Smith's home while armed once again, ransacked it for money, took what they could find, tied up and handcuffed Mr. Smith, beat him, and set his home on fire with him still bound inside. **(R. p. 80, line 2-p. 86, line 11; pp. 453-457).** Mr. Smith died in the fire. **(R. p. 162, lines 3-5).**

There is no physical evidence connecting Mr. Benton to these events. Various family members put Mr. Benton in North Carolina on these dates. Mr. Benton's mother, Christie Hudson, placed Mr. Benton with her and her husband at Mr. Benton's grandmother's house in Leland, North Carolina, until approximately 2:00 a.m. on April 18, arriving home with them in Chadbourn, North Carolina around 3:00 a.m. **(R. p. 299, line 11-p. 301, line 11).**

Ms. Hudson further recalled Mr. Benton arrived at his grandmother's house in Leland around 10:30 or 11:00 p.m. on April 25 and left for Chadbourn around 3:00 a.m. on April 26. **(R. p. 302, line 17-p. 303, line 5; p. 307, line 22-p. 308, line 6).** He left his grandmother's sporadically in the interim to run errands with family. **(R. p. 303, line 6-p. 304, line 4; p. 305, line 14-p. 307, line 21).** Upon returning home to Chadbourn around 4:30 a.m. after getting some food, Mr. Benton and his step-father stayed up playing video games until 7:00 a.m. before leaving for the flea market. **(R. p. 309, lines 3-24).**

Finally, Ms. Hudson testified Mr. Benton was with her in Chadbourn beginning at 10:00 p.m. on April 28. **(R. p. 310, line 5-p. 311, line 12).** Shortly before midnight, Mr. Benton and Ms. Hudson went to Mr. Benton's great-grandmother's house in Chadbourn to help fix his great-grandfather's oxygen machine. **(R. p. 311, line 13-p. 314, line 11).** They left his great-grandmother's house around 1:00 a.m., made one stop, and returned home around 1:40 a.m. **(R. p. 314, line 19-p. 315, line 14).** Mr. Benton left the house shortly thereafter. **(R. p. 315, lines 15-17).**

Mr. Benton's step-father, great-grandmother, and uncle's ex-girlfriend all confirmed his whereabouts during these times. **(R. p. 319, line 14-p. 326, line 14)** (testimony of Mr. Benton's step-father); **(R. p. 330, line 24-p. 332, line 25)** (testimony of Mr. Benton's great-grandmother); **(R. p. 335, line 8-p. 338, line 22)** (testimony of Mr. Benton's uncle's ex-girlfriend).

Mr. Cheatham, Mr. Rose, and Mr. Thomas nevertheless implicated Mr. Benton in these crimes. **(R. p. 71, line 2-p. 75, line 21; p. 80, line 2-p. 86, line 11; pp. 450-457).** But none of them signed a written statement indicating the times when Mr. Benton allegedly committed these acts with them. Mr. Rose's voluntary statement contained no indication as to the time they robbed Mr. Smith's home on April 18. **(R. p. 450).** Mr. Thomas did not sign a written statement at all. Mr. Cheatham expressly stated he could not recall the time of the April 18 burglary, and he said nothing regarding the time he committed the April 26 and 29 crimes. **(R. pp. 451-457).**

Investigators interviewed Ms. Hudson and her brother's ex-girlfriend. **(R. p. 317, line 17-p. 318, line 13; p. 339, line 13-p. 340, line 2).** Mr. Benton's step-father was locked in an interrogation room with Ms. Hudson but not questioned. **(R. p. 328, line 23-p. 329, line 17).** They asked Ms. Hudson about Mr. Benton's whereabouts at 5:30 a.m. on April 29, the morning of Mr. Smith's murder. **(R. p. 318, lines 8-13).** Yet their internal records suggest a different time for the

murder. The fire department stated units were dispatched beginning at 2:48 a.m. on April 29 but gave no indication as to when the fire started. **(R. p. 464).** The Crime Scene Investigator's notes for Mr. Smith's death suggest an "[a]pprox[imate] . . . [t]ime of [i]ncident" of 3:00 a.m. and state the fire department received a call for a structure fire at 2:45 a.m. **(R. pp. 501-02).** The coroner estimated time of death as 2:30 a.m. **(R. p. 496).**

Records for the other offenses either were non-existent or even less definitive. Mr. Smith did not call the police following the burglary of his home on April 18. **(R. p. 99, lines 18-19).** Thus, there are no contemporaneous police or other investigatory records of that incident. The Investigation Report for the April 26 fire at Mr. Smith's store indicates fire services were dispatched beginning at 6:17 a.m. **(R. p. 480).** It too contains no statement or opinion as to when the fire started. There is no evidence of when Mr. Benton or anyone allegedly broke into the store.

The Horry County Police Department obtained arrest warrants for Mr. Benton on May 2, 2014, but it did not serve them until November 19, 2015. **(R. pp. 357-62).** Detective James Chatfield attested there was probable cause to believe Mr. Benton committed the April 18 burglary "between the hours of 0300 hours to 0400 hours." **(R. p. 357).** Detective Chatfield did not state the basis for this probable cause. **(R. p. 357).** Detective Chatfield made no statement as to time for the April 26 incident. **(R. p. 359).** He claimed probable cause existed to believe Mr. Benton committed murder and arson on April 29 "at approximately 0230 hours." **(R. p. 361).**

On April 1, 2016, the state served Mr. Benton with a Mutual Reciprocal Disclosure Request for the still-unindicted murder charge. This is the only Mutual Reciprocal Disclosure Request served by the State on Mr. Benton. The State requested, pursuant to Rule 5(e)(1), SCRCrimP, "written notice of the Defendant's intention to offer an alibi defense as to the charge(s) noted hereinabove which allegedly occurred on or about **APRIL 29, 2014** IN THE AYNOR **SECTION**

OF HORRY COUNTY, SC." (R. p. 510). It does not state the time Mr. Benton allegedly murdered Mr. Smith or reference any other documents that do. Mr. Benton did not provide a formal written response to this request. **(R. p. 40, lines 14-19).** However, Mr. Benton's trial counsel discussed Mr. Benton's alibi with the State prior to trial. **(R. p. 38, lines 3-18; p. 39, lines 6-12).**

The State indicted Mr. Benton for murder twenty days later on April 21, 2016. **(R. pp. 363-64).** It did not indict him for the remaining offenses until October 20, 2016. **(R. pp. 365-66)** (first degree burglary on or about April 18, 2014); **(R. pp. 367-68)** (first degree arson); **(R. pp. 369-70)** (third degree arson); **(R. pp. 371-72)** (first degree burglary on or about April 29, 2014). None of the indictments provides the time Mr. Benton allegedly committed these crimes.

First Trial in July 2017

Mr. Benton's case was called for trial on July 17, 2017. The trial court indicated it was available for two weeks to try the case if necessary. **(R. p. 25, line 19-p. 26, line 23).** The jury was sworn the next day. **(R. p. 29, lines 4-10).**

Mr. Benton's trial counsel previewed the expected alibi testimony in his opening statement. **(R. p. 35, line 1-p. 37, line 4).** The State objected on the ground that Mr. Benton had not provided notice of his alibi defense as required by Rule 5(e)(1), SCRCrimP, despite the Mutual Reciprocal Disclosure Request. **(R. p. 37, line 22-p. 38, line 2).** The State asked the court only to strike this defense. **(R. p. 37, line 22-p. 38, line 2).** Mr. Benton's trial counsel explained he was under the impression formal notice had been given, and that he also had conversations with the Solicitor, Lauree Richardson, about Mr. Benton's alibi and which witnesses supported it. **(R. p. 38, lines 5-**

18; p. 40, lines 14-24). He put it succinctly: "[T]hat's always been the defense in this case."[1] **(R. p. 38, line 11).** Another member of Mr. Benton's trial team explained he too spoke with Ms. Richardson regarding Mr. Benton's alibi witnesses—including one witness subpoenaed by the State. **(R. p. 39, lines 6-12).** Ms. Richardson was present and did not dispute these assertions. A different Solicitor claimed no discussions took place but confirmed he was aware of at least some witnesses Mr. Benton intended to call. **(R. p. 38, line 20-p. 39, line 1).**

The trial court *sua sponte* declared a mistrial without a record of input from counsel on that decision beforehand. The court believed Rule 5(e)(1) refers to the indictment when it requires a written statement of the time, date, and place of the offense. **(R. p. 41, line 20-p. 42, line 1).** It then incorrectly concluded the indictments and "this Court's notice" (which was not identified) provided "whatever is required of the state stating the time, date, and place at which the alleged offense occurs." **(R. p. 43, lines 16-20)**; *see also* **(R. pp. 363-72)** (indictments not stating time of offenses).

With Mr. Benton having already conceded he did not send a formal response to the State's request, the trial court summarily postulated that "the most probable conclusion" of striking Mr. Benton's alibi would be that the jury "would convict the defendant of all the crimes based upon a less than complete factual presentation." **(R. p. 42, lines 5-17).** Conversely, the court theorized that not excluding Mr. Benton's alibi evidence would "deprive the state of a full and complete opportunity to explore these witnesses, to be prepared to answer to the jury as to what they may say, and again would deprive the jury of a full and complete factual determination from which they

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[1] At a pre-trial hearing held on March 14, 2017, trial counsel explained he would not contest the manner and fact of Mr. Smith's death because "[t]he defense in this case is that Mr. Benton didn't do it, didn't participate in it." **(R. p. 11, lines 13-23).** He continued, "If necessary, I intend to make it clear to the jury in the opening statement what I've told the Court. We're not gonna challenge those facts. Those facts are true; those things happened." **(R. p. 12, lines 18-22).**

need to judge the credibility and believability and make a decision here." **(R. p. 42, line 23-p. 43, line 3).**

From this, the court firmly determined it had "no choice but to declare a mistrial in this matter." **(R. p. 43, lines 7-8).** The court took no testimony, considered no alternatives other than full exclusion or unconditional admission of Mr. Benton's alibi witnesses, and requested no input or argument of counsel before doing so. As grounds for "manifest necessity" justifying the mistrial, the court relied on "[t]he harm that it would do the defendant, the harm that it would do to the state," and its belief "there is no other reasonable conclusion that can be had in the matter because of that." **(R. p. 43, lines 8-13).** The court declared "[t]he matter will be rescheduled for a new trial." **(R. p. 43, line 14).** It then discharged the jury. **(R. p. 46, line 24-p. 48, line 21).**

The court held a hearing the following day on the proper interpretation of Rule 5(e)(1). Mr. Benton's counsel reminded the trial court that the indictments do not state the time Mr. Benton allegedly committed these offenses. **(R. p. 50, line 21).** He further explained that an affirmative statement from the prosecution is necessary to help prevent prosecution witnesses from molding their testimony to defeat an alibi. **(R. p. 51, line 18-p. 52, line 10).** The State did not address that concern. Instead, it argued for the first time that notice of time had been given through documents that were not statements of the prosecution and not cited in the alibi request: the arrest warrants, police reports, fire reports, and statements in the State's Rule 5 and *Brady* material. **(R. p. 52, lines 12-22).** There is no suggestion or indication these documents were produced contemporaneously with the alibi request.

In response to the State's new argument, the court reviewed the text of the arrest warrants, noted the fire reports "stat[e] the times and dates that the fire department responded to matters," referenced the coroner's report, and referenced "the statements of the codefendants in this

particular matter as to when the events occurred, that being time, date, place." **(R. p. 54, line 21-p. 55, line 5).** The court found this disparate set of information not cited in the alibi request sufficient to comply with the State's obligation under Rule 5(e)(1). **(R. p. 55, lines 6-8).** It consequently denied Mr. Benton's request for a more specific statement from the State as to the time of these offenses. **(R. p. 56, lines 13-15).**

The court thereafter reiterated these conclusions in a written order declaring a mistrial. **(R. pp. 4-5).** In its order, the court espoused its belief that the State would be deprived of a fair trial even if it "*agree[d]* to waive the Defendant's requirements of Rule 5(e) and proceed with trial." **(R. p. 5)** (emphasis added). There is no record of the State sharing this opinion.

Second Trial in December 2017

Mr. Benton's second trial commenced on December 4, 2017. Prior to the swearing of this second jury, Mr. Benton moved to dismiss the charges under the Double Jeopardy Clause because there was no justification for the original mistrial. **(R. p. 62, line 18-p. 63, line 24).** The court "reaffirm[ed] and readopt[ed]" its prior rulings and denied the motion. **(R. p. 64, line 8-p. 65, line 23).**

The State relied on the testimony of Mr. Thomas and Mr. Cheatham (who were not tried with Mr. Benton) to implicate Mr. Benton in these acts—both of whom are admitted murders, arsonists, and burglars who offered testimony in exchange for sentencing consideration from the State. **(R. p. 92, line 11-p. 93, line 12; p. 94, lines 5-15; p. 268, line 17-p. 269, line 20; p. 274, line 18-p. 275, line 5).** Mr. Rose died in a car accident prior to trial. **(R. p. 97, lines 15-18).** Multiple witnesses, including one called by the State, testified Mr. Cheatham is untrustworthy and not to be believed even when under oath. *E.g.*, **(R. p. 216, lines 7-15)** (testimony of State's witness Kaitlin Rose); **(R. p. 315, line 22-p. 316, line 25)** (testimony of Ms. Hudson); **(R. p. 333, line 20-**

p. 334, line 3) (testimony of character witness Steven Bielinski). Mr. Benton's cell phone was the other primary source of evidence the State used to implicate Mr. Benton, in particular text/internet messages and the location of Mr. Benton's phone during the commission of these crimes.[2]

Foundational Evidence for Text and Internet Messages

Mr. Benton challenged the admission of *any* text or internet (*e.g.*, Facebook) messages without foundational, authenticating testimony from a witness confirming the author of each message. **(R. p. 27, line 15-p. 28, line 19; p. 144, line 22-p. 145, line 21; p. 164, line 8-p. 165, line 10).** The court initially agreed the State would lay this foundation. **(R. p. 146, line 15-p. 147, line 4).** The court then rejected this argument and required only that the State identify which phone the messages came from without any proof of authorship. **(R. p. 147, line 5-p. 148, line 17; p. 158, lines 8-22; p. 166, lines 11-15).**

The court admitted Mr. Benton's text and internet messages *en masse*. Instead of offering targeted, discreet messages, the State introduced all of the text and internet messages to or from Mr. Benton or Mr. Cheatham in its possession regardless of their connection to this case. As a result, the court received into evidence well over 1,000 messages, less those redacted by agreement of the parties or order of the court.[3] **(R. pp. 373-449).**

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[2] An investigator testified as to which towers Mr. Benton's cell phone "pinged" at various times during the commission of these crimes. **(R. p. 192, line 2-p. 207, line 7).** Aside from Mr. Cheatham testifying that Mr. Benton left his cell phone in the car during the April 26 events, **(R. p. 270, line 22-p. 273, line 20)**, there is no evidence Mr. Benton had his phone at all during these crimes. As noted below, possession of Mr. Benton's phone was expressly disputed.

[3] State's Trial Exhibit 71 is the marrying of information from State's Trial Exhibits 69 and 70, which are documents generated by Verizon containing text message data associated with Mr. Benton's cell phone number, into a summary compilation document. **(R. p. 142, line 11-p., 143, line 25; p. 155, lines 10-19; p. 156, lines 7-12; p. 157, lines 19-23).** The pertinent information from Exhibits 69 and 70 is duplicated in Exhibit 71. These two exhibits therefore are not necessary for this appeal, as the Court can resolve this issue using only Exhibit 71. Because Exhibits 69 and 70 total 510 pages, Mr. Benton has not designated them to be included within the Record on Appeal in order to conserve resources and avoid an unnecessarily long record. However, Mr. Benton will

The State offered limited foundational testimony for these messages through Mr. Cheatham. He authenticated only three brief exchanges:

> (1) a message from Mr. Cheatham stating, "Bro apparently cb was murdered?? I heard he died in a fire but cops are saying there is evidence that it was murder," coupled with a response from Mr. Benton of, "I saw that when garland told me. Apparently he died holding a gun at the front door trying to get out?" and a link from Mr. Cheatham to a news story about the fire, **(R. p. 258, line 11-p. 259, line 17; p. 425, lines 183-88)**;
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> (2) an exchange between Mr. Cheatham and Mr. Benton from April 9, 2014, discussing obtaining weapons for an unidentified crime that Mr. Cheatham claimed was the attack on Mr. Smith, **(R. p. 260, lines 15-25; p. 447)**; and
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> (3) another exchange from Facebook messenger on April 9 about being "on the same page" with a plan for Mr. Cheatham to hold a gun while Mr. Benton makes Mr. Smith talk, **(R. p. 261, lines 11-22; p. 448)**.

The State broadly asked Kaitlin Rose, Mr. Rose's widow, to identify "this conversation" she had with Mr. Benton from State's Trial Exhibit 76, but it is not clear to which of the conversations between them from Exhibit 76 she and the State referred. **(R. p. 215, line 15-p. 216, line 2)**; *see also* **(R. pp. 440-444).** The only specific message she later identified is one she personally sent from Mr. Benton's phone. **(R. p. 216, line 23-p. 219, line 9).** Separately, Mr. Benton's step-father confirmed Ms. Hudson sent Mr. Benton a message observing someone tried to break into Mr. Benton's truck the night of Mr. Smith's murder. **(R. p. 327, lines 23-25).**

Beyond these isolated queries, no witness authenticated any other specific text or internet messages sent to or received from Mr. Benton or Mr. Cheatham.

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supplement the record upon request to include them. The State's Trial Exhibits 72 and 76 are extractions of data from Mr. Cheatham's and Mr. Benton's cell phones, respectively, containing text and internet message data. **(R. p. 149, line 24-p. 150, line 4; p. 153, line 24-p. 154, line 8).** Mr. Benton's foundational authenticity objection applied to the messages contained in these five exhibits.

Questions were raised at trial regarding who had access to and possession of Mr. Benton's phone. Ms. Hudson understood Mr. Cheatham had Mr. Benton's cell phone the night of Mr. Smith's murder. **(R. p. 312, line 17-p. 315, line 10)**; *see also* **(R. p. 331, line 20-p. 332, line 5)** (testimony of Mr. Benton's great-grandmother confirming Ms. Hudson's recollection). Moreover, Mr. Cheatham admitted to accessing Mr. Benton's phone on at least one occasion during these incidents. **(R. p. 270, line 22-p. 273, line 20).** As noted, Mr. Rose's widow testified she sent messages from Mr. Benton's phone in the past. **(R. p. 216, line 23-p. 219, line 9).** And Ms. Rose denied only that Mr. Rose borrowed Mr. Benton's phone "*for long periods of time*"; she did not claim Mr. Rose never borrowed his phone. **(R. p. 215, lines 7-9)** (emphasis added). Mr. Benton therefore was not in exclusive possession of his phone, and neither was the phone entirely secure.

Crime Scene Photographs

The trial court also admitted a series of photographs depicting the scene of the April 29 fire. At issue here are three photographs showing and highlighting Mr. Smith's burned remains. **(State's Exs. 54-56).** State's Trial Exhibit 54 depicts Mr. Smith's charred body lying amongst the ashes of his house with his intestines and other organs falling out, **(State's Ex. 54)**, State's Trial Exhibit 55 shows the same but not as close up, **(State's Ex. 55)**, and State's Trial Exhibit 56 is the detail of Mr. Smith's detached, dried up, and burned arm with handcuffs still attached, **(State's Ex. 56)**.

At a pre-trial hearing to exclude these three photographs, Mr. Benton's trial counsel explained they have no probative value because the facts and manner of Mr. Smith's death were not contested. **(R. p. 11, line 13-p. 12, line 25; p. 19, line 18-p. 21, line 7).** As he argued to the trial court, "the only effect of these photographs is not to present any evidence that matters, since that issue is never going to be challenged, the death of the victim and how he died. . . . So, our

concern is that these photographs would inflame a jury and they really have no probative value to this case." **(R. p. 12, lines 6-18).** The State responded that State's Trial Exhibit 54 (then marked as Exhibit 5) showed Mr. Smith's body as it was found by the fire department. **(R. p. 15, lines 10-20).** The State contended that State's Trial Exhibit 55, marked as Exhibit 10 for the hearing, was relevant based on its depiction of where Mr. Smith's body was in relation to the rest of the scene. **(R. p. 18, line 24-p. 19, line 1).** Finally, the State argued that State's Trial Exhibit 56 (Exhibit 7 for the hearing) was relevant to show that Mr. Smith's handcuffs were still closed and his hands bound. **(R. p. 17, line 23-p. 18, line 10).** These were the only justifications for the relevancy of the photographs advanced by the State.

The trial court declined to rule on their admissibility at that time.[4] It instead wanted to hear the evidence at trial to determine "if it is necessary for the jury's understanding of this particular matter to have those in evidence." **(R. p. 23, lines 14-19).**

At trial, the court admitted thirty-nine photographs of the crime scene without objection. **(R. p. 113, lines 8-19; p. 115, lines 6-22; p. 119, line 21-p. 120, line 10; p. 122, line 11-p. 127, line 4; p. 132, line 17-p. 133, line 5; p. 141, lines 4-11; State's Exs. 16-53, 57).** At the State's insistence, the court also admitted the three photographs showing Mr. Smith's remains over Mr. Benton's renewed objection solely because they too were accurate depictions of the crime scene. **(R. p. 107, line 1-p. 109, line 21)**; *see also* **(R. p. 110, line 21-p. 111, line 11)** (correcting the numbering of these exhibits). The State's witnesses testified to the details depicted in the photographs without objection and without the need for them. *E.g.*, **(R. p. 104, line 21-p. 106, line 15; p. 114, line 19-p. 115, line 1; p. 131, lines 20-24; p. 159, line 25-p. 160, line 21)**; *see also*

[4] The trial court made preliminary rulings excluding some other photographs at this pre-trial hearing. **(R. p. 21, line 18-p. 23, line 7).** The State did not seek to offer these particular photographs into evidence at trial.

(R. p. 133, lines 8-16) (admitting the handcuffs removed from Mr. Benton's body into evidence). Mr. Benton never contested anything depicted in the photographs.

Moreover, the State did not confine its use of these grotesque images to corroborating other evidence or showing the scene. The Solicitor showed State's Trial Exhibit 54, a picture of Mr. Smith's burned body with internal organs spilling out, to Mr. Cheatham and asked, "Was that worth $1500?" **(R. p. 262, lines 17-18).** When Mr. Cheatham said no, the Solicitor inquired, "Who did that, Mitchell?" **(R. p. 262, line 20).** Mr. Cheatham responded, "Me and Tommy did." **(R. p. 262, line 21).**

The jury convicted Mr. Benton of murder, first degree arson, third degree arson, and two counts of first degree burglary on December 8, 2017. **(R. p. 294, line 20-p. 295, line 11).** The court sentenced Mr. Benton to life imprisonment without the possibility of parole for murder, life imprisonment for first degree burglary, thirty years' imprisonment for first degree arson, and fifteen years' imprisonment for third degree arson. **(R. p. 296, line 18-p. 297, line 13).** Mr. Benton timely filed a Notice of Appeal. **(R. pp. 6-9).**

STANDARD OF REVIEW

Our courts have held that the decision to grant a mistrial, within the context of a subsequent motion to dismiss under the Double Jeopardy Clause, is reviewed for an abuse of discretion amounting to an error of law. *State v. Council*, 335 S.C. 1, 12, 515 S.E.2d 508, 514 (1999). The Fifth Amendment's prohibition against putting an accused twice in jeopardy adds an additional overlay not fully captured by this standard. *See Arizona v. Washington*, 434 U.S. 497, 514 (1978) (holding the great deference to the trial court "does not, of course, end the inquiry" because "a constitutionally protected interest is inevitably affected by any mistrial decision"). The trial court must engage in a "scrupulous exercise of judicial discretion" when granting a mistrial. *United States v. Jorn*, 400 U.S. 470, 485 (1971). "[R]eviewing courts have an obligation to satisfy themselves that, in the words of Mr. Justice Story, the trial judge exercised 'sound discretion' in declaring a mistrial." *Arizona*, 434 U.S. at 514. This Court reviews the record for evidence supporting a mistrial regardless of the basis for the trial court's decision. *Id.* at 516-17.

The Fourth Circuit has identified factors used by the Supreme Court of the United States to determine whether the trial court exercised sound discretion within these Constitutional boundaries. First is whether the trial court "rationally could conclude that the grant of the mistrial was compelled by manifest necessity or whether the ends of public justice demanded that one be granted on the peculiar facts presented." *Gilliam v. Foster*, 75 F.3d 861, 894 (4th Cir. 1996). This Court should also consider whether the trial court "acted precipitously," "expressed a concern regarding the possible double jeopardy consequences of an erroneous declaration of a mistrial," "heard extensive argument on the appropriateness" of a mistrial, and "gave appropriate consideration to alternatives less drastic than granting a mistrial." *Id.*

This Court therefore accords less deference to the trial court on this issue than under an ordinary abuse of discretion standard.

As to Mr. Benton's remaining issues on appeal, questions of law are reviewed *de novo*. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). The trial court's decision to admit evidence is reviewed under the traditional abuse of discretion standard. *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 434, 673 S.E.2d 448, 457 (2009). This occurs when the ruling is based on an error of law or the court's factual conclusions lack evidentiary support. *Id.*

ARGUMENT

I. The trial court violated Mr. Benton's protection against Double Jeopardy by trying his case after granting a mistrial without sufficient inquiry, cause, or justification.

The trial court erred in granting a mistrial on the ground that Mr. Benton did not provide formal written notice of his alibi for two reasons: (1) the State did not satisfy its antecedent obligation to state the time, date, and place of the alleged offenses, and (2) the trial court failed to adequately consider alternatives to granting a mistrial. As a result, the trial court did not exercise sound discretion in finding manifest necessity for the mistrial. Mr. Benton's second trial therefore violated his Double Jeopardy rights, and this Court should reverse Mr. Benton's convictions.

"No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend V; *see also* S.C. Const. art. I, § 12. Both the United States and our constitutions prohibit the State from prosecuting a defendant for the same offense following acquittal, conviction, or an improvidently granted mistrial. *State v. Parker*, 391 S.C. 606, 612, 707 S.E.2d 799, 801 (2011). This protection exists to ensure "the imposition of the adjudicatory gauntlet only once when one is accused of a crime." *State v. Kirby*, 269 S.C. 25, 27, 236 S.E.2d 33, 34 (1977). Double Jeopardy serves to protect the accused's "valued right to have his trial completed by a particular tribunal." *Arizona v. Washington*, 434 U.S. 497, 503 (1978) (citations and quotations omitted).

> The reasons why this "valued right" merits constitutional protection are worthy of repetition. Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.

Id. at 503-505.

Jeopardy attaches when the jury is sworn. *Martinez v. Illinois*, 134 S. Ct. 2070, 2075 (2014). Because the jury was sworn in Mr. Benton's first trial, the question becomes "whether the jeopardy ended in such a manner that the defendant may not be retried." *Id.* The power to order a mistrial in criminal cases "ought to be used with greatest caution and for plain and obvious causes." *State v. Prince*, 279 S.C. 30, 32, 301 S.E.2d 471, 472 (1983). This means a trial ending in a mistrial may commence again only where there was a "manifest necessity" for the mistrial. *State v. Robinson*, 360 S.C. 187, 193, 600 S.E.2d 100, 103 (Ct. App. 2004).

"The words 'manifest necessity' appropriately characterize the magnitude" of this burden. *Arizona*, 434 U.S. at 505. The requirement for manifest necessary "stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the determination that the ends of justice would not be served by a continuation of the proceedings." *Jorn*, 400 U.S. at 485. The term "necessity" is not read literally, but rather as a "'high degree' of necessity to in order to conclude that a mistrial is appropriate." *State v. Baum*, 355 S.C. 209, 214, 584 S.E.2d 419, 422 (Ct. App. 2003) (citing *Arizona*, 434 U.S. at 505-06). It has been "equated with so great a need to discharge the jury that 'the ends of ends of public justice would otherwise be defeated.'" *United States v. Hanno*, 21 F.3d 42, 46 (4th Cir. 1994) (quoting *Jorn*, 400 U.S. at 482).

This test is fact-specific, not mechanical, and requires attention be paid to the particular problem facing the trial court. *Baum*, 355 S.C. at 215, 584 S.E.2d at 422; *see also Illinois v. Somerville*, 410 U.S. 458, 462 (1973). Yet there are some guideposts. At one end of the spectrum, manifest necessity exists where a jury is deadlocked or "error would make reversal on appeal a certainty." *Arizona*, 434 U.S. at 509 (deadlocked jury); *Somerville*, 410 U.S. at 464 (certainty of reversal). At the other end are harassment of the accused or declaring a mistrial "so as to afford

the prosecution a more favorable opportunity to convict." *Downum v. United States*, 372 U.S. 734, 736 (1963). This Court is to apply "the strictest scrutiny" when the mistrial is premised on the "unavailability of critical prosecution evidence" or there exists a reason to believe the "prosecutor is using the superior resources of the State to harass or achieve a tactical advantage over the accused." *Arizona*, 434 U.S. at 508. These "extreme cases" do not mark the limits of this constitutional guarantee. *Downum*, 372 U.S. at 736. In between is a "spectrum of trial errors and other difficulties," some rising to the level of manifest necessity for a mistrial and others not. *Sanders v. Easley*, 230 F.3d 679, 686 (4th Cir. 2000).

Manifest necessity must exist even when the prosecution did not request a mistrial or when the error of *either* counsel brings about the issue. *United States v. Sloan*, 36 F.3d 386, 395 (4th Cir. 1994) (citing *Jorn*, 400 U.S. at 486, 490). The constitutional implications of a mistrial place the burden of establishing manifest necessity solely on the prosecution. *Arizona*, 434 U.S. at 505; *see also State v. Van Sant*, 198 Conn. 369, 381 n. 11, 503 A.2d 557, 563 n. 11 (1986) (finding the trial court's offer for the defense to make a record "commendable" but agreeing with the defendant that "the burden of demonstrating manifest necessity for a mistrial to avoid the double jeopardy bar was entirely with the state"). Even where the trial court declares a mistrial *sua sponte*, the prosecution must ensure the record is complete if it wishes to re-try the defendant. *United States v. Bonas*, 344 F.3d 945, 951 (9th Cir. 2003). It is not the defendant's burden to insist on a better record. *Id.*

This Court is to resolve any doubt as to the propriety of a mistrial in favor of the defendant. *State v. Rowlands*, 343 S.C. 454, 458, 539 S.E.2d 717, 719 (Ct. App. 2000) (citing *Downum*, 372 U.S. at 738). The defendant need not show any prejudice other than an infringement of his right to have the first properly sworn jury decide his case. *Sloan*, 36 F.3d at 395.

A. The trial court incorrectly found manifest necessity existed for a mistrial because the State's alibi request failed to state the time it contends the offenses occurred as required by Rule 5(e)(1).

The trial court's finding of manifest necessity was rooted in its interpretation of Rule 5(e)(1), SCRCrimP. This rule conditions the defense's obligation to disclose alibi information on a "written request of the prosecution stating the time . . . at which the alleged offense occurred." Rule 5(e)(1), SCRCrimP. The State's sole written request to Mr. Benton did not state the time at which the alleged offense occurred. At the time it declared a mistrial and dismissed the jury, the court improperly found that the indictments and the court's "notice" provided the required information and should be substituted for and relieve the prosecution from its clear burden under Rule 5(e)(1). The following day, it changed course. In that hearing, the court determined the State satisfied its obligation instead by generally providing discovery material and arrest warrants that, when cobbled together, allegedly contained this information. Each time, the trial court's conclusion that the State complied with Rule 5(e)(1) was error. As a result, the court did not exercise sound discretion in declaring a mistrial and thereby prejudiced Mr. Benton's right to have the first properly sworn jury decide his case. *See Sloan*, 36 F.3d at 395.

Rule 5(e)(1) provides,

> Upon written request of the prosecution stating the time, date and place at which the alleged offense occurred, the defendant shall serve within ten days, or at such time as the court may direct, upon the prosecution a written notice of his intention to offer an alibi defense. The notice shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi.

Rule 5(e)(1), SCRCrimP. The same rules of construction for interpreting statutes apply to court rules. *Green ex rel. Green v. Lewis Truck Lines, Inc.*, 314 S.C. 303, 304, 443 S.E.2d 906, 907 (1994) (per curiam). It is axiomatic that where a statute's language is clear and explicit, there is no need to resort to statutory interpretation. *Hodges v. Rainey*, 341 S.C. 79, 87, 533 S.E.2d 578,

582 (2000). "[A] court cannot rewrite the statute and inject matters into it which are not" in the statute's language. *Id.* Only when a literal application "leads to a result so patently absurd" that the legislature could not have intended it can a court look beyond the plain language. *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 536, 725 S.E.2d 693, 695-96 (2012). Interpretation of a statute of a question of law. *Town of Summerville*, 378 S.C. at 110, 662 S.E.2d at 41.

There are no reported South Carolina decisions interpreting Rule 5(e)(1). But the rule states an unambiguous, explicit directive. The alibi request must include a written statement *by the prosecution* as to the time at which the alleged offense occurred if the State wants to obtain alibi information from the defense. And the prosecution must state the time "with specificity."[5] *United States v. Bickman*, 491 F. Supp. 277, 279 (E.D. Pa. 1980); *see also State v. Anderson*, 18 S.W.3d 11, 15 (Mo. Ct. App. 2000) ("The request need not state the exact moment of the crime. However the drafters of the rule thought such specification was of sufficient importance to warrant that it be a specific requirement." (internal citations omitted)).[6]

Without this specificity, a defendant is unable to meet his or her reciprocal obligation to provide detailed alibi information. *United States v. Ponzo*, No. CRIM. 97-40009-NMG-5, 2012 WL 2990765, at *1 (D. Mass. July 19, 2012); *Bickman*, 491 F. Supp. at 27. The rule "is not available . . . to require a defendant to respond to alibi demands for time, place and date that are unnecessarily vague." *Bickman*, 491 F. Supp. at 27. Incorporating other documents into an alibi

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[5] The federal counterpart to our Rule 5(e)(1) is Rule 12.1(a)(1), Fed. R. Crim. P., which provides in pertinent part, "An attorney for the government may request in writing that the defendant notify an attorney for the government of any intended alibi defense. The request must state the time, date, and place of the alleged offense." Our courts have looked to corollary federal criminal rules for guidance in interpreting our rules. *E.g., State v. Miller*, 289 S.C. 316, 317, 345 S.E.2d 489, 490 (1986).

[6] Missouri employs a similar rule conditioning the defense's obligation to disclose alibi evidence on the prosecution delivering a request that "specifies the place, date, and time of the crime charged." Mo. Sup. Ct. R. 25.05.

request by express reference may satisfy the State's obligations, but only if those documents also state the time, date, and place of the offense. *Ponzo*, 2012 WL 2990765, at *1. But the mere production of discovery or other materials containing the required information is insufficient as that is not a statement *by the prosecution* as to where and when the offense was committed. *United States v. Saa*, 859 F.2d 1067, 1071 (2d Cir. 1988).

A defendant's obligation to provide notice of his or her alibi defense is expressly conditioned upon the State's compliance with the requirements of Rule 5(e)(1). "A condition precedent is any fact, other than the mere lapse of time, which, unless excused, must exist before a duty of immediate performance by the promisor can arise." *Ballenger Corp. v. City of Columbia*, 286 S.C. 1, 5, 331 S.E.2d 365, 368 (Ct. App. 1985). Stated differently, it is "an act which must occur before performance by the other party is due." *Alexander's Land Co. v. M & M & K Corp.*, 390 S.C. 582, 596, 703 S.E.2d 207, 214 (2010) (internal quotations omitted). Failure to comply with these strictures therefore precludes the State from objecting to the introduction of alibi evidence. *Bickman*, 491 F. Supp. at 27.

There is one written request for an alibi from the State in this case, and it pertains only to the murder charge. **(R. p. 510).** It states the date and place of the murder but not the time, and it references no other documents. **(R. p. 510).** There is no written request for Mr. Benton's alibi for any other alleged offense occurring on any other date. That should end the discussion as a matter of law. The State failed to meet its initial burden under the plain and unambiguous language of Rule 5(e)(1) for the murder charge, and it made *no written request* for any other charge.

But the trial court went further. Not only did it consider crimes for which the State served no alibi request in the first instance, it looked to the indictments and the court's "notice" for the time of the offenses. **(R. p. 43, lines 16-20).** This expansion of the rule was an error of law. There

also is no indication in the record of what the court's "notice" is, and the indictments indisputably do not state a time. **(R. pp. 363-72).** Thus, as a factual matter the State failed to comply even with the court's erroneous interpretation of the rule.[7]

The proceedings held the day after the trial court declared a mistrial and discharged the jury are irrelevant. The prejudice to Mr. Benton in dismissing his first jury was complete and could not be undone. *See McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("[W]hatever doesn't make any difference, doesn't matter."). This Court therefore should not consider the trial court's changed position. Regardless, it too was error. The trial court wrongly continued to excuse the State's non-compliance with Rule 5(e)(1) by looking even further beyond the face of the State's single request. The trial court turned to crimes and discovery material produced by the State which were not referenced in the request, including police reports, fire reports, a coroner's report, and the statements of co-defendants. **(R. p. 54, line 21-p. 55, line 8).** This was an error of law based on the plain language of Rule 5(e)(1) as they are not statements of the prosecution. Neither are they clear or specific as to what time the State believed Mr. Benton committed these crimes.[8] Once again, there is no factual support for the court's conclusion that State complied with the court's continued incorrect interpretation of Rule 5(e)(1).

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[7] The trial court's general belief that indictments are the requisite written notice of time, date, and place is mistaken. Where time is not an essential element of the offense, it need not be stated in the indictment. *State v. Nicholson*, 366 S.C. 568, 574, 623 S.E.2d 100, 102-03 (Ct. App. 2005). Rule 5(e)(1) necessarily must envision a written statement besides the indictment.

[8] For example, the only reference to time for the April 18 incident is a statement in Mr. Benton's arrest warrant that there was probable cause to believe it occurred between 3:00 and 4:00 in the morning. The arrest warrant contains no source for this belief. There were no police records for this incident, and none of Mr. Benton's co-defendants provided a time in their written statements. As to the April 26 fire, the only indication of time is when the fire department was dispatched to the scene. The arrest warrant contains no time Mr. Benton allegedly committed the arson or any other crime on that day, and the other documents referenced by the court do not either. Investigators also initially inquired as to Mr. Benton's whereabouts at 5:30 a.m. on the date of the murder, not between 2:30 and 3:00 a.m. as suggested by their own contemporaneous documents.

While the trial court insisted on "strict compliance" with Rule 5(e)(1) on Mr. Benton's part, *e.g.*, **(R. p. 41, lines 12-20)**, the court looked far beyond the text of rule to justify the State's actions. Because this afforded the State "a more favorable opportunity to convict" by improperly excusing its non-compliance with Rule 5(e)(1), the court's declaration of a mistrial is subject to "the strictest scrutiny." *Arizona*, 434 U.S. at 508; *Downum*, 372 U.S. at 736. It certainly cannot be said that the "ends of justice would otherwise be defeated" if the trial carried on. *Hanno*, 31 F.3d at 46. To the contrary, the ends of justice were defeated by declaring a mistrial.

Neither is the trial court's approach of a *post hoc* review of document productions in search of evidence to satisfy the State's obligation workable. Under it, defendants must sift out any references to time in potentially voluminous material to divine the prosecution's belief. Rule 5, however, places the initial burden on the State. If the State does not satisfy its obligations, the defense need not disclose this information. Requiring clairvoyance of the defense turns the rule on its head. This also undermines the goal of mutual disclosure. "[S]ince an alibi derives its potency as a defense from the fact that it involves the physical impossibility of the accused's guilt, a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all." *State v. Robbins*, 275 S.C. 373, 376, 271 S.E.2d 319, 320 (1980) (quoting 21 Am. Jur. 2d *Criminal Law* § 136). Accounting for a defendant's whereabouts at the specific time the prosecution contends the offense was committed is an essential component of an alibi. Without an affirmative position of the prosecution as to when the crime occurred, counsel cannot meaningfully disclose an alibi defense.

Furthermore, the evidence in these materials may be incomplete, inaccurate, or inconsistent. The State may believe the evidence as to time is incorrect, such as a witness being mistaken as to the time he claims he observed a crime occur. The alibi information provided by

the defense would, in this circumstance, be inapposite. More troubling, the State could ferret out a defendant's alibi through information it believes to be incomplete or incorrect and then tailor its presentation of evidence to avoid the defense. While the State ultimately may not be bound to the time it places in an alibi demand, Rule 5 cannot be interpreted in a way that encourages such gamesmanship by giving an end-run around the notice requirement. This jeopardizes the rights of criminal defendants and encourages tactics the disclosure rules were designed to avoid. A defendant also could find his evidence excluded at trial through no fault of his own if he guesses the wrong time when responding. Hence the express requirement in Rule 5(e)(1) for a written statement from the prosecution as to the time of the offense.

As a final matter, the term "alleged offense" within the context of this rule refers to conduct alleged in an indictment. *United States v. Gilbert*, 188 F.R.D. 176, 178 (D. Mass. 1999). It is improper for the prosecution to seek alibi information for uncharged offenses. *United States v. Ducran*, 639 F. Supp. 2d 127, 128 (D. Mass. 2009); *Gilbert*, 188 F.R.D. at 177-78. Allowing otherwise "could cause mischief." *Gilbert*, 188 F.R.D. at 178. The State's request in this case pre-dated the earliest of Mr. Benton's indictments by twenty days. It therefore could not have triggered Mr. Benton's obligations under Rule 5(e)(1) in the first instance. *See* Rule 5(e)(1), SCRCrimP (requiring a response from the defense within ten days of the State's request).

The trial court erred as a matter of law by looking beyond the face of the single Mutual Reciprocal Disclosure Request served by the State. That request has no statement of time, and there is no more for the court to examine. There also is no factual basis for its conclusion that the indictments or discovery materials state the time of each offense with specificity even if it correctly interpreted Rule 5(e)(1). The court therefore did not exercise sound discretion in declaring a mistrial, and as a result violated Mr. Benton's right to have his case heard by the first jury.

B. The trial court did not adequately consider available alternatives to a mistrial even if Mr. Benton did not comply with Rule 5(e)(1).

Even if the trial court correctly interpreted Rule 5(e)(1), which Mr. Benton disputes, it did not adequately consider the alternatives to declaring a mistrial. The court therefore did not exercise sound discretion in finding manifest necessity, thereby violating Mr. Benton's constitutional rights when trying him again.

The "critical inquiry" into whether manifest necessity exists to declare a mistrial is whether less drastic alternatives are available. *United States v. Shafer*, 987 F.2d 1054, 1057 (4th Cir. 1993). "If alternatives existed, then society's interest in 'fair trials designed to end in just judgments' was not in conflict with the defendant's right to have the case submitted to the jury." *Id.* (quoting *United States v. Perez,* 22 U.S. (9 Wheat.) 579, 579-80 (1824)); *see also Ex parte Bruce*, 112 S.W.3d 635, 640 (Tex. App. 2003) ("Before granting a mistrial on the grounds of manifest necessity, a trial court must determine whether alternative courses of action are available and, if so, choose one that is less drastic than a mistrial."); *Cornish v. State*, 272 Md. 312, 320, 322 A.2d 880, 886 (1974) ("[A] retrial is barred by the Fifth Amendment where reasonable alternatives to a mistrial, such as continuance, are feasible and could cure the problem."). If less drastic viable alternatives exist, by definition there is no manifest necessity for a mistrial.

The trial court summarily discussed two sides of the same coin as the only possible alternatives: exclusion of Mr. Benton's alibi witnesses, which it felt unfair to Mr. Benton, or allowing them to testify, which it felt unfair the State. **(R. p. 5; p. 41, line 12-p. 43, line 3).** This cursory analysis failed to consider whether the court constitutionally could exclude Mr. Benton's alibi witnesses in the first instance. The Compulsory Process Clause of the Sixth Amendment guarantees criminal defendants the right to call favorable witnesses. *State v. Page*, 406 S.C. 272, 286, 750 S.E.2d 623, 631 (Ct. App. 2013). "Few rights are more fundamental than that of an

accused to present witnesses in his own defense. Indeed, this right is an essential attribute of the adversary system itself." *Taylor v. Illinois*, 484 U.S. 400, 408 (1988).

Like many other constitutional rights, this one is not absolute. Before excluding an undisclosed defense witness, the trial court must weigh "the fundamental character of the defendant's right to offer the testimony of witnesses in his favor" against "the integrity of the trial process." *Id.* at 414. This includes "the presentation of reliable evidence and the rejection of unreliable evidence, the interest in the fair and efficient administration of justice, and the potential prejudice to the truth-determining function of the trial process." *Id.* at 414-15. The trial court may also examine the reason for the defendant's non-disclosure to ascertain whether the conduct was willful or designed to obtain a tactical advantage. *Id.* at 415. Indeed, "most cases upholding the preclusion of an alibi defense have involved willful misconduct by the defense." *Toney v. Miller*, 564 F. Supp. 2d 577, 587 (E.D. La. 2008) (collecting cases).

The trial court incidentally and in passing touched upon some, but not all, of these questions in its brief analysis of manifest necessity. **(R. p. 5; p. 41, line 12-p. 43, line 13).** But at no point did the trial court consider the question of whether exclusion was permissible to begin with under the Compulsory Process Clause. The facts of this case call for this inquiry. Mr. Benton's trial counsel was under the impression notice had been given, **(R. p. 38, lines 5-18; p. 40, lines 14-24)**, the State knew the identity of some alibi witnesses already and had subpoenaed one itself, **(R. p. 38, line 5-p. 39, line 12)**, investigators spoke with some of these witnesses and had the opportunity to speak with another, **(R. p. 317, line 17-p. 318, line 13; p. 328, line 23-p. 329, line 17; p. 339, line 13-p. 340, line 2)**, Mr. Benton's trial counsel discussed the alibi defense with the State, **(R. p. 38, lines 5-18; p. 39, lines 5-12)**, and trial counsel stated on the record months before trial that he

would not dispute the facts of the underlying crimes because "[t]he defense in this case is that Mr. Benton didn't do it, didn't participate in it," **(R. p. 11, lines 13-23)**.

Whether exclusion would be proper is not before this Court; relevant only is that the trial court never considered it. Mr. Benton's alibi defense had been disclosed to and investigated by the State. There is not a scintilla of bad faith on the part of Mr. Benton's trial counsel; to the contrary, counsel thought notice had been sent and openly discussed Mr. Benton's alibi with the State. If anything, it is at least arguable whether the State acted in good faith under these circumstances if it knew of Mr. Benton's intention to advance an alibi defense, it had discussions with defense counsel about it, and Mr. Benton identified witnesses to be called in support thereof, **(R. p. 38, line 5-p. 39, line 12)**, yet retreated to a defense of strict compliance with Rule 5 when the State itself had not strictly complied. Under these facts, exclusion would have been unconstitutional. *See Toney*, 564 F. Supp. 2d at 589. Ms. Richardson, the Solicitor with whom Mr. Benton's trial team had these discussions, did not dispute these representations. But to the extent the State did dispute them, additional argument, testimony, and fact finding would have been appropriate to discern what information the State already had in its possession. The trial court never undertook this analysis.

The trial court also failed to consider other reasonable alternatives. Allowing trial to proceed under any circumstances was not an option for the trial court, as it volunteered it would mistry the case even if the State agreed Mr. Benton could present his witnesses. **(R. p. 5).** However, Rule 5(g), SCRCrimP, allows the court to waive the requirements of the rule for good cause. There is no indication the court ever contemplated this relief, particularly in the absence of bad faith and where much, if not all, of the information already had been disclosed. The record also reveals no consideration of a brief continuance. While the court had two weeks to try case,

and trial took only four days, there was no discussion of a continuance for the State to investigate Mr. Benton's alibi. The court also could have considered, but did not, the possibility of allowing witnesses whom investigators had already interviewed to testify while excluding the rest. Failing to consider these reasonable alternatives and compromises does not comport with Rule 5(g) or the Fifth Amendment.

In sum, the trial court failed to fully consider whether it could exclude Mr. Benton's alibi witnesses and wholly failed to consider other less drastic alternatives to a mistrial. In so doing, the court did not question the Double Jeopardy implications of its *sua sponte* ruling, did not request the input of counsel prior to firmly and finally declaring a mistrial, and could not rationally find manifest necessity or that "the ends of public justice" compelled a mistrial. *See Gilliam*, 75 F.3d at 894 (identifying required factors for exercise of sound discretion). The court therefore did not exercise sound discretion in finding manifest necessity for a mistrial and consequently erred in denying Mr. Benton's motion to dismiss under the Double Jeopardy Clause.

II. The trial court abused its discretion by admitting into evidence text and internet messages allegedly sent or received by Mr. Benton and Mr. Cheatham without evidence they actually sent or received them.

Should this Court disagree with Mr. Benton's invocation of the Double Jeopardy Clause, the trial court also committed reversible error in admitting over 1,000 unauthenticated text and internet messages allegedly sent to or from Mr. Benton and Mr. Cheatham without a foundation showing they were, in fact, sent by or to Mr. Benton and Mr. Cheatham.

Authentication is a condition precedent to the admissibility of documentary evidence. Rule 901(a), SCRE. It requires evidence "sufficient to support a finding that the matter in question is what the proponent claims." *Id.* While the burden is not high, the proponent of the evidence still must offer a satisfactory foundation. *Deep Keel, LLC v. Atl. Private Equity Grp., Inc.*, 413 S.C. 58,

64-65, 773 S.E.2d 607, 610 (Ct. App. 2015) (quoting *United States v. Hassan*, 742 F.2d 104, 133 (4th Cir. 2014)). The proponent may satisfy its burden through direct or circumstantial evidence. *Winburn v. Minn. Mut. Life Ins. Co.*, 261 S.C. 568, 576-77, 201 S.E.2d 372, 376 (1973).

The quantum of evidence necessary to meet this threshold for text and internet messages is a matter of first impression in South Carolina. Courts in several other jurisdictions have considered this question and near universally require some proof establishing the author of the message beyond just to whom the cell phone belonged, whether that proof is direct or circumstantial.[9] *See, e.g., People v. Heisler*, No. 16CA0104, 2017 WL 1756277, at *2 (Colo. Ct. App. May 4, 2017); *State v. Zachary*, 2013 WL 3833058, at * 3 (Del. Sup. Ct. July 16, 2013); *State v. Koch,* 157 Idaho 89, 97, 334 P.3d 280, 288 (2014); *People v. Ziemba*, 100 N.E.3d 635, 648-49 (Ill. Ct. App. 2018); *Dickens v. State*, 175 Md. App. 231, 238-40, 927 A.2d 32, 36-37 (2007); *State v. Harris*, 358 S.W.3d 172, 175 (Mo. Ct. App. 2011); *Rodriguez v. State*, 128 Nev. 155, 162, 273 P.3d 845, 849 (2012); *State v. Taylor*, 178 N.C. App. 395, 414, 632 S.E.2d 218, 230-31 (2006); *State v. Thompson,* 777 N.W.2d 617, 625-26 (N.D. 2010); *Commonwealth v. Koch*, 630 Pa. 374, 389, 106 A.3d 705, 714 (2014); *Tienda v. State*, 358 S.W.3d 633, 639–42 (Tex. Crim. App. 2012).

One of the leading opinions on this subject is the Pennsylvania Supreme Court's decision in *Koch.* There, authorities seized a cell phone the defendant identified as hers during the execution of a search warrant at her home. *Koch*, 630 Pa. at 376, 106 A.3d at 706. Authorities transcribed text messages from her phone that they believed indicated drug activity. *Id.* at 377, 106 A.3d at 706. The court noted there was "no first-hand corroborating testimony from either author or

[9] Requiring proof of authorship is consistent with authenticating analogous forms of evidence under South Carolina law. For example, one can authenticate a telephone conversation with proof that the call was made through a number assigned to a particular person *and* that particular person was on the phone. Rule 901(b)(6), SCRE.

recipient" that Koch sent the messages in question. *Id.* at 387, 106 A.3d at 713. The court observed there are "a growing number of jurisdictions that require at least some corroboration of authorship, whether direct or circumstantial." *Id.* at 389, 106 A.3d at 714. The court joined them:

> [L]ike courts in many other states, we believe that authorship is relevant to authentication, particularly in the context of text messages proffered by the government as proof of guilt in a criminal prosecution. This is not an elevated "*prima facie* plus" standard or imposition of an additional requirement. Rather, it is a reasonable contemporary means of satisfying the core requirement of Rule 901 when a text message is the evidence the Commonwealth seeks to admit against a defendant; the Commonwealth must still show that the message is what the Commonwealth claims it to be, and authorship can be a valid (and even crucial) aspect of the determination.

Id. While the court agreed there was no evidence Koch authored the messages, it nevertheless held the trial court did not abuse its discretion in admitting them because Koch "was charged as an accomplice and conspirator in a drug trafficking enterprise" and thus "authorship was not as crucial to authentication as it might be under different facts." *Id.* at 389-90, 106 A.3d at 714. In other words, it did not matter if Koch actually authored the messages in that particular case.

This requirement is one of both "reason and common sense." *Butler v. State*, 459 S.W.3d 595, 601 (Tex. Crim. App. 2015). "[C]omputers can be hacked, protected passwords can be compromised, and cell phones can be purloined." *Tienda*, 358 S.W.3d at 641. A cell phone number therefore "does not necessarily establish the identity of the user at a particular moment in time with the same definitiveness that fingerprints, signatures, photographs, or DNA may establish the identity of the perpetrator of a crime." *Butler*, 459 S.W.3d at 601. There must be some evidence to "bridge the logical gap and permit a proper inference that the purported author sent the message." *Id.* at 602. This may be done through varying forms of direct and circumstantial evidence. *Id.* It is not that text messages demand a different standard for authenticity; it is that this

proof is necessary to show a text message is what it purports to be—a message sent by one particular individual to another.

There is sufficient evidence that the text and internet messages came from Mr. Benton's and Mr. Cheatham's phones. But this is not enough to authenticate any specific message as being sent by Mr. Benton, Mr. Cheatham, or anyone else. It was up to the State to fill this evidentiary gap. The State took this burden and authenticated three exchanges between Mr. Cheatham and Mr. Benton: two sent nine days before the first incident containing vague planning references, and one after the murder expressing surprise upon hearing the news. **(R. p. 258, line 11-p. 261, line 22).** But the State offered no direct or circumstantial proof as to authorship of any other specific message. The need for this proof was compounded by the evidence that Mr. Cheatham had Mr. Benton's phone the night of the murder, and others (including Mr. Cheatham) used Mr. Benton's phone on various other occasions. **(R. p. 215, lines 7-9; p. 216, line 23-p. 219, line 9; p. 270, line 22-p. 273, line 20; p. 312, line 17-p. 315, line 10; p. 331, line 20-p. 332, line 5).** Authorship of the messages on Mr. Benton's phone therefore was very much in dispute. The State had the obligation and the opportunity to lay the requisite foundation. While it consciously elicited sufficient evidence for some messages, it by and large chose not to.

The court's conclusion that identification of Mr. Benton's and Mr. Cheatham's phone was sufficient authentication was an error of law. In the resulting vacuum, the court abused its discretion by admitting all unredacted text and internet messages from their phones except the three identified by Mr. Cheatham and the one from Ms. Hudson regarding Mr. Benton's truck. The prejudice to Mr. Benton was patent, as these text messages were one of the cornerstones of the State's proof against him.

III. The trial court abused its discretion by admitting into evidence gruesome crime scene photographs that had no probative value and were designed to inflame the passions of the jury.

The trial court further abused its discretion in admitting three gruesome crime scene pictures that were not necessary to prove any facts at issue, were inflammatory in and of themselves, and were used by the State unabashedly and explicitly to directly appeal to the jury's passions.

Otherwise relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE. Evidence is inadmissible under Rule 403 if it suggests a decision on an improper basis. *State v. Lyles*, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008). Trial courts have discretion to determine the relevancy and materiality of photographs. *State v. Livingston*, 282 S.C. 1, 6, 317 S.E.2d 129, 132 (1984). "If photographs are calculated to arouse the sympathy or prejudice of the jurors or are irrelevant or not necessary to substantiate facts, they should be excluded." *Id.* Cases discussing the admissibility of crime scene and autopsy photographs are legion in South Carolina. A review of the extant case law reveals critical factors bearing on their admissibility.

The first is whether the photographs are admitted during the sentencing phase of a capital trial, or during the guilt phase of a capital or other case. The scope of probative value is "much broader" in the sentencing phase of a capital murder trial. *State v. Torres*, 390 S.C. 618, 623, 703 S.E.2d 226, 229 (2010). "The purpose of the bifurcated proceeding in a capital case is to permit the introduction of evidence in the sentencing proceeding which ordinarily would not be admissible in the guilt phase." *State v. Kornahrens*, 290 S.C. 281, 289, 350 S.E.2d 180, 185 (1986). Though this lens, photographs depicting the circumstances of the crime generally are admissible in the sentencing phase. *Torres*, 390 S.C. at 623-24, 703 S.E.2d at 229; *State v. Rosemond*, 335

S.C. 593, 597, 518 S.E.2d 588, 590 (1999); *State v. Powers*, 331 S.C. 37, 46–47, 501 S.E.2d 116, 120 (1998); *State v. Tucker*, 324 S.C. 155, 167-68, 478 S.E.2d 260, 266–67 (1996); *State v. Franklin*, 318 S.C. 47, 55, 456 S.E.2d 357, 361–62 (1995); *State v. Gilbert*, 277 S.C. 53, 57, 283 S.E.2d 179, 181 (1981).

When determining guilt, on the other hand, "photographs of murder victims should be excluded where the facts they are intended to show have been fully established by competent testimony." *Kornahrens*, 290 S.C. at 288-89, 350 S.E.2d at 185. While crime scene or autopsy photographs generally are admissible to corroborate testimony, they lose their evidentiary value where they depict information that is stipulated to or "not really at issue." *State v. Middleton*, 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986). Of course, the State is not necessarily bound by a defendant's proposal to stipulate to certain facts. And photographs may be admitted to prove facts beyond those stipulated. *See State v. Jarrell*, 350 S.C. 90, 106, 564 S.E.2d 362, 371 (Ct. App. 2002). But where they simply serve to corroborate stipulated facts that are not at issue in the trial, they are no longer probative.

Instead, photographs to demonstrate guilt generally are admitted to prove *specific facts at issue* in the case. *E.g.*, *State v. Holder*, 382 S.C. 278, 290–91, 676 S.E.2d 690, 697 (2009) (finding autopsy photographs admissible where the pathologist testified they were necessary to assist jurors without medical training in understanding the victim's injuries and that it would have been difficult for defendant to ignore the injuries); *Tucker*, 324 S.C. at 167, 478 S.E.2d at 266–67 (1996) (affirming admission of photographs in guilt phase where they were used to contradict the defendant's assertion that the killing was accidental or the result of a faulty weapon); *State v. Nance*, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996) (finding photographs corroborated testimony and were relevant to malice under assault and battery with intent to kill); *State v.*

Livingston, 282 S.C. 1, 6, 317 S.E.2d 129, 132 (1984) (holding photographs corroborated testimony of a witness whose memory had been challenged by the defense); *State v. Hawes*, 423 S.C. 118, 131, 813 S.E.2d 513, 520 (Ct. App. 2018), *reh'g denied* (May 24, 2018) (holding photographs showing "extreme nature of killing" were probative of malice and thus admissible); *State v. Thompson*, 420 S.C. 192, 214–15, 802 S.E.2d 623, 634–35 (Ct. App. 2017), *cert. denied* (Mar. 7, 2018) (affirming admission of autopsy photographs necessary to help understand testimony regarding nature of injuries and defendant's awareness of injuries); *State v. Gray*, 408 S.C. 601, 609, 759 S.E.2d 160, 164 (Ct. App. 2014) (allowing autopsy photographs where it "was important for the jury to see the nature and location of these injuries in order to understand the witnesses' testimony about the fights and the pathologists' testimony about the injuries"); *State v. Martucci*, 380 S.C. 232, 250, 669 S.E.2d 598, 608 (Ct. App. 2008) (finding the pictures were necessary to show injuries were inconsistent with accidental injury or play); *State v. Ward*, 374 S.C. 606, 613, 649 S.E.2d 145, 149 (Ct. App. 2007) (affirming admission of photographs of graze gunshot wound to rebut defense arguments about the angle of the shot).

In light of the foregoing, our Supreme Court has become increasingly weary of Solicitors seeking to admit gruesome crime scene and autopsy photographs where they are not necessary. In *Torres*, the court went out of its way to admonish Solicitors who "push[] the envelope of admissibility" with these photographs. *Torres*, 390 S.C. at 624, 703 S.E.2d at 229. In *State v. Collins*, 409 S.C. 524, 763 S.E.2d 22 (2014), often and erroneously cited in support of admissibly, a majority of the court found the photographs to be *inadmissible*. *Collins*, 409 S.C. at 539, 763 S.E.2d at 30 (Kittredge, J., concurring in result (joined by Hearn, J.)); *id.* at 540, 763 S.E.2d at 30 (Pleicones, J., dissenting). Justice Kittredge, joined by Justice Hearn, explained that "[t]he detailed and graphic testimony of the pathologist was more than sufficient for the State to establish the

elements of the offense." *Id.* at 539, 763 S.E.2d at 30. Ultimately, a majority of the court found admission of the photographs harmless error. *Id.* at 538-39, 763 S.E.2d at 30 (plurality opinion); *id.* at 539, 763 S.E.2d at 30 (Kittredge, J., concurring in result).

The trial court here did not consider these factors. This is not a capital case, the jury was tasked only with determining guilt, and Mr. Benton did not challenge the basic underlying circumstances of these crimes. Against this back drop, the trial court admitted thirty-nine photographs depicting the scene of the April 29 murder and fire without objection. **(State's Ex. 16-53, 57).** The court then admitted the three photographs at issue here also for the sole purpose of depicting the scene of the crime. **(R. p. 107, line 1-p. 111, line 11).** With over three dozen other crime scene photographs, these three were not necessary to serve that end. They in fact went far beyond it. State's Trial Exhibit 54 shows Mr. Smith's charred remains lying in a smoldering pile of rubble, his abdomen ruptured and internal organs plainly visible. **(State's Ex. 54).** State's Trial Exhibit 55 depicts the same just from a different angle and farther away. **(State's Ex. 55).** State's Trial Exhibit 56 is a close-up of Mr. Smith's detached forearm and hand, lying among the ashes shriveled from the fire with a blackened handcuff still attached. **(State's Ex. 56).** Separate and apart from these photographs, the State's witnesses testified to the facts depicted in them. *E.g.*, **(R. p. 104, line 21-p. 106, line 15; p. 114, line 19-p. 115, line 1; p. 131, lines 20-24; p. 159, line 25-p. 160, line 21).** Mr. Benton did not dispute a single fact shown in these photographs, and they consequently were unnecessary to prove a single fact. The pictures have no probative value. *Kornahrens*, 290 S.C. at 288-89, 350 S.E.2d at 185.

The only value they can serve is to inflame the passions of the jury, which is precisely what the State attempted to do. Their gruesome nature alone is the precise prejudice a majority of our Supreme Court identified in *Collins*. However, the State did not stop with the mere admission of

the photographs. Instead, the State proceeded to show Mr. Cheatham State's Trial Exhibit 54 and ask, "Was that worth $1500?" When Mr. Cheatham responded "No," he said he and Mr. Benton "did that." **(R. p. 262, lines 17-21).** This was not an attempt explain or depict the scene of a crime. It was an appeal to the jury's passion and prejudice just as the *Torres* Court feared.

For these reasons, the trial court abused its discretion in admitting into evidence State's Trial Exhibits 54, 55, and 56.

IV. These evidentiary errors were not harmless beyond a reasonable doubt because this evidence formed the central core of the State's proof against Mr. Benton.

The State may argue any error in admitting this evidence was harmless. Given the centrality of the messages to the State's case and the highly inflammatory nature of the photographs, their erroneous admission was extraordinarily prejudicial. This Court cannot conclude any error was harmless beyond a reasonable doubt, and new trial therefore is warranted.

The key factor in determining whether error is reversible is whether it appears beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Tapp*, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012). The question is not whether the State proved its case beyond a reasonable doubt. *Id.* Instead, the question is whether this Court can say the verdict was "surely unattributable to the error." *Roberts v. State*, 408 S.C. 123, 135, 757 S.E.2d 744, 751 (Ct. App. 2014) (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)).

The State's proof against Mr. Benton was three-fold: (1) the testimony of admitted criminals seeking sentencing consideration and whose credibility no witness would vouch for, (2) the location of Mr. Benton's cell phone, and (3) the text/internet messages. Aside from the testimony of Mr. Benton's co-defendants, the State's proof was circumstantial. Much of the State's closing argument focused on Mr. Benton's text messages. **(R. p. 277, line 2-p. 282, line 2).** And without them, the State is left with discredited testimony of co-defendants and the location

of Mr. Benton's phone, with scant proof and even an express denial that Mr. Benton had it at the time his co-defendants committed these crimes. This Court cannot say, beyond a reasonable doubt, that the messages had no influence on the jury's verdict. The three gruesome photographs of Mr. Benton's body, with his abdomen ruptured, his organs spilled out, and his detached shriveled arm still handcuffed, had no purpose but to impassion the jury. The State drove this home by asking Mr. Cheatham is these horrific injuries were worth $1,500. **(R. p. 262, lines 17-18).** Particularly in light of the circumstantial nature of the State's proof aside from the questionable co-defendants' testimony, this Court cannot say these photographs had no effect on the jury's verdict.

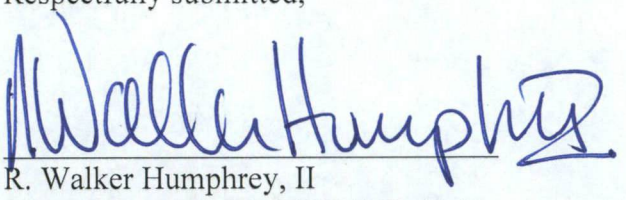
The trial court's error in admitting each of these items was not harmless beyond a reasonable doubt. This Court therefore should reverse and remand for a new trial.

[Conclusion and signature page follow]

CONCLUSION

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

Respectfully submitted,



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June 12, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY

Steven H. John, Circuit Court Judge

Appellate Case No. 2017-002553

The State, ...Respondent,

v.

Tommy Lee Benton, ...Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Briefs of Appellant Tommy Lee Benton comply with Rule 211(b), SCACR.

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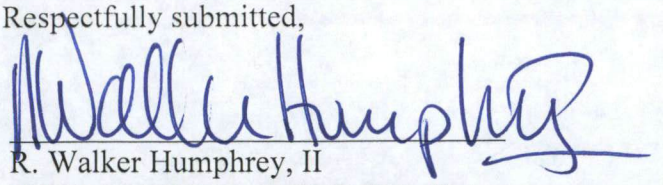
Respectfully submitted,



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