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SC Court of Appeals

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.

APPELLANT'S PETITION FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, Appellant Tommy Lee Benton hereby files this petition for rehearing. The Court issued its decision, Opinion No. 5868 (Howard Adv. Sh. No. 36), on October 13, 2021. On October 27, 2021, this Court extended the time for Mr. Benton to file this petition to November 4, 2021. Accordingly, this petition is timely under Rule 221(a), SCACR.

Mr. Benton resubmits the arguments from his briefs on the merits of the issues raised in this appeal as if stated verbatim herein, which arguments were not addressed in the Court's opinion, and additionally submits the following issues that the Court may have overlooked or misapprehended in reaching its decision:

I. The Court Overlooked and Misapprehended the Standard of Review for Double Jeopardy Claims, the State's Failure to Comply with Rule 5(e)(1), SCRCrimP, Alternatives to a Mistrial, and the Prejudice Mr. Benton Suffered.

The gist of this Court's Double Jeopardy holding is that the State need only *substantially* comply with Rule 5(e)(1), SCRCrimP, but a defendant must *strictly* comply or face a mistrial. The State did not comply with Rule 5(e)(1) when it requested Mr. Benton's alibi. Notwithstanding that clear failure, Mr. Benton nevertheless disclosed his alibi. But the circuit court *sua sponte* granted a mistrial because Mr. Benton did not disclose it strictly in the form required by the rule—even though the State did not request it strictly in the form required by the rule. In holding that the circuit court did not abuse its discretion, this Court overlooked and misapprehended several substantive issues and the correct standard of review as set forth below. This Court therefore should grant rehearing.

A. A heightened "sound discretion" standard of review applies to Double Jeopardy claims.

This Court recognized that trial courts must use "sound discretion" when granting a mistrial, Opinion at 5, but it failed to consider and apply the difference between a routine exercise of discretion and the heightened exercise of sound discretion.

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 otherwise familiar 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. 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)).

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 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 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.* at 895.

The manifest necessity requirement captures this heightened standard. It is "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. There must be a "'high degree' of necessity 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 506). 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).

This Court therefore accords less deference to the trial court on the grant of a mistrial compared to other discretionary rulings. This Court failed to apply the proper standard of review and rehearing is warranted on that basis.

B. The State did not comply with Rule 5(e)(1)'s express requirement that it provide a statement from the prosecution of the place, date, and time of each indicted offense.

This Court overlooked several arguments Mr. Benton raised demonstrating that the Court's substantial compliance rule is contrary to Rule 5(e)(1)'s plain language and unworkable. Each argument on its own is independently sufficient to grant rehearing and ultimately vacate Mr. Benton's convictions because manifest necessity did not exist.

1. *This Court overlooked the plain language of Rule 5(e)(1) requiring a statement as to the time of the offense.*

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). 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.* Likewise, courts must read a statute so that "no word, clause, sentence, 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). Interpretation of a statute of a question of law. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

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.

(emphasis added). The rule states an unambiguous, explicit directive. The alibi request must include, among others, 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. Here, it is undisputed that the written request did not include the required statement. The State therefore failed to comply with the rule. As a result, Mr. Benton's obligation under the rule was obviated, as he had not been presented with the necessary condition precedent that would have triggered his obligation to provide written notice of his intention to offer an alibi defense. *See United States v. Bickman*, 491 F. Supp. 277, 279 (E.D. Pa. 1980) (analyzing the substantially identical Rule 12.1, Fed. R. Crim. P, and finding that the "[t]he Government must trigger the alibi defense discovery procedures" and its failure to properly do so means "the defendant may raise an alibi defense at trial to which the Government, though surprised, may not object"); *see also 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").

Respectfully, this Court reduced the requirement to state the time of the alleged offense in writing to mere surplusage in contravention of the canons of construction and Rule 5(e)(1)'s plain language. Providing a written statement of time is not just "better practice" and an "overly technical application" of the rule. Opinion at 7. It is what Rule 5(e)(1) strictly requires. Rehearing should be granted.

2. *This Court overlooked the evidence proving the State knew Mr. Benton's alibi and thereby created an imbalance where a criminal defendant must strictly comply with Rule 5(e)(1) but the State does not.*

This Court forgave the State's failure to strictly comply with the rule because it believed Mr. Benton "clearly knew the time and place of the events set forth in the indictments because his counsel came prepared to the initial trial with four alibi witnesses ready to testify." *Id.* at 6.

But it overlooked the evidence confirming that the State knew about Mr. Benton's alibi and thus did not give Mr. Benton the same treatment it gave the State.

Investigators interviewed two alibi witnesses (Mr. Benton's mother and his uncle's ex-girlfriend) and had the opportunity to interview another (Mr. Benton's stepfather). **(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).** During a March 2017 pre-trial hearing, Mr. Benton's 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).** Trial counsel later explained that he had conversations with the Solicitor, Lauree Richardson, about the alibi and which witnesses supported it. **(R. p. 38, lines 5-18; p. 40, lines 14-24).** Another member of Mr. Benton's trial team said he too spoke with Ms. Richardson regarding Mr. Benton's alibi witnesses, including one subpoenaed by the State for the first trial. **(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).**

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. **(R. p. 38, line 5-p. 41, line 2).** 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.

In overlooking the evidence of the State's knowledge, this Court held the State and Mr. Benton to different standards. The State need not strictly comply with the rule so long as Mr. Benton had otherwise divined what time the offense allegedly occurred. Mr. Benton, however, must strictly comply with the rule or face a mistrial even if the State otherwise knows his alibi. He was penalized for not disclosing a defense he did not have to disclose—even though he disclosed his alibi anyway. 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. It certainly cannot be said that the "ends of justice would otherwise be defeated" if the original trial carried on. *Hanno*, 21 F.3d at 46. To the contrary, the ends of justice were defeated by declaring a mistrial under these circumstances. Manifest necessity therefore did not exist.

Rehearing should be granted so this Court can consider the State's knowledge of Mr. Benton's alibi and cure the legal imbalance the opinion created.

3. *This Court overlooked the case law Mr. Benton cited requiring that the time of the offense be stated with specificity.*

This Court overlooked and did not address several cases Mr. Benton cited which confirm that a statement as to time is an indispensable requirement of the rule. The alibi request must state the time of the alleged offense "with specificity." *Bickman*, 491 F. Supp. at 279; *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)). Without this specificity, a defendant is unable to meet his or her 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); *Bickman*, 491 F. Supp. at 279. 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 279. The defendant cannot meaningfully respond without such specificity. *State v. Robbins*, 275 S.C. 373, 376, 271 S.E.2d 319, 320 (1980) (quoting 21 Am. Jur. 2d *Criminal Law* § 136) ("[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."). Here, of course, the alibi request stated no time, much less a statement of time with specificity.

The Court also overlooked the practical implications of failing to enforce a Rule 5(e)(1)'s objective requirement that the alibi request expressly state time, date, and place. A defendant who responds to a defective alibi request cannot enforce the prosecution's reciprocal obligation to disclose its alibi rebuttal witnesses. *Ponzo*, 2012 WL 2990765, at *1. Thus, a defendant may respond in good faith to a request that does not state time but then not be entitled to any information in return. A defendant could even find his alibi excluded at trial or a mistrial granted through no fault of his own if he guesses the wrong time and therefore is deemed to have not complied with the rule. The State could also use non-existent or vague statements as time (or date or place, for that matter) to ferret out a defendant's alibi 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 request, 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.

4. *This Court overlooked the case law Mr. Benton cited holding that the mere production of disclosure materials stating time is insufficient.*

This Court excused the State's failure to comply with Rule 5(e)(1) because the State's disclosure materials and arrest warrants contain a time of death estimate and indicate when the

fire department responded to the April 29 fire. In doing so, this Court overlooked and failed to address the case law Mr. Benton cited which explicitly holds that the mere production of disclosure materials does not satisfy the rule. Rehearing therefore is warranted.

Incorporating other documents into an alibi request by express reference may satisfy the State's obligations 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). Here, the alibi request states the date and place of the murder but not the time, and it references no other documents. **(R. p. 510).** The State therefore failed to comply with Rule 5(e)(1).

Rule 5(e)(1) places the initial burden on the State. If the State does not satisfy its obligation, then the defendant need not disclose this information regardless of whether he can otherwise formulate an alibi. *Bickman*, 491 F. Supp. at 279. Requiring Mr. Benton to sift through voluminous disclosure materials to predict when the State believes he committed the murder flips the rule on its head. Furthermore, disclosure materials may be incomplete, inaccurate, or inconsistent.[1] The State may believe the evidence as to time is incorrect, such as a witness being mistaken as to when he observed a crime occur. The alibi information provided would, in this circumstance, be inapposite for the defense—but be valuable to the State and be information the State otherwise would not be entitled to discover. Therefore Rule 5(e)(1)

[1] This Court overlooked evidence of inconsistency here. For example, law enforcement questioned Mr. Benton's mother about his whereabouts at 5:30 a.m. on the morning of Mr. Smith's murder. **(R. p. 318, lines 8-13).** Other evidence suggested the murder occurred between 2:30 and 3:00 a.m. **(R. pp. 464, 496, 501-02).** This discrepancy heightened the need for a statement from the prosecution as to time, as Rule 5(e)(1) mandates.

contains an express requirement for a written statement from the prosecution as to the time of the offense which the State did not satisfy.

5. *This Court overlooked that the State improperly requested an alibi before Mr. Benton was indicted.*

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 much mischief." *Gilbert*, 188 F.R.D. at 178. The State's request here pre-dated the earliest of Mr. Benton's indictments by twenty days. *Compare* **(R. p. 510)** (alibi request)*, with* **(R. pp. 363-72)** (indictments). The request therefore could not have triggered Mr. Benton's obligations under Rule 5(e)(1) in the first instance. Rehearing is warranted for this Court to consider this foundational flaw in the State's alibi request.

C. This Court overlooked multiple viable alternatives to a mistrial.

The "critical inquiry" for whether manifest necessity for a mistrial exists 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 a continuance, are feasible and could cure the problem."). If less drastic alternatives exist, there is no manifest necessity for a mistrial.

The circuit court considered excluding Mr. Benton's witnesses, which it believed was unfair to Mr. Benton,[2] or allowing them to testify, which it believed was unfair to the State. **(R. p. 5; p. 41, line 12-p. 43, line 3).** This Court affirmed, finding the circuit court's analysis sufficient. Opinion at 6-7. But this Court overlooked the circuit court's unwillingness to allow the first trial to proceed even if the State agreed Mr. Benton could present his alibi witnesses. **(R. p. 5).** In other words, going forward was never an option for the circuit court.

This Court also overlooked other obvious alternatives to a mistrial which the circuit court failed to consider. Rule 5(g), SCRCrimP, allows a court to waive the requirements of the rule for good cause—which existed here where 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 to try the case, **(R. p. 25, line 19-p. 26, line 23)**, and trial took only four days. There was more than enough time for the State to discover any additional information regarding Mr. Benton's alibi which it did not already have. The court also could have allowed witnesses whom investigators had already interviewed or could have interviewed to testify.

This Court also overlooked that the State only requested an alibi for the murder on April 29. **(R. p. 510).** It did not request an alibi for any alleged offense occurring on April 18 and 26. The State therefore was not entitled to pre-trial disclosure of Mr. Benton's alibi for those

[2] The circuit court did not consider whether the Compulsory Process Clause would have required that Mr. Benton be allowed to call his witnesses. *See Taylor v. Illinois*, 484 U.S. 400, 414-15 (1988). Exclusion therefore may not have been a viable option.

offenses, and Mr. Benton should have been allowed to present that evidence.[3] 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. Each of the options above would have been sufficient.

Without considering these alternatives, the circuit court could not question the Double Jeopardy implications of the circuit court's ruling, request the input of counsel prior to firmly and finally declaring a mistrial, or rationally find manifest necessity or that "the ends of public justice" compelled a mistrial. *See Gilliam*, 75 F.3d at 894. This Court's opinion suffers from the same error. Rehearing should be granted for this Court to consider these alternatives to a mistrial and whether manifest necessity existed.

D. Mr. Benton was prejudiced by the mistrial.

This Court held that Mr. Benton "suffered no prejudice upon the granting of the mistrial because he was able to present his alibi witnesses at the subsequent trial." Opinion at 6-7. This overlooks and misapprehends the prejudice resulting from an improvidently granted mistrial.

The only prejudice required is an infringement of the defendant's right to have the first properly sworn jury decide his case. *United States v. Sloan*, 36 F.3d 386, 395 (4th Cir. 1994).

[3] To the extent this Court believes the State's disclosure materials contained information as to time for these offenses and Mr. Benton therefore was obligated to disclose his alibi without a request from the State, that belief would be incorrect. First, Mr. Benton had no obligation to disclose that alibi because the State served no request whatsoever. *See Bickman*, 491 F. Supp. at 279 ("The Government must trigger the alibi defense discovery procedures."). Second, there was insufficient evidence as to time in the referenced records. 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. **(R. p. 357).** The arrest warrant contains no source for this belief. There were no police records for this incident, and Mr. Benton's co-defendants did not provide a time in their written statements. **(R. pp. 450-51).** As to the April 26 fire, the only indication of time is when the fire department was dispatched to the scene. **(R. pp. 476, 480).** Neither the arrest warrant nor Mr. Cheatham's written statement mention the time the offenses allegedly occurred. **(R. pp. 359, 452).**

Double Jeopardy serves to protect the accused's "valued right to have his trial completed by a particular tribunal." *Arizona*, 434 U.S. at 503 (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.

Id. at 503-505. The Double Jeopardy Clause therefore 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). If this Court grants rehearing on the merits of Mr. Benton's Double Jeopardy challenge, it should also grant rehearing to correctly determine whether Mr. Benton was prejudiced by the circuit court's improvident grant of a mistrial.

II. The Court Improperly Reached Unpreserved Arguments Supporting Admission of the Challenged Text and Facebook Messages, Misapprehended the Alleged Authenticating Evidence, and Overlooked that it Committed the Same Error as the Circuit Court.

This Court correctly held that the circuit court erred in authenticating the text messages and Facebook messages only because they were sent from Mr. Benton's phone.[4] Opinion at 9-10. As an additional sustaining ground, this Court held that the messages nevertheless were authenticated by their content. This was a multi-step process: (1) some messages use generic

[4] However, this Court incorrectly stated that Mr. Benton "ignores Cheatham's testimony identifying certain of the conversation threads, as well as Katlin Rose's clarification that she never took Benton's phone out of his presence." Opinion at 7. Mr. Benton admitted that Mr. Cheatham authenticated three different exchanges, and he cited Ms. Rose's full testimony regarding her use of Mr. Benton's phone. Final Br. of Appellant at 12-13. On the other hand, this Court overlooked that Ms. Rose admitted she sent messages from Mr. Benton's phone **(R. p. 216, line 23-p. 219, line 9)**, Ms. Rose did not deny that her husband had borrowed Mr. Benton's phone **(R. p. 215, lines 7-9)**, Mr. Cheatham admitted he accessed Mr. Benton's phone during the April 26 events **(R. p. 270, line 22-p. 273, line 20)**, and Mr. Cheatham had Mr. Benton's phone the night of the murder **(R. p. 312, line 17-p. 315, line 10; p. 331, line 20-p.332, line 5)**.

phrases when texting Mr. Benton's girlfriend during times when he did not dispute possession of his phone; (2) some messages use similar phrases when texting the girlfriend's number during the "days leading up to" when Mr. Benton did not dispute possession of the phone; (3) the messages to the girlfriend during those days therefore are authentic; (4) messages were sent allegedly relating to the crimes "during this same period," which could be hours before or after Mr. Benton allegedly texted his girlfriend; and (5) therefore these additional messages, and all of the over 1,000 messages offered by the State, are authentic. Opinion at 10-11. In reaching this conclusion, this Court overlooked multiple points which justify the grant of rehearing.

The State never raised this argument to the circuit court or this Court. And the circuit court did not raise the issue on its own; it admitted the messages solely because they came from Mr. Benton's phone and rejected Mr. Benton's request that the State lay more of a foundation. **(R. p. 147, line 5-p. 148, line 17; p. 158, lines 8-22; p. 166, lines 11-15).** This argument therefore is not preserved for review. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Of course, 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 or 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 this Court overlooked three limitations on additional sustaining grounds.

First, 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). The State failed to present this argument to this Court and thus has waived it. It was error for this Court to reach the issue on its own.

Second, *I'On* 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.

> While the current rules do not require the respondent to present an issue to the lower court in order to raise it as an additional sustaining ground, an appellate court is less likely to rely on such a ground when the respondent has failed to present it to the lower court. In such cases, *the appellate court likely would perceive it as being unfair or unwise to resolve a case on a ground never mentioned by the respondent prior to appeal*. Stated another way, the respondent may raise an additional sustaining ground that was not even presented to the lower court, but *the appellate court is likely to ignore it*.

Id. (emphasis added); *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."). This Court failed to heed the Supreme Court's caution when it reached an issue never argued below or on appeal.

Third, this Court can reach an additional sustaining ground only when it fully appears in the record. *See I'on*, 338 S.C. at 420, 526 S.E.2d at 723. Mr. Benton was not given an opportunity to make a record regarding the specific grounds for authentication which this Court unilaterally found. This court therefore could not review it. Furthermore, Mr. Benton was not afforded sufficient notice or a meaningful opportunity to be heard on this ground for authentication which was used to affirm his convictions in violation of the Due Process Clause. *See Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008).

This case exemplifies why it is unfair and unwise to affirm on a ground not argued by either party. The Court authenticated eight messages allegedly concerning Mr. Benton's charges: one on April 25 within five minutes of allegedly texting Mr. Benton's girlfriend, three

messages sent *three hours* after allegedly corresponding with his girlfriend and *two more hours* before allegedly sending her another message, and four allegedly with his girlfriend. Opinion at 10-11; **(R. pp. 374, 377, 379, 389, 393)**. The messages with his girlfriend do not provide evidence of authorship for other messages to other individuals—particularly messages sent hours after last texting his girlfriend, 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).**

This Court similarly did not recognize that these isolated exchanges and the few Mr. Benton acknowledges were authentic cannot authenticate the remaining 1,000 messages.[5] These messages provide no context, content, or distinguishing characteristics to authenticate every single other message from Mr. Benton's phone. In the end, these other messages were authentic simply because they were downloaded from a phone that contained some messages which Mr. Benton may have sent. This Court, therefore, ultimately committed the same error it held the circuit court made.

As a final matter, this Court excused any error in admitting the Facebook messages as harmless because the messages were cumulative to Mr. Cheatham's testimony that he and Mr.

[5] This Court observed 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. However, to conserve resources the record does not include every objection on other grounds to individual messages which were not before this Court, such as relevance or Rule 403. This Court also misapprehended Mr. Benton's statement that the circuit court "admitted Mr. Benton's text and internet messages *en masse*." Opinion at 7 n. 3; *see also* Final Br. of Appellant at 11. The State moved into evidence every single message from Mr. Benton's phone without any effort to introduce only those relevant to the crimes. The circuit court found them all authentic and admitted them subject only to specific objections "to some contents that may be contained therein." **(R. p. 147, line 5-p. 148, line 17; p. 158, lines 8-25; p. 166, lines 11-15).**

Benton began planning the crimes in late March and early April.[6] Opinion at 11. This Court overlooked the standard for harmless error and misapprehended the nature of the evidence. 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). Stated differently, this Court must find that the verdict was "surely unattributable to the error" for it to be harmless. *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 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 served as an admission by Mr. Benton that he was planning and participated in the crimes, and there were messages sent before and during their commission. *See* **(R. pp. 440-449).** This Court did not find, nor could it properly find, beyond a reasonable doubt that such an admission did not contribute to the verdict.

For each of these reasons, this Court should grant rehearing.

III. The Court Overlooked and Misapprehended the Standard for Admitting Victim Body Photographs and Overlooked the Substantial Evidence Demonstrating Malice and Corroborating Cheatham's Testimony.

A. Victim body photographs are admissible to show guilt only when they show facts not otherwise established by competent testimony.

This Court stated the standard for the admission of victim body photographs as follows: "If 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)). This is not a correct statement of the law.

[6] This Court held the authentication of these messages "is more problematic" but stopped short of finding error. Opinion at 11. For the reasons explained in Mr. Benton's merits briefing,

First, the quoted statement is from the *Collins* minority. A majority of the *Collins* Court found the circuit court abused its discretion when admitting the subject photographs despite their alleged corroborating value. *Id*. 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). This Court overlooked Mr. Benton's caution that *Collins* is "often and erroneously cited in support of admissib[ility]." Appellant's Final Br. at 36.

Second, the quote misstates the correct standard. South Carolina has a well-established framework for admitting victim photographs under Rule 403, SCRE. Photographs of murder victims should be excluded during a trial on guilt "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, 692 (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). 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 not be admissible in the guilt phase." *Kornahrens*, 290 S.C. at 289, 350 S.E.2d at 185.

This Court overlooked and compounded the circuit court's error of law in failing to apply this standard. This Could therefore should grant rehearing so it can apply the proper standard for admissibility of victim body photographs.

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the circuit court erred in admitting them.

B. This Court overlooked the substantial evidence in the record demonstrating malice and otherwise corroborating Cheatham's testimony.

This Court held that 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. In so holding, the Court overlooked and misapprehended three points.

First, the State did not offer the photographs for this purpose. The only purpose the State identified at trial—and thus the only purpose for which the trial court admitted the photographs—was that they established the crime scene. **(R. p. 15, line 10-p. 19, line 1; 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). There were dozens of other photographs establishing the crime scene. *See* Appellant's Br. at 37. The State accordingly abandoned that argument on appeal and instead argued for the first time that the photographs demonstrate malice and corroborate testimony. Resp't's Br. at 24-26. This Court incorrectly reached this unpreserved issue. *See I'On*, 338 S.C. at 421, 526 S.E.2d at 724.

Second, corroboration and demonstrating malice were not the purposes for which the State used the photographs at trial. The State used them only to gild the lily and inflame the passions of the jury. *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."). The State abandoned any pretense of corroboration when it asked Mr. Cheatham if Mr. Smith's ruptured abdomen with his internal organs spilling out was "worth $1500." *See* **(R. p. 262, lines 17-18).** Our Supreme 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). This Court overlooked the fact that the State pushed too far in this case.

Third, the photographs only showed facts otherwise fully established by competent evidence. 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)). Malice was fully established by other testimony, photographs, and physical evidence demonstrating Mr. Smith was handcuffed, gasoline was poured inside his house before being set on fire, and he still alive when the fire consumed him. **(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—the ruptured abdomen and detached arm, which the pathologist described without needing the photographs **(R. p. 159, line 11-p. 163, line 23)**—were not necessary to demonstrate malice.

Likewise, the photographs were not necessary to "corroborate[] 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. Two photographs—State's Exhibits 54 and 55—do not show the handcuffs. One, State's Exhibit 56, shows a pair of handcuffs attached to Mr. Smith's

charred and detached arm. But multiple witnesses, including investigators and the pathologist, otherwise established that Mr. Smith was left handcuffed. *E.g.*, **(R. p. 84, lines 15-25; p. 104, lines 12-25; p. 114, line 19-p. 115, line 1; p. 118, lines 12-21; p. 131, line 13-p. 133, line 16; p. 159, line 25-p. 160, line 17, p. 162, lines 3-11).**

Thus, even reaching the merits of the State's new argument on appeal, this court overlooked that the State proved malice beyond a reasonable doubt and corroborated Mr. Cheatham's testimony without objection from Mr. Benton, without a stipulation from him, and without the challenged photographs. The State admitted as much in its brief to this Court. Resp't's Br. at 19 ("At worst, the photographs were cumulative to the other evidence . . . ."). This Could should grant rehearing.

CONCLUSION

For the reasons stated above, this Court overlooked and misapprehended several material points. This Court therefore should grant rehearing and issue an opinion either vacating Mr. Benton's convictions under the Double Jeopardy Clause or remanding for a new trial due to improper admission of evidence.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,

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November 4, 2021

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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.

Proof of Service

This is to certify that I, a paralegal with the law firm Willoughby & Hoefer, P.A., have caused to be served this day one (1) copy of **Appellant's Petition for Rehearing** by electronic mail delivery of same to the recipients listed and at their Attorney Information System provided email addresses below and via the attached emails:

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November 4, 2021

VIA ELECTRONIC FILING
The Honorable Jenny Abbott Kitchings
Clerk of Court, Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: *The State v. Tommy Lee Benton*
Appellate Case No. 2017-002553

Dear Ms. Kitchings:

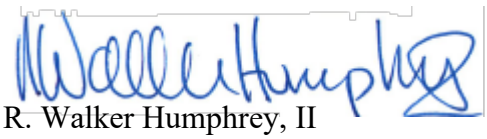
Attached for electronic filing in accordance with Supreme Court Order 2020-05-29-02, parts (c)(6) and (f), please find **Appellant's Petition for Rehearing** in the above-referenced matter. As permitted by Order 2020-05-29-02, part (d) no other copies, whether paper or electronic, are being provided.

By copy of this letter, we are serving counsel of record via electronic mail only and enclose a Proof of Service to that effect, with transmittal email, as provided for under Order 2020-05-29-02, part (g)(3). If you have any questions or if you need any additional information, please do not hesitate to contact me.

If you have any questions or if you need any additional information, please do not hesitate to contact me. With kindest regards, I am

Sincerely yours,

WILLOUGHBY & HOEFER, P.A.



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