THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY

Steven H. John, Circuit Court Judge

Appellate Case No. 2017-002553

The State, ...Respondent,

v.

Tommy Lee Benton, ...Petitioner.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

Counsel for Petitioner certifies that he made a timely Petition for Rehearing which the Court of Appeals finally ruled upon and denied on November 18, 2021.

QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals err in holding the circuit court exercised sound discretion when granting a mistrial for Mr. Benton's failure to formally respond to a Rule 5(e)(1), SCRCrimP, alibi request, where the State did not provide the information required for Mr. Benton to respond, he otherwise disclosed his alibi to the State, and the circuit court failed to consider less drastic alternatives to a mistrial?

II. Did the Court of Appeals exceed Rule 220(c), SCACR, and violate Mr. Benton's due process rights by affirming the admission of text and Facebook messages under an additional sustaining ground without notice to Mr. Benton and which was not raised to or ruled upon by the circuit court, not argued by the State in its brief, not referenced during oral argument, and not developed in or supported by the record?

III. Did the Court of Appeals err in holding the circuit court was within its discretion to admit victim body photographs solely to corroborate substantial undisputed evidence of malice, where such photographs are inadmissible when they show facts which otherwise have been established by competent evidence and the State only used them to inflame the jury?

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. Petitioner Tommy Lee Benton was indicted for Mr. Smith's murder on April 21, 2016, and for two counts of first-degree burglary, one count of first-degree arson, and one count of third-degree arson on October 20, 2016.

All 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 because Mr. Benton did not serve a written response to a pre-indictment alibi request pursuant Rule 5(e)(1), SCRCrimP. Mr. Benton argued the State did not first provide

formal written notice of the time of each offense as required by Rule 5(e)(1) and he nevertheless disclosed his alibi. The trial court found Mr. Benton did not comply with the rule and declared a mistrial from the bench on July 18, 2017, and by written order entered July 26, 2017.

Judge John called a second jury trial on December 4, 2017. Prior to the swearing of the second jury, Mr. Benton moved to dismiss all 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 text and Facebook messages allegedly sent by or to him without specific proof that they were, in fact, sent by or to him. Mr. Benton further objected to the introduction of three victim body photographs under Rule 403, SCRE, because they were gruesome and did not demonstrate any disputed facts. The trial court overruled these objections.

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. On October 13, 2021, the Court of Appeals affirmed Mr. Benton's convictions in a published opinion. Mr. Benton timely petitioned for rehearing on November 4, 2021, which the Court of Appeals denied on November 18, 2021.

STATEMENT OF FACTS

I. The State knew Mr. Benton's alibi for a series of crimes others admitted committing.

Mitchell Cheatham, Garland Rose, and Douglas Thomas carried out a crime spree that ended in C.B. Smith being burned alive while handcuffed in a chair. It began on April 18, 2014, when Mr. Cheatham and Mr. Rose broke into Mr. Smith's home in Aynor and stole money. (R. pp. 450-51). Mr. Cheatham and Mr. Thomas then broke into Mr. Smith's store in Aynor on April 26, 2014, and set it on fire after finding no money. (R. p. 71, line 2-p. 75, line 21; p. 452). Mr. Cheatham returned to Mr. Smith's home with Mr. Thomas on April 29, 2014, entered it while

armed, took what money 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).

Mr. Cheatham, Mr. Rose, and Mr. Thomas admitted to these atrocities and claimed Mr. Benton participated in them.[1] (R. p. 71, line 2-p. 75, line 21; p. 80, line 2-p. 86, line 11; pp. 450-457). However, Mr. Benton was with family in North Carolina during each attack perpetrated by Mr. Cheatham and the others. (R. p. 299, line 11-p. 301, line 11; p. 302, line 17-p. 304, line 4; p. 305, line 14-p. 308, line 6, p. 309, lines 3-24; p. 310, line 5-p. 315, line 17). The State ultimately indicted Mr. Benton in April and October 2016. (R. pp. 363-72). The indictments do not state the time the alleged offenses occurred.

Before securing any indictments, the State served Mr. Benton with one Rule 5(e)(1) Mutual Reciprocal Disclosure Request requesting his alibi for the April 29 murder only. (R. p. 510). The prosecution never stated the time Mr. Smith was allegedly murdered by Mr. Benton or referenced any documents that did. And time references in the written record were spotty. Mr. Thomas never signed a written statement, and Mr. Cheatham's and Mr. Rose's statements are silent on time. (R. pp. 450-457). There is no record of the April 18 burglary because Mr. Smith did not call the police. (R. p. 99, lines 18-19). The arrest warrant for this burglary asserted it occurred "between the hours of 0300 hours to 0400 hours" without stating the basis for this assertion. (R. p. 357). The April 26 fire report indicated fire services were dispatched to the store beginning at 6:17 a.m. but did not say when the fire started or when anyone broke in. (R. p. 480). The arrest warrant did not contain a statement as to time. (R. p. 359). Investigators questioned Mr. Benton's mother about his whereabouts at 5:30 a.m. on April 29 (R. p. 318, lines 8-13), while their internal records state units

[1] Mr. Rose died in a car accident prior to trial. (R. p. 97, lines 15-18).

were dispatched beginning at 2:48 a.m. and the coroner estimated time of death as 2:30 a.m. (R. pp. 464, 496). There is no statement as to when anyone broke into Mr. Smith's home or started the fire. The arrest warrant claimed the murder occurred at "at approximately 0230 hours" on April 29. (R. p. 361). There was no arrest warrant for arson or burglary on April 29.

Mr. Benton did not formally respond to the alibi request. (R. p. 40, lines 14-19). He nevertheless discussed his alibi with the State prior to trial. (R. p. 38, lines 3-18; p. 39, lines 6-12). Investigators interviewed two alibi witnesses—his mother and his uncle's ex-girlfriend—and locked another—his step-father—in an interrogation room. (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). At a March 2017 pre-trial hearing, Mr. Benton explained he would not contest the crimes committed against Mr. Smith 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, p. 12, lines 18-22). The State did not claim it was unaware Mr. Benton would present an alibi. By the time of trial, two of his attorneys had discussed his alibi and which witnesses supported it, including one subpoenaed by the State, with Assistant Solicitor Lauree Richardson. (R. p. 38, line 5-p. 40, line 24). Ms. Richardson did not dispute that claim. A different Assistant Solicitor claimed no discussions took place but conceded he was aware of at least some witnesses supporting Mr. Benton's alibi. (R. p. 38, line 20-p. 39, line 1).

II. Mr. Benton's first trial ended in an improvidently granted mistrial.

Mr. Benton's first jury was sworn on July 18, 2017. (R. p. 29, lines 4-10). The court set aside two weeks for trial. (R. p. 25, line 19-p. 26, line 23).

Mr. Benton previewed his alibi in his opening statement. (R. p. 35, line 1-p. 37, line 4). The State objected and asked that the court strike the alibi because Mr. Benton had not served a written notice pursuant to Rule 5(e)(1). (R. p. 37, line 22-p. 38, line 2). 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.

Mr. Benton believed he gave formal notice of his alibi as required, and he openly discussed his alibi with the State. (R. p. 38, line 5-p. 40, line 24). As he put it, "[alibi's] always been the defense in this case." (R. p. 38, line 11).

The trial court spoke with counsel in chambers. (R. p. 41, lines 3-7). That conversation was not immediately placed on the record, but Mr. Benton later explained that he argued during the first trial that there was no justification for a mistrial. (R. p. 63, lines 16-18). The trial court declared a mistrial over Mr. Benton's objection. The court wrongly believed that an indictment is the written statement of the time, date, and place Rule 5(e)(1) requires from the State to trigger a defendant's disclosure obligation. (R. p. 41, line 20-p. 42, line 1). It then incorrectly concluded that the indictments and "this Court's notice" (which was not identified) provided the time, date, and place. (R. p. 43, lines 16-20). The court only considered two alternatives to a mistrial—striking Mr. Benton's alibi in full and allowing him to present it in full—and found both would be unfair. (R. p. 42, lines 5-p. 43, line 3). These options were illusory, as the court suggested it would have granted a mistrial even if the State agreed Mr. Benton could present his witnesses. (R. p. 5).

The court held a hearing the next day on the proper interpretation of Rule 5(e)(1). Mr. Benton reminded the court that the indictments do not state the time Mr. Benton allegedly committed the charged offenses. (R. p. 50, line 21). He further explained that an affirmative statement from the prosecution as to time is necessary to 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 were not cited in the alibi request: the arrest warrants, police reports, fire reports, and voluntary statements. (R. p. 52, lines 12-22). There is no evidence these documents were produced to Mr. Benton with or before the alibi request. The court found this sufficient to comply with the State's Rule 5(e)(1) obligation. (R. p. 54, line 21-55, line 8). The court reiterated these conclusions in a written order declaring a mistrial. (R. pp. 4-5).

III. The circuit court held Mr. Benton's second trial over his objection and received inadmissible messages and photographs into evidence.

Mr. Benton's second trial began on December 4, 2017. Prior to the second jury's swearing, Mr. Benton moved to dismiss his 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 reiterate[d]" its prior rulings and denied the motion. (R. p. 64, line 8-p. 65, line 23).

Foundational Evidence for Text and Internet Messages

The State offered every text and Facebook message from Mr. Benton and Mr. Cheatham's phones—over 1,000 messages from March 20, 2014, to May 2, 2014—without introducing only those relevant to the crimes.[2] (R. pp. 373-449). Mr. Benton challenged their admission without authenticating testimony 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). It then retreated and required

[2] State's Exhibit 71 is a compilation of State's Exhibits 69 and 70, which are documents generated by Verizon containing text message data associated with Mr. Benton's phone number. (R. p. 142, line 11-p., 143, line 25; p. 155, lines 10-19; p. 156, lines 7-12; p. 157, lines 19-23). Because Exhibits 69 and 70 total 510 pages and the pertinent information is duplicated in Exhibit 71, Mr. Benton only designated Exhibit 71 to conserve resources. Mr. Benton offered to supplement the record with Exhibits 69 and 70 if necessary. (Final Br. of Appellant at 11 n. 3). State's Exhibits 72 and 76 are data extractions from Mr. Cheatham's and Mr. Benton's phones containing text and internet messages. (R. p. 149, line 24-p. 150, line 4; p. 153, line 24-p. 154, line 8). Mr. Benton's authenticity objection applied to the messages contained in these five exhibits.

only that the State identify the phone from which the messages came. (R. p. 147, line 5-p. 148, line 17; p. 158, lines 8-22; p. 166, lines 11-15). The circuit court found all messages authentic on this basis and admitted them subject only to specific objections "to some contents that may be contained therein."[3] (R. p. 147, line 5-p. 148, line 17; p. 158, lines 8-25; p. 166, lines 11-15).

While the State did not seek to authenticate the messages on any other basis, the record incidentally contains sufficient evidence to demonstrate authorship of a few. For instance, Mr. Cheatham authenticated three isolated exchanges with Mr. Benton:

> (1) a message from Mr. Cheatham on April 29, 2014, 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);
>
> (2) an exchange between Mr. Cheatham and Mr. Benton from April 9, 2014, nearly three weeks before the fatal attack on Mr. Smith, 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
>
> (3) another Facebook Messenger exchange on April 9 about being "on the same page" with a plan for Mr. Cheatham to hold a gun while Mr. Benton makes someone talk, who Mr. Cheatham claimed was Mr. Smith. (R. p. 261, lines 11-22; p. 448).

Kaitlin Rose, Mr. Rose's widow, identified one message she personally sent from Mr. Benton's phone. (R. p. 216, line 23-p. 219, line 9). Finally, Mr. Benton's stepfather confirmed Ms. Hudson sent Mr. Benton a message observing someone tried breaking into Mr. Benton's truck on the evening of April 29. (R. p. 327, lines 23-25; *see also* p. 395, line 562). No witness authenticated any other messages allegedly sent to or received from Mr. Benton or Mr. Cheatham.

[3] The Court of Appeals noted that "[t]he record on appeal does not contain the entire trial discussion regarding the admission of the text messages." (Opinion at 7 n. 3). The record contains the entire discussion regarding authenticity. To conserve resources, it does not include every objection on other grounds to individual messages which were not raised on appeal.

Authentication was critical because Mr. Benton disputed possession of and access to his phone. His mother and great-grandmother testified that Mr. Cheatham had Mr. Benton's phone the night of Mr. Smith's murder. (R. p. 312, line 17-p. 315, line 10; p. 331, line 20-p. 332, line 5). Mr. Cheatham admitted to accessing Mr. Benton's phone on at least one occasion during the April 26 arson and burglary. (R. p. 270, line 22-p. 273, line 20). As noted, Ms. Rose sent messages from Mr. Benton's phone. (R. p. 216, line 23-p. 219, line 9). And Ms. Rose only denied that Mr. Rose borrowed Mr. Benton's phone "for long periods of time"; she did not claim Mr. Rose never borrowed it. (R. p. 215, lines 7-9). Mr. Benton therefore was not in exclusive possession of his phone during the critical period surrounding the crimes, and neither was the phone entirely secure.

Victim Body Photographs

The trial court admitted a series of photographs depicting the scene of the April 29 fire. At issue here are three photographs showing Mr. Smith's burned remains.[4] State's Exhibit 54 depicts Mr. Smith's charred body with his intestines and other organs falling out, State's Exhibit 55 shows the same but from a slight distance, and State's Exhibit 56 depicts Mr. Smith's detached, dried up, and burned arm with handcuffs still attached.

Mr. Benton argued pre-trial that the photographs have no probative value because the facts and manner of Mr. Smith's death were not contested and the photographs would only inflame the jury. (R. p. 11, line 13-p. 12, line 25; p. 19, line 18-p. 21, line 7). The State responded that Exhibit 54 (then marked as Exhibit 5) showed Mr. Smith's body as it was found by the fire department, Exhibit 55 (then marked as Exhibit 10) depicted where Mr. Smith's body was in relation to the rest of the scene, and Exhibit 56 (Exhibit 7 for the hearing) showed that Mr. Smith's handcuffs

[4] All pictures were transmitted directly from the circuit court to the Court of Appeals. They are not reproduced in the Record on Appeal.

were still closed and his hands bound (R. p. 15, lines 10-20; p. 17 line 23-p. 19, line 1). The trial court declined to rule on their admissibility at that time.

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 on the sole ground that they were also accurate depictions of the crime scene over Mr. Benton's renewed objection. (R. p. 107, line 1-p. 109, line 21); *see also* (R. p. 110, line 21-p. 111, line 11) (correcting the exhibit numbering). The State's witnesses testified to the facts shown 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). Mr. Benton never contested anything depicted in the photographs.

The State ultimately did not use these images to corroborate other evidence or show the scene. It instead showed State's Exhibit 54, the 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. (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).

IV. The Court of Appeals affirmed Mr. Benton's convictions after failing to consider material arguments compelling reversal, failing to consider the entire record, reaching unpreserved issues, and misapplying the law.

Mr. Benton timely appealed the circuit court's denial of his motion to dismiss and admission of the messages and victim body photographs. The Court of Appeals affirmed in a published opinion issued on October 13, 2021.

The Court of Appeals first addressed the Double Jeopardy Clause and Rule 5(e)(1). (Opinion at 5-7). The court held that "[w]hile the better practice is for the State to include the time, date, and place in any written Rule 5 alibi request, finding the failure to include an exact time automatically renders an alibi request ineffective would be an overly technical application of Rule 5(e)." (Opinion at 7). The court summarized evidence of time stated in certain law enforcement records and concluded that Mr. Benton "clearly knew the time and place of the events set forth in the indictments because his counsel came to the initial trial with four alibi witnesses ready to testify." (*Id*. at 6). Finally, the Court of Appeals believed the circuit court "considered the alternatives available to avoid a mistrial and properly examined the potential prejudice to each party likely to result." (*Id*. at 7). The court therefore held the circuit court did not improvidently grant a mistrial. (*Id.*). The court alternatively held that Mr. Benton was not prejudiced because he ultimately presented his alibi at his second trial. (*Id.* at 6-7).

As explained in Mr. Benton's Petition for Rehearing, the Court of Appeals' brief analysis overlooked several points regarding the interpretation and application of Rule 5(e)(1): the rule's plain language which requires a written statement of time by the prosecution as a condition precedent to a defendant's obligation to disclose; Mr. Benton's actual disclosure of his alibi, including the identification of witnesses whom police interrogated and the State subpoenaed; the imbalance created by excusing the State from strict compliance with the rule while imposing a

strict compliance standard on a defendant; case law interpreting substantively identical rules holding that statements of time must be made with specificity, finding the mere production of disclosure materials containing the evidence is insufficient, and applying the rule only to indicted offenses; and the practical problems of not enforcing Rule 5(e)(1)'s objective requirements. (*See* Pet. for Reh'g at 4-10). The Court of Appeals also overlooked mistrial alternatives which the circuit court failed to consider and the constitutional prejudice caused by losing a defendant's first properly sworn jury. (*See id.* at 10-13).

The Court of Appeals next agreed that the circuit court erred in authenticating the text and Facebook messages solely because they came from Mr. Benton's and Mr. Cheatham's phones. (Opinion at 9-10). The court nevertheless held that the timing and content of eight individual messages sent over three days authenticated the remaining 1,000 sent over 44 days which Mr. Benton challenged. (*Id.* at 10-11; *see also* R. p. 374, line 38; p. 377, lines 138-40; p. 379, lines 188 and 197; p. 389, line 427, p. 393, line 535). While the court acknowledged that authentication of Mr. Benton's alleged Facebook messages was "more problematic," it held any error was harmless because some (but not all) messages were cumulative to Mr. Cheatham's testimony. (*Id.* at 11). Mr. Benton's Petition for Rehearing noted that the State never raised this argument to the circuit court or the Court of Appeals, it was not a proper additional sustaining ground, Mr. Benton therefore could not make a sufficient record to address this novel argument, and the record otherwise does not support it. (Pet. for Reh'g at 14-16). Mr. Benton also explained that the court did not apply the correct harmless error standard and the Facebook messages were not merely cumulative. (Pet. for Reh'g at 16-17).

Finally, the Court of Appeals held that the circuit court did not abuse its discretion in admitting the photographs of Mr. Smith's body because they demonstrated malice and

"corroborated Cheatham's testimony that Smith was restrained with handcuffs when the house was set on fire and the assailants left him handcuffed there." (Opinion at 13). The court did not consider the wealth of undisputed evidence otherwise demonstrating malice and that Mr. Smith was left handcuffed, that two of the photographs do not even show Mr. Smith handcuffed, or that the State only used the photographs specifically to inflame the jury. (Pet. for Reh'g at 19-21).

The Court of Appeals denied Mr. Benton's Petition for Rehearing on November 18, 2021.

STANDARD OF REVIEW

Appellate courts review the grant of a mistrial for an abuse of discretion. *State v. Council*, 335 S.C. 1, 12, 515 S.E.2d 508, 514 (1999). The Double Jeopardy Clause adds an additional layer to this standard. *See Arizona v. Washington*, 434 U.S. 497, 514 (1978) (holding the great deference given 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. Any doubt as to the propriety of a mistrial must be resolved in favor of the defendant. *State v. Rowlands*, 343 S.C. 454, 458, 539 S.E.2d 717, 719 (Ct. App. 2000) (citing *Downum v. United States*, 372 U.S. 734, 738 (1963)). This Court therefore accords less deference on this issue than under an ordinary abuse of discretion standard.

While the United States Supreme Court has not defined what constitutes the exercise of sound discretion, *Renico v. Lett*, 559 U.S. 766, 779 (2010), various federal circuit courts have. For example, the Fourth Circuit first determines 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 881, 894 (4th Cir. 1996). It also considers whether the trial court "acted precipitately," "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.* at 895.

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. This Court should review the substantial constitutional question of whether manifest necessity existed to grant a mistrial and the novel question of what Rule 5(e)(1), SCRCrimP, requires of the State and a defendant.

The first issue presented involves interwoven substantial constitutional and novel state law questions. The Double Jeopardy Clause prohibits 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). The power to order a mistrial in criminal cases "ought to be used with the greatest caution and for plain and obvious causes." *State v. Prince*, 279 S.C. 30, 32, 301 S.E.2d 471, 472 (1983). 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). This means trial judges cannot "foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public

justice would not be served by a continuation of the proceedings." *Jorn*, 400 U.S. at 485. There must be "so great a need to discharge the jury that 'the 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). Reviewing courts must pay attention to the particular problem facing the trial court. *State v. Baum*, 355 S.C. 209, 215, 584 S.E.2d 419, 422 (Ct. App. 2003).

The claimed "plain and obvious cause" for this mistrial was Mr. Benton's failure to strictly follow Rule 5(e)(1). Mr. Benton's Rule 5 obligations thus are inextricably intertwined with his Double Jeopardy rights; there was no manifest necessity for the mistrial if he did not violate the rule. This Court has never interpreted Rule 5(e)(1) and therefore should grant certiorari to review the Court of Appeals' decision which renders the express requirement for the prosecution to state time in an alibi request mere surplusage in contravention of this Court's decisions, and which improperly requires strict compliance from a defendant but not the State. *See* Rule 242(b)(1), (3)-(4), SCACR. This Court likewise should grant certiorari to review the Court of Appeals' misapplication of the constitutional rule that courts cannot find manifest necessity without considering the viable alternatives. *See* Rule 242(b)(4), SCACR

A. The extent of Rule 5(e)(1)'s reciprocal obligations is a novel question of law that directly bears on Mr. Benton's protection against Double Jeopardy.

The rules 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). There is no need to resort to statutory interpretation where a statute's language is clear and explicit. *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.*; *see also Pickens Cnty. v. S.C. Dept. of Health & Envtl. Control*, Op. No. 28073 (S.C. Sup. Ct. filed Dec. 8, 2021) (Howard Adv. Sh. No. 43 at 68). Likewise, courts must read a statute so that "no word, clause, sentence, provision or part shall

be rendered surplusage, or superfluous." *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (quotation omitted). Interpretation of a statute is a question of law. *Town of Summerville*, 378 S.C. at 110, 662 S.E.2d at 41.

Rule 5(e)(1) unambiguously provides that "[u]pon *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." (emphasis added). The request must state the time with specificity. *United States v. Bickman*, 491 F. Supp. 277, 279 (E.D. Pa. 1980).[5] Without this specificity, a defendant is unable to meet his reciprocal obligation to provide detailed alibi information. *United States v. Ponzo*, No. 97-40009-NMG-5, 2012 WL 2990765, at *1 (D. Mass. July 19, 2012). Incorporating other documents into an alibi request by express reference may satisfy the State's obligation if those documents expressly state the time, date, and place of the offense. *Id*. 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.[6] *United States v. Saa*, 859 F.2d 1067, 1071 (2d Cir. 1988). Finally, the term "alleged offense" refers to conduct alleged in an indictment. *United States v. Gilbert*, 188 F.R.D. 176, 178 (D. Mass. 1999). Allowing the prosecution to request alibis for unindicted offenses "could cause much mischief." *Id*.

[5] This Court has looked to corollary federal criminal rules for guidance when interpreting our rules. *E.g., State v. Miller*, 289 S.C. 316, 317, 345 S.E.2d 489, 490 (1986). Rule 12.1(a)(1), Fed. R. Crim. P., provides in pertinent part, "[a]n 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."

[6] Moreover, disclosure materials may be incomplete, inaccurate, or inconsistent. The State may believe the evidence as to time is incorrect, such as a witness being mistaken. The alibi provided would, in this circumstance, be inapposite for the defense—but be valuable information which the State otherwise would not be entitled to discover.

A written statement from the prosecution stating the time, date, and place of the alleged offense is a condition precedent to a defendant's obligation to disclose his alibi. *See Alexander's Land Co. v. M & M & K Corp.*, 390 S.C. 582, 596, 703 S.E.2d 207, 214 (2010) (holding a condition precedent is "an act which must occur before performance by the other party is due"). The State's failure to fully satisfy this condition means "the defendant may raise an alibi defense at trial to which the Government, though surprised, may not object." *Bickman*, 491 F. Supp. at 279. Here, it is undisputed that the written request did not include a statement as to time, did not incorporate any documents which state time, and pre-dated Mr. Benton's indictments. The State therefore failed to comply with the rule. As a result, Mr. Benton had no obligation to respond and there was no manifest necessity for a mistrial. The Court of Appeals therefore erred.

The need for this Court's review is heightened because the Court of Appeals purposefully bypassed the rule's plain language and then, more troublingly, failed to apply its lenient reading even-handedly. The Court of Appeals allowed the State to request an alibi for an unindicted offense and further held that requiring a statement of time is an "overly technical application," despite the rule's clear requirement for such a statement. (Opinion at 7). Under this construction, the court excused the State's failure to strictly comply with the rule because Mr. Benton knew what time the offense allegedly occurred. (*Id.* at 6). But it did not excuse Mr. Benton's failure to strictly comply even though the State knew his alibi from interviews with witnesses (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 disclosure on the record of his intent to present an alibi (R. p. 11, lines 13-23), and conversations with Mr. Benton's trial counsel (R. p. 38, lines 5-18; p. 39, lines 6-12, p. 40, lines 14-24). Mr. Benton acted in good faith and openly discussed his alibi with the State. It is arguable whether the State acted in good faith by knowing Mr. Benton's alibi in advance yet retreating to a defense of

strict compliance with Rule 5 despite the State's own knowledge and noncompliance. The resulting imbalance afforded the State "a more favorable opportunity to convict" and thus is subject to "the strictest scrutiny." *Arizona*, 434 U.S. at 508; *Downum*, 372 U.S. at 736. This Court cannot allow the State to receive more favorable treatment than a defendant under the same rule.

The Court of Appeals further held Mr. Benton suffered no prejudice because he presented his alibi at the second trial. (Opinion at 6-7). This is plainly incorrect. The only prejudice required for a Double Jeopardy violation is the loss of the first properly sworn jury. *United States v. Sloan*, 36 F.3d 386, 395 (4th Cir. 1994). Mr. Benton need not show any further prejudice.

This Court therefore should grant certiorari to review the novel question presented by the Court of Appeals and the court's unequal application of its ruling to the State and Mr. Benton, issues which directly affect Mr. Benton's Double Jeopardy rights.

B. The Constitution requires consideration of alternatives to a mistrial.

The "critical inquiry" for the existence of manifest necessity is the availability of less drastic alternatives. *United States v. Shafer*, 987 F.2d 1054, 1057 (4th Cir. 1993). The circuit court considered just two alternatives: excluding all Mr. Benton's alibi witnesses, which it believed was unfair to Mr. Benton, or allowing them to testify, which it believed was unfair to the State. (R. p. 5; p. 41, line 12-p. 43, line 3). The Court of Appeals affirmed and likewise never considered other options. (Opinion at 6-7).

Both the circuit court and the Court of Appeals overlooked viable alternatives. The State only requested an alibi for murder on April 29. (R. p. 510). It did not request an alibi for April 18 or April 26, and Mr. Benton therefore had no obligation to disclose it. This means the "particular problem confronting the trial judge" was narrow: was there an alternative to a mistrial that would accommodate Mr. Benton's alibi for just one of the three dates at issue? *See Baum*, 355 S.C. at

214, 584 S.E.2d at 422. Rule 5(g), SCRCrimP, allows a court to waive the rule's requirements for good cause, which existed here because Mr. Benton did not act in bad faith and much, if not all, of his alibi information already had been disclosed. A brief continuance could have been granted for the State to investigate Mr. Benton's alibi. The court set aside two weeks for a trial which only took four days, giving the State ample time to discover any additional alibi information it did not already have, while protecting Mr. Benton's right to the initially sworn jury. (R. p. 25, line 19-p. 26, line 23). The court also could have allowed witnesses whom investigators already interviewed or knew of to testify.

Without considering these alternatives, the circuit court could not exercise sound discretion to find that manifest necessity or "the ends of public justice" compelled a mistrial. *See Gilliam*, 75 F.3d at 894. The Court of Appeals' opinion suffers from the same error. This Court therefore should grant certiorari to consider this substantial constitutional question.

II. This Court should review the Court of Appeals' affirmance of Mr. Benton's convictions on a ground which the State did not argue to the circuit court or the Court of Appeals, for which Mr. Benton was denied the right to make a sufficient record, and which is not supported by the record.

The Court of Appeals' opinion raises another question this Court has not answered: at what point does it become "unfair or unwise" for an appellate court to affirm a criminal conviction using a fact-intensive evidentiary argument which no one raised and for which the appellant had no meaningful opportunity to build a record? This Court should grant certiorari to review this novel question and provide guidance to the bench and bar, and to review the merits of the ground the Court of Appeals reached. *See* Rule 242(b)(1), -(3), SCACR.

The Court of Appeals correctly held the circuit court erred in authenticating the text and Facebook messages solely because they were sent from Mr. Benton's and Mr. Cheatham's phones. (Opinion at 9-10). As an additional sustaining ground, however, the court held the messages were

authenticated by their content. (Opinion at 10-11). The State never raised this argument to the circuit court or the Court of Appeals. It therefore is not preserved for review. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Ordinarily, a respondent may raise any reason appearing in the record as a basis to affirm the ruling below, regardless of whether it was raised to and ruled upon by the circuit court. *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000). But there are limits.

A respondent abandons an additional sustaining ground by failing to raise the issue in its brief. *Id.* at 420, 526 S.E.2d at 723; *see also Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 540 n. 2, 725 S.E.2d 693, 698 n. 2 (2012) (holding that a general request to affirm under Rule 220(c), SCACR, constitutes abandonment of any additional sustaining grounds). *I'On* also did not "dilute the important principle that all parties should raise all necessary issues and arguments to the lower court and attempt to obtain a ruling." *I'On*, 338 S.C. at 421, 526 S.E.2d at 724. It is "unfair or unwise to resolve a case on a ground never mentioned by the respondent prior to appeal" and "the appellate court is likely to ignore it." *Id.*; *see also Alexander v. Houston*, 403 S.C. 615, 620 n. 4, 744 S.E.2d 517, 520 n. 4 (2013) ("[W]e are reticent to invoke an alternative sustaining ground where the ground is not raised in the appellate brief. Invoking an additional sustaining ground under such circumstances would generally be unfair to an unaware appellant."). Finally, appellate courts can only reach additional sustaining grounds which fully appear in the record. *See I'on*, 338 S.C. at 420, 526 S.E.2d at 723.

The State abandoned this ground by not raising it in its brief. The absence of any notice that 44 days' worth of messages could be authenticated by the content of a few precluded Mr. Benton from making a record before the circuit court or on appeal regarding this argument. It therefore is not a ground which fully appears in the record and was not properly before the Court

of Appeals. This lack of notice and a meaningful opportunity to be heard violated Mr. Benton's right to Due Process. *See Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008).

This case illustrates why it is unfair and unwise to affirm on a ground not argued by either party. There is sufficient evidence to authenticate five messages. (*See* discussion *supra* at 7). The Court of Appeals, on its own accord, held there was sufficient evidence to authenticate eight more sent between April 26 and April 28. (Opinion at 10-11; R. p. 374, line 38; p. 377, lines 138-40; p. 379, lines 188 and 197; p. 389, line 427, p. 393, line 535). The court's strained analysis was wrong.[7] But even assuming it was correct, the Court of Appeals slingshotted to the unfounded conclusion that those eight messages were sufficient to authenticate the over 1,000 messages sent from March 20 to May 2 when others had access to and sent messages from Mr. Benton's phone. These remaining messages were authentic simply because they came from a phone which contained some other messages Mr. Benton may have sent at some point in time. This is exact error the Court of Appeals held the circuit court committed. (Opinion at 9-10 ("We acknowledge the circuit court erred in stating that the fact the messages were sent from Benton's phone provided sufficient proof to establish Benton authored them—the authentication of text and social media

[7] The Court used a multi-step process: (1) some messages use generic phrases when texting Mr. Benton's girlfriend (who did not testify) when he did not dispute possession of his phone; (2) some messages use similar phrases when texting his girlfriend's number during the "days leading up to" when Mr. Benton did not dispute possession; (3) the messages to his girlfriend during those days therefore are authentic; (4) messages allegedly relating to the crimes were sent "during this same period," which could be hours before or after Mr. Benton allegedly texted his girlfriend; (5) these additional messages allegedly concerning the crimes are therefore authentic. (Opinion at 10-11). The record fails to support the Court of Appeals' conclusion. The four messages with Mr. Benton's girlfriend do not prove authorship of the four messages to others—particularly messages sent hours later, such as "Meet us at 501" and the reference to "CB's furniture outlet" between 3:37 and 3:41 a.m. on April 26, the night Mr. Cheatham admitted to having Mr. Benton's phone "[f]or a couple of minutes." (R. p. 273, lines 3-20; p. 377, lines 138-40).

messages requires more than proving mere ownership of the device from which messages originated."). Mr. Benton could have identified these flaws if given the chance, and this Court should give him the opportunity if reaching this issue is proper.

As a final matter, the Court of Appeals excused as harmless any error in admitting Facebook messages because the messages were cumulative to Mr. Cheatham's testimony that he and Mr. Benton began planning the crimes in late March and early April. (Opinion at 11). It unclear if the Court of Appeals held their admission was proper; regardless, there was insufficient evidence to authenticate the Facebook messages for the reasons discussed above. Error is harmless only when 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 improper admission of evidence is harmless when it is "*merely cumulative* to other evidence." *State v. McLeod*, 362 S.C. 73, 82-83, 606 S.E.2d 215, 220 (Ct. App. 2004) (emphasis added). The Facebook messages were not "merely cumulative" of Mr. Cheatham's testimony. They went far beyond the isolated planning references Mr. Cheatham identified.[8] The Court of Appeals also did not find, nor could it find, beyond a reasonable doubt that these messages did not contribute to the verdict.

This Court therefore should grant certiorari to review the limits of alternative sustaining grounds and whether the ground reached here is supported by the record.

[8] The opinion identifies messages with Mr. Cheatham on April 9 and unspecified messages with Ms. Rose. (Opinion at 11). Mr. Benton already agreed that Cheatham sufficiently authenticated the April 9 messages. (Final Br. of Appellant at 12). The State broadly asked Ms. Rose to identify "this conversation" she had with Mr. Benton from State's Exhibit 76, but they never identified which of the conversations between April 18 and May 2 she and the State referred to. (R. p. 215, line 15-p. 216, line 2; pp. 440-444). The trial court also received dozens of other Facebook messages pre- and post-dating the crimes. (R. pp. 445-449).

III. This Court should review the Court of Appeals' misstatement and misapplication of the standard for admitting victim body photographs to demonstrate guilt.

Photographs of murder victims should be excluded during a trial on guilt under Rule 403, SCRE, "where the facts they are intended to show have been fully established by competent testimony." *State v. Kornahrens*, 290 S.C. 281, 288-89, 350 S.E.2d 180, 185 (1986); *State v. Middleton*, 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986) (holding crime scene photographs lose their evidentiary value where they depict information that is stipulated to or "not really at issue"). The simple fact that they corroborate other evidence does not automatically render them admissible. *See State v. Gray*, 408 S.C. 601, 613, 759 S.E.2d 160, 166-67 (Ct. App. 2014); *see also State v. Livingston*, 282 S.C. 1, 6, 317 S.E.2d 129, 132 (1984) ("If photographs are . . . not necessary to substantiate facts, they should be excluded."). This is in contrast to introducing photographs during the sentencing phase of a capital trial, where "[t]he purpose . . . is to permit the introduction of evidence . . . which ordinarily would be inadmissible in the guilt phase." *Kornahrens*, 290 S.C. at 289, 350 S.E.2d at 185.

The Court of Appeals did not cite or apply this standard. Instead, it simply held that "[i]f the photograph serves to corroborate testimony, it is not an abuse of discretion to admit it." (Opinion at 12 (quoting *State v. Collins*, 409 S.C. 524, 534, 763 S.E.2d 22, 27 (2014))). The quoted statement is from the *Collins* minority. A majority of the *Collins* Court held the circuit court abused its discretion in admitting the subject photographs despite their alleged corroborating value. *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).

The court also erroneously found the photographs served a corroborating purpose. It held the photographs of Mr. Smith's burned body, ruptured abdomen, and shriveled and detached arm (State Exhibits 54, 55, and 56) were admissible to show malice because they corroborate Mr.

Cheatham's testimony that Mr. Smith was restrained with handcuffs and left that way when his house was set on fire. (Opinion at 12-13). Two photographs—State's Exhibits 54 and 55—do not show Mr. Smith restrained by handcuffs. Only State's Exhibit 56 shows a pair of handcuffs attached to Mr. Smith's charred and detached arm. Multiple witnesses, including investigators and the pathologist, otherwise established that Mr. Smith was left handcuffed and established any other circumstances which demonstrate malice without relying on these photographs.[9] (R. p. 80, line 2-p. 86, line 11; p. 104, line 21-p. 106, line 15; p. 112, line 10-p. 116, line 19; p. 117, line 2-p. 120, line 10; p. 121, line 7-p. 140, line 9; p. 159, line 11-p. 163, line 23). These three photographs showing post-mortem injuries therefore were not necessary to prove malice. The State admitted as much in its brief to the Court of Appeals. (Resp't's Br. at 19 ("At worst, the photographs were cumulative to the other evidence . . . .")).

Moreover, the State abandoned any pretense of corroboration when it asked Mr. Cheatham if Mr. Smith's ruptured abdomen and exposed internal organs were "worth $1500." (R. p. 262, lines 17-18). This Court has expressed diminishing tolerance for Solicitors pushing the envelope with gruesome photographs. *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); *State v. Torres*, 390 S.C. 618, 624, 703 S.E.2d 226, 229 (2010)*; see also Livingston*, 282 S.C. at 6, 317 S.E.2d at 132 ("If photographs are calculated to arouse the sympathy or prejudice of the jurors . . . they should be excluded."). The State pushed too far here despite this Court's admonitions.

[9] Malice is "the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong." *In re Tracy B*, 391 S.C. 51, 69, 704 S.E.2d 71, 80 (Ct. App. 2010) (quoting *State v. Kelsey*, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998)). It does not require ill-will toward the victim. Rather, it requires "a general malignant recklessness of the lives and safety of others, or a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief." *Id*. (quoting *State v. Mouzon*, 231 S.C. 655, 662, 99 S.E.2d 672, 675-76 (1957)).

This Could therefore should grant certiorari to consider the conflict between the Court of Appeals' decision and this Court's established framework for admitting victim body photographs, to consider the Court of Appeals' incorrect determination that the photographs were admissible to demonstrate malice, and to reinforce the sentiment expressed in *Collins* and *Torres* which continues to go unheeded. *See* Rule 242(b)(3), SCACR.

CONCLUSION

For the reasons set forth above, this Court should grant certiorari to review the substantial constitutional and novel questions concerning Double Jeopardy and Rule 5(e)(1), the limitations on additional sustaining grounds which were not raised at trial or on appeal, whether the new ground reached was supported by the record, the Court of Appeals' failure to apply this Court's framework for admitting victim body photographs, whether the pictures properly served a corroborating purpose, and the Court of Appeals' failure to enforce this Court's limits on Solicitors using gruesome photographs at trial.

Respectfully submitted,

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December 20, 2021