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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY

Steven H. John, Circuit Court Judge

Appellate Case No. 2021-001498

The State, ...Respondent,

v.

Tommy Lee Benton, ...Petitioner.

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

Petitioner Tommy Lee Benton's Petition for Writ of Certiorari presents novel questions of law, substantial constitutional questions, and conflicts between the Court of Appeals' opinion and the decisions of this Court and Federal courts. The State ignores almost all these points. It instead devotes its energy primarily to opposing arguments which Mr. Benton did not raise. This leaves unopposed most of Mr. Benton's grounds for granting a writ of certiorari.

The reasons this Court should grant certiorari are straightforward. *First*, the Double Jeopardy clause prevents the State from retrying a defendant following an improvidently granted mistrial. The propriety of the circuit court's mistrial turns on the requirements imposed by Rule 5(e)(1), SCRCrimP, on the State and on a defendant. That novel question of state law is inextricably intertwined with Mr. Benton's constitutional rights and this Court's canons of statutory construction. Also at issue is whether the circuit court properly considered less drastic alternatives to a mistrial as required by the constitution and Federal precedent. *Second*, this Court has never defined the limits of alternative sustaining grounds under Rule 220(c), SCACR. The Court of Appeals affirmed the authentication of over 1,000 text and Facebook messages for a highly-fact intensive reason which neither party raised to the circuit court or the Court of Appeals and which was not developed in the record, thus depriving Mr. Benton of a meaningful opportunity to be heard. This Court should review the novel question of Rule 220(c)'s limits and whether the Court of Appeals' decision was correct on the merits. *Third*, this Court has repeatedly held that victim body photographs are inadmissible to prove guilt when they depict undisputed facts. The Court of Appeals ignored this rule, holding that mere corroboration of undisputed facts is sufficient to admit these photographs. The court also erroneously held that the photographs served a corroborating purpose. This Court should review those errors.

Each ground alone would be sufficient under Rule 242, SCACR, for this Court to grant certiorari. Mr. Benton therefore respectfully requests that this Court grant his Petition and review the Court of Appeals' decision.[1]

ARGUMENT

I. This Court should review the constitutional Double Jeopardy issues, novel questions regarding Rule 5(e)(1)'s requirements, and conflicts between the Court of Appeals' opinion and precedent from this Court and Federal courts presented in the Petition.

This Petition raises three issues regarding Mr. Benton's constitutional protections against being put in Double Jeopardy and the alleged existence of manifest necessity for granting a mistrial: (1) whether Rule 5(e)(1) requires the prosecution to state the time of the alleged offense with specificity before a defendant is obligated to disclose his alibi[2]; (2) whether a defendant is required to strictly comply with his reciprocal obligation under Rule 5(e)(1) if the State need not strictly comply with its initial obligation to trigger disclosure; and (3) whether the Court of Appeals correctly held that the circuit court properly considered alternatives to a mistrial. If the State did not comply with Rule 5(e)(1), if Mr. Benton's substantial compliance with the rule by voluntarily disclosing his alibi was sufficient where the State was not required to strictly comply when requesting his alibi, or if feasible alternatives to a mistrial existed, then there was no manifest necessity for the mistrial, Mr. Benton's constitutional rights were violated by trying him a second time, and his convictions must be vacated and his charges dismissed.

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[1] Rather than dispute the State's factual presentation point by point, Mr. Benton defers to the Record on Appeal and appendix materials for an accurate account of the evidence presented and arguments made.

[2] Rule 5(e)(1), SCRCrimP, states, in pertinent part, 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."

The State first argues that the Petition does not raise novel questions because "[t]here have been numerous South Carolina Supreme Court decisions that allow a mistrial in the sound discretion of the trial judge." (Return at 5). The standard for granting a mistrial is not at issue. Instead, at issue are whether the State triggers a defendant's obligation to disclose his alibi under Rule 5(e)(1) by serving a pre-indictment request that does not state the time of the offense, and whether strict compliance is required only from defendants but not from the State.

Rather than respond to these questions, the State makes broad generalizations about Rule 5(a)(1)'s purpose. (*E.g.*, Return at 5 ("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."); *id.* at 15 ("This is the reason Rule 5 exists, so as to allow one side to be blindsided [sic] by information presented to the jury by either side without the other side have [sic] an opportunity to prepare.")). Mr. Benton's voluntary disclosure of his alibi and its supporting witnesses fulfilled that purpose. (R. p. 11, lines 13-23, p. 12, lines 18-22; p. 38, line 5-p. 40, line 24). Moreover, the State is entitled an alibi only if it properly "trigger[s] the alibi defense discovery procedures. If they do not, then the defendant may raise an alibi defense at trial to which the Government, though surprised, may not object." *United States v. Bickman*, 491 F. Supp. 277, 279 (E.D. Pa. 1980). Mr. Benton asks this Court to review whether the State properly triggered the disclosure procedures and whether Mr. Benton complied with them. By not addressing those questions, the State concedes that certiorari is proper and should be granted. *See W. Va. Coal Workers' Pneumoconiosis Fund v. Bell*, 781 F. App'x 214, 226 (4th Cir. 2019) (Richardson, J.) ("[A]ppellee's wholesale failure to respond to a conspicuous, nonfrivolous argument in the appellant's brief ordinarily constitutes a forfeiture."); *see also* Rule 240(e), SCACR ("Failure of a party to timely file a return may be deemed consent by that party to the relief sought in the motion or petition.").

The State's only substantive argument regarding Double Jeopardy concerns the circuit court's considerations of mistrial alternatives. The "critical inquiry" for the existence of manifest necessity for a mistrial is the availability of less drastic alternatives. *United States v. Shafer*, 987 F.2d 1054, 1057 (4th Cir. 1993). This case involves crimes occurring on April 18, April 26, and April 29, 2014. The State only requested an alibi for April 29. (R. p. 510). Mr. Benton presented three alibi witnesses for April 29: his mother, whom police interviewed (R. p. 310, line 5-p. 315, line 17; p. 317, line 17-p. 318, line 13); his stepfather, whom police could have interviewed but chose not to (R. p. 324, line 17-p. 326, line 14; p. 328, line 23-p. 329, line 17); and his great-grandmother, the only alibi witness for that date whom police did not interview or have an opportunity to interview (R. p. 330, line 24-p. 332, line 25). Assuming *arguendo* that Mr. Benton was required to disclose his alibi for that day and did not properly do so, the circuit court only needed to consider alternatives to accommodate these witnesses.

Of the alternatives Mr. Benton suggested, the State only discusses the feasibility of a brief continuance to allow the State to investigate Mr. Benton's alibi for that day. (Return at 15-16). It argues that "there was no way of the trial court knowing how long the State['s] investigation would have taken" (the State suggests it "might have taken weeks") and lists hypothetical worst-case scenarios for unanswered questions regarding a continuance. (*Id.* at 15). But the duty to consider less drastic alternatives obligated the circuit court to make inquiry into the questions raised by the State. That they remain unanswered proves the circuit court did not sufficiently explore the viability of a continuance and did not "ma[k]e a thoughtful consideration of the clearly available alternatives." (Return at 16). The only "new" witness was Mr. Benton's great-grandmother, who merely corroborated his mother's testimony. The State would not have needed "weeks" to interview her. But the circuit court never made that inquiry or any of the others the State identifies

in its Return. This Court therefore should grant certiorari to consider the substantial constitutional question of whether the circuit court fulfilled its constitutional obligation to evaluate mistrial alternatives.

II. This Court should review the novel question of Rule 220(c)'s limits on the ability to affirm on an issue not raised to the circuit court or the Court of Appeals, and whether the Court of Appeals' holding on the unpreserved issue is supported by the record and the law.

The question before the Court of Appeals was whether the circuit court erred by authenticating over 1,000 text and Facebook messages solely because they came from the phones of Mr. Benton or his co-defendant, Mitchell Cheatham. (Final Br. of Appellant at 30-33). The Court of Appeals agreed that this was error. (Opinion at 9-10). But the Court of Appeals nevertheless affirmed on a fact-intensive ground no one argued either to the circuit court or on appeal: that other circumstantial evidence sufficiently authenticated this mountain of messages sent over a span of 44 days. (*Id.* at 10-11). Mr. Benton asks this Court to determine whether the Court of Appeals exceeded its authority under Rule 220(c), SCACR, and whether the Court of Appeals' decision was correct on its merits.

The State sets up three strawmen to avoid addressing Mr. Benton's Rule 220(c) argument. It first claims Mr. Benton "somewhat misleading[ly]" says the Court of Appeals held the circuit court erred in authenticating the text messages, because the Court of Appeals ultimately found the messages were authenticated by circumstantial evidence. (Return at 18). The State's argument conflates the Court of Appeals' two holdings. The Court of Appeals expressly held that "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 messages requires more than proving mere ownership of the device from which messages originated." (Opinion at 9-10). Invoking Rule 220(c), the court nonetheless held that other circumstantial

evidence sufficiently authenticated the text messages notwithstanding the circuit court's original error. (*Id.* at 10). Thus, Mr. Benton's representation was correct, not misleading.

Next, the State argues that an appellate court's general right to affirm on any basis appearing in the record is not a novel question. (Return at 18-19). Once again, the State misses the point because that is not the question presented. Mr. Benton asks this Court to examine the limits of Rule 220(c), namely at what point it becomes "unfair or unwise to resolve a case on a ground never mentioned by the respondent prior to appeal," *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 421, 526 S.E.2d 716, 724 (2000), whether a fact-intensive ground never argued or presented below can appear in the record for purposes of the rule, and whether Due Process requires that an appellant be afforded a meaningful opportunity to make a record and be heard on an alternative sustaining ground. These are novel questions, and the State never argues why certiorari on them is not proper. Certiorari therefore should be granted. *See W. Va. Coal Workers' Pneumoconiosis Fund*, 781 F. App'x at 226 (Richardson, J.) ("[A]ppellee's wholesale failure to respond to a conspicuous, nonfrivolous argument in the appellant's brief ordinarily constitutes a forfeiture."); *see also* Rule 240(e), SCACR ("Failure of a party to timely file a return may be deemed consent by that party to the relief sought in the motion or petition.").

Finally, the State bewilderingly claims that Mr. Benton is "attempt[ing] to relitigate their [sic] argument on appeal." (Return at 19). The Court of Appeals resolved the issue Mr. Benton raised in his appeal—whether the circuit court erred in authenticating the messages because they came from Mr. Benton's or Mr. Cheatham's phones—in Mr. Benton's favor. Presented here is the Court of Appeals' *sua sponte* holding that the messages nevertheless were authenticated by their content. Mr. Benton never had a chance to litigate that question in the first instance, as it was

never raised to the circuit court and he did not know the Court of Appeals would consider it. He therefore cannot "relitigate" it here.

As to the merits of the Court of Appeals' decision, the State simply declares without citation or explanation that "the legal and factual basis [for authentication] exists in the record and justifies this decision." (Return at 19). It never addresses the substance of Mr. Benton's argument that there is insufficient circumstantial evidence to authenticate the messages. Mr. Benton detailed how the Court of Appeals erred in authenticating the brief exchanges it reviewed and how, even assuming the court was correct with respect to those individual messages, eight messages sent over three days cannot authenticate over 1,000 messages sent in a span of 44 days, particularly here, where evidence indicated that the phones were in the possession of others during the relevant period. (Petition at 20-21). The State likewise does not dispute that the Court of Appeals effectively committed the same error as the circuit court: 1,000 messages cannot properly be authenticated simply because they came from a phone that contains a handful of other allegedly authentic messages. Certiorari therefore is proper on this issue. *See W. Va. Coal Workers' Pneumoconiosis Fund*, 781 F. App'x at 226 (Richardson, J.); *see also* Rule 240(e), SCACR.

The State also fails to address Mr. Benton's challenge to the Court of Appeals' holding that the admission of the Facebook messages was harmless error. The circuit court authenticated dozens of Facebook messages pre-dating, contemporaneous with, and post-dating the alleged offenses. (R. pp. 445-449). The Court of Appeals held that co-defendant Mr. Cheatham's and State's witness Kaitlin Rose's authentication of some alleged planning messages rendered all Facebook messages merely cumulative and thus harmless. (Opinion at 10). Mr. Benton seeks this Court's review because messages extending far beyond isolated planning references are not cumulative to this limited testimony. (Petition at 21). The State again does not respond to this

argument. It instead posits for the first time that any error was harmless because there was sufficient evidence to convict Mr. Benton without the messages. (Return at 19-20). Harmless error requires substantially more—the defendant's guilt must have been "conclusively proven by *competent evidence* such that *no other rational conclusion can be reached.*" *State v. Byrant*, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006) (emphasis added). The only inculpatory evidence the State specifically cites is cell phone location data and selected text messages.[3] (Return at 19-20). Authentication of the messages is obviously disputed, as was possession of Mr. Benton's phone. (Petition at 8 (citing and summarizing the evidence of disputed possession of and access to Mr. Benton's phone)). This evidence therefore does not constitute conclusive proof by competent evidence such that no other rational conclusion could be reached. The State's newest argument therefore fails on its merits and cannot serve as a basis to deny certiorari.

In sum, the State failed to respond to the substance of Mr. Benton's petition. It is uncontested that the limit of Rule 220(c) is a novel question which this Court should review and resolve and that the Court of Appeals' decision on the merits of the issues it raised *sua sponte* are not supported by the record. This Court therefore should grant certiorari.

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

The circuit court admitted three photographs over Mr. Benton's objection: one showing victim C.B. Smith's charred body and ruptured abdomen (State's Exhibit 54), another showing the same but from a little farther away (State's Exhibit 55), and a third showing Mr. Smith's shriveled,

[3] The State generically observes that "[c]o-defendant's [sic] Douglas Thomas and Mitchell Cheatham without promise of leniency both testified for the state." (Return at 19-20). Both are admitted murderers, arsonists, and burglars who, while not expressly offered leniency prior to testifying, expected sentencing consideration from the State. (R. p. 92, line 11-p. 93, line 12; p. 94, lines 5-15; p. 268, line 17-p. 269, line 20; p. 274, line 18-p. 275, line 5).

detached arm with handcuffs still attached (State's Exhibit 56). The State proved all facts depicted in the pictures via the testimony of multiple disinterested witnesses and physical evidence. (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). Mr. Benton did not dispute those facts or object to this other proof. He thus objected to these photographs as unduly prejudicial due their facially graphic nature and minimal probative value considering this other evidence, but the circuit court overruled his objections. (R. p. 11, line 13-p. 12, line 25; p. 19, line 18-p. 21, line 7; p. 107, line 1-p. 109, line 21, p. 110, line 21-p. 111, line 11).

The Court of Appeals held the circuit court did not err in admitting the superfluous and graphic photographs because they showed malice by corroborating Mr. Cheatham's undisputed testimony that he and Mr. Benton left Mr. Smith handcuffed when they set his mobile home on fire.[4] (Opinion at 12-13). Mr. Benton asks this Court to review both the legal standard the Court of Appeals used and its application of the standard.

A. Certiorari is warranted because the Court of Appeals' standard conflicts with this Court's precedent.

Mr. Benton first requests that this Court grant certiorari to consider the conflict between the Court of Appeals' opinion and the decisions of this Court holding that mere corroboration of undisputed facts is *not* enough to admit gruesome victim body photographs to prove guilt. *State v. Collins*, 409 S.C. 524, 539, 763 S.E.2d 22, 30 (2014) (Kittredge, J., concurring in result (joined by Hearn, J.)) ("The primary, if not sole, purpose of these horrific photographs was to inflame the passions of the jury. The detailed and graphic testimony of the pathologist was more than

[4] The State incorrectly suggests that it argued to the circuit court that the photographs demonstrate malice. (*See* Return at 22). The only argument raised at trial was that the photographs accurately depicted the crime scene. (R. p. 107, line 1-p. 109, line 21; p. 110, line 21-p. 111, line 11). The State first argued malice on appeal.

sufficient to enable the State to establish the elements of the offense."); *id.* at 540, 763 S.E.2d at 30 (Pleicones, J., dissenting); *State v. Kornahrens*, 290 S.C. 281, 288-89, 350 S.E.2d 180, 185 (1986) (holding that 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. 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 State submits there is no conflict because mere corroboration is enough. (Return at 22-23). First, it attempts to distinguish *Collins* because a majority of this Court found the photographs were admitted to inflame the passions of the jury, that Justice Kittredge recognized there may be some instances where these photographs are admissible, and that the offenses in *Collins* did not require proof of malice. (*Id.* at 22). These are of no moment. The State offered the photographs here solely to inflame the passions of jury, as demonstrated by the State's use of its Exhibit 54—which shows post-mortem injures but not whether Mr. Smith was handcuffed—to ask Mr. Cheatham if Mr. Smith's injuries were "worth $1500" and "[w]ho did that." (R. p. 262, lines 17-21). Furthermore, Justice Kittredge correctly observed that victim photographs can be admissible under certain circumstances. The question is whether they are admissible *in this case* given the substantial amount of other undisputed evidence proving the uncontested facts depicted. Finally, *Collins* examined whether the photographs were needed to prove the elements of the charged offenses. *Collins*, 409 S.C. at 530, 763 S.E.2d at 25. It is immaterial that malice was not one of them. This Court notably held the photographs were inadmissible even though they established the offenses' elements. *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). The State's effort to distinguish *Collins* therefore is unavailing.

The State also cites *State v. Torres*, 390 S.C. 618, 703 S.E.2d 226 (2010), for the proposition that autopsy photographs are relevant to show the circumstances of the crime and the character of the defendant. This invocation of *Torres* demonstrates the State's continuing failure to appreciate the difference between admitting photographs during the sentencing phase of a capital case and during a trial on guilt. In *Torres*, the State offered the subject photographs during the sentencing phase. *Id*. at 623, 703 S.E.2d at 229. The purpose of a capital sentencing phase "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. Even under that more permissive standard, this Court used *Torres* "to address an area of growing concern":

> The photographs at issue in this case, while admissible, are at the outer limits of what our law permits a jury to consider. Moreover, the State also sought to introduce evidence in the form of an autopsy dissection photo at trial, which the trial judge wisely excluded. Today, we strongly encourage all solicitors to refrain from pushing the envelope on admissibility in order to gain a victory which, in all likelihood, was already assured because of other substantial evidence in the case.

Torres, 390 S.C. at 624, 703 S.E.2d at 229.

Mr. Benton acknowledges this Court has stated that a circuit court does not abuse its discretion when admitting victim photographs which "serve[] to corroborate testimony." (*See* Return at 23 (quoting *State v. Holder*, 382 S.C. 278, 290, 676 S.E.2d 690, 697 (2009)). That language comes from this Court's decision in *Middleton.* A full review of the operative portion of that case confirms that mere corroboration is not enough to admit these photographs:

> Although photographs may be used to corroborate other evidence, it is well-established that photographs calculated to arouse the sympathies and prejudices of the jury are to be excluded if they are irrelevant or unnecessary to the issues at trial. Appellant's counsel offered to stipulate to any relevant information contained in the photographs, and it is clear the information was not really at issue. Furthermore,

> the testimony of the forensic pathologist negated any arguable evidentiary value of the photographs. The prejudice created by the photographs clearly outweighed any evidentiary value.

Middleton, 288 S.C. at 24, 339 S.E.2d at 693 (internal citations omitted).

This Court therefore should grant certiorari to review the conflict between the Court of Appeals' holding that mere corroboration of undisputed facts is enough to admit victim body photographs to prove guilt and this Court's precedent holding that such is not enough.

B. Certiorari is warranted because the Court of Appeals misapplied the standard for corroboration.

Even if corroboration is enough, this Court should grant certiorari to review the Court of Appeals' application of that rule to the record before it. Contrary to the State's intimation, Mr. Benton does not contend that his decision to not contest the fact or manner of death—and particularly whether Mr. Smith was left handcuffed in his burning home—automatically renders the photographs inadmissible. The question presented is whether the photographs are admissible as corroboration when the State otherwise conclusively proved the facts they depict by substantial evidence and the State used them to inflame the passions of the jury.

The State summarily argues that the photographs were needed to corroborate Mr. Cheatham's testimony that he and Mr. Benton left Mr. Smith handcuffed because "[t]he testimony of the co-defendant was going to be questioned by the Petitioner." (Return at 23). In doing so, the State ignores the wealth of evidence Mr. Benton cited from multiple witnesses, including investigators and the pathologist, which otherwise established that Mr. Smith was left handcuffed and established any other circumstances which demonstrate malice without relying on these photographs. (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). The State likewise ignores the fact that the photographs only show post-mortem injuries and that

two of them—State's Exhibits 54 and 55—do not even include a view of the handcuffs, their purported evidentiary purpose. And, critically, the State ignores its explicit use of the photographs as a direct appeal to emotion without any pretense of corroboration when it asked Mr. Cheatham if Mr. Smith's post-mortem injuries were "worth $1500." (R. p. 262, lines 17-18).

This case falls squarely within the warning expressed in Justice Kittredge's concurrence in *Collins* against admitting gruesome photographs where other evidence was "more than sufficient to enable the State to establish the elements of the offense." *Collins*, 409 S.C. at 539, 763 S.E.2d at 30 (Kittredge, J., concurring in result). It also demonstrates that despite this Court's clearly expressed "concern," the State has not changed its "seeming practice of seeking admission of highly prejudicial and inflammatory" victim body photographs. *Id.* Mr. Benton therefore respectfully requests that this Court grant certiorari to review the Court of Appeals' holding that the photographs served a proper corroborating purpose and to reinforce the limits on the use of "highly prejudicial and inflammatory" victim body photographs. *See* Rule 242(b)(3), SCACR.

CONCLUSION

For the reasons set forth above and in the Petition, this Court should grant certiorari to review the substantial constitutional and novel questions concerning Double Jeopardy and Rule 5(e)(1), SCRCrimP, 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.

[Signature page follows]

Respectfully submitted,

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