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STATE OF SOUTH CAROLINA  
In the Supreme Court

S.C. SUPREME COURT

*On Petition for Writ of Certiorari to the Court of Appeals*  
APPEAL FROM HORRY COUNTY  
Steven H. John, Circuit Court Judge

THE STATE.....RESPONDENT

v.

TOMMY LEE BENTON,.....PETITIONER

**RETURN TO PETITION FOR WRIT OF CERTIORARI**  
Appellate Case No. 2021-001498

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## **PETITIONER'S QUESTIONS PRESENTED**

1. 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 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?
2. 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?
3. 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?

## **RESPONDENT'S COUNTER STATEMENT OF QUESTIONS PRESENTED**

1. Did the Court of Appeals err in finding that the circuit court exercised sound discretion when it granted a mistrial after the Petitioner failed to properly notify the State of its intentions to present an alibi defense, because manifest necessity existed to justify the circuit court's declaring of a mistrial?
2. Did the Court of Appeals err in affirming the admission of text messages and finding the admission of Facebook messages though in error, it was harmless, and even though this matter was not raised before the Circuit Court nor argued by the State within its brief, the Court of Appeals decided this issue pursuant to Rule 220(c) of the South Carolina Appellate Court Rules?
3. Did the Court of Appeals err in affirming the Circuit Court's admission of crime scene photographs, because they were being admitted in order to prove malice and to corroborate the testimony of the co-defendant?

## **STATEMENT OF THE CASE**

In April of 2016, the Tommy Lee Benton (Petitioner) was indicted by the Horry County Grand Jury for the offenses of murder; two counts of burglary in the first degree (burglary 1<sup>st</sup>); arson in the first degree (arson 1<sup>st</sup>); and, arson in the second degree (arson 2<sup>nd</sup>). (Indictment No(s): 2016-GS-26-1719, 5008, 5009, 5010, and 5011)(R. p. 363-372). Representing the Petitioner was attorney Thomas C. Brittain and representing the State of South Carolina was Assistant Solicitor Lauree Richardson Ortiz of the Fifteenth Circuit Solicitor's Office.

The case was originally called for trial on July 17, 2017 before the Honorable Steven H. John, Circuit Court Judge. After a day of motions and selecting and swearing of the jury, the trial began on July 18. During the defense's opening statement they alluded to the fact that alibi witnesses were going to testify. The State immediately objected due to the fact they never received notice pursuant to Rule 5 of the South Carolina Rules of Criminal Procedure. Both sides argued their position outside the presence of the jury. The trial judge determined that manifest necessity existed and decided to declare a mistrial. The next day the trial court called all parties before him to make sure everyone received proper notices. He ordered that if notice is not given, the evidence will not be allowed to be entered.

The case was called again for trial on December 4, 2018. At that time the defense moved for a dismissal due to Double Jeopardy. It was their position that manifest necessity did not exist for a mistrial so this case should be subject to dismissal. This motion was immediately denied by the trial court and the case proceeded as scheduled. After five days of testimony, a jury of his peers found the Petitioner guilty. After the verdict the Petitioner appeared before the trial judge for sentencing. The trial court proceeded to sentence the Petitioner to a term of incarceration for the

remainder of his natural life for the offense of murder; thirty years for arson 1<sup>st</sup>; and, fifteen years for arson 3<sup>rd</sup>. The trial judge ordered that each of these sentences were to be served concurrently.

During his incarceration the Petitioner filed a timely notice of appeal before the South Carolina Court of Appeals. All parties appeared before Judges McDonald, Lockemy, and Kondurous on October 14, 2020. On October 13, 2021 the Court of Appeals issued a published opinion. They determined unanimously that: (1) double jeopardy did not bar a second trial after declaration of mistrial as a matter of manifest necessity; (2) text messages sent from and received by defendant's phone were sufficiently authenticated by circumstantial evidence; (3) any error in admission of social networking website messages was harmless; and, (4) probative value of photographs of victim's burned body at the crime scene was outweighed by their prejudicial effect. *State v. Benton*, 865 S.E.2d 919 (2021).

Petitioner now requests a writ of certiorari seeking review from this Honorable Court. The Respondent will argue that the decision of the Court of Appeals does not fall within any of the parameters found in South Carolina Appellate Court Rule 242. This petition should be subject to dismissal. The return by Respondent follows.

## WHY CERTIORARI SHOULD BE DENIED

The Supreme Court reviews Court of Appeals by writ of certiorari only where special reasons justify exercise of that power. *Douglas v. State*, 369 S.C. 213, 216, 631 S.E.2d 542, 544 (2000). Pursuant to Rule 242 of the South Carolina Rules of the Appellate Court, “a writ of certiorari is not a matter of right, but of sound judicial discretion and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court’s discretion or power to grant review in general, indicates the character of reasons which will be considered:

1. Where there are novel questions of law;
2. Where there is a dissent in the decision of the Court of Appeals;
3. Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court;
4. Where substantial constitutional issues are directly involved;
5. Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.”

Rule 242 SCACR.

In reviewing each of these criteria the present case does not apply to any of them. The Court of Appeals properly and unanimously affirmed the decision of the trial court. This decision should not be subject to review.

There have been numerous South Carolina Supreme Court decisions that allow a mistrial in the sound discretion of the trial judge. Rule 5(e)(1) of the Rules of Criminal Procedure was created to allow both parties to have an idea if an alibi witness will be testifying. Petitioner had alibi witnesses prepared to testify so he had knowledge of the State’s accusations of when this

crime occurred. However, Petitioner failed to notify the State of his intent to present the defense of alibi. In order to be fair, a mistrial was given by the trial court.

There have been numerous decisions made by this court regarding when photographs are to be allowed into evidence. It was clear that the Court of Appeals followed recent decisions made by this court regarding the admissibility of photographs.

This Court has also determined that Rule 220(c) allows the appellant court to affirm any decision made by the trial court upon any grounds appearing in the record. So this is not a novel question of law.

There was no Constitutional question raised by the Petitioner, this decision was not in conflict with any prior decision made by this court, there was no federal question included within this opinion that conflicted with a prior opinion made by the United States Supreme Court; and the decision was unanimous there was no dissenting opinion; and, there exist no novel question of law. The Court of Appeals decision was lawful, so this opinion should not be subject to review.

## STATEMENT OF FACTS

The victim Charles Bryant Smith (victim) owned a mobile home park, and various business and rental properties. Rent for the trailers ranged from \$300 to \$1100 and was collected monthly, with most of his tenants paying in cash. (R. p. 95, line 23 - p. 96, line 15.). The victim carried the money in a case, as he did not believe in banks, and “had a bad habit of wanting to flash his money....” (R. p. 68, lines 22-25; p. 99, lines 13-15).

Lorraine Rose and her son, Garland Rose, worked for the victim. (R. p. 97, lines 1-5). The victim paid his employees daily, in cash, and would count the money on a table. (R. p. 69, lines 17-25; p. 97, lines 6-11). Lorraine also rented from the victim and paid him in cash each month at his produce stand. Whenever Lorraine paid her rent, the victim would show his cash, then put the rent money with the large sum of money he was already carrying. (R. p. 211, line 17 - p. 212, line 17). Both Lorraine and Garland knew the victim to have cash on his person. (R. p. 97, lines 12-14). Petitioner had seen Lorraine Rose pay her rent in cash to the victim and knew that he kept a significant amount of cash on him at all times. (R. p. 212, lines 5-17).

Lisa Rose had been married to one of the co-defendant’s Garland Rose, who died on November 8, 2014. Lisa had been friends with the Petitioner since the fifth grade. (R. p. 210, lines 7-12). Lisa introduced Garland to the Petitioner and they became friends. (R. p. 213, line 21 - p. 214, line 8). Garland Rose told Petitioner and co-defendant Mitchell Cheatham about the victim having a lot of cash, so they made plans to rob him. (R. p. 222, line 5 - p. 223, line 22). During the trial, co-defendant Cheatham testified on behalf of the State without any promise of leniency. He testified that the Petitioner and Garland Rose planned the first burglary. (R. p. 228, lines 15-16).

On April 18, 2014, Petitioner, Cheatham, and Garland Rose met at Garland Rose’s house. This is where they started discussing the robbery. Petitioner and Cheatham stole a shotgun and

brought it with them. The men then got into Petitioner's girlfriend's Black Ford Focus and drove to a road near the victim's trailer. Petitioner and Garland went into the house through the window on the side of the home. A few minutes later, they came out of the back door, jumped in the back seat of the car and drove off. They exited the home, with a gun, a crowbar, and grocery bag with around twenty-seven thousand (\$27,000.00) dollars in cash. (R. p. 224, line 2 - p. 228, line 7; p. 229, lines 7-19).

The victim's son, Sammy Charles Smith was living with his father in 2014. (R. p. 95, lines 12-15; p. 98, line 15). Over Sammy's objections, the victim did not call the police after the incident because he did not believe in getting the police involved. He thought it would not do any good. (R. p. 99, lines 1-25).

On April 25, a man named J.T. introduced Petitioner and Cheatham to Douglas Thomas. The group met in a Walmart parking lot for the sole purpose of robbing the victim. Petitioner, Cheatham, Thomas, and J.T. went to a Holiday Inn motel in Whiteville, North Carolina. There they discussed plans to rob the victim's outlet store. (R. p. 230, line 10 - p. 232, line 15; p. 220, line 18 - p. 221, line 8). Petitioner told them victim had \$100,000 in the store ripe for the taking. (R. p. 73, lines 18-25). That night, the four men drove to Mullins in the Black Ford Focus to steal a truck from someone Petitioner's stepfather knew. (R. p. 233, line 16 - p. 234, line 15; p. 70, line 1 - p. 71, line 1). Later, around 3:00 in the morning, Petitioner, J.T. and Thomas drove to the victim's store in the stolen truck. The plan was to go to the store and stay there until the victim arrived for work, because they believed he kept more money in the store than he did at his house. (R. p. 235, line 13- p. 238, line 21). The Petitioner and Thomas went through the side bathroom into the back area of the store and started looking for money, having found none, they went to the front of the store to wait for the victim's arrival. (R. p.73, lines 9-14). Eventually they realized no

one was coming in because it was a Saturday. They decided to set the store on fire and they exited the same way they came in. They eventually parted ways and returned to North Carolina. (R. pp. 74, line 20- p. 76, line 4). At the request of the victim, the Horry County Police Department did not investigate the fire. (R. p. 103, line 25 - p. 104, line 12).

On the night of April 28<sup>th</sup>, Petitioner, Thomas, and Cheatham met at the motel where Petitioner and Cheatham were staying to plan their final crime against the victim. They planned to go to his home and take the \$100, 000.00 they did not find at the outlet store.<sup>1</sup> (R. p. 76, lines 15-25; p. 239, lines 10-17). Benton drove Thomas and Cheatham to the stolen truck in the same black Ford he was driving previously.<sup>2</sup> Petitioner popped the back door open with a crowbar and went in first. Each of the men was armed when they entered the home. Petitioner jumped on the victim who was sleeping on the couch, and handcuffed him. The men took turns watching and interrogating him while the others looked for money. While the Petitioner was watching the victim, he beat him with a crowbar and threw vodka on his bleeding face. Eventually, they found a few thousand dollars. Petitioner then went to the truck and returned with a can of gasoline. He poured gas on the victim, who was still alive. Petitioner also poured gas around the trailer. Cheatham lit a shirt on fire and dropped it on the floor, it did not catch the trailer on fire, so Petitioner poured gas on the flaming shirt. Petitioner, Chatham, and Thomas then fled the scene. They later burned the truck before they returned to the motel to count their money. The men left the victim bound on the floor, alive, as the trailer burned down around him. (R. p. 77, line 4 - p. 91, line 19; p. 239, line 10- p. 267, line 13). Cheatham later testified that they had what he described as a “crime bag.”

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<sup>1</sup> Investigators found a safe with \$120,000.00 in cash in the debris. (R. p. 134, line 1 – p. 135, line 12).

<sup>2</sup> The owner of the stolen truck testified he knew Benton as his sister was once married to Benton’s stepfather. (Tr. p. 181, lines 1-9).

This bag contained gloves, masks, extra ammunition, handcuffs and a rope. (R. p. 253, lines 5-15). This bag was found at the burned home during the investigation. (R. p. 112, line 10 – p. 115, line 1).

When the first responders arrived they found the victim, his body was badly burned, and he still had a pair of handcuffs attached to his left hand. (R. p. 103, line 13 - p. 106, line 15). They knew it was arson due to the smell of gasoline. (R. p. 116, lines 20-22). The victim body was so badly burned that his abdominal organs were exposed. There were also fractured ribs on the right side his body with significant hemorrhaging surrounding the remaining soft tissue, which indicated blunt force trauma. (R. p. 160, lines 2-21). The toxicology report showed black particulate matter indicating carbon monoxide was present, proving that the victim was still breathing at the time of the fire. (R. p. 161, lines 4-15). Victim died as a result of carbon monoxide inhalation and burning. (R. p. 162, lines 3-5).

On May 2<sup>nd</sup>, Law Enforcement got a call from Petitioner's stepfather, Gregory Hudson. Mr. Hudson found Petitioner's black Motorola ZTE cell phone and wanted to turn the phone over to police. (R. p. 188, line 2 - p. 189, line 5). Officers also received a Moto G Motorola cell phone from Cheatham's family the same day. (R. p. 189, line 10 - p. 190, line 9). Law enforcement was able to use a program called Cellebrite that extracts forensic data maintained on mobile devices and puts it into a readable format. They used this program on both phones. (R. p. 151, line 17- p. 152, line 3). They then used a program called CellHawk that takes cell tower information and combines it with the phone records to make a visual representation of what the phone records revealed. (R. p. 208, lines 1-8). Law enforcement was able to plot cell phone locations on the dates in question and identified that both phones were connected to a tower closest to where the victim lived on the day of his murder and first robbery. (R. p. 194, line 21 - p. 195, line 17; p. 196, line

22 - p. 200, line 16; p. 200, line 18 - p. 204, line 8; p. 206, lines 7-23) Specifically, the phones were connected to the Charleston Switch Tower 1531 which is located off of Pine Oaks Road in the Conway area, 1.33 miles from the incident location. (R. p. 191, lines 4-8; p. 194, line 21 - p. 201, line 8).

## ARGUMENTS

- 1. The Court of Appeals did not err in affirming the decision of the trial court finding that manifest necessity existed in order to grant a mistrial. The trial court observed other alternatives and came to the conclusion that the only possible way to be fair to each party was to grant a mistrial.**

During the defense's opening statement, defense counsel began to reference alibi and specific alibi witnesses and alibi specifics. (R. p. 30, line 21 – p. 31, line 1; p. 35, line 7 – p. 37, line 6). The State asked to speak on a legal matter outside the presence of the jury. (R. p. 37, lines 9-17). The State argued: "It's becoming clear through this opening ... that the defense is going to rely essentially on alibi witnesses ... We have been provided no notice of alibi and ... don't believe that defense is proper at this point...." (R. p. 37, line 22 – p. 38, line 1). The defense contended alibi was always the defense, but the State contended some names they knew from discovery, but some they had not heard, and that there was no notice given pursuant to Rule 5. (R. p. 38, line 20 – p. 39, line 1). The Court reviewed the Rule 5 provisions, including the provision that a failure to disclose could result in exclusion. (R. p. 39, line 13 – p. 40, line 13). The Court asked defense counsel if written notice had been served upon the State. Defense counsel responded: "... we can't find a written notice ... So, we must not have done it." (R. p. 40, lines 16-19). Defense counsel asserted he believed the defense was alibi, and thought notice had previously been given, though he conceded he did not send any addresses, and further believed the defense did not "completely compl[y] with the rule." (R. p. 40, line 21 – p. 41, line 2). After a break and an off the record discussion in chambers, (R. p. 41, lines 3-5),<sup>3</sup> Judge John announced he would grant a mistrial rather than exclude the defense evidence, or require the prosecution to

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<sup>3</sup> After the break, the court reporter as noted "July 19, 2017," however, the transcript shows the "end of day two," after the jury is dismissed. (R. p. 41, line 8 and p. 48, line 24). It would appear the reference to the 19<sup>th</sup> after the break was a mere scrivener's error.

continue without proper notice and time to investigate. The trial court set out strict requirements on disclosure while giving a warning that failure to disclose would result in exclusion of testimony. (R. p. 41, line 12 – p. 45, line 14). The following day, defense counsel asked the trial judge to direct the State to give more specific information on time of the crimes; however, the trial judge found that the State had given notice of the specific times through discovery and had specifically requested notice of alibi. (R. p. 49, line 13 – p. 55, line 11). The trial judge also affirmed his prior finding that the defense did not comply with the notice requirements after having received sufficient notice of the time, date and place as required by the rule. (R. p. 55, line 11 – p. 56, line 18). The trial judge also issued a written order on July 26, 2017. (R. pp. 4-5).

This case was again called for trial on December 4, 2017. After the selection of a jury and presentation of various pretrial matters, defense counsel sought to place on the record that the State failed “to make a specific request of the particulars” such that the defense duty was triggered. (R. p. 62, line 18 – p. 63, line 1). The defense noted within the presentation that it was “not trying to reprove anything today,” but argued “there was no justification for the mistrial” so the “trial shouldn’t proceed and the charges ... should be dismissed.” (R. p. 63, lines 6-24). The State responded that the request gave sufficient notice. (R. p. 64, lines 1-7). The trial judge affirmed his prior reasoning and rulings, noting the basis for his findings as found throughout the State’s discovery properly given to the defense, and also “noted the defense counsel conceded failure to comply with notice requirements of Rule 5. He also affirmed again that he did not choose the remedy of exclusion that was available to him, or forced trial by surprise on the state, which was also available to him, but opted to set the trial for December 4, 2017. (R. p. 64, line 8 – p. 65, line 23).

### Standard of Review

In criminal cases, appellate court only review errors of law. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The decision to grant or deny a motion for mistrial is a matter within a trial court's sound discretion, and such a decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law. *State v. Council*, 335 S.C. 1, 12, 515 S.E.2d 508, 514 (1999). The Supreme Court has directed reviewing courts to examine the ruling of the trial judge to determine whether sound discretion was exercised in granting the mistrial. *Gilliam v. Foster*, 75 F.2d 881, 903 (4<sup>th</sup> Cir. 1996). The test to determine whether sound grounds exist for declaring a mistrial after the jury is sworn is 'whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public's interest in a fair trial designated to end in just judgment.'" *Id.*, 355 S.C. at 214, 584 S.E.2d at 422, quoting, *State v. Prince*, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983).

### Analysis

It was clear according to the rules that once notice is given by the State then notice of alibi must be given by the defense. It was well within the right of the trial judge to exclude the alibi witnesses due to the defendant's failure to provide notice. The court thought that it cannot exclude the evidence which would be detrimental to the defense; however, allowing the evidence before the jury without allowing the State an opportunity to investigate would be not fair to the state either. The trial court determined the only remedy in the interest of justice was to declare a mistrial.

Within their petition, the Petitioner argues that the State only requested alibi notice for the day of April 29, the day the murder occurred. The Petitioner offered that the trial judge could have just allowed the alibi evidence for that particular day. However, even if the trial court only allowed the alibi for only that particular day, it would still have been unfair to the State not to allow them

to prepare for these witnesses. This is the reason Rule 5 exists, so as to allow one side to be blindsided by information presented to the jury by either side without the other side have an opportunity to prepare. The notice rule is, “designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State have ample opportunity to investigate certain facts crucial to the determination of guilt or innocence.” *Williams v. Fla.*, 399 U.S. 78, 81-82 (1970).

Petitioner states that the trial judge could have granted a continuance instead of ordering a mistrial. He makes the argument that since there was two weeks set aside for trial, and the trial only lasted five days, there was ample time for the trial judge to grant a continuance and begin the trial at a later date. The problem with that idea is that after the jury is sworn you cannot replace them with another jury. At the time the alibi evidence was presented without the knowledge of the State, there was no way of the trial court knowing how long the State investigation would have taken. This investigation might have taken weeks, holding up the jury without allowing them to be released. This would have conflicted with other plans members of the jury might have had. A continuance would have obligated the jury longer than they were scheduled to be in the process. This would have placed these citizens in uncompromising situations regarding their work and families. So a continuance might have caused a rush to a final verdict. It is ultimately the responsibility of the trial court to make sure a fair and just verdict is made, and that both sides are allowed to present and reply to all evidence presented. As this Court decided in *State v. Prince*, 279 S.C. 30, 301 S.E.2d 471 (1983).

“The less than lucid test is therefore declared to be whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public’s interest in a fair trial designated to end in just judgment.”

*Id.*, 279 S.C. at 33, 301 S.E.2f at 472.

It was clear that manifest necessity existed to declare a mistrial. The trial court only had three logical choices, allow the alibi testimony which would have been unfair to the State; not allow the testimony which would have been unfair to the Petitioner or to declare a mistrial in order for the State to prepare an investigation. The final decision was the only logical decision that would allow the trial to remain fair to each party involved.

The record clearly reveals that the trial court made thoughtful consideration of the clearly available alternatives. The trial judge made a deliberate and thoughtful decision taking into consideration the right of both parties. There exists no abuse of discretion by the trial court. The trial court took specific steps to order disclosures and set aside a date certain so that the matter could be concluded fairly and quickly. This reveals a deliberate and thoughtful consideration of the rights of each party involved and to come to a fair resolution, particularly in ensuring that the Petitioner would not have a long delay in resolving the charges. Since the trial court revealed that manifest necessity existed for the granting of the mistrial, the Court of Appeals did not err in deciding that the trial courts decision to grant a mistrial was lawful.

- 2. The Court of Appeals did not err in making a decision that was not argued by the Respondent. According to Rule 220(c) of the South Carolina Appellate Court Rules the Court of Appeals is allowed to affirm an order upon any grounds appearing in the record on appeal.**

During trial there were text and Facebook messages allowed into evidence. These messages revealed the planning between Petitioner and his co-defendants. Within their opinion the Court of Appeals decided,

“The timing and distinctive characteristics of the text messages here – in addition to Cheatham’s identification of certain messages during his testimony – provided the circumstantial evidence necessary for authentication.”

*Benton*, 865 S.E.2d at 926.

In *Benton*, the Court of Appeals also decided,

“The authentication of the “Tommy Lee Kruspe” Facebook messages is more problematic. State’s Exhibit 76 is a collection of Facebook message, some of which Cheatham identified as in April 9 conversation he had with Benton about robbing the victim. Cheatham testified they had ‘just spoken on the phone about it,’ and he messaged Benton because he was unsure about the plan. Others include speculating as to Garland’s involvement and location, with noncommittal responses from ‘Kruspe.’ The contents of the Facebook messages were obtained through a Cellebrite extraction of Benton’s phone. Like Cheatham, Katlin Rose testified as to her belief that she was communicating with Benton through the Tommy Lee Kruspe account, but there is no other evidence to necessarily tie Benton to her messages or the possession of his phone on April 9.”

*Id.*, 865 S.E.2d at 927.

The Court of Appeals finally concluded,

“To the extent the admission of the Facebook messages was erroneous, we find it harmless because the messages were cumulative to Cheatham’s testimony that he began to plan the burglaries with Benton in late March and early April.”

*Id.*

#### **Standard of Review**

A ruling on admissibility of evidence is within the sound discretion of the trial court and will not be reversed without an abuse is discretion. *State v. Washington*, 379 S.C. 120, 123-124, 665 S.E.2d 602, 604. An abuse of discretion occurs when a trial court’s decision is unsupported by the evidence or controlled by an error of law. *State v. Bryant*, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007).

## Analysis

### Rule 220(c)

Petitioner argues that the Court of Appeals correctly decided that the trial court erred in authenticating the text and Facebook messages. The Petitioner's interpretation of the Court of Appeals decision is somewhat misleading. Although the Court of Appeals did conclude that, "the admission of the Facebook messages was erroneous." *Benton*, 865 S.E.2d at 927. The Court of Appeals, however, found that the inclusion of the text messages was not done in error. There was sufficient evidence presented to authenticate the text messages through circumstantial evidence.

The Petitioner argues that the decision that the messages being authenticated by their content was not raised by the State so it was not preserved for appeal. It is the opinion of the Petitioner that this ruling creates a novel question of law. However, the authority of the Court of Appeals to make this decision can be found in the rules of the Appellant Law Court which specifically state:

The Appellant court may affirm any ruling order, decision or judgment upon any ground(s) appearing in the Record on Appeal.

Rule 220(c) SCACR.

This matter has been previously addressed and ruled on by this Court, so no novel questions of law exist. *State v. The victim*, 316 S.C. 53, 447 S.E.2d 175 (1993)(Appellate court can affirm criminal conviction for any reason appearing in the record.); *I'on L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000)(Appellate Court may affirm for any reason appearing in the record.), *also see, State v. Beck*, 342 S.C. 129, 536 S.E.2d 679 (2000) n.4; *State v. Humphries*, 354 S.C. 87, 579 S.E.2d 613 (2003) n. 2; and, *State v. Griffin*, 339 S.C. 74, 528 S.E.2d 668 (2000) n. 2.

In order for this Court to grant certiorari it must be a new issue, one that has not yet been litigated or decided by this Court. It is clear that under Rule 220(c) of the Appellant Court Rules that the Court of Appeals is allowed to affirm a decision of the trial court based on information presented in the record. The Petitioner makes an attempt to relitigate their argument on appeal; however, this is not the forum for relitigation. In granting certiorari this Court should only determine if the decision made by the Court of Appeals went against a previous decision of this Court or the United States Supreme Court; or that there is no factual or legal basis for the decision. It is clear in their opinion the Rules allow this decision, and the legal and factual basis exists in the record and justifies this decision.

*Harmless Error*

Petitioner argues that the Court of Appeals erred in determining that the error of allowing the Facebook posts into evidence was harmless. The Court of Appeals determined that since these posts were cumulative to the testimony of co-defendant Mitchell Cheatham so any error in allowing these posts into evidence was harmless. Error is harmless where it could not reasonably have affected the result of the trial. *State v. Burton*, 326 S.C. 605, 610, 486 S.E.2d 762, 764 (Ct. App. 1997). The evidence in the Facebook posts was related to the planning that Mitchell Cheatham testified to, so it was cumulative. The admission of improper evidence is harmless where the evidence is merely cumulative to other evidence. *State v. Blackburn*, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978).

Without the Facebook posts there was sufficient evidence for a conviction. The Petitioner's cell phone was connected to the tower closest to the incident location on the day of the murder, and first robbery. (R. p. 194 line 21 – p. 195 line 17; p. 196 line 22 – p. 200 line 16; p. 200 line 18 – p. 204 line 8). Co-defendant's Douglas Thomas and Mitchell Cheatham without promise of

leniency both testified for the state. They both presented identical versions as to how the crime occurred. Text messages Petitioner sent to his girlfriend at 11:28pm on the date of the incident stated "About to try get \$100 g" (R. p. 393). A text from the co-defendant Cheatam to the Petitioner asking if another co-defendant "would be down, and "Tell him we pay big." (R. p. 373). On April 26, the day the store was burned to the ground, Petitioner texted a co-defendant to, "meet us at 501, tell us when you're close to C.B Furniture Outlet." (R. p. 377). This was the victim's store that they burned down.

Since there was ample evidence to prove Petitioner guilty beyond a reasonable doubt the error could be considered harmless. An insubstantial error not affecting the result of the trial is harmless when guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached. *State v. Bailey*, 298 S.C. 1, 377 S.E.2d 581, 584 (1989)

**3. The Court of Appeals did not err in allowing into evidence crime scene photographs of the charred remains of the victim. Allowing these photographs were more probative than prejudicial as it proved malice an essential element of murder, as well as corroborated the testimony of a co-defendant.**

Petitioner contested three photographs that were placed into evidence, one showed the victim with the handcuff remaining on one arm. The other two revealed the victim's full body as it was found by the fire department and law enforcement at the scene of the crime. The Petitioner argues that the Court of Appeals erred in affirming the decision of the trial court allowing these photographs into evidence. Petitioner argues that the photographs were not necessary to prove any fact in contest because the fact of the death was not contested. The Petitioner also argues that these photographs had no probative value, there were other witnesses that testified about what occurred at the scene like the fact that the victim was handcuffed and burned. Petitioner argues the photographs were only put into evidence to arouse the emotions of the jury.

The State argues that malice is an essential element of murder that must be proven by the State beyond a reasonable doubt. Although the Petitioner would argue that the manner of death was not disputed or that he died, it is still the duty of the State to prove their case and to put up relevant evidence in order to accomplish this responsibility. The State would further argue that placing these photographs into evidence corroborated the testimony of Mitchell Chatham who testified that the victim was handcuffed by the Petitioner before the trailer was set on fire. Since Chatham and the Petitioner were the only two in the house at the time this occurred, the State was obligated to introduce some evidence that would corroborate his testimony. The State argues that these photographs had more probative value than any prejudicial effect, so the Court of Appeals was correct in affirming the trial court decision.

#### **Standard of Review**

The materiality, relevance and admissibility of evidence are within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Rosemond*, 335 S.C. 593, 596, 518 S.E.2d 588, 589 (1999). An abuse of discretion occurs when the conclusions of the trial court lack evidentiary support or are controlled by an error of law. *State v. Anderson*, 386 S.C. 120, 126, 687 S.E.2d 35, 38 (2009). “A trial judge’s decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances.” *State v. Collins*, 409 S.C. 524, 763 S.E.2d 22, 28 (2014).

#### **Argument**

A trial judge is given broad discretion in ruling on questions concerning the relevancy of evidence, and his decisions will be reversed only if there is a clear abuse of discretion. Evidence is relevant if it tends to establish or make more or less probable some matter which is an issue upon which it directly or indirectly bears. *State v. Alexander*, 303 S.C. 377, 401 S.E.2d 146 (1991).

During trial the State introduced evidence that revealed photographs of the victim's charred body and the arm that was handcuffed. The State argued that this revealed malice which is an essential element of murder.<sup>4</sup> That must be proven beyond a reasonable doubt. The trial judge instructed the jury that the level of brutality could be considered in the jury's consideration of the element of malice aforethought: "Malice, that hatred, ill will, hostility towards another person...Malice can be inferred from conduct showing a total disregard for human life." (R. p. 283 line 9 – p. 284 line 3). *See, State v. Jones*, 86 S.C. 17, 19-20, 67 S.E.160, 162 (1910).

Petitioner within his petition stated that this Court in *State v. Collins*, 409 S.C. 524, 763 S.E.2d 22 (2014) ruled by majority that the photographs were inadmissible. The Petitioner failed to state as to why this Court ruled as such. In the Concurring opinion members of this Court concluded that the photographs were introduced for the sole purpose of inflaming the passions of the jury. However, it was also stated in the concurring opinion,

"I fully understand there are circumstances where autopsy photographs are relevant and that the relevance of the photographs is not substantially outweighed by the danger of unfair prejudice."

*Collins*, 409 S.C. at 539, 763 S.E.2d at 30 (Kittredge J. Concurring).

The one important feature that the present case has that *Collins* did not was the elements of the crime. In *Collins* the Appellant was indicted for involuntary manslaughter and three counts of owning a dangerous animal. *Id.*, 409 S.C. at 529, 763 S.E.2d at 25. Neither of those offenses has malice as an element, therefore, malice was not an element the State was obligated to prove. In murder the State must prove that the Petitioner acted maliciously in order for a jury to convict him of murder. In *State v. Torres*, 390 S.C. 618, 703 S.E.2d 226 (2010) a capital murder case this Court

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<sup>4</sup> "Murder" is the killing of any person with malice aforethought, either expressed or implied. S.C. Code Ann. §16-3-10 (1976).

decided that “autopsy photographs may be presented to the jury in an effort to show the circumstances of the crime and character of the defendant.” *Torres*, 390 S.C. at 623, 703 S.E.2d at 229, citing, *State v. Rosemond*, 335 S.C. 593, 597, 518 S.E.2d 588, 590 (1999). In order to prove this element of the crime these photos were relevant evidence. These photos were admissible to prove that the victim was handcuffed and left in a burning building. The State just put forth evidence of the victim as the Petitioner left him. This was done to prove how malicious he was in committing this heinous crime. The actions of the defendant is what is used to prove malice. These photographs were not introduced to inflame the jury’s emotions but to prove the malice that was involved in committing this murder.

The State also was obligated to place these photographs into evidence in order to corroborate the testimony of Mitchell Cheatham’s. In *State v. Holder*, 382 S.C. 278, 676 S.E.2d 690 this Court held, “if the offered photograph serves to corroborate testimony it is not an abuse of discretion to admit it.” *Id.*, 382 S.C. at 290, 676 S.E.2d at 697, quoting, *Nance*, 320 S.C. at 508, 466 S.E.2d at 353. The testimony of the co-defendant was going to be questioned by the Petitioner. That is because they were the only two people present when the victim was handcuffed and his house was set on fire. It was essential that these photographs were allowed to be introduced in order to corroborate his testimony.

In *Benton*, the Court of Appeals concluded,

“The photographs corroborated Cheatham’s testimony that the victim was restrained with handcuffs when the house was set on fire and the assailants left him handcuffed there. Benton stipulation that the victim was murdered and his argument that he was not challenging the manner of death did not relieve the State of its burden to prove its case beyond a reasonable doubt. *See Estelle v. McGuire*, 502 U.S. 62, 69, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991)(‘[T]he prosecution’s burden to prove every element of the crime is not relieved by the defendant’s tactical decision not to contest an essential element of the offense.’); *Martucci*, 380 S.C. at

249, 669 S.E.2d at 607 ('The State has the right to prove every element of the crime charged and is not obligated to rely upon a defendant's stipulation.') Accordingly, we find the circuit court acted within its discretion in admitting these photographs into evidence.

*Benton*, 865 S.E.2d at 928.

The Court of Appeals was correct in affirming the trial court in allowing these photographs into evidence. These photographs were introduced by the State not to cause any emotions by the jury, but to prove an essential element of the crime and corroboration testimony. These are reasons this Court has ruled are lawful in order to place autopsy and crime scene photographs into evidence. Therefore, the Petitioner has not revealed any error made by the Court of Appeals, this petition should be subject to dismissal.

**CONCLUSION**

Based on the foregoing reasons, the State submits Petitioner has failed to show that the questions presented warrants certiorari review. This Court should deny this petition and let stand the decision of the Court of Appeals.

Respectfully submitted,

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