No. 24-

IN THE

Supreme Court of the United States

TOMMY LEE BENTON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Double Jeopardy Clause protects a defendant's "valued right to have his trial completed by a particular tribunal." *Arizona* v. *Washington*, 434 U.S. 497, 503 (1978) (citations and quotations omitted). To protect that right, the government must prove there was "manifest necessity" for a mistrial declared over the defendant's objection if it wishes to re-prosecute. *Id.* at 505. This requirement "command[s]" trial judges to only declare a mistrial when "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." *United States* v. *Jorn*, 400 U.S. 470, 485 (1971).

The federal and state courts are deeply split on whether the "ends of public justice" are served by a mistrial when viable alternatives exist. Most courts hold they are not and require trial courts to consider all viable alternatives before declaring a mistrial. But several courts, including the court below, have adopted one of at least three variations on when trial courts need not consider alternatives.

The question presented is:

Whether a trial judge must consider all viable alternatives to a mistrial before finding manifest necessity exists.

STATEMENT OF RELATED PROCEEDINGS

State of South Carolina v. *Tommy Lee Benton*, Case Nos. 2016-GS-26-017919, -05008, -05009, -05010, and -05011, South Carolina Court of General Sessions. Judgment entered December 8, 2017.

State of South Carolina v. *Tommy Lee Benton*, Case No. 2017-002553, South Carolina Court of Appeals. Judgment entered October 13, 2021, petition for rehearing denied November 18, 2021.

State of South Carolina v. *Tommy Lee Benton*, Case No. 2021-001498, South Carolina Supreme Court. Judgment entered January 17, 2024, petition for rehearing denied June 20, 2024.

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PETITION FOR A WRIT OF CERTIORARI

A mistrial is a drastic measure. It pits a defendant's constitutional right to have one jury decide his fate against the public's interest in allowing the prosecution a full opportunity to try its case. *Arizona* v. *Washington*, 434 U.S. 497, 505 (1978). To balance these competing interests, the prosecution must prove there was manifest necessity—a "high degree" of need—for a mistrial if it wants a second chance. *Id.* at 505–506. While the circumstances giving rise to a mistrial vary widely, each granted over the defendant's objection raises a common question: is there another option? If there is, then there is not a high degree of need to end the first trial and the Double Jeopardy Clause bars a second one.

Despite the simplicity of the question, the federal and state courts have created a conflicting patchwork of rules governing consideration of mistrial alternatives under Double Jeopardy. As a result, the same set of facts will prevent a second prosecution in some jurisdictions but allow it in others. This disparate application of an accused's constitutional rights requires this Court's immediate review.

OPINIONS BELOW

The opinion of the South Carolina Supreme Court (App., *infra*, 1a–11a) is reported at 901 S.E.2d 701. The opinion of the South Carolina Court of Appeals (App., *infra*, 12a–31a) is reported at 865 S.E.2d 919. The trial court's decisions (App., *infra*, at 32a–35a, 39a–41a, 47a–53a) are unreported.

JURISDICTION

The South Carolina Supreme Court entered its final judgment on January 17, 2024. A petition for rehearing was denied on June 20, 2024. App., *infra*, 36a. This Court's jurisdiction is timely invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the United States Constitution, Amendment V:

> No person shall * * * be subject for the same offence to be twice put in jeopardy of life or limb.

STATEMENT OF THE CASE

A. Background Facts.

Mitchell Cheatham, Douglas Thomas, and Garland Rose murdered C.B. Smith, robbed him, and burned his home and store over three days in April 2014. App., *infra*, 13a–14a. A grand jury also indicted Petitioner Tommy Lee Benton for his alleged participation in these crimes. *Id.* at 14a.

Benton's chief defense was alibi. The State served Benton with a "mutual reciprocal disclosure request" seeking his alibi only for the day of the murder.[1] App.,

1. "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,

infra, 20a. While Benton did not respond to this request in writing under the rule, he verbally disclosed his alibi to the State. *Id.* at 44a–45a. Investigators also interviewed two alibi witnesses—Benton's mother and his uncle's ex-girlfriend—and had another—his stepfather—in an interrogation room. R. 317–318, 328–329, 339–340.

Despite knowing Benton intended to present an alibi, the State waited until opening statements to raise his failure to formally disclose it. App., *infra*, 3a, 42a–43a. After moving to strike the alibi, the State conceded that it knew some of Benton's alibi witnesses. *Id.* at 44a. The only potentially new alibi witness was Benton's great-grandmother, who merely corroborated Benton's mother's testimony. Compare R. 310–315 (mother's testimony), with R. 330–332 (great-grandmother's testimony).

The trial court *sua sponte* declared a mistrial. App., *infra*, 47a–51a. Even though the court set aside two weeks for a trial that took only four days, R. 25–26, it never considered a recess for the State to investigate Benton's sole new alibi witness. The court instead considered only two other alternatives to a mistrial—striking Benton's alibi in full or letting him present it in full—and found both would be unfair. *Id.* at 48a. From this, the court found manifest necessity existed based on generic notions of "[t]he harm it would do the defendant, the harm that it would do to the state" if trial moved forward. *Id.* at 49a.

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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." S.C. R. Crim. P. 5(e)(1).

The State did not contact Benton's great-grandmother, the only late-disclosed witness, before the second trial began five months later. Supp. R. 2. Benton timely moved to dismiss his charges under the Double Jeopardy Clause, arguing the original mistrial was unjustified. App., *infra*, 38a–39a. The trial court "reaffirm[ed] and reiterate[d]" its earlier rulings and denied the motion. *Id.* at 39a–41a.

The jury convicted Benton of murder, first-degree arson, third-degree arson, and two counts of first-degree burglary. App., *infra*, 17a. The trial court sentenced Benton to life imprisonment without the possibility of parole for murder, life imprisonment for first-degree burglary, thirty years' imprisonment for first-degree arson, and fifteen years' imprisonment for third-degree arson. *Id.* at 17a.

B. The State Appellate Courts Found Manifest Necessity for a Mistrial Can Exist Despite There Being Viable Alternatives.

The South Carolina Court of Appeals affirmed Benton's convictions in a published opinion. Relevant here, Benton argued that the trial court ignored a recess as a mistrial alternative. Appellant's Br. 29–30. But like the trial court, the court of appeals did not discuss the availability of a recess as an alternative. The court just summarily held that the trial court "considered the alternatives available to avoid a mistrial and properly examined the potential prejudice to each party likely to result." App., *infra*, 21a.

The South Carolina Supreme Court affirmed. Unlike those before it, the court did not skip the recess question. The court unanimously held there was no evidence that the trial court adequately considered whether a recess was a viable mistrial alternative. *E.g.*, App., *infra*, 5a ("There may have been some space for the trial court to have recessed the trial so the State could conduct a due diligence investigation of Benton's alibi disclosure, but given the skimpy record before us, we cannot say so without speculating."); *id.* at 10a (Few, J., concurring) ("[T]he trial court did not consider whether a short recess in the trial could have given the State time to respond to the late-disclosed alibi witness. * * * Absolutely, the trial court should have paused, reflected, and listened. The trial court's failure to do this—by itself—was error."). Still, the court excused the trial court's failure because it felt Benton was partially to blame for the mistrial by not putting his alibi in writing. *Id.* at 5a–6a (majority opinion); *id.* at 11a (Few, J., concurring). The court then denied Benton's petition for rehearing. *Id.* at 36a.

REASONS FOR GRANTING THE PETITION

A. The Circuit and State Courts Are Deeply Divided on the Question Presented.

The Double Jeopardy Clause protects an accused's "valued right to have his trial completed by a particular tribunal." *Arizona* v. *Washington*, 434 U.S. 497, 503 (1978) (citations and quotations omitted). It generally grants the government "one, and only one, opportunity to require an accused to stand trial." *Id.* at 505. But this protection is not absolute. The accused's right sometimes yields to the government's interest in having a "full and

fair opportunity to present [its] evidence to an impartial jury." *Ibid.*

To give effect to both interests, the prosecution must show "manifest necessity" for any mistrial granted over the defendant's objection if it seeks a retrial. *Washington*, 434 U.S. at 505. "The words 'manifest necessity' appropriately characterize the magnitude" of this burden. *Ibid*. They require a "scrupulous exercise of judicial discretion" to find that "the ends of public justice would not be served by a continuation of the proceedings." *United States* v. *Jorn*, 400 U.S. 470, 485 (1971). A mistrial need not literally be necessary, but there still must be a "high degree" of necessity for one. *Washington*, 434 U.S. at 506. This standard varies based on the underlying cause of mistrial. The "strictest scrutiny" applies when a mistrial is premised on the "unavailability of critical prosecution evidence" or there is a reason to believe the "prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused." *Washington*, 434 U.S. at 508. On the other hand, trial courts have more leeway with other causes of a mistrial. *E.g.*, *Washington*, 434 U.S. at 509 (not applying heightened scrutiny when a jury is deadlocked); *Illinois* v. *Somerville*, 410 U.S. 458, 464 (1973) (not applying heightened scrutiny when the underlying issue "would make reversal on appeal a certainty"). But no matter the cause, manifest necessity must exist even when the prosecution did not ask for a mistrial or the error of either counsel brings about the issue. *United States* v. *Sloan*, 36 F.3d 386, 395 (4th Cir. 1994) (citing *Jorn*, 400 U.S. at 486, 490).

Against this backdrop sits a question which has vexed both federal and state courts: when must a trial judge

consider alternatives to a mistrial before finding manifest necessity exists?

1. Most federal and state courts hold that viable mistrial alternatives prevent a finding of manifest necessity in all cases.

The First, Second, Fourth, and Eighth Circuits each hold that manifest necessity cannot exist in the face of viable mistrial alternatives, no matter the mistrial's cause.

For example, the First Circuit held, in a case involving a missing juror which invoked regular scrutiny, that "[w]here there is a viable alternative to a mistrial and the district court fails adequately to explore it, a finding of manifest necessity cannot stand." *United States* v. *Toribio-Lugo*, 376 F.3d 33, 39 (1st Cir. 2004); see also *United States* v. *Pierce*, 593 F.2d 415, 417 (1st Cir. 1979) ("[O]ur first inquiry must be whether the court gave adequate consideration to the existence of any less drastic alternative."). When a trial judge did not consider a continuance after a defendant was hospitalized, the Second Circuit held that "the apparent availability of at least one alternative to a mistrial adjourning the trial for 7 to 10 days leads us to conclude that a mistrial was not a 'manifest necessity.'"[2] *Dunkerley* v. *Hogan*, 579 F.2d 141,

2. The Second Circuit has since explained that a trial court need not make explicit findings about alternatives. *United States* v. *Klein*, 582 F.2d 186, 194 (2d Cir. 1978), cert. denied, 439 U.S. 1072 (1979). And the trial judge's decision to pursue or not pursue a particular alternative is reviewed for an abuse of discretion. *United States* v. *Razmilovic*, 507 F.3d 130, 138 (2d Cir. 2007). But the record still must show that the trial judge considered alternatives and found them to be inadequate before declaring a mistrial. *Id.* at 139; *Klein*, 592 F.2d at 194–95.

148 (2d Cir. 1978), cert. denied, 439 U.S. 1090 (1979); see also *Drayton* v. *Hayes*, 589 F.2d 117, 121 (2d Cir. 1979) ("[A] trial judge should not grant a mistrial Sua sponte, or at the instance of the prosecutor, until he has canvassed procedural alternatives that might cure the defect.") (citations omitted).

In the Fourth Circuit, "the critical inquiry is whether less drastic alternatives were available. 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." *United States* v. *Shafer*, 987 F.2d 1054, 1057 (4th Cir. 1993) (citations and quotations omitted). The court has applied this rule to a wide range of mistrials including both the strictest and regular scrutiny. *E.g.*, *Seay* v. *Cannon*, 927 F.3d 776, 784 (4th Cir. 2019), cert. denied, 140 S. Ct. 2633 (2020) ("We thus agree with our sister circuits' conclusion that, applying strictest scrutiny review, the government must demonstrate that the trial court gave 'careful consideration' to the availability of reasonable alternatives to a mistrial, and that the court concluded that none were appropriate."); *Washington* v. *Jarvis*, 137 Fed. Appx. 543, 552 (4th Cir. 2005) (holding in a case involving regular scrutiny that "[w]hen such alternatives exist, manifest necessity does not exist for a mistrial"); *Harris* v. *Young*, 607 F.2d 1081, 1085 (4th Cir. 1979), cert. denied, 444 U.S. 1025 (1980) ("In determining whether the trial judge exercised sound discretion in declaring a mistrial, we must consider if there were less drastic alternatives to ending the trial. If less drastic alternatives than a mistrial were available, they should have been employed in order to protect the defendant's interest in promptly ending the trial, and the Commonwealth's interest in

rapid prosecution of offenders."); *United States* v. *Walden*, 448 F.2d 925, 929 (4th Cir. 1971), cert. denied, 409 U.S. 867 (1972) (holding that a trial judge "must seek out and consider all avenues of cure to avoid trial abortion" when declaring a mistrial after two jurors saw some defendants handcuffed in a hallway).

And relying substantially on the Fourth Circuit's decision in *Shafer*, the Eighth Circuit held that a trial court's grant of a mistrial in the face of alternatives was an unreasonable application of clearly established Supreme Court precedent such that habeas relief was justified. *Long* v. *Humphrey*, 184 F.3d 758, 761 (8th Cir. 1999); see also *Huss* v. *Graves*, 252 F.3d 952, 955 (8th Cir. 2001), cert. denied, 535 U.S. 933 (2002) (holding in a case involving regular scrutiny that "the judge failed to consider potential alternatives to a mistrial, an inquiry that is central to determining whether manifest necessity requires a mistrial").

3. The Eleventh Circuit largely applies the same rule but gives trial courts more latitude. In *Abdi* v. *Georgia*, 744 F.2d 1500 (11th Cir. 1984), cert. denied, 471 U.S. 1006 (1985), defense counsel cross-examined the alleged victim of sexual assault in violation of Georgia's rape shield law. *Id.* at 1502. The trial judge rejected the prosecution's request for a curative instruction and declared a mistrial *sua sponte*. *Ibid.* The Eleventh Circuit recognized that "manifest necessity for a mistrial can exist alongside less drastic alternatives, *so long as the record discloses that the trial court considered alternatives before declaring mistrial*." *Id.* at 1503 (emphasis added); see also *id.* at 1504 ("But *as long as* other parts of the record indicate that the trial court considered alternatives, the failure to consult

with one attorney is not by itself fatal to the declaration of mistrial.") (emphasis added). Because the trial court there considered and reasonably rejected alternatives, it did not abuse its discretion in finding manifest necessity existed for a mistrial. *Id.* at 1503–1504.

At the same time, a trial court's failure to "consider a *particular* alternative is not constitutional error." *Venson* v. *Georgia*, 74 F.3d 1140, 1145 (11th Cir. 1996) (emphasis added); see also *United States* v. *Scott*, 613 Fed. Appx. 873, 875 (11th Cir. 2015) (citations omitted). Even so, the record still must show the trial court considered at least some alternatives before declaring a mistrial. *Scott*, 613 Fed. Appx. at 875. But see *id.* at 876 ("[T]he district court was not bound to pursue the alternatives until it was absolutely infeasible to exercise one.").

4. Most state courts applying the federal Double Jeopardy Clause have adopted this standard. See *State* v. *Aguilar*, 172 P.3d 423, 228 (Ariz. Ct. App. 2007) ("[W]hen a trial court fails to consider viable alternatives to a mistrial, manifest necessity has not been shown."); *People* v. *Segovia*, 196 P.3d 1126, 1133 (Colo. 2008) ("[A] mistrial is justified only where other reasonable alternatives are no longer available."); *Douglas* v. *United States*, 488 A.2d 121, 126 (D.C. 1985) ("Without consideration of the possible waiver, therefore, the trial court had no reasonable basis for concluding there was 'manifest necessity' for a mistrial. Accordingly, appellant may not be prosecuted a second time; we have no alternative to vacating the challenged order and directing dismissal of the indictment."); *Thomason* v. *State*, 620 So. 2d 1234, 1237 (Fla. 1993) ("Courts construing *Jorn* generally have found that it requires trial judges, *at the very least*, to evaluate and

discuss available alternatives before declaring a mistrial over the objection of the defendant."); *Meadows* v. *State*, 813 S.E.2d 350, 356 (Ga. 2018) (finding no manifest necessity for a mistrial given the trial court's failure to consider alternatives); *State* v. *Manley*, 127 P.3d 954, 961 (Idaho 2005) ("In making the manifest necessity determination, a district court ought to obtain sufficient information to enable it to consider alternatives to a mistrial and give counsel a timely and meaningful opportunity to be heard on the subject."); *People* v. *Shoevlin*, 123 N.E.3d 652, 659 (Ill. Ct. App. 2019) ("It is of the utmost importance that a trial court carefully considers all reasonable alternatives prior to declaring a mistrial."); *Cardine* v. *Com.*, 283 S.W.3d 641, 650 (Ky. 2009), cert. denied, 559 U.S. 1025 (2010) ("Having these viable options precludes a finding of manifest necessity, and it was thus an abuse of discretion to grant the mistrial."); *State* v. *Smith*, 244 A.3d 296, 312 (N.J. App. Div. 2020) ("A trial judge's discretion is exercised improperly if the trial judge has an appropriate alternative course of action.") (cleaned up); *Cornish* v. *State*, 322 A.2d 880, 886 (Md. 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."); *State* v. *Wrice*, 235 S.W.3d 583, 588 (Mo. Ct. App. 2007) ("Therefore, if less drastic alternatives than a mistrial are available they must be employed 'in order to protect the defendant's interest in promptly ending the trial.'") (quoting *Harris*, 607 F.2d at 1085); *State* v. *King*, 551 A.2d 973, 976 (N.H. 1988) ("Assuming that the record reflects the trial judge's consideration of alternatives and documents the necessity for the mistrial, the mistrial order will pass constitutional muster and permit the defendant's retrial."); *Day* v. *Haskell*, 799 N.W.2d 355, (N.D. 2011) ("In this case, the trial court did

not consider any alternatives and the decision was made quickly and without sufficient reflection. The trial court did not engage in the 'scrupulous exercise of judicial discretion' required before making its decision."); *City of N. Olmsted* v. *Himes*, Nos. 84076, 84078, 2004 WL 1796343, at *5 (Ohio Ct. App. Aug. 12, 2004) ("A trial court abuses its discretion by declaring a mistrial without considering any alternatives.") (citing *Jorn*, 400 U.S. 470); *State* v. *Gillespie*, 451 P.3d 637, 640 (Or. 2019) ("[W]e have made clear that 'manifest necessity' requires 'at the least that a trial not be terminated if any reasonable alternative action is possible under the facts of each case.'") (quoting *State* v. *Embry*, 530 P.2d 99, 102–103 (Or. 1974)); *Com.* v. *Balog*, 576 A.2d 1092, 1098 (Pa. Sup. Ct. 1990) ("Failure to consider alternatives before declaring a mistrial raises doubt as to the existence of manifest necessity to terminate the trial. This doubt must be resolved in favor of Appellant who opposed such a declaration. Therefore we hold that the trial court abused its discretion in declaring a mistrial * * * ."); *State* v. *Stephens*, No. E2005-01925-CCA-R9CD, 2006 WL 2924960, at *5 (Tenn. Crim. App. Oct. 13, 2006) ("Only when there is 'no feasible alternative to halting the proceedings' can a manifest necessity be shown.") (quoting *State* v. *Knight*, 616 S.W.2d 593, 596 (Tenn. 1981), cert. denied, 454 U.S. 1097 (1981)); *Brown* v. *State*, 907 S.W.2d 835, 839 (Tex. Crim. App. 1995) ("Where a trial judge grants a mistrial despite the available option of less drastic alternatives there is no manifest necessity and we will find an abuse of discretion."); *State* v. *Moeck*, 695 N.W.2d 783, 793 (Wis. 2005), cert. denied, 546 U.S. 998 (2005) ("We conclude that the circuit court did not exercise sound discretion in declaring a mistrial when it failed to give adequate consideration to the State's ability to refer to the defendant's silence and to the effectiveness of a curative jury instruction.").

2. The Fifth Circuit holds that alternatives are dispositive in cases subject to the "strictest scrutiny" but not in others.

The "strictest scrutiny requires the government to show that the district court carefully considered whether reasonable alternatives existed and that the court found none." *United States* v. *Fisher*, 624 F.3d 713, 722 (5th Cir. 2010). "A painstaking examination of all relevant facts and circumstances naturally encompasses at least a careful consideration of any reasonable alternative to a mistrial." *Ibid.* In *Fisher*, the mistrial arose from scheduling conflicts for the government's witnesses. *Ibid.* Because the trial court never explored ways to resolve the conflicts, there was no manifest necessity for the mistrial. *Id.* at 722–723.

But "a trial judge does not err for failing to consider or adopt a specific alternative for a mistrial" in cases not using the strictest scrutiny. *Cherry* v. *Director, State Board of Corrs.*, 635 F.2d 414, 418 (5th Cir. 1981), cert. denied, 454 U.S. 840 (1981) (*Cherry II*). In *Cherry II*, the court sitting en banc reviewed a mistrial granted after a juror's mother died and the defendant was unwilling to move forward with 11 jurors. *Id.* at 416. The panel held that "where the trial judge apparently did not canvass the alternatives such as continuance, it is clear that an inadequate concern for the rights of the accused to have his case tried once before the same tribunal was present." *Cherry* v. *Director, State Bd. of Corrs.*, 613 F.2d 1262, 1267 (5th Cir. 1980) (*Cherry I*). The en banc court reversed. It recognized that "before granting a mistrial it is incumbent on the trial judge to consider available alternatives." *Cherry II*, 635 F.2d at 418. But "the Constitution does not

require canvassing of specific alternatives or articulation of their inadequacies." *Ibid.* As a result, "the availability of another alternative does not without more render a mistrial order an abuse of sound discretion." *Id.* at 419. Because the trial judge considered some alternatives, such as proceeding with 11 jurors, his failure to consider a continuance was not an abuse of discretion. *Id.* at 420.

3. The Third Circuit has recognized a sliding scale for when alternatives are dispositive.

The Third Circuit has taken two approaches. In *Crawford* v. *Fenton*, 646 F.2d 810 (3d Cir. 1981), cert. denied, 454 U.S. 872 (1981), the district court held that the existence of an unexercised alternative to a mistrial (there, another charge to a deadlocked jury) barred the later prosecution of the defendant. *Id.* at 818. The Third Circuit, however, disagreed. It held that the cases relied on by the district court "do speak of alternatives, but the alternatives to which they refer are not independent measures of the district court's discretion. Rather, they speak only of an available alternative as a factor to consider in determining whether a manifest necessity for a mistrial exists." *Ibid.* At the same time, failing to consider "obvious and adequate" alternatives may bar re-prosecution. *Id.* at 819 n.11 (citing *Harris*, 607 F.2d at 1085 n.4). The court therefore adopted a sliding scale:

> It is clear that the more obvious and adequate the alternative is, the greater the role it must play in the trial judge's discretionary determination of whether a manifest necessity exists to declare a mistrial. Conversely, the less obvious and adequate the alternative, the less

> compelling influence such an alternative need play in the trial judge's determination. Thus, there can be no question but that consideration of alternatives is required, but that consideration is not invariably of controlling significance.

Id. at 818 n.9. Because the court did not believe that the proposed alternative was obvious and adequate, the trial judge's failure to consider it in *Crawford* was not dispositive. *Id.* at 819–820.

The Third Circuit has not cited *Crawford* for this sliding scale since. The court instead has embraced a more categorical rule that trial judges must consider all reasonable alternatives before declaring a mistrial. *E.g.*, *United States* v. *Medina*, 175 Fed. Appx. 541, 544–545 (3d Cir. 2006) (holding that a mistrial should not be declared without consideration of alternatives and that the trial judge's failure to consider certain alternatives and make a record showing they were unavailing "refutes the conclusion that a mistrial was manifestly necessary") (citations omitted); *United States* v. *Rivera*, 384 F.3d 49, 56 (3d Cir. 2004) ("Critically, a mistrial must not be declared without prudent consideration of reasonable alternatives. * * * Ultimately, however, the District Court must exercise prudence and care, giving due consideration to reasonably available alternatives to the drastic measure of a mistrial. Where a District Court *sua sponte* declares a mistrial in haste, without carefully considering alternatives available to it, it cannot be said to be acting under a manifest necessity.") (citations and quotations omitted); *Love* v. *Morton*, 112 F.3d 131, 137 (3d Cir. 1997) ("To demonstrate manifest necessity, the state must show that under the circumstances the trial judge 'had no alternative to the

declaration of a mistrial.' The trial judge must consider and exhaust all possibilities.") (quoting and citing *United States* v. *McKoy*, 591 F.2d 218, 222 (3d Cir. 1979)). But because these cases contradict *Crawford*, they likely are not good law in the Third Circuit. See *Holland* v. *N.J. Dep't of Corrs.*, 246 F.3d 267, 278 (3d Cir. 2001) ("[T]o the extent that [a case within the circuit] is read to be inconsistent with earlier case law, the earlier case law * * * controls.") (citing *O. Hommel C.* v. *Ferro Corp.*, 659 F.2d 340, 354 (3d Cir. 1981)).

4. The existence of alternatives is not dispositive in the Sixth Circuit and at least three state courts.

1. The Sixth Circuit comprehensively addressed this issue when reviewing a mistrial granted following the September 11 attack. *Walls* v. *Konteh*, 490 F.3d 432, 435–436 (6th Cir. 2007). The state court affirmed the mistrial declaration, *id.* at 436, but a federal district court granted a writ of habeas corpus because the trial judge did not consider available alternatives such as a continuance, *id.* at 438. The Sixth Circuit reversed. It was "undoubtedly true" that the trial judge had alternatives which he did not consider. *Ibid.* But "the Supreme Court has never required that a judge consider other options when 'the record provides sufficient justification for the state-court ruling.'" *Ibid.* (quoting *Washington*, 434 U.S. at 516–517). The court recognized that this Court's past discussions of alternatives are "not mere dicta," but the Sixth Circuit believed this Court did not "*hold* that a declaration of mistrial without deliberate consideration of alternatives is necessarily an abuse of discretion." *Ibid.* That a continuance might have been reasonable does not

mean the trial judge abused his discretion in granting a mistrial without considering it. *Id.* at 439.

In reaching this result, the Sixth Circuit distinguished a past case where it had suggested that consideration of alternatives is required. *Walls*, 490 F.3d at 439 n.3 (citing *Johnson* v. *Karnes*, 198 F.3d 589 (6th Cir. 1999)). *Walls* explained that the *Johnson* court's statements about alternatives did not create an independent requirement, and instead were part of the court's broader finding that the trial court acted irrationally. *Ibid.* Without other evidence that the trial court acted irrationally in *Walls*, its failure to consider all alternatives did not defeat manifest necessity. *Id.* at 439.

2. At least three states follow the Sixth Circuit's approach. The Supreme Court of Michigan "has never required an examination of alternatives before a trial judge declares a mistrial on the basis of jury deadlock," for example. *People* v. *Lett*, 644 N.W.2d 743, 751 (Mich. 2002). The court recognized that it has required consideration of alternatives in other circumstances. *Id.* at 751 n.13. But it quickly cast doubt on that requirement by observing that this Court has overturned some cases relied on for the rule. *Ibid.* (citing *Arizona* v. *Washington*, 546 F.2d 829 (9th Cir. 1976), rev'd, 434 U.S. 497, and *United States* v. *Grasso*, 552 F.2d 46 (2d Cir. 1977), vacated, 438 U.S. 901 (1978)). It then stated, incorrectly, that this Court "has expressly indicated that the failure of the trial judge to examine alternatives * * * before declaring a mistrial does not render the mistrial declaration improper."[3] *Id.*

3. *Lett* claimed the *Washington* majority rejected Justice Marshall's insistence that "the record make clear either that there

at 752. The Supreme Court of Indiana similarly miscited *Washington* to hold that a trial court is not required to "attempt other curative measures before declaring a mistrial." *Jackson* v. *State*, 925 N.E.2d 369, 374 (Ind. 2010) (citing *Washington*, 434 U.S. at 516–517).

The South Carolina Supreme Court employed this same approach here. Even though it believed that "[t]he trial court conscientiously considered alternatives to a mistrial," in its next breath the court admitted it would have to "speculat[e]" as to whether the trial court considered the clearest alternative—a recess for the State to investigate Benton's great-grandmother's testimony. App., *infra*, 5a. The majority therefore recognized that the record does not show the trial court considered viable alternatives. The concurrence was blunter: the trial court's failure to consider a recess was error. *Id.* at 10a (Few, J., concurring). But even so, the court unanimously gave the trial court a pass because other factors favored finding manifest necessity notwithstanding the trial court's error. *Id.* at 5a–6a (majority opinion); *id.* at 11a (Few, J., concurring).

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were no meaningful and practical alternatives to a mistrial, or that the trial court scrupulously considered available alternatives and found all wanting but a termination of the proceedings" before finding manifest necessity. 644 N.W.2d 743, 752 n.14 (Mich. 2002) (quoting *Arizona* v. *Washington*, 434 U.S. 497, 525 (1978) (Marshall, J., dissenting)). But the *Washington* majority did not dispute that trial courts must consider alternatives. In fact, the majority noted that the parties argued about the viability of an alternative before the trial court. *Washington*, 434 U.S. at 514 n.34 (majority opinion). And there was no suggestion that other alternatives were available. The majority parted with the dissent in this regard simply by holding that any consideration need not be *express*, so long as the record otherwise shows the trial court examined alternatives. *Id.* at 515–516.

B. This Case Is Worthy of this Court's Review.

1. This issue is recurring and important.

This Court has detailed the irreparable harm which defendants suffer when forced to endure a second trial against their will:

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

Washington, 434 U.S. at 503–505. This protection is structural—defendants need not show any prejudice to obtain relief other than losing their first properly sworn jury. *Sloan*, 36 F.3d at 395 (citing *Somerville*, 410 U.S. at 471).

The current state of confusion among the state and federal courts as to what extent trial courts must consider mistrial alternatives erodes Double Jeopardy's fundamental protection. The question of alternatives arises with every mistrial granted over a defendants'

objection. It recurs on a regular, if not daily, basis in courts across the country. Disturbingly, the answer to this question varies widely depending on which federal or state court a defendant is being tried in. For Benton, this disparity is real—his retrial would have been barred in a majority of state and federal courts, but was affirmed here when the state court adopted a different rule. He now stands to spend the rest of his life in prison.

The result is intolerable uncertainty about, and a diminution of, the Double Jeopardy rights of defendants. This Court's review therefore is needed.

2. This case is an excellent vehicle.

This case presents an excellent vehicle to resolve the deep split in the circuits.

There is no dispute about the jurisdiction of any lower court or of this Court, the dispute is ripe, and the state court directly ruled on the question in a published opinion. Further, the state court's unanimous finding that there is no evidence the trial court considered viable alternatives (App., *infra*, 5a; *id.* at 10a (Few, J., concurring)) presents a clean record to review this important question.

There is no reason to allow further percolation. Most circuits and states have addressed this question. As detailed above (Pet. 7–18), they have reached varying and conflicting conclusions. Further delay while other courts weigh in will only result in more confusion and not bring clarity.

Finally, there are no alternative grounds of decision to support the judgment. Every other finding of the courts below is subsidiary to the question presented here. For example, Benton raised two alternative evidentiary grounds for reversal which the courts rejected. App., *infra*, 8a–9a, 21a–31a. But a Double Jeopardy violation trumps these arguments. The courts below also rejected Benton's arguments that there was no manifest necessity because the State did not properly ask for Benton's alibi and therefore could not rely on Benton's failure to formally disclose it. *Id.* at 17a–21a; see also *id.* at 5a ("Benton and the solicitor shared fault perhaps for the circumstances and apparent misunderstandings that led to the mistrial."). This was a standalone ground for reversal which does not affect the question presented here.

While the state court claimed in passing that "[n]either Benton nor the State objected to the trial court's analysis or its declaration of a mistrial" (App., *infra*, at 6a), the court never held that Benton *consented* to a mistrial. This distinction is important, because Benton opposed the state's efforts to strike his alibi and the trial court's mistrial declaration. See R. 38–41, 49–52, 63. To the extent Benton's language opposing a mistrial was not clear enough, the state court did not find that any alleged silence was "tantamount to consent." See *United States* v. *Gantley*, 172 F.3d 422, 429 (6th Cir. 1999) ("[A] defendant's failure to object to a mistrial implies consent thereto only if the sum of the surrounding circumstances positively indicates this silence was tantamount to consent."); see also *United States* v. *Brewley*, 382 Fed. Appx. 232, 236 (3d Cir. 2010) (holding that silence must evidence a "deliberate election" by the defendant to forgo his right to have his first jury decide his case) (quoting *United States* v. *Scott*,

437 U.S. 82, 93 (1978)); *Jarvis*, 137 Fed. Appx. at 552 ("Therefore, while it is indeed possible for a court to infer consent based on a defendant's simple silence, it may only do so if the totality of the circumstances justifies such a finding."). Because the state court did not hold that Benton consented to a mistrial, and there is no evidence that its passing statement about objections affected its disposition, this issue does not prevent review by this Court.

The question raised here therefore warrants this Court's immediate review.

C. The State Court's Decision Is Wrong.

The burden of establishing manifest necessity rests only with the prosecution. *Washington*, 434 U.S. at 505. Even where the trial court declares a mistrial *sua sponte*, the prosecution must ensure the record is complete if it wishes to re-try the defendant. *United States* v. *Bonas*, 344 F.3d 945, 951 (9th Cir. 2003). It is not the defendant's burden to insist on a better record. *Ibid.* Any doubt as to the propriety of a mistrial must be resolved in favor of the defendant. *Downum* v. *United States*, 372 U.S. 734, 738 (1963).

There cannot be a "high degree" of necessity for a mistrial if less drastic alternatives exist. See *Washington*, 535 U.S. 505–506. And allowing a mistrial when the trial court does not consider all alternatives resolves doubt about the mistrial in favor of the prosecution, not in favor of the defendant. Whether a particular alternative is appropriate is within the trial court's discretion. But declaring a mistrial despite viable alternatives—and particularly without consideration of those alternatives—

devalues the trial court's extraordinary power. And it enables courts to unnecessarily deprive defendants of their constitutional right to a trial before their first properly sworn jury.

A recess in Benton's case was a viable alternative. Benton presented three alibi witnesses for the murder during his second trial: his mother, whom police interviewed, R. 310–315, 317–318; his stepfather, whom police could have interviewed but chose not to, R. 324–326, 328–329; and his great-grandmother, the only alibi witness whom police did not interview or have in a room to interview, R. 330–332. His great-grandmother simply corroborated his mother's testimony. Compare R. 310–315 (mother's testimony), with R. 330–332 (great-grandmother's testimony). This means the issue before the trial court was narrow: was there an alternative to a mistrial that would accommodate Benton's single new alibi witness?

There was ample time for the State to speak with Benton's great-grandmother and conduct any follow-up investigation. The trial court set aside two weeks for a trial that took four days. R. 25–26. And the lack of prejudice to the State from letting the trial go forward was confirmed by the State's failure to contact Benton's great-grandmother *even after she was disclosed*. Supp. R. 2. The State therefore started the second trial on the same foot as it ended the first one. As a result, the trial court let the State exploit a situation for which it was at least partially to blame (App., *infra*, 6a) and deprive Benton of his constitutional right to "hav[e] his fate determined by the first impaneled jury" (*ibid.*) for no reason.

From this, the state court correctly held that the record does not show the trial court considered allowing a brief recess to interrogate the new witness. App, *infra*, 5a; *id.* at 10a (Few, J., concurring). But the court should have stopped there. The only rule consistent with the definition of "manifest necessity" and the presumption for the defense is that failing to consider viable alternatives prevents re-trial. There cannot be a "high degree" of necessity for a mistrial if there is another option. The majority rule has it right, and the state court here erred by joining the minority. This Court should review the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 18, 2024

APPENDIX

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APPENDIX A — OPINION OF THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA, FILED JANUARY 17, 2024

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Appellate Case No. 2021-001498

THE STATE,

Respondent,

v.

TOMMY LEE BENTON,

Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Horry County
Steven H. John, Circuit Court Judge.

Opinion No. 28185

Heard June 7, 2023 Filed January 17, 2024

AFFIRMED AS MODIFIED

JUSTICE HILL: Tommy Lee Benton was indicted for murder and other violent offenses. His first trial ended in a mistrial after the jury had been sworn and heard opening arguments but before any evidence was presented. At his retrial, a jury convicted Benton of the murder of Charles

Bryant Smith (Victim), as well as two counts of first-degree burglary, one count of first-degree arson, and one count of third-degree arson. The court of appeals affirmed his convictions. *State v. Benton*, 435 S.C. 250, 865 S.E.2d 919 (Ct. App. 2021). We granted Benton's petition for a writ of certiorari to review the court of appeals' decision that: (1) his first trial was not improvidently declared a mistrial and, thus, his second trial and ensuing convictions were not barred by double jeopardy; (2) the trial court did not err in admitting several disturbing photographs of Victim's body from the crime scene; and (3) the trial court did not err in admitting certain text and Facebook messages.

I. Factual and Procedural Background

The opinion of the court of appeals sets forth the pertinent facts. In sum, this case involves a depraved plot by Benton, Michael Cheatham, and several others to rob and kill Victim, a well-known store owner in Aynor. Benton and his cohorts targeted Victim, believing he stored large amounts of cash at his store and home. They first burgled Victim's home, stealing some $27,000. They next broke into his store and, finding neither cash nor the Victim, burned the store down. Finally, a few days later, they returned to Victim's home. The evidence demonstrated they tied Victim to a chair and handcuffed him, Benton beat him with a crowbar, poured gasoline on Victim and around his home, set the home on fire, and fled. Law enforcement discovered Victim's charred, handcuffed body in the chair. The autopsy concluded Victim died of carbon monoxide poisoning, meaning he was burned alive.

Appendix A

During opening arguments at Benton's first trial, Benton asserted his great-grandmother would be testifying that, on the night of Victim's murder, Benton was with her in North Carolina. The State objected, contending Benton should be precluded from offering his alibi evidence at trial because he had never responded to the State's Rule 5(e), SCRCrimP request for disclosure of alibi. After Benton conceded he had not responded to the alibi disclosure request, the trial court gave him and the State the opportunity to be further heard, in essence an open invitation for both sides to explain their perspectives on the harm caused by Benton's failure to disclose. Ultimately, the trial court *sua sponte* declared a mistrial, reasoning it was:

> faced with the situation that if [it] impose[s] the strictures or the sanctions that are set forth in Rule 5, it would deprive the defendant basically of his defense to these crimes and the most probable consequence of that would be that there would be a less than complete factual presentation of the case to the jury and they would base their decision on a less than complete factual basis.

The trial court went on to explain that, if it decided not to exclude Benton's undisclosed witnesses, the State would not have a full and fair opportunity to challenge Benton's alibi or present evidence disputing it. The trial court ruled:

> I have no choice but to declare a mistrial in this matter. I do find there is manifest necessity in

> doing so based upon the reasons that I have said. The harm that it would do to the defendant, the harm that it would do the State, I find there is no other reasonable conclusion that can be had in this matter because of that.

The trial court later reaffirmed its finding of manifest necessity in a written order.

Before Benton's retrial began, Benton moved to have the charges against him dismissed as barred by double jeopardy, asserting the trial court had improvidently declared his first trial a mistrial. The motion was denied.

II. Standard of Review

Our review extends only to corrections of errors of law. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). We review a trial court's mistrial decision for abuse of discretion. *Renico v. Lett*, 559 U.S. 766, 774, 130 S. Ct. 1855, 176 L. Ed. 2d 678 (2010). A mistrial should be declared cautiously and only in the most urgent circumstances for plain and obvious reasons. *Id.* We review evidentiary rulings for abuse of discretion. *State v. Wise*, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004).

III. Double Jeopardy

We affirm as modified the court of appeals' decision that there was no double jeopardy violation. When a defendant's first trial ends in a mistrial, the double jeopardy clause bars a second prosecution unless the

mistrial was declared due to "manifest necessity," that is a "high degree" of necessity to further the ends of justice and preserve public confidence in fair trials. *Renico*, 559 U.S. at 774-75; *Illinois v. Somerville*, 410 U.S. 458, 468, 93 S. Ct. 1066, 35 L. Ed. 2d 425 (1973). Like the court of appeals, we conclude the trial court exercised sound discretion in declaring a mistrial in Benton's first trial. The trial court conscientiously considered alternatives to the drastic remedy of declaring a mistrial. *Cf. United States v. Jorn*, 400 U.S. 470, 487, 91 S. Ct. 547, 27 L. Ed. 2d 543 (1971) (holding a trial court abused its discretion in declaring a mistrial when it did so without allowing either party to object or request a continuance); *see also Arizona v. Washington*, 434 U.S. 497, 506, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978) (explaining the "manifest necessity" test cannot be applied "mechanically or without attention to the particular problem confronting the trial [court]"). There may have been some space for the trial court to have recessed the trial so the State could conduct a due diligence investigation of Benton's alibi disclosure, but given the skimpy record before us, we cannot say so without speculating. The transcript states an "off the record" conference occurred before the trial court's ruling. The trial court should have held or memorialized these discussions on the record, a point we will discuss more fully in the next section of this opinion. Still, we agree with the court of appeals that the trial court otherwise well navigated the issue. Benton and the solicitor shared fault perhaps for the circumstances and apparent misunderstandings that led to the mistrial. *Cf. Oregon v. Kennedy*, 456 U.S. 667, 676, 102 S. Ct. 2083, 72 L. Ed. 2d 416 (1982) (stating there can be no manifest necessity

to declare a mistrial when the prosecutor intentionally goads the defendant into moving for one). The trial court gave both the solicitor and Benton's skilled trial counsel the opportunity to be heard and offer comments. Neither Benton nor the State objected to the trial court's analysis or its declaration of a mistrial.

The only quibble we have with the court of appeals' double jeopardy analysis is its discussion that Benton suffered no prejudice from the mistrial because he was allowed to present his alibi witnesses at his retrial. The constitutional guarantee against double jeopardy protects defendants from the dread, anxiety, and financial cost of enduring the gauntlet of criminal prosecution and punishment more than once for the same offense. *See Arizona*, 434 U.S. at 503-05 (explaining the double jeopardy clause protects "the defendant's 'valued right to have his trial completed by a particular tribunal'" and this right is valued because "a second prosecution . . . 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" (citations removed)). The defendant's interest in having his fate determined by the first impaneled jury is therefore "a weighty one." *Somerville*, 410 U.S. at 471. As such, "the lack of apparent harm to the defendant from the declaration of a mistrial [does] not itself justify the mistrial[.]" *Id.* at 469. Further, in *Jorn*, a plurality of the Supreme Court noted inquiries into who benefits from a mistrial are "pure speculation." 400 U.S. at 483. Therefore, the *Jorn* plurality concluded that to allow a retrial "based

on an appellate court's assessment of which side benefited from the mistrial ruling does not adequately satisfy the policies underpinning the double jeopardy provision." *Id.*

Here, the trial court focused, as it should have, on whether, given all the circumstances, a mistrial was necessary to further the ends of public justice. *See United States v. Perez*, 22 U.S. 579, 580, 6 L. Ed. 165 (1824) (stating a mistrial may be granted without violating double jeopardy when, in the sound discretion of the court, "taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated"); *Gori v. United States*, 367 U.S. 364, 368, 81 S. Ct. 1523, 6 L. Ed. 2d 901 (1961) ("Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection"). The trial court wisely understood that not granting a mistrial under the circumstances could undermine public confidence in the outcome. *See Wade v. Hunter*, 336 U.S. 684, 689, 69 S. Ct. 834, 93 L. Ed. 974 (1949) ("[A] defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgements."). We therefore vacate the court of appeals' prejudice discussion but otherwise affirm its double jeopardy ruling.

IV. Admissibility of Crime Scene Photographs

Next, we agree with the court of appeals that the trial court did not abuse its discretion in admitting the graphic crime scene photographs of Victim's burned body. (State's Ex. 54-55). It is inescapable that the photographs were gruesome and revolting. We have long warned the State not to overplay its hand in criminal trials by seeking to admit shockingly graphic photographs that have scant probative value in violation of Rule 403, SCRE, just to inflame the passions of the jury. We recently reversed a conviction the State had secured by doing just such a thing. *See State v. Nelson*, Op. No. 28171 (S.C. Sup. Ct. filed Aug. 9, 2023) (Howard Adv. Sh. No. 31 at 25) (reversing murder conviction due to the prejudice caused by erroneous admission of gruesome autopsy photographs).

This case differs from *Nelson* in several ways. The photographs at issue in *Nelson* were autopsy pictures of the victim's decomposing and disfigured body. *Id.* at 28-29. They could corroborate nothing but the prosecutor's overreach. *Id.* at 35. By contrast, the pictures here were relevant as they depicted the crime scene. They drew probative force from their unique power to make Benton's accomplices' testimony more believable. The pictures gave important context to the testimony and other evidence about who did what at the scene. Under the specific circumstances of this case, the pictures assisted the jury in their task to understand other key evidence.

In our review of the trial court's admission of the photographs, we note the trial court again did not place its Rule 403 analysis on the record. Instead, after an off-the-record bench conference, the trial court simply admitted

the three photographs, commenting they were a "proper representation of the scene." As we have expressed in the past, "we stress the importance of placing on the record arguments and rulings that took place off the record, whether during a bench conference, in emails, or in chambers." *State v. Washington*, 431 S.C. 394, 405 n.4, 848 S.E.2d 779, 785 n.4 (2020). We emphasize that on-the-record arguments and rulings enable judicial review and allow the parties and the public to better understand the rulings.

At any rate, any error during the process of admitting the pictures was harmless, as their introduction did not affect the result of the trial. *See State v. Byers*, 392 S.C. 438, 447, 710 S.E.2d 55, 60 (2011) ("Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result." (quoting *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006))); *id.* ("Where 'guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached,' an insubstantial error that does not affect the result of the trial is considered harmless." (quoting *Pagan*, 369 S.C. at 212, 631 S.E.2d at 267)). The record is loaded with compelling evidence incriminating Benton of each of the crimes in this violent spree. We conclude the photographs did not contribute to the verdict in any significant way.

V. Admissibility of Text and Facebook Messages

We affirm the decision of the court of appeals affirming the admission of the text and social media messages.

AFFIRMED AS MODIFIED.

BEATTY, C.J., KITTREDGE and JAMES, JJ., concur. FEW, J., concurring in a separate opinion.

JUSTICE FEW: I concur with the majority's ruling on the admissibility of the autopsy photographs. The record supports the trial court's determination the photos had enough probative value to survive Benton's Rule 403 challenge and, thus, the trial court's decision to allow them into evidence was within its discretion.

As to the mistrial issue, however, the majority stretches itself too far to say the trial court acted "wisely" and "conscientiously." In my view, the trial court acted rashly. The majority points out the trial court's two errors.

First, the trial court did not consider whether a short recess in the trial could have given the State time to respond to the late-disclosed alibi witness. As the majority under-states, "There may have been some space for the trial court to have recessed the trial so the State could conduct a due diligence investigation of Benton's alibi disclosure." Absolutely, the trial court should have paused, reflected, and listened. The trial court's failure to do this—by itself—was error.

Second, the trial court appears to have conducted an off-the-record discussion of Benton's late-disclosed alibi witness. As the majority states, "The trial court should have held or memorialized these discussions on the record." This failure also was error.

The majority nevertheless justifies the trial court's impatience by rationalizing—incorrectly in my view—"the

trial court gave [Benton] and the State the opportunity . . . to explain their perspectives on the harm caused by Benton's failure to disclose." The record does not indicate the trial court gave the parties such an opportunity. If it were true the trial court did that, my position would be different. But this event did not occur on the record, and we have no idea what occurred in the proceedings the trial judge conducted off the record in his office.

Ultimately, however, on the unique facts of this case, the trial court's decision to grant a mistrial does not prevent a retrial under the Double Jeopardy Clause because Benton brought this on himself by failing to disclose the alibi witness as our Rules plainly require. Thus, as to the mistrial issue, I concur with the majority only in result.

APPENDIX B — OPINION OF THE COURT OF APPEALS OF THE STATE OF SOUTH CAROLINA, FILED OCTOBER 13, 2021

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appellate Case No. 2017-002553.

THE STATE,

Respondent,

v.

TOMMY LEE BENTON,

Appellant.

Appeal From Horry County.
Steven H. John, Circuit Court Judge.

Opinion No. 5868
Heard October 14, 2020 Filed October 13, 2021

MCDONALD, J.: Tommy Lee Benton appeals his convictions for murder, first-degree burglary, first-degree arson, and third-degree arson, arguing the circuit court erred in (1) trying his case after previously granting a mistrial on the same charges and (2) admitting into evidence certain crime scene photographs, text messages, and Facebook messages. We affirm Benton's convictions.

FACTS AND PROCEDURAL HISTORY

Charles Bryant Smith owned a mobile home park, rental properties, and commercial properties in Horry

County. Many tenants paid in cash, and Smith paid his employees in cash. According to Smith's son, Smith distrusted banks, so he carried large sums of cash and only deposited enough money in his accounts to pay bills. Garland Rose and his mother, Lorraine Rose, worked for Smith; Smith was also Lorraine's landlord. Garland informed Benton and Mitchell Cheatham that Smith often had large amounts of cash, and the three devised a plan to rob him.

Cheatham testified at Benton's trial regarding the various burglaries the group committed in their efforts to steal from Smith. On April 18, 2014, Cheatham met Benton at Garland's house before the first burglary. Benton borrowed Heather Faircloth's[1] black Ford Focus and drove the group to Smith's Aynor home. Benton and Garland then broke into Smith's home and stole approximately $27,000 in cash. Cheatham claimed he remained in the car while Benton and Garland burgled the house.

On the afternoon of April 25, 2014, Cheatham, Benton, and Justin Travis met Douglas Thomas at a local Walmart, then went to Cheatham's hotel room to discuss robbing Smith again—this time, at his store.[2] Benton believed Smith kept about $100,000 in cash in a safe at the store, and the group planned to lie in wait and rob Smith when

1. Heather Faircloth was Benton's girlfriend at the time of these events.

2. Thomas also testified at trial, detailing Benton's involvement in the robbery at the store, the planning at the hotel, and the burglary at Smith's home.

he arrived at the store that night. For this effort, Benton, Thomas, and Travis used a stolen truck, while Cheatham remained nearby in Heather's car. In the early morning hours of April 26, the three broke into Smith's store. When Smith did not arrive as expected, they set the store on fire.

Two days later, Benton, Thomas, and Cheatham met at a hotel to discuss yet another effort to rob Smith. In the wee hours of April 29, 2014, Benton drove them in Heather's car to pick up the stolen truck. The group left the car on a dirt road and took the truck to Smith's mobile home, where they beat and handcuffed him. They ransacked and robbed the home, set it on fire, and left Smith handcuffed inside to die.

When firemen arrived at the scene and found a handcuffed body inside the burnt trailer, they alerted the Horry County Police Department. Investigator Jill Domogauer received the dispatch around 4:45 a.m. and went to process the scene. While sifting through the debris, Domogauer found handcuffs, a rope, several exploded casings, and metal debris in close proximity to the area from which the body had been removed. She also found a safe containing $120,000 in cash.

On April 21, 2016, the Horry County grand jury indicted Benton for Smith's murder. On October 26, 2016, the grand jury indicted Benton for two counts of first-degree burglary, first-degree arson, and third-degree arson.

The case initially went to trial on July 17, 2017, and the jury was sworn the following day. During his

opening statement, Benton's counsel began to discuss Benton's alibi for the night of the murder, noting he was with his mother at the home of his great-grandmother. The State immediately objected, and the circuit court held a bench conference off the record. The circuit court subsequently excused the jury to address the objection on the record. The State argued Benton had failed to provide written notice of his intention to offer an alibi defense as required by Rule 5 of the South Carolina Rules of Criminal Procedure, noting the State first learned of some of the proposed alibi witnesses during Benton's opening statement. Benton conceded he did not give the State written notice of his intent to raise an alibi defense, but stated he did not believe notice was an issue because the State had already been talking with at least one of Benton's witnesses regarding Benton's whereabouts on the night of the murder.

Following a discussion on the record and a conference in chambers, the circuit court declared a mistrial as a matter of manifest necessity and ordered Benton to serve the State with written notice of his intent to offer an alibi defense. The circuit court reasoned that excluding the alibi witnesses' testimony as contemplated by Rule 5 would deprive Benton of his right to present a defense, but allowing the trial to continue without excluding the witnesses would deprive the State of a full and complete opportunity to challenge the alibi testimony. Thus, a mistrial was the only reasonable option.

At Benton's request, the circuit court again addressed the matter at a hearing the following day. Benton stated, "I wanted to make a further request of the Court in

connection [with] the interpretation of [Rule 5] and express my views on it."

Benton explained he received a standard disclosure request from the State requesting written notification of any alibi defense, however, Benton argued the State's request was insufficient because Rule 5 required the State to set forth the time, date, and place or any alleged offense and the indictments did not contain the times of the alleged offenses. Benton clarified, "And so all I'm asking is that we follow—that I get that full compliance as I am interpreting the rule before I have to comply with the remainder of the rule." The State responded, and the circuit court detailed the items provided by the State during reciprocal discovery, noting the various times, dates, and locations set forth therein. The circuit court then found the State "has more than sufficiently complied with any requirement set forth in Rule 5(e)(1). The defendant has more than sufficient information as to time, date, and place regarding these allegations, charges, and indictments that have been brought against him in this particular matter." The circuit court concluded,

> Based upon that, the request for further information from the state as to time, date and place in this matter, under Rule 5(e) is denied. Again, I reaffirm what the Court said yesterday and also that I am requiring strict compliance with the—with the rule, as I indicated yesterday, both from the defense and the state in this matter.

The case went back to trial on December 4, 2017. Pretrial, Benton moved to dismiss the indictments, asserting double jeopardy prevented him from standing trial for the indicted offenses because there was no justification for the prior mistrial. Again, Benton argued Rule 5 did not require him to give the State written notice of his alibi defense because the State failed to include the times of the alleged offenses in its Rule 5 request for written notification. The circuit court reaffirmed its prior rulings and denied Benton's motion to dismiss.

Benton presented four alibi witnesses at trial: his mother, his stepfather, his great-grandmother, and his uncle's former girlfriend. The jury convicted Benton of murder, first-degree arson, third-degree arson, and two counts of first-degree burglary. The circuit court sentenced Benton to life imprisonment without the possibility of parole for murder, life imprisonment for first-degree burglary, thirty years' imprisonment for first-degree arson, and fifteen years' imprisonment for third-degree arson.

Law and Analysis

I. Double Jeopardy

Benton argues double jeopardy barred his December trial on the murder, burglary, and arson charges because the circuit court erred in finding manifest necessity existed for the mistrial. Essentially, Benton contends his own Rule 5(e) obligation to notify the State of his intent to raise an alibi defense was not triggered because the

State's written alibi request did not comply with Rule 5. He further asserts the circuit court erred in failing to consider available alternatives before declaring a mistrial. We disagree.

The Double Jeopardy Clauses of the United States Constitution and the South Carolina Constitution protect citizens from repetitive conclusive prosecutions and multiple punishments for the same offense. U.S. Const. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ."); S.C. Const. art. I, § 12 ("No person shall be subject for the same offense to be twice put in jeopardy of life or liberty . . . ."). "Under the law of double jeopardy, a defendant may not be prosecuted for the same offense after an acquittal, a conviction, or an improvidently granted mistrial." *State v. Parker*, 391 S.C. 606, 612, 707 S.E.2d 799, 801 (2011) (quoting *State v. Coleman*, 365 S.C. 258, 263, 616 S.E.2d 444, 446 (Ct. App. 2005)). "Hence, a properly granted mistrial poses no double jeopardy bar to a subsequent prosecution." *Id.* at 612, 707 S.E.2d at 802.

The decision to grant or deny a mistrial falls within the sound discretion of the trial court, however, a "mistrial should be granted only if there is a manifest necessity or the ends of public justice are served. The trial court should first exhaust other methods to cure possible prejudice before declaring a mistrial." *State v. Brown*, 389 S.C. 84, 94, 697 S.E.2d 622, 627-28 (Ct. App. 2010) (citation omitted). "Whether a mistrial is manifestly necessary is a fact specific inquiry. It is not a mechanically applied standard, but rather is a determination that must be made in the context of the specific difficulty facing the trial

judge." *State v. Bantan*, 387 S.C. 412, 417, 692 S.E.2d 201, 203 (Ct. App. 2010) (quoting *State v. Rowlands*, 343 S.C. 454, 457-58, 539 S.E.2d 717, 719 (Ct. App. 2000)).

Rule 5(e), SCRCrimP, provides:

> (1) Notice of Alibi by Defendant. 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.
>
> . . . .
>
> (4) Failure to Disclose. If either party fails to comply with the requirements of this rule, the court may exclude the testimony of any undisclosed witness offered by either party. Nothing in this rule shall limit the right of the defendant to testify on his own behalf.

"In interpreting the language of a court rule, we apply the same rules of construction used in interpreting statutes." *Green ex rel. Green v. Lewis Truck Lines, Inc.*, 314 S.C. 303, 304, 443 S.E.2d 906, 907 (1994) (per curiam).

Appendix B

The pertinent portion of the State's mutual reciprocal disclosure request stated:

> The State requests written notice of Defendant's intention to offer an alibi defense as to the charge(s) noted hereinabove which allegedly occurred on or about **APRIL 29, 2014** IN THE AYNOR **SECTION OF HORRY COUNTY, SC**.

Crime scene worksheet entries provided to Benton in discovery set out the time the Horry County Fire Department responded to the April 29 structure fire as well as the time of the Fire Department's subsequent request for police assistance. Other reports contained the dispatch and arrival times of unit responding to both fires. Victim's autopsy report noted the suspected time of death, and two of Benton's arrest warrants set out the approximate times of the offenses for which he was being arrested.

Moreover, 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. The circuit court expressly considered an alternative to a mistrial—excluding Benton's alibi witnesses—and determined it would be unacceptably prejudicial to the defendant. Benton suffered no prejudice upon the granting of the mistrial because he was able to present his alibi witnesses at the subsequent trial. While the better practice is for the State to include the time, date, and place in any written Rule 5 alibi request, finding the failure to include an exact time automatically renders

an alibi request ineffective would be an overly technical application of Rule 5(e). The circuit court considered the alternatives available to avoid a mistrial and properly examined the potential prejudice to each party likely to result. Because the circuit court did not improvidently grant the mistrial in July 2017, double jeopardy did not bar Benton's December 2017 trial. *See Parker*, 391 S.C. at 612, 707 S.E.2d at 802 (quoting *Coleman*, 365 S.C. at 263, 616 S.E.2d at 446 ("[A] properly granted mistrial poses no double jeopardy bar to a subsequent prosecution.")).

II. Authentication of Text and Facebook Messages

Benton next argues the circuit court erred in admitting text and Facebook messages into evidence without requiring that the State properly authenticate them. Specifically, Benton argues the State failed to present evidence that he sent or received the challenged messages, and he argues there is testimony in the record to demonstrate he was not in possession of his phone during some of the events. For example, Benton points to testimony from Lisa Katlin Rose (Katlin) that she may have used Benton's phone to send a message on one occasion as evidence casting doubt as to Benton's possession of his phone at other times. However, this argument ignores Cheatham's testimony identifying certain of the conversation threads, as well as Katlin Rose's clarification that she never took Benton's phone outside of his presence. Cheatham testified that although Benton left his phone in the car during the events of April 26, Benton used his phone's flashlight function during the April 29 crimes at Smith's mobile home.

In any event, Benton concedes the State properly authenticated three text threads between Benton and Cheatham: "two sent nine days before the first incident containing vague planning references, and one after the murder expressing surprise upon hearing the news." Benton further acknowledged some of the messages were likely admissible because Katlin Rose, Garland's wife, authenticated the conversations. As detailed below, we find sufficient distinctive characteristics and accompanying circumstances existed to authenticate the text messages not identified by Cheatham, Katlin Rose, or Benton's concession.[3]

"The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 901(a), SCRE.

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3. The record on appeal does not contain the entire trial discussion regarding the admission of the text messages. Benton argues on appeal that the circuit court "admitted Mr. Benton's text and internet messages *en masse*" regardless of their specific relevance to the criminal case, and it appears Benton's authenticity objection primarily addressed State's Exhibits 69-72 and 76. The circuit court identified State's Exhibit 71 as a "compilation" of evidence from State's Exhibits 69 and 70, the text content, and a text detail report for Benton's phone number. As particular exchanges were discussed outside the presence of the jury, the circuit court considered the relative probative value versus potential prejudicial effect, and admitted some with the compilation exhibit. The circuit court ordered the State to redact other messages, such as those referencing Benton's involvement with an unrelated crime at a North Carolina McDonald's.

Appendix B

> By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:
>
> (1) Testimony of Witness With Knowledge. Testimony that a matter is what it is claimed to be.
>
> . . . .
>
> (4) Distinctive Characteristics and the Like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

Rule 901(b), SCRE. "'[T]he burden to authenticate . . . is not high' and requires only that the proponent 'offer[ ] a satisfactory foundation from which the jury could reasonably find that the evidence is authentic.'" *Deep Keel, LLC v. Atl. Private Equity Grp., LLC*, 413 S.C. 58, 64, 773 S.E.2d 607, 610 (Ct. App. 2015) (alterations in original) (quoting *United States v. Hassan*, 742 F.3d 104, 133 (4th Cir. 2014)).

> The court decides whether a reasonable jury could find the evidence authentic; therefore, the proponent need only make "a prima facie showing that the 'true author' is who the proponent claims it to be." Once the trial court determines the prima facie showing has been met, the evidence is admitted, and the jury

> decides whether to accept the evidence as genuine and, if so, what weight it carries.

State v. Green, 427 S.C. 223, 230, 830 S.E.2d 711, 714 (Ct. App. 2019) (quoting *United States v. Davis*, 918 F.3d 397, 402 (4th Cir. 2019)), *aff'd as modified*, 432 S.C. 97, 99, 851 S.E.2d 440, 441 (2020).

> Text messages sent between cell phone users are treated the same as emails for purposes of authentication. Typically, such messages are admitted on the basis of identifying the author who texted the proffered message. Ownership of the phone that originated the message is not sufficient. Like email, authorship can be determined by the circumstances surrounding the exchange of messages; their contents; who had the background knowledge to send the message; and whether the parties conventionally communicated by text message.

2 Kenneth S. Broun et al., *McCormick On Evid.* § 227 (8th ed. 2020) (footnotes omitted).

This court addressed the authentication of social media messages in *Green*, in which it explained that circumstantial evidence related to the content, tenor, and timing of such messages may serve as "sufficient authentication to meet the low bar Rule 901(b)(4), SCRE, sets." 427 S.C. at 231-33, 830 S.E.2d at 714-16. Still, the court noted social media messages are writings, and "evidence law has always viewed the authorship of

writings with a skeptical eye." *Id.* at 230, 730 S.E.2d at 714. Authentication of social media messages, like writings, requires more than "merely offering the writing on its own." *Id.* at 231, 730 S.E.2d at 714. [4] This is likewise true for text messages such as those admitted here.

We acknowledge the circuit court erred in stating that the fact the messages were sent from Benton's phone provided sufficient proof to establish Benton authored them—the authentication of text and social media messages requires more than proving mere ownership of the device from which messages originated. However, 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. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."); Rule 901(b)(4), SCRE (providing evidence may be authenticated by "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances").

The contents of some of the late April messages demonstrate Benton had possession of his phone when the messages were sent; the timing of others provides

4. Our supreme court granted Green's petition for a writ of certiorari to address a separate issue and affirmed the circuit court's authentication determination and the admission of the social media messages "without further comment." *Green*, 432 S.C. at 99, 851 S.E.2d at 440.

additional circumstantial evidence that Benton sent them. During the time Benton concedes he was in possession of his phone, he frequently sent text messages to a phone number saved in his phone as "My Love." He addressed these texts to Heather, identified at trial as his girlfriend. In these texts, Benton texted, "I love you"; he called her nicknames like "princess," "beautiful," and "baby"; and he talked to her about her children, their "perfect family," and their engagement. In the days leading up to April 30, Benton frequently sent Heather text messages containing the same or substantially similar language.[5] During these periods, he also texted Cheatham and others. The contents of the text messages to Heather provides circumstantial evidence from which a reasonable jury could find Benton was in possession of his phone and sent the text messages to others during this same period. *See Deep Keel*, 413 S.C. at 64, 773 S.E.2d at 610 ("'[T]he burden to authenticate . . . is not high' and requires only that the proponent 'offer[ ] a satisfactory foundation from which the jury could reasonably find that the evidence is authentic.'" (alterations in original) (quoting *Hassan*, 742 F.3d at 133)).

For example, on April 25, five minutes before texting Heather, Benton texted a number and asked if it was "Dougie." Late that evening, the couple exchanged texts about baths for the children and the babies going to bed. Just after midnight on April 26, Heather texted Benton, "I'm headed to bed baby," and three hours later, a message was sent from Benton's phone instructing the recipient

5. Benton conceded at trial, "There are plenty of messages in here that prove on April 30th—this is after everything happened—he has his telephone."

to "Meet us at 501," then referencing "CB's furniture outlet." Approximately two hours after that, Benton texted Heather again. Later on April 26, Heather asked what Benton was doing, and he responded, "Planning." Benton texted Heather he was talking to Cheatham about speakers and "to tell me that cb burnt his store down."[6]

On April 27, Heather and Benton texted back and forth about Heather's children, and Benton stated, "If you do pick me up, we have to meet dougie down the road and head to fair bluff I think it is to get the truck." Then, in the late hours of April 28, Benton and Heather exchanged several text messages back and forth, in which Benton called Heather "baby" and "love." When Heather asked Benton what he was doing, he responded, "About to try to get $100 g."

The authentication of the "Tommy Lee Kruspe" Facebook messages is more problematic. State's Exhibit 76 is a collection of Facebook messages, some of which Cheatham identified as an April 9 conversation he had with Benton about robbing Smith. Cheatham testified they had "just spoken on the phone about it," and he messaged Benton because he was unsure about the plan. Others include questions and accusations from Garland's wife, Katlin Rose, speculating as to Garland's involvement and location, with noncommittal responses

6. Cheatham explained he and Benton would at times discuss matters by phone and then send texts as a "smokescreen" to hide anything incriminating. Cheatham also identified news links and messages the participants sent to update one another on the progress of the investigation.

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 to the possession of his phone on April 9. 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. *See State v. Martucci*, 380 S.C. 232, 261, 669 S.E.2d 598, 614 (Ct. App. 2008) ("The admission of improper evidence is harmless where the evidence is merely cumulative to other evidence.").

III. Admission of Crime Scene Photographs

Benton asserts the circuit court erred in admitting into evidence certain crime scene photographs that lacked probative value and served only to inflame the passions of the jury. He challenges the admission of State's Exhibits 54, 55, and 56, which show Smith's burned body. We find no reversible error.

Generally, "[a]ll relevant evidence is admissible." Rule 402, SCRE. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Although relevant, evidence may be excluded if its probative value is substantially

outweighed by the danger of unfair prejudice . . . ." Rule 403, SCRE. "Unfair prejudice means an undue tendency to suggest a decision on an improper basis." *State v. Lyles*, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008) (quoting *State v. Gilchrist*, 329 S.C. 621, 627, 496 S.E.2d 424, 427 (Ct. App. 1998)).

"The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court." *State v. Collins*, 409 S.C. 524, 534, 763 S.E.2d 22, 27 (2014) (quoting *State v. Nance*, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996)). "A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." *Id.* at 534, 763 S.E.2d at 28 (quoting *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003)). "If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it." *Id.* at 534, 763 S.E.2d at 27 (quoting *Nance*, 320 S.C. at 508, 466 S.E.2d at 353).

"[T]he standard is not simply whether the evidence is prejudicial; rather, the standard under Rule 403, SCRE is whether there is a danger of *unfair* prejudice that *substantially* outweighs the probative value of the evidence." *Id.* at 536, 763 S.E.2d at 28. "All evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided." *State v. Bratschi*, 413 S.C. 97, 115, 775 S.E.2d 39, 49 (Ct. App. 2015) (quoting *Gilchrist*, 329 S.C. at 630, 496 S.E.2d at 429). "[A] court analyzing probative value considers the importance of the evidence and the significance of the issues to which the evidence relates."

State v. Gray, 408 S.C. 601, 610, 759 S.E.2d 160, 165 (Ct. App. 2014).

Here, the circuit court acted within its discretion in admitting the photographs of Smith's body at the crime scene. State's Exhibits 54 and 55 are photographs of Smith's charred remains, and State's Exhibit 56 showed the handcuff on Smith's arm. Although these photographs may have been gruesome, they were highly probative as evidence of malice, which is an essential element of murder. *See* S.C. Code Ann. § 16-3-10 (2015) ("'Murder' is the killing of any person with malice aforethought, either express or implied."); *Collins*, 409 S.C. at 535, 763 S.E.2d at 28 ("Courts must often grapple with disturbing and unpleasant cases, but that does not justify preventing essential evidence from being considered by the jury, which is charged with the solemn duty of acting as the fact-finder."). The photographs corroborated Cheatham's testimony that Smith was restrained with handcuffs when the house was set on fire and the assailants left him handcuffed there. Benton's stipulation that Smith 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 a 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.

Conclusion

Based on the foregoing, Benton's convictions are

AFFIRMED.

LOCKEMY, C.J., and KONDUROS, J., concur.

APPENDIX C — ORDER OF MISTRIAL IN THE COURT OF GENERAL SESSIONS, FILED JULY 26 2017

IN THE COURT OF GENERAL SESSIONS

WARRANTS: 2014A2610201195, 2014A2610201255, 2014A2610700451, 2014A2610700452, 2016GS2605011

INDICTMENTS: 2016GS2601719, 2016GS2605008, 2016GS2605009, 2016GS2605010, 2016GS2605011

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

STATE OF SOUTH CAROLINA,

vs.

TOMMY LEE BENTON,

Defendant.

ORDER OF MISTRIAL

This matter was called to trial in this Court by the State on July 18, 2017. Present at the call of the case were Lauree Richardson, Senior Assistant Solicitor and Thomas Groom Terrell, III, Assistant Solicitor for the State, Defendant Tommy Lee Benton, and Thomas C. Brittain and T. Case Brittain, Jr., Attorneys for the Defense. The jury was properly sworn and instructed

and opening statements ensued. During Defendant's opening statements, the State raised several objections to Defendant's apparent alibi defense. At issue is South Carolina Rule of Criminal Procedure 5(e) governing notice of alibi defense; specifically, whether the State gave sufficient notice to defense triggering the Defendant's obligation, and, if so, whether Defense complied therewith.

Defendant's contentions raised following this Court's ruling in open court of a Mistrial that the State failed to make a proper written request sufficient to trigger Defendant's obligations under Rule 5(e) are unsubstantiated. This Court finds that the State made a written request for a notice of alibi in its Mutual Reciprocal Disclosure Request sent to the Defendant along with initial discovery/Rule 5 material. This Court further finds that Defendant received ample notice of the time, date, and place of the alleged offenses in discovery to include: the Mutual Reciprocal Disclosure Request, the Arrest Warrants, the Indictments, the Police Reports, the Fire Department Reports, and the witnesses' statements.

Defense counsel conceded failure to comply with the notice requirements of Rule 5, acknowledging that they did not provide the State with notice of alibi, and agreeing that they never informed the State neither where the Defendant claims to have been at the time of the offenses nor the names and addresses of the witnesses upon whom he relies to establish such a claim.

This Court finds that to follow the remedy provided by Rule 5, namely the exclusion of the undisclosed witnesses'

testimony, would deprive the Defense of putting forth a complete defense. Should Defendant be convicted after excluding these witnesses, Defendant would have grounds for Post-Conviction Relief based on ineffective assistance of counsel at trial, thereby resulting in a retrial on these charges.

This Court further finds that should the State agree to waive the Defendant's requirements of Rule 5(e) and proceed with trial, the State would not be given a full opportunity to contact these witnesses and investigate their claims, thereby depriving the State of a fair trial.

Therefore, having exhausted all other methods to cure, possible prejudice to both sides and finding none sufficient, this court finds a declaration of a mistrial to be of manifest necessity. *State v. Council,* 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999). "[T]he public's interest in a fair trial designated to end in just judgment" dictates no other result given the present circumstances in this case. *State v. Prince,* 279 S.C. 30, 301 S.E.2d 471 (1983).

IT IS THEREFORE ORDERED that a mistrial be granted in the matter of *The State of South Carolina, County of Horry, v. Tommy Lee Benton* on indictments 2016OS2605008 (Burglary, 1st Degree), 20160S2605009 (Arson, 1st Degree), 2016GS2605010 (Arson, 3rd Degree), 2016GS2605011 (Burglary, 1st Degree), and 2016OS2601719 (Murder).

The Court hereby sets this matter as the first case for trial on December 4, 2017, before the undersigned.

Appendix C

IT IS SO ORDERED.

/s/ Steven H. John
THE HONORABLE STEVEN H. JOHN
CHIEF ADMINISTRATIVE JUDGE,
GENERAL SESSIONS
FIFTEENTH JUDICIAL CIRCUIT

Dated: 7/26/17
Conway, South Carolina

APPENDIX D — ORDER OF THE SUPREME COURT OF SOUTH CAROLINA, FILED JUNE 20, 2024

THE SUPREME COURT OF SOUTH CAROLINA

Appellate Case No. 2021-001498

THE STATE,

Respondent,

v.

TOMMY LEE BENTON,

Petitioner.

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

/s/ _____ C.J.

/s/ _____ J.

/s/ _____ J.

/s/ _____ J.

/s/ _____ J.

Columbia, South Carolina
June 20, 2024

APPENDIX E — TRANSCRIPT OF RECORD OF THE STATE OF SOUTH CAROLINA V. TOMMY LEE BENTON IN THE COURT OF GENERAL SESSIONS, COUNTY OF HORRY, DECEMBER 4-8, 2017

STATE OF SOUTH CAROLINA
IN THE COURT OF GENERAL SESSIONS
COUNTY OF HORRY

2016-GS-26-01719, 05008, 05009, 05010 and 05011

STATE OF SOUTH CAROLINA,

Plaintiff,

vs.

TOMMY LEE BENTON,

Defendant.

December 4-8, 2017

TRANSCRIPT OF RECORD

BEFORE: Honorable Steven H. John Horry County Courthouse Conway, South Carolina

[56] Cricket Wireless. It is my understanding when speaking with them, that those -- the content of those messages do not exist. I am looking at and we have provided for the defense part of what Cricket Wireless did respond with and it's a SMS records, it's 64 pages, and it says text message data from April 1, 2014 to May 2nd, 2014. However, the content does not exist.

Appendix E

THE COURT: All right. And Mr. Brittain, as I understand it, you have received that documentation the solicitor just talked about?

MR. T. BRITTAIN: That is correct, sir.

THE COURT: All right. So, the documents not being in existence and not being able to be produced to the state or the defense, through no fault of anyone, then those records are just not available for use by the parties in this particular matter.

MR. T. BRITTAIN: Very well, sir.

Your Honor, when we convened last time for the trial, we swore the jury and an issue came up about sufficient notice with respect to alibi. The, the defendant in this case had an alibi defense, and I, I'll leave it to the Court to review what was said in Court, but my recollection of events are that there, there was no written notification of the defendant's witnesses for alibi made to the prosecution, to the state. And even though there had been some discussion about it, there [57] hadn't been enough discussion about two other dates, the 18th and the 26th. And the question was were we gonna break down court and give the state some time to make whatever inquiries they wanted to make or move for a mistrial and mistry that case after the jury had been sworn.

Here's our view of what happened there for purposes of the record -- and I just want to make sure I'm making the motion in a timely fashion. Our view is that -- and

I'm not trying to reprove anything today, all this is on the record -- that in order under Rule 5 to trigger our obligation to provide written notice, the state has to make a specific request of the particulars. Then, that triggers our obligation and responsibility to do so. They have in their general discovery coversheet the mention of alibi defense. They do not have the particulars, the specific interrogatory associated with it. So, for purposes of the record, the position we took then, we're making it now, was that there was no justification for a mistrial in that case and that since there was no justification for a mistrial in that case -- I mean, respectfully disagreeing with the Court's order, that jeopardy attached at the original trial and that no defendant should be placed in jeopardy twice, and so this trial shouldn't proceed and the charges against him should be dismissed.

THE COURT: The State's response?

[58] MS. RICHARDSON: Your Honor, we were not provided notice -- we provided notice of alibi under Rule 5, Section (e). Your Honor, because we were not provided with written notice of that, Your Honor, did declare manifest necessity and ordered that the jeopardy did not attach. We did request any and all alibi defenses through our discovery process, Your Honor, and we are attempting to locate that right now.

THE COURT: All right. Well, in this particular matter, besides -- and once again, I'll just reaffirm and reiterate the Court's oral rulings in this matter and readopt them. Further, the Court issued a written order

of mistrial dated July 26, 2017 filed that same date with the Clerk of Court. In that, it was said that the matter was called for trial by the state on July 18th, 2017. The Court made findings in that order that the state made a written request for notice of alibi in its mutual reciprocal disclosure requests sent to the defendant along with the initial discovery Rule 5 material. The Court further found that the defendant received ample notice of the time, date, and place of the alleged offenses in the discovery to include the mutual reciprocal disclosure request, the arrest warrants and the indictment, the police reports, the fire department reports, and the witness statements. The Court noted that the defense counsel conceded failure to comply with notice requirements of Rule 5, that they did not inform the state where the defendant claims to [59] have been at the time of the offenses, nor the names and addresses of the witnesses upon whom he would rely to establish such claim. The Court finds that to find the follow the remedy provided in Rule 5, mainly the exclusion of undisclosed witness testimony would deprive the defense of putting forth a complete defense. Further the Court found that should the state agree to waive the defendant's requirements of Rule 5(e) and proceed with trial, the state would not be given a full opportunity to contact these witnesses and investigate their claims depriving the state of a fair trial. The Court ruled that having exhausted all of the methods to cure possible prejudice to both sides and finding none sufficient, the Court found a declaration of mistrial to be of manifest necessity. The Court quoted certain cases decided by the South Carolina Supreme Court that the public's interest in a fair trial designated to an end in just judgment dictates no other result given

the present circumstances of the case. Therefore, the Court ordered that a mistrial be granted in that matter and in the order, I also set the trial again for trial on this date, December 4th, 2017. So, the Court reaffirms and readopts the written order of the Court in addition to the oral pronouncements of the Court at the time the matter was presented.

All right. Anything else?

MR. T. BRITTAIN: Yes, Your Honor. As part of the

* * *

APPENDIX F — TRANSCRIPT OF RECORD OF THE STATE OF SOUTH CAROLINA V. TOMMY LEE BENTON IN THE COURT OF GENERAL SESSIONS, COUNTY OF HORRY, JULY 17-19, 2017

STATE OF SOUTH CAROLINA
IN THE COURT OF GENERAL SESSIONS
COUNTY OF HORRY

2016-GS-26-01719, 05008, 05009, 05010 and 05011

STATE OF SOUTH CAROLINA,

Plaintiff,

vs.

TOMMY LEE BENTON,

Defendant.

July 17-19, 2017

TRANSCRIPT OF RECORD

BEFORE: Honorable Steven H. John Horry County Courthouse Conway, South Carolina

[121] breathing machine, which is what the old man was using that night to breathe, something the doctor gave him. So, he goes at 11:55 with his mother to the home of Shelby Fowler, who is his great-grandmother, to work on that breathing machine

MR. TERRELL: Objection, Your Honor.

MR. T. BRITTAIN: That's what the witness is gonna say.

THE COURT: Explain it properly, Mr. Brittain. Thank you.

MR. TERRELL: Your Honor, may we approach briefly?

THE COURT: Yes, sir.

(REPORTER'S NOTE: A bench conference was held off the record in the presence of but out of hearing of the Jury.)

BY THE COURT:

THE COURT: Ladies and gentlemen, there's a matter of law that I need to take up outside your presence at this time. So, if -- Mr. Foreman, take your jury to the jury room, please. Thank you.

(REPORTER'S NOTE: Jury exits courtroom. The following takes place outside the presence of the Jury.)

THE COURT: All right, Solicitor. You had an objection you wanted to raise, please?

MR. TERRELL: Yes, sir, Your Honor. It's becoming clear through this opening testimony, opening statement

that the defense is going to rely essentially on alibi witnesses for their defense. We have been provided no notice of alibi and I [122] don't believe that defense is proper at this point, Your Honor.

THE COURT: All right. What's the response from the defense, please?

MR. T. BRITTAIN: Your Honor, my understanding is we certainly have. They've been talking to my witness Heather Faircloth and asking her what her testimony was about where Tommy Benton was on the night in question. And, you know, I will say, when I got in this case, I asked if they had been noticed of alibi, whether I could find a written notice of it, but that's always been the defense in this case. I've discussed this with Ms. Richardson, these are the witnesses I'm calling and this is my defense in the case. But if I can't find it in writing, you know, maybe I can't find it in writing. But I -- I'm not -- I'm gonna ask you to be excused for it, but I had asked if we'd given notice of alibi because I've been functioning on that basis ever since I got involved in the case.

THE COURT: All right.

MR. TERRELL: Your Honor, the first time we -- the state was made aware of some of these witnesses -- some of them we know about from the discovery that they've received from the state, but some of these names that we heard yesterday was the first time we'd heard of some of those names. There haven't been discussions about any of this and there's no motion [123] pursuant to Rule 5, Your Honor.

THE COURT: All right.

MR. C. BRITTAIN: Your Honor, and I apologize, I'm looking for it.

THE COURT: All right. Do you need a minute to ---

MR. C. BRITTAIN: Please, I'm going as fast as I can, but I have spoken with Lauree about this and -- whether I've got the piece of paper with me right now, but we've always said that we were gonna have an alibi defense with Christy Hudson, his great-grandmother who is gonna testify, and we also were relying on Heather Faircloth, she's been -- was subpoenaed by the state. So, that's -- that's my position, Your Honor.

THE COURT: All right. So, Rule 5(e), notice of alibi. It says, Subsection 1, notice of alibi by Defendant, upon written request of the prosecution stating the time, date, and place at which the alleged offense occurred, the defendant shall serve within 10 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.

Subsection 2, within 10 days after Defendant serves his notice but in no event less than 10 days before trial or as [124] the Court may otherwise direct, the prosecution shall serve upon the defendant or his attorney the names

and addresses of the witnesses upon whom the state intends to rely to establish Defendant's presence at the scene of the alleged crime.

3, both parties shall be under a continuing duty to properly disclose the names and addresses of additional witnesses whose identify, if known, should've been included in the information previously provided in Subsection 1 or 2.

Failure to disclose, if either party fails to comply with the requirements of this rule, the Court may exclude the testimony of any undisclosed witness offered by either party. Nothing in this rule shall limit the right of the defendant to testify on his own behalf.

Mr. Brittain, do you know whether or not you served upon the state any written notice of alibi?

MR. T. BRITTAIN: We can't -- we can't find a written notice.

THE COURT: All right.

MR. T. BRITTAIN: So, we must not have done it.

THE COURT: All right.

MR. T. BRITTAIN: I didn't think it was an issue. I mean, this has been where I've headed with this case since I first got involved in it. So, I thought it'd previously been done. I'll say this, Judge, I don't -- I don't ever remember sending any addresses because I know I would've

remembered [125] that. We didn't send any addresses to anybody about it. So, we -- I don't think we've completely complied with the rule.

THE COURT: All right. Let's take a short break and let me talk to the prosecution and the defense in chambers, please. Thank you very much.

*****OFF THE RECORD*****

(On the Record.)

(JULY 19, 2017.)

(REPORTER'S NOTE: The following takes place outside the presence of the jury.)

RULING OF THE COURT:

THE COURT: All right. In this particular matter regarding the prosecution of the State of South Carolina versus Tommy Lee Benton in 2016-GS-26-1719 for murder, 05011 for burglary in the first degree, 05008 for burglary in the first degree, 05009 for arson in the first degree, and 05010 for arson in the third degree, it has been presented to the Court that a strict compliance with Rule 5 regarding notice of alibi may not have been accomplished by the defense in this particular matter. Just as an aside, when you look at Rule 5(e), notice of alibi in Subsection 1, there's something that says, upon written request of the prosecution stating the time, date, and place at which the alleged offense occurred, I take that to mean upon

service of the indictment, when the defendant is served with the indictment, that's what I take it [126] to mean. There might be some other argument that might be made but that appears to be what that means, it's just strangely worded. But, it's clear the defense needs to in writing serve notice of the intention to offer an alibi defense. Since there is -- does not seem to have been strict compliance with this, the Court is faced with the situation that if I impose the strictures or the sanctions that are set forth in Rule 5, it would deprive the defendant basically of his defense to these crimes and the most probable consequence of that would be that there would be a less than complete factual presentation of the case to the jury and they would base their decision on a less than complete factual basis. The most probable conclusion would be they would convict the defendant of all of these crimes based upon a less than complete factual presentation or because it -- as I have indicated and as you have heard earlier, their job is to judge credibility and believability. They've got to hear from everybody to judge whether or not they believe them and then make their decision on whether or not the state has proved the defendant guilty beyond a reasonable doubt. It also -- and if I would force, or if I would -- because the statute does not or the rule does not say shall, it says the Court may exclude. So, if I chose not to exclude them, I'd deprive the state of a full and complete opportunity to explore these witnesses, to be prepared to answer to the jury as to what they may say, and [127] again would deprive the jury of a full and complete factual determination from which they need to judge credibility and believability and make a decision here.

Based upon this, I find I have no choice -- again, because a full and complete factual determination needs to be made, it is this Court's duty to ensure that fairness and justice is done in each and every matter. I have no choice but to declare a mistrial in this matter. I do find there is manifest necessity in doing so based upon the reasons that I have said. The harm that it would do to the defendant, the harm that it would do the state, I find there is no other reasonable conclusion that can be had in this matter because of that. Therefore, I do officially declare a mistrial in this matter. The matter will be rescheduled for a new trial. Before that new trial, I am going to require full, complete, and strict compliance with Rule 5(e). I am telling the defense that they have, by the basis of the indictment and this Court's notice, whatever is required of the state stating the time, date, and place at which the alleged offense occurs, they have that. The defendant shall now through his counsel serve the state within 10 days, I find that to be more than sufficient time, within 10 days of today's date, a written notice of their intention to offer an alibi defense. As required by the rule, this notice shall state the specific place or places at which the defendant claims to have been at [128] the time of the particular alleged offense. And obviously, there being more than one offense, all alleged on different dates, and so it has to be specific as to the particular date, crime. It must set forth the names and addresses of the witnesses upon whom the defendant intends to rely to establish such alibi defense. So, it not only has to be specific as to the crime, the date, there must be the specific place or places the defendant claims to have been at the time of those offenses and the persons upon whom he may rely

to try to prove or to establish, rather, to establish this alibi defense. Within 10 days after the defendant serves notice to the state, the prosecution shall serve upon the defense, through his counsel, the names and addresses of witnesses upon whom the state intends to rely to establish the defendant's presence at the scene of the alleged crime. So, based upon the information the defense provides as to the specific crime on that date, the state must in kind reply to the defense as to the names and addresses that they would use to prove otherwise. Both parties shall remain under a continuing duty to promptly, that means immediately if you find additional information after you have served your written notice, you find additional information -- promptly means immediately, as soon as you know it to disclose whatever additional information you have, and that includes names, addresses, additional witnesses that should have been included in the [129] original written notice, either by the defense or the state. And that includes, again, saying that the defendant was at a certain place or place at the time of the alleged offense.

Since we have continued this matter and I have set forth this explicit compliance with Rule 5(e), I will tell both the defense and the state that if there is a further violation of this rule, I will impose the sanction that is granted to the Court and that is to exclude the testimony of an undisclosed witness offered by each party. There's gonna be full and complete disclosure. If you do not, you will not be allowed to use that particular witness for that particular information. Again, this does not impact the defendant's right to testify in his own behalf should he choose to do so at the appropriate time during the trial.

Appendix F

Comments or further matters from the State of South Carolina?

MS. RICHARDSON: No, Your Honor, not as it relates to that, just the bond issue.

THE COURT: All right. As to this particular matter, comments or further statements from the defense?

MR. T. BRITTAIN: Nothing, Your Honor.

THE COURT: All right. Very good.

We do need to address the matter of bond. So, if you would, stand at this time, Mr. Benton.

The Court has declared a mistrial regarding the charges [130] that have been levied against you by the State of South Carolina. That means that this puts you back in the same position that we were in prior to this morning when the jury was sworn. That is you have been indicted, you have been served with the indictments and you are on notice that the state is prosecuting you for the crimes of burglary, first degree, two counts; murder; arson in the first degree; and arson in the third degree. The -- and if a jury should so convict on those, you do have potential of life in prison without the possibility of parole. Based upon that, we will this week, hopefully tomorrow -- I'm asking the defense and the state to work on that, to find a time tomorrow that this can be accomplished, you remain under the same terms and conditions of your bond that were previously set. We will fully address the

matter, most likely tomorrow with the bonding company present, but you remain under those same terms and conditions. Again, if you fail to comply with them, if you fail to comply with a notice, any parts of it, you can be tried in your absence. The case has already been called by the State of South Carolina. The actions of the Court -- I declared a mistrial, but the case was called. You're on notice of that. If you do not participate, if you do not come when you are called for by the state or the Court, you can be tried in your absence, the matter will proceed to a conclusion with or without your participation. Do you understand that, [131] Mr. Benton?

MR. BENTON: Yes, sir.

THE COURT: Very good.

Further matters from the state?

MS. RICHARDSON: Not at this time, Your Honor.

THE COURT: Further matters from the defense?

MR. T. BRITTAIN: Your Honor, could I get a copy of the letter we handed up yesterday from the bondsman?

THE COURT: That's -- the clerk of court has that in the -- I think it's either with the court reporter or the clerk of court. Okay. So, we can -- you can make a copy of that. But, if you would, Solicitor and Mr. Brittain, if y'all will work together, come tell me a time, hopefully tomorrow

that we can come back regarding the bond issue so that it's fully and completely placed on the record. All right?

Thank you very much.

MR. T. BRITTAIN: Thank you, Your Honor.

MS. RICHARDSON: Thank you, Your Honor.

(RECESS.)

*****OFF THE RECORD*****

(On the Record.)

(REPORTER'S NOTE: Jury enters courtroom.)

COURT TO JURY:

THE COURT: All right. Ladies and gentlemen, the first thing I want to do is apologize for the amount of time it took [132] to come to the place that we are at the present time. I'll just let you know that something highly unusual occurred. And based upon that, the Court found that it was absolutely necessary to postpone this trial. That doesn't mean that your work -- you will be involved in it in the future. You're gonna -- your service will end this week. But, there were matters that I found that both the defense and the state would have been put in the position of not being able to put all of the possible facts and evidence before you and you would've been in a position of making the decision without all of the facts and evidence. And, it

was necessary to postpone it to a later date to make sure that when I reschedule it and we have the trial of Mr. Benton on those charges that the jury that decides that case has all of the facts and evidence necessary to reach a proper conclusion in this matter. I did not want to put you in the position of doing so, I did not want to put the state and the defense of trying to prepare or present their cases without the ability to give to you all of the information. That just wouldn't have been -- obviously not right or fair to any of the parties, the defendant, the victims, the state, no one. So, with that, I took it upon myself to postpone it to a later date.

What's that mean for y'all? You're relieved of your responsibilities in this case but that also means I've got to move on to other cases that are scheduled for trial. None of [133] them, honestly, I believe are of the length or the complexity of this particular matter, but they are serious criminal matters that need to be resolved. And, this afternoon, I will be meeting with the lawyers on those cases and I am reconvening the whole panel, jury panel, in the assembly room tomorrow morning at 9:30, and that includes y'all. We don't have a large pool to pick from so I do need your help and assistance to be part of the whole jury pool tomorrow morning at 9:30 in the assembly room. At that point in time, we'll have gone through the other matters and we'll either have scheduled those for a resolution without the assistance of a jury or we'll be starting a jury trial tomorrow morning.

Again, I apologize to you. This is -- honestly, it was highly unusual. It's not -- I've been a circuit judge for 17

years and can count on one hand the times that this has occurred in those 17 years and thousands of cases that I've tried. So, I apologize to you that we did not go forward, but it was absolute necessary that I did what I did.

So, with that, I will see you back tomorrow morning in the jury assembly room at 9:30 tomorrow morning.

Thank you very much.

(REPORTER'S NOTE: Jury exits courtroom.)

(RECESS.)

END OF DAY TWO.

*****OFF THE RECORD*****