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It is great that you apologized. You owe that to the person it was directed at and God. None of us can or should judge. I can however give you some suggestions. I remember when you posted about excepting Christ as your Savior which I Praised God. We all need salvation. But when you are a babe in Christ, the devil will do all to get you back. But Greater is He who is in you then he that is in the world. So grab that Bible, cling to God's Holy word, leave and let go of that world you left behind and ask God to rebuke Satan. Find a daily devotional, find a Bible. God fearing preaching Church. Invest in the Love Dare 365 day devotional. My husband and I are doing it now. And please, we are all human. we will fail daily. But we need to kneel boldly before the Throne of God and give it all to him. And remember to stay off of social media when you aren't at your best. Prayers going up and out for you and your wife. Not preaching, just giving sound advise from someone who came through a life of misery to doing all I can to live for CHRIST. Hang in and hold on!!!!.!!!

Like Reply 1w

Timothy Stone
[redacted] thanks and where can I find that devotional book

Like Reply 1w

[redacted]
[redacted] we are no longer together. I can't serve God and the devil both so I had to let go of what was keeping me from getting closer to God. You can't get to heaven holding on to someone else's skirt or shirt tail and think your going to make it. It's a relationship between you and God that will allow you to enter in. The wall with the Lord is straight and narrow and you've got to serve him with a whole heart and not just with half your heart or because your wife or your husband wants you to. It's something you have to do for yourself and nobody else

Like Reply 1w

[redacted]
Timothy Stone you can go on line and type in Love Dare devotion 365 day. But since I see y'all are not together, I would still recommend it. I have found out that alot of things in it helps me personally and not just for my marriage. Prayers and may God's will be done!

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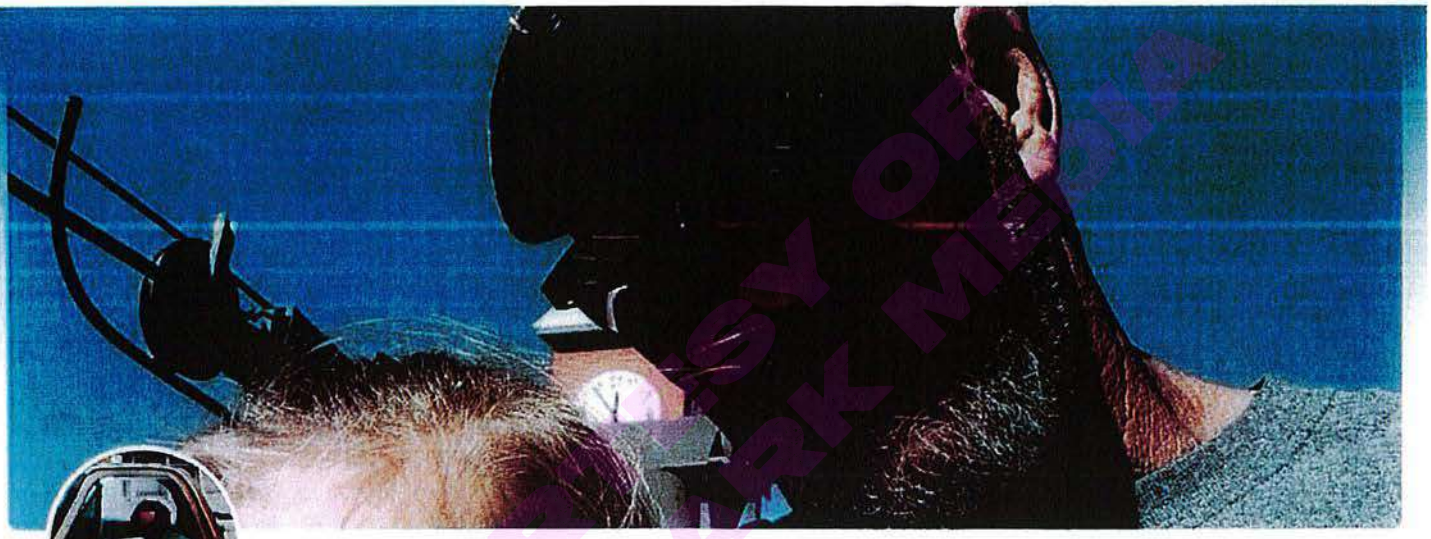
Like Reply 1w

[redacted] thank you so much

Like Reply 1w

# Exhibit B

Search Facebook



# Timothy Stone

128 friends

Add friend | Message

Posts | About | Friends | Photos | Videos | Check-ins | More

## Intro

Works at Dopson all terrain timber

Studied at Jeff Davis High School

Went to Jeff Davis High School

## Posts

Filters

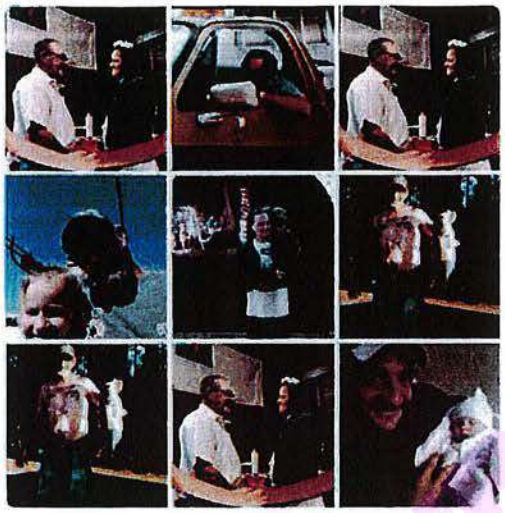
Timothy Stone
February 27 ·

Fixing to delete Facebook I'll leave messenger on for a few days for certain ones to get my new number later Facebook world

3

## Photos

See all photos



## Friends

See all friends

128 friends

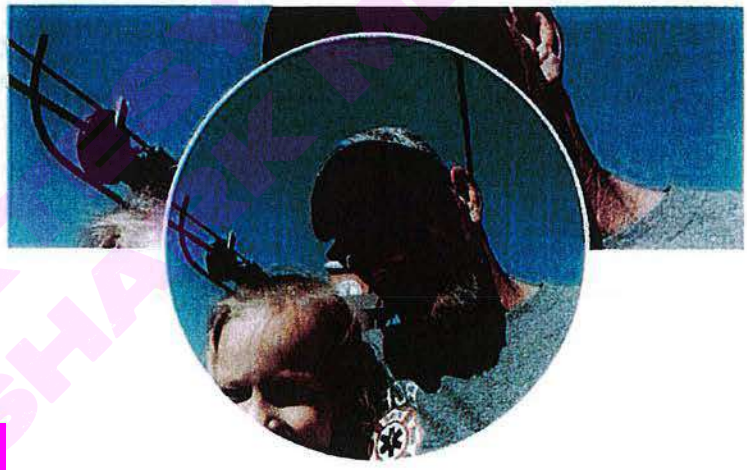
[redacted]

Stitch Lovers
February 16

Like Comment Share

Write a comment..

Timothy Stone updated his profile picture
February 16



9

Share

Timothy Stone
February 16

Search Facebook

Timothy Stone

**Friends** See all friends

128 friends

[redacted]

**Life events** See all

Like Comment Share

Write a comment...

Timothy Stone
February 16

Folks I posted a ugly post yesterday to which I have deleted and I kinda in a round about way directed it towards a certain person and I would like to apologize to everyone who read it that ugly for me to do that and yes I let Satan control me and I broke down and started drinking and when I was drunk I made that post and I'm sorry

5 5 comments

Like Comment Share

View more comments

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It is great that you apologized. You owe that to the person it was directed at and God. None of us can or should judge. I can however give you some suggestions. I remember when you posted about excepting Christ as your Savior, which I Praised God. We a... **See more**

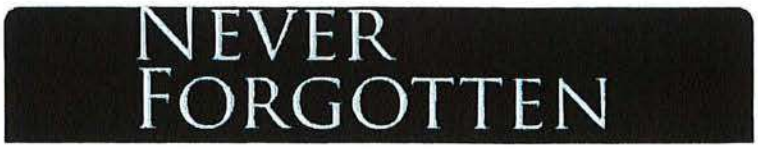
Like Reply 29w

[redacted] replied · 3 Replies

Write a comment...

Timothy Stone
February 16

For my mom and sister



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5 5 comments

Like Comment Share

Most relevant

[redacted]
When life gets hard you're supposed to call on God but when you're down the devil finds a way to get in and when you let him he will take control pray for you Tim because you have a beautiful granddaughter that loves you and so many more of the grandbabies that love you and you will get through this just let God help you 🙏‼️ I love you men and I am praying 🙏 for you hope you have a blessed day 🙏‼️

Like Reply 29w

[redacted]
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Like Reply 29w

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA<br><br>COUNTY OF COLLETON | )<br>)<br>) | IN THE COURT OF GENERAL SESSIONS<br>FOURTEENTH JUDICIAL CIRCUIT |

The State of South Carolina,

Plaintiffs,

vs.

Richard Alexander Murdaugh,

Defendant.

Indictment Nos. 2022GS1500592 – 00595

**CERTIFICATE OF SERVICE**

I, Holli Miller, paralegal to the attorney for the Defendant, Richard A. Harpootlian, P.A., with offices located at 1410 Laurel Street, Columbia, South Carolina 29201, hereby certify that on October 27, 2023 did serve via email the following document to the below mentioned person:

Document: Motion for a new trial

Served: Creighton Waters, Esquire
Office of The Attorney General
Rembert C. Dennis Building
Post Office Box 11549
Columbia South Carolina 29211-1549
cwaters@scag.gov

Holli Miller

# EXHIBIT C

(Juror 741 Affidavit)

RECEIVED

Jan 29 2024

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA )
) AFFIDAVIT OF [redacted]
COUNTY OF COLLETON ) JUROR #741

PERSONALLY appeared before me, [redacted] who being first duly sworn, deposes and states as follows:

1. I was juror #741 in the case of *State of South Carolina v. Richard Alexander Murdaugh* tried in Colleton County, South Carolina. I was an alternate juror.
2. During the trial, I witnessed the clerk of court, Becky Hill, come to the jury room and she and the forewoman went into the bathroom. After Mrs. Hill and the forewoman exited the bathroom, she told the jurors that we could not ask the forewoman questions.
3. Before the defense put up their case, Mrs. Hill told the jurors "the defense is about to do their side, they are going to say things that will try to confuse you, don't let them confuse you or convince you or throw you off."
4. Mrs. Hill made the above statement warning that the defense would try to confuse us in the presence of all of the jurors, as we had assembled in the same jury room.
5. Mrs. Hill said, "if you get emotional, we want to see your face, because that is what they want to see." All jurors were assembled in one room when she made this comment as well.
6. Mrs. Hill also informed us that Alex Murdaugh was going to testify but I don't recall exactly what she said. All jurors were assembled in one room when she made this comment as well.

7. During the visit to Moselle, Juror #826 and I walked to the scene together. Then Juror #826 began walking with the Clerk of Court, Becky Hill. I could tell they were talking, but I could not hear what was said between them.
8. I also overheard discussions in the jury room that Mrs. Hill drove a juror home. I believe it was the juror whose nickname was [redacted]
9. Before the jury began deliberating, I heard a member of the Court staff say that the deliberations shouldn't take long. I don't remember specifically who made this statement, but it was made in the presence of the entire jury right after closing arguments in the jury room.
10. As the jury was deliberating, I believe Judge Newman came to the room I was in and told me the jury would have to spend the night at a hotel if they did not have a vote by a certain time. I do not recall the time deadline.

FURTHER AFFIANT SAYETH NOT.

[redacted]
[redacted] Juror #741

January 29, 2024

SWORN TO before me this 29 day
of January, 2024

Notary Public for South Carolina
My Commission Expires: 11/24/2030

# EXHIBIT D

(Appellant's Brief)

| STATE OF SOUTH CAROLINA<br>COUNTY OF COLLETON | COURT OF GENERAL SESSIONS<br>FOURTEENTH JUDICIAL CIRCUIT |
|---|---|
| State of South Carolina,<br><br>v.<br><br>Richard Alexander Murdaugh,<br><br>Defendant. | Indictment Nos. 2022-GS-15-00592, -593, -594, and -595<br><br>**DEFENDANT'S PRE-HEARING BRIEF RE: MOTION FOR A NEW TRIAL** |

Defendant Richard Alexander Murdaugh, through undersigned counsel hereby submits this pre-hearing brief as the Court requested at the December 21, 2023, telephonic status conference.

## I. Introduction

Mr. Murdaugh was indicted for the murder of his wife Maggie and son Paul on July 14, 2022. His murder trial began January 23, 2023. The presiding judge was the Honorable Clifton Newman. The trial ran for six weeks, ending with convictions on the evening of March 2, 2023, and sentencing on March 3, 2023.

On October 27, 2023, Mr. Murdaugh filed a motion for a new trial based on after-discovered evidence, having obtained leave from the Court of Appeals to suspend his appeal of his convictions to file the motion. His motion alleges that Rebecca Hill, the elected Clerk of Court for Colleton County, had extensive private communications with members of the jury during trial. This allegation was supported by sworn affidavits of jurors and a witness to juror interviews, testimony at *in camera* proceedings, and other evidence including Ms. Hill's own book. The subject matter of Ms. Hill's alleged communications was the evidence being presented by the defense at trial. Mr. Murdaugh alleges that an elected state official deliberately violated his constitutional right to a fair trial before an impartial jury. If that allegation is proven, the law requires a new trial.

## II. Argument

### A. Mr. Murdaugh does not need to show actual bias on the part of any juror to obtain a new trial.

If Mr. Murdaugh proves his allegation that Ms. Hill communicated with the jury about the evidence presented by the defense during his murder trial, South Carolina and federal law require that Mr. Murdaugh receive a new trial, irrespective of whether the Court believes the outcome of the trial would have been the same had Ms. Hill's jury tampering not occurred. "A defendant in a criminal prosecution is constitutionally guaranteed a fair trial by an impartial jury, and in order to fully safeguard this protection, it is required that the jury render its verdict free from outside influence." *State v. Johnson*, 302 S.C. 243, 250, 395 S.E.2d 167, 170 (1990) (internal quotation marks omitted). Where "'[t]here was the private communication of the court official to members of the jury, an occurrence which cannot be tolerated if the sanctity of the jury system is to be maintained . . . a new trial ***must*** be granted unless it clearly appears that the ***subject matter*** of the communication was harmless and could not have affected the verdict.'" *State v. Cameron*, 311 S.C. 204, 207–08, 428 S.E.2d 10, 12 (Ct. App. 1993) (quoting *Holmes v. United States*, 284 F.2d 716, 718 (4th Cir. 1960)) (emphasis added). The law requires the "subject matter" of the communication to be harmless— "clearly" harmless. *Id.* Otherwise, a new trial must be granted. Asking the jury what it wants for lunch is clearly harmless. Telling it not to believe the defendant when he testifies is not.

The issue before the Court is a structural issue in Mr. Murdaugh's trial, not a failure to impanel unbiased jurors. Where a new trial is sought based on biases jurors brought with them into the trial, the required standard is to show actual bias, whether those biases were facts jurors concealed during voir dire (*e.g.*, *State v. Woods*, 345 S.C. 583, 550 S.E.2d 282 (2001)), were created by state action during voir dire (*e.g.*, *State v. Bryant*, 354 S.C. 390, 581 S.E.2d 157 (2003)),

resulted from jurors reading newspapers or other unauthorized materials during trial (*e.g.*, *State v. Stone*, 290 S.C. 380, 350 S.E.2d 517 (1986)) or from initiating inappropriate communications during trial (*e.g.*, *Smith v. Phillips*, 45 U.S. 209 (1982)), or the like. The present case is different. Here, a state official argued the merits of the evidence presented to jurors during trial outside of the presence of the Court, the Defendant, and his counsel, and in other ways deliberately and surreptitiously used her official authority to direct the verdict to her preferred outcome. This is, fortunately, a vanishingly rare event, but it is one that requires a new trial.

The *Cameron* court's distinction between the communication being harmless and the subject matter of the communication being harmless and its requirement that a new trial be granted unless the latter is established recognizes that deliberate jury tampering by a court official cannot be cured or excused by the strength of the evidence presented at trial or jurors offering their own subjective opinions regarding their own biases. Even if every juror were to testify that he or she would have reached the same verdict regardless of Ms. Hill's tampering, a new trial is required if it is proven that Ms. Hill communicated with jurors about the merits of the evidence presented. Sustaining a conviction based on the Court's opinion of the strength of the evidence against the accused regardless of improper external influences on the jury from court officials about the merits of the case would effectively be a directed verdict for the prosecution—a statement that whatever happened at trial simply does not matter because the evidence can admit only one result regardless. That would constitute structural error. *Cf. Neder v. United States*, 527 U.S. 1, 34 (1999) (Scalia, J., concurring in part) (noting that even if "the judge certainly reached the 'right' result," "a directed verdict against the defendant . . . would be *per se* reversible *no matter how overwhelming the unfavorable evidence*," because "[t]he very premise of structural-error review is that even

convictions reflecting the 'right' result are reversed for the sake of protecting a basic right" (emphasis in original)).

For example, in *Parker v. Gladden*, a bailiff told a juror in a murder trial "that wicked fellow, he is guilty." 385 U.S. 363, 363 (1966). The Supreme Court of Oregon held the statement did not require a new trial because it was not shown the statement prejudiced the outcome of the trial. The U.S. Supreme Court reversed, holding "[t]he evidence developed against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel," and "[w]e have followed the undeviating rule, that the rights of confrontation and cross-examination are among the fundamental requirements of a constitutionally fair trial." *Id.* at 364–65 (internal quotation marks and citations omitted).

In *Parker,* the state also argued that the bailiff's statement was harmless because ten members of the jury never heard his statement and Oregon law at that time allowed a guilty verdict by ten affirmative votes of the twelve jurors. The Supreme Court rejected that reasoning, and, after questioning whether the factual record supported that argument, stated that in "any event, petitioner was entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors." *Id.* at 366. That reasoning accords with the reasoning in *Cameron* 27 years later—the right being protected is not the right to a "correct" verdict but the constitutional right to trial before a fair and impartial jury free from state officials' improper influences. What matters is what was in fact said to the jurors by the state official, not a counterfactual analysis of what probably would have happened had that not in fact been said.

Our Supreme Court more recently touched on this point in *State v. Green*, 432 S.C. 97, 851 S.E.2d 440 (2020). In *Green*, during jury deliberations a juror asked a bailiff "what would happen

in the event of a deadlock, and he responded the judge would likely give them an *Allen* charge and ask if they could stay later." *State v. Green*, 427 S.C. 223, 229, 830 S.E.2d 711, 713 (Ct. App. 2019), *aff'd as modified*, 432 S.C. 97, 851 S.E.2d 440 (2020) (citation omitted). The Court of Appeals held the bailiff's comments were presumptively prejudicial because of his official position, but that the State rebutted that presumption by showing for various reasons that the remark did not in fact influence the outcome of the jury's deliberations. *Id.* at 236, 830 S.E.2d at 717. The Supreme Court affirmed but modified the decision to correct the Court of Appeals' reasoning. The communication was not prejudicial not because it did not in fact change the verdict, instead, it was not prejudicial because the subject matter of the communication was harmless: "The bailiff's actions here—though improper—did not touch the merits, but dealt only with the procedural question of how the judge might handle a jury impasse that apparently never materialized." *Green*, 432 S.C. at 100, 851 S.E.2d at 441. In other words, a bailiff presuming to tell the jury that if it is deadlocked, the judge will instruct them to keep deliberating is improper but likely harmless because the subject matter is procedural or logistical, rather than to the merits of the case.

Of course, the allegations in the instant motion—that a state official told the jury not to believe the defendant's defense or his testimony when he testified in his own defense—indisputably regard the merits of the case. The extensive, deliberate, and self-interested jury tampering in which Ms. Hill allegedly engaged far exceeds the simple bailiff mistakes that forced a retrial in *Cameron*, where "a bailiff's misleading response to a juror's question about sentencing options compromised the jury's impartiality because it left the impression that their verdict could not affect the trial court's sentencing discretion," or in *Blake by Adams v. Spartanburg General Hospital*, where a bailiff told a juror "that the trial judge 'did not like a hung jury, and that a hung

jury places an extra burden on taxpayers.'" *See State v. Green*, 427 S.C. at 237, 830 S.E.2d at 717–18 (citing 311 S.C. at 208, 428 S.E.2d at 12 and quoting 307 S.C. 14, 16, 413 S.E.2d 816, 817 (1992)).

**B. The State misstates the controlling legal standard and provides no authority supporting its mistaken position.**

In response to Mr. Murdaugh's motion for a new trial, the State incorrectly asserts that Murdaugh "must show both that the alleged improper communications occurred and that jurors were actually biased as a result." Resp. Opp'n Mot. New Trial 3 n. 2. The State can cite no authority supporting that proposition. The State's response includes citations to several cases purportedly supporting its position, but not one cited case actually supports it.

*State v. Kelly*, 331 S.C. 132, 502 S.E.2d 99 (1998): The State provides no parenthetical explanation of how *Kelly* supports its position because the case has nothing to do with the present motion. In *Kelly*, a juror was accused of misconduct, not a court official. During the guilt phase of a capital trial, a juror provided a pamphlet purportedly expressing God's views on capital punishment to other jurors in the jury room. The trial judge dismissed the offending juror but determined that a mistrial was not warranted because it was not relevant to the issues in the guilt phase of the trial and because "no other juror had been exposed to the contents of this pamphlet." *Id.* at 141, 502 S.E.2d at 104. The Supreme Court affirmed. Chief Justice Finney and Justice Toal dissented, arguing "the inappropriate possession and use of the extraneous pamphlet by jury members so tainted the jury that its contents affected the ability of the jury to be fair and impartial at both the guilt and penalty phases of appellant's bifurcated trial." *Id.* at 150, 502 S.E.2d at 109. Regardless, as in the *Holmes* case that provides the controlling legal standard quoted in *Cameron*,

> ***Here there is more than jury misconduct in reading forbidden matter***. There was the private communication of the court official to members of the jury, an occurrence which cannot be tolerated if the sanctity of the jury system is to be maintained. When there has been such a communication, a new trial must be

> granted unless it clearly appears that the subject matter of the communication was harmless and could not have affected the verdict.

*Holmes*, 284 F.2d at 718 (emphasis added).

*Smith v. Phillips*, 45 U.S. 209 (1982): This case says nothing about the standard for granting a new trial when a state official tampers with the jury. In *Smith*, the prosecution failed to disclose that a juror had, during trial, applied for employment as an investigator in the prosecutor's office. The U.S. Supreme Court held "[t]his Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias," and agreed with the state courts and federal district court that no actual bias was proven at the hearing. *Id.* 455 U.S. at 214–15. It reversed the U.S. Court of Appeals for the Second Circuit on the issue of whether the prosecution's failure to disclose the letter was misconduct necessitating a new trial. But the issue in the instant motion is not whether a particular juror had an undisclosed bias or whether the prosecution concealed any pertinent information.

*State v. Green*, 432 S.C. 97, 851 S.E.2d 440 (2020): As explained above, in *Green* the Court held that an improper procedural comment by a bailiff to a jury was harmless because it did not bear on the merits. There is no suggestion in *Green* that a comment by a state official that did bear on the merits of the case could also be harmless. Any such assertion would be precluded by the U.S. Supreme Court's holding *Parker v. Gladden,* discussed above but notably not mentioned at in the State's response despite also being discussed in Mr. Murdaugh's initial motion. The *Green* court did reasonably decline to extend the presumption in *Remmer v. United States* that "'any private communication, contact, or tampering . . . with a juror during a trial about the matter pending before the jury is . . . deemed presumptively prejudicial'" to situations where the communications at issue "did not touch the merits" of the case on trial. *Id.* at 99–100, 851 S.E.2d at 441 (quoting 347 U.S. 227 (1954)). Instead, it reversed the Court of Appeals application of

*Remmer* prejudice and instead followed the reasoning of *Cameron*: the inquiry should focus on the subject matter of the improper communication rather than presuming all improper communications are prejudicial and then requiring the State to rebut the presumption even where the communications did not bear on the merits of the case. *Id.* at 99–101, 851 S.E.2d at 441. This has no relevance here because Ms. Hill's alleged statements to jurors indisputably bore on the merits.

*State v. Cameron*, 311 S.C. 204, 428 S.E.2d 10 (Ct. App. 1993): The State cites *Cameron* for the unremarkable proposition "[n]ot every inappropriate comment by a member of court staff to a juror rises to the level of constitutional error," Resp. Opp'n Mot. New Trial 3, but in a footnote claims Mr. Murdaugh's citations to *Cameron* for the controlling legal standard cite to a "portion of the opinion which does not state the legal standard, but rather quotes a portion of a 4th Circuit Court of Appeals opinion inconsistent with the standard acknowledged by *Cameron* and more subsequently clarified in *Smith* and most recently in *Green*," *id.* at 3 n.2. That assertion only makes sense if the State did not expect the Court to read the *Cameron* opinion. The entire portion of the *Cameron* opinion that follows its factual recitation is quoted below:

> The trial judge ruled that the jury properly decided that the length of sentence he might impose was not their concern. He further ruled that the short colloquy between the bailiff and the forelady could not have in any way influenced the jury to refuse to recommend mercy.
>
> A defendant in a criminal prosecution is constitutionally guaranteed a fair trial by an impartial jury, and in order to fully safeguard this protection, it is required that the jury render its verdict free from outside influences of whatever kind and nature. *State v. Johnson*, 302 S.C. 243, 250, 395 S.E.2d 167, 170 (1990); *State v. Wasson*, 299 S.C. 508, 511, 386 S.E.2d 255, 256 (1989); *State v. Salters*, 273 S.C. 501, 504, 257 S.E.2d 502, 504 (1979). The mere fact, however, that some conversation occurred between a juror and a court official would not necessarily prejudice a defendant. *State v. Goodwin*, 250 S.C. 403, 405, 158 S.E.2d 195, 197 (1967).
>
> In this case, "[t]here was the private communication of the court official to members of the jury, an occurrence which cannot be tolerated if the sanctity of the jury system is to be maintained. When there has been such a communication, a new trial must be granted unless it clearly appears that the subject matter of the communication

> was harmless and could not have affected the verdict." *Holmes v. United States*, 284 F.2d 716, 718 (4th Cir. 1960); *see Blake v. Spartanburg General Hospital*, 307 S.C. 14, 413 S.E.2d 816 (1992).
>
> While the trial court adequately instructed the jury on the verdicts of guilty with and without mercy, the jury was obviously confused as to the length of the respective sentences. In this case, the right to fix punishment or make a recommendation that would place punishment in the discretion of the court rested exclusively with the jury. *State v. Brooks*, 271 S.C. 355, 359, 247 S.E.2d 436, 438 (1978); *State v. McGee*, 268 S.C. 618, 620, 235 S.E.2d 715, 716 (1977). The bailiff's response to the forelady, that they should not worry if they were deadlocked because the judge was fair, was misleading. It tended to lessen the jury's sense of responsibility by implying that if they rendered a verdict of guilty without mercy, the judge had some discretion in sentencing. "Jurors are simply not to consider the opinions of neighbors, officials or even other juries." *State v. Thomas*, 287 S.C. 411, 413, 339 S.E.2d 129, 129 (1986) (quoting *State v. Smart*, 278 S.C. 515, 526, 299 S.E.2d 686, 693 (1982), *cert. denied*, 460 U.S. 1088, 103 S. Ct. 1784, 76 L. Ed.2d 353 (1983)).
>
> The appellant's conviction is reversed and the case is remanded for a new trial.
>
> REVERSED AND REMANDED.

311 S.C. at 205–08, 428 S.E.2d at 11–12. There is no standard "acknowledged" or otherwise stated in the above opinion other than "a new trial must be granted unless it clearly appears that the subject matter of the communication was harmless and could not have affected the verdict." Mr. Murdaugh has no idea what "*Smith*" case the State believes "more subsequently clarified" the legal standard. The only "*Smith*" case cited in the State's response is *Smith v. Phillips*, the irrelevant 1982 U.S. Supreme Court case discussed above that predated *Cameron* by eleven years. And as discussed above, *Green* reversed a Court of Appeals decision to correct its reasoning to bring it in line with *Cameron*.

**C. The applicable standard of proof is a preponderance of the evidence.**

As the movant, Mr. Murdaugh has the burden of proving his claim for relief. Although no South Carolina case states the standard of proof applicable in this situation, the general rule for new trial motions based on unauthorized communications with jurors is that the standard of proof

is a preponderance of the evidence. Mr. Murdaugh must make "'two showings, by a preponderance of the evidence: [1] [extrajudicial] contact or communications between jurors and unauthorized persons occurred, and [2] the contact or communications pertained to the matter before the jury.'" *E.g.*, *State v. Berrios*, 129 A.3d 696, 713 (Conn. 2016) (quoting *Ramirez v. State*, 7 N.E.3d 933, 939 (Ind. 2014)). As discussed above, the burden-shifting described in *Remmer* is not relevant to this case because the alleged communications were by a court official, to at least one deliberating juror, and inarguably pertained to the merits of the case being tried. If Mr. Murdaugh proves that the Clerk of Court engaged in surreptitious advocacy on the merits during trial, there is nothing for the State to rebut. A new trial is required.

**D. The Court must hold an evidentiary hearing.**

The State's response argues Mr. Murdaugh has failed to show that he is entitled to an evidentiary hearing. Resp. Opp'n Mot. New Trial 19–21. The Court appears to have rejected that argument already because it has set dates for the evidentiary hearing. Nevertheless, because the State made the argument, Mr. Murdaugh will briefly rebut it. As the State correctly argued before the Court of Appeals, the standard to suspend the direct appeal and for leave to file a motion for a new trial is a prima facie showing of an entitlement for relief. Return to Motion to Suspend Appeal and for Leave to File Motion for New Trial, *State v. Murdaugh*, Appellate Case No. 2023-000392 (Sept. 15, 2023) (citing *State v. Butler*, 261 S.C. 355, 358, 200 S.E.2d 70, 71 (1973)). Mr. Murdaugh agreed that is the correct standard. Reply to the State's Return, *Murdaugh*, Appellate Case No. 2023-000392 (Sept. 21, 2023) (quoting *State v. Ford*, 301 S.C. 485, 491, 392 S.E.2d 781, 784 (1990) ("In order to obtain leave from this Court to move for a new trial based on after-discovered evidence, an appellant must make a *prima facie* showing that a new trial is warranted."). The Court of Appeals concluded that standard was satisfied when it granted the motion to suspend the appeal and for leave to file the instant motion. Order, *Murdaugh*, Appellate Case No. 2023-

000392 (Oct. 17, 2023). There has been no material change to the law or to the record before the Court (other than the discovery of yet more examples of Ms. Hill's dishonesty and malfeasance in office) since the Court of Appeals' order. It therefore is the law of the case that a prima facie case has been made. *Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997) ("The doctrine of the law of the case prohibits issues [that] have been decided in a prior appeal from being relitigated in the trial court in the same case."). Where a prima facie case is made, an evidentiary hearing is required. *Barnes v. Joyner*, 751 F.3d 229, 242 (4th Cir. 2014) ("[W]hen the defendant presents a credible allegation of communications or contact between a third party and a juror concerning the matter pending before the jury" the defendant has an "entitlement to an evidentiary hearing." (citing *Remmer*, 347 U.S. 227)). The Court therefore must hold an evidentiary hearing on the merits of the motion for a new trial.

**E. The State's motions to strike should be denied.**

In its response to the motion for a new trial, the State moves to strike (1) affidavits of paralegal Holli Miller, (2) any statements regarding jury deliberations, and (3) any claims regarding Facebook posts, Ms. Hill's book deal, or "post-trial media interactions." It is unclear what purpose striking anything from the motion for a new trial would accomplish, given that it is the law of the case that a prima facie case has been made, that an evidentiary hearing therefore is required, that an evidentiary hearing has been scheduled, and that the motion will be decided on the evidence presented to the Court at the hearing and not on attorney argument made before the Court receives any evidence whatsoever. Nevertheless, since the State makes the argument, Mr. Murdaugh will briefly rebut it.

*First*, the affidavits of Holli Miller were offered only as evidence as to what certain jurors would say if called to testify at an evidentiary hearing. Of course, they are hearsay. All affidavits from persons who have not (yet) testified in court are hearsay. Rule 801(c), SCRE ("'Hearsay' is

a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."). Hearsay is just an objection to the admissibility of evidence; it is not a basis to strike a filing. The purpose of Ms. Miller's affidavits was to help obtain an evidentiary hearing, which has been accomplished. Obviously, they cannot prove Mr. Murdaugh's is entitled to a new trial. Witness testimony in a courtroom will do that.

*Second*, there is no basis for the State's motion to strike references to jury deliberations. Juror 630's affidavit was freely given to support a public filing. Other jurors have spoken about the deliberations in national television interviews. Such statements may or may not be admissible as evidence at the merits evidentiary hearing, but Rule 606 of the South Carolina Rules of Evidence in no way supports striking public statements from a motion memorandum.

*Third*, the State correctly notes that the only relevance of the Facebook post Ms. Hill fabricated to remove Juror 785, her book plans, or her other post-trial actions, is to impeach Ms. Hill. The State argues attacking Ms. Hill's character is "an outlandish theory" against "a dedicated public servant" that is "Immaterial, Impertinent, and Scandalous" and so should be struck. That is incorrect. Ms. Hill likely is the only witness the State can offer who can directly contradict Juror 630's averments of jury tampering, and Ms. Hill has offered an affidavit doing exactly that. Resp. Opp'n Mot. New Trial Ex. A. Her credibility is the crux of the matter before the Court. The purpose of the evidentiary hearing is to allow the Court to decide whether it believes the word of Ms. Hill more than it believes the sworn testimony of one or more jurors. Anything that impeaches Ms. Hill is relevant. And the State's rhetoric about Ms. Hill being "a dedicated public servant" unfairly maligned has not aged well in the two months since the State filed its response, to put it mildly. Ms. Hill is alleged to have stolen money, illegally sold access to the courthouse, conspired

with her son to conduct illegal wiretaps, and even had her book removed from publication because of her plagiarism.

**F. To prevail, Mr. Murdaugh must prove by a preponderance of the evidence that Ms. Hill made statements to at least one deliberating juror about the merits of the evidence presented at trial.**

The issue presented to the Court is not what happened during jury deliberations. It is what happened during the presentation of evidence at trial. Mr. Murdaugh anticipates at least one deliberating juror will testify that Ms. Hill advocated against Mr. Murdaugh in improper communications to jurors during trial, and that at least two other persons who were part of the jury at the time will corroborate that testimony. Such communications include telling jurors not to be "misled" by evidence presented in Mr. Murdaugh's defense and not to be "fooled by" Mr. Murdaugh's testimony in his own defense. Based on the chart of juror interviews provided in the State's response to the motion for a new trial (at pages 21–22), at least five jurors (including the dismissed juror and alternate) will testify that Ms. Hill told jurors to watch Mr. Murdaugh's body language when he testified. Mr. Murdaugh also anticipates juror testimony that Ms. Hill asked jurors for their opinions about Mr. Murdaugh's guilt or innocence, that she pressured jurors to reach a quick verdict, telling them from the outset of their deliberations that it "shouldn't take them long," and that she had frequent private conversations with the jury foreperson. It is likely several jurors will testify that they never heard any such jury tampering and that they do not believe it occurred. But that is not a direct contradiction of the testimony of jurors who say they saw and heard it. Mr. Murdaugh anticipates the only person who can directly contradict jurors who witnessed Ms. Hill's jury tampering is Ms. Hill.

Mr. Murdaugh therefore must present evidence corroborating Juror 630's testimony, including testimony from the alternate juror and Juror 785, who was dismissed on the last day of trial, and possibly testimony from court staff. He must also present evidence impeaching Ms. Hill.

Evidence impeaching Ms. Hill includes her emails, text messages, and telephone records, testimony from court staff, testimony and documentary evidence from persons involved in the production of her book, complaints against Ms. Hill and the results of investigations into Ms. Hill's wrongdoing. It includes evidence related to her involvement in the removal of Juror 785—not because the removal itself is grounds for a new trial, but because Juror 785 has averred Ms. Hill was involved with her removal in an improper and dishonest way that, if true, would serve to impeach Ms. Hill's credibility. Both witnesses and documentary evidence regarding the allegedly fabricated Facebook post, which ultimately did not cause Juror 785 to be removed, and witnesses and documentary evidence regarding Juror 785's alleged statements to her tenants during trial, which ultimately did cause Juror 785 to be removed, are relevant to Ms. Hill's credibility. Evidence impeaching Ms. Hill includes evidence demonstrating her personal interest in the outcome of the trial and willingness to engage in obviously inappropriate conduct to further that personal interest. For example, emails released to journalists in response to FOIA requests show that Ms. Hill was sending emails directly to prosecutors and law enforcement witnesses for the State during trial about the merits of testimony from defense witnesses under examination at that moment. Emails from B. Hill to C. Waters, C. Jewell, & C. Ghent (Feb. 21, 2023) (FITSNEWS_FOIA_000624 & _000861) (attached as **Exhibit A**). Evidence impeaching Ms. Hill likely also includes testimony from Judge Newman.

It is possible that Ms. Hill will respond to one or more questions at the evidentiary hearing by asserting rights under the Fifth Amendment. She should not be permitted to do so. She waived the right to assert the Fifth Amendment in this proceeding when she submitted an affidavit specifically denying each allegation against her. *See Brown v. United States*, 356 U.S. 148, 154–55 (1958) (holding that if a witness offers testimony voluntarily "his credibility may be impeached

and his testimony assailed like that of any other witness, and the breadth of his waiver is determined by the scope of relevant cross-examination"). If she asserts the Fifth Amendment in response to any question, she should be instructed to answer the question, and if she refuses, her testimony should be struck in its entirety.

There will be much evidence to present that impeaches Ms. Hill. The State may argue presenting it all would be cumulative or repetitive or otherwise unnecessary. But evidence is cumulative only when it "supports a fact established by the existing evidence." Evidence, Black's Law Dictionary (11th ed. 2019). So long as the Court is prepared to give Ms. Hill's testimony any weight, her lack of credibility is not "established" and evidence impeaching her cannot be considered cumulative or repetitive.[1] Courts have underscored the noncumulative nature of additional evidence when a trial features a "swearing match" between witnesses on both sides. *See, e.g.*, *English v. Romanowski*, 602 F.3d 714 (6th Cir. 2010) (rejecting state court's conclusion that witness's testimony was cumulative; the state court "failed to recognize that the trial was essentially a swearing match" between witnesses on both sides); *Montgomery v. Petersen*, 846 F.2d 407, 413, 415 (7th Cir. 1988) (holding that, given the "swearing match" between the witnesses, the uncalled witnesses were not cumulative because they would have "directly contradicted the state's chief witness," while providing the defense with a disinterested alibi witness who could have caused the jury to "view[] the otherwise impeachable testimony of the twelve [defense] witnesses in a different light"); *Nealy v. Cabana*, 764 F.2d 1173, 1174 (5th Cir. 1985) (holding that counsel's failure to investigate and call alibi witnesses was prejudicial "[b]ecause the trial boiled

[1] If the Court were to decide pre-hearing that it cannot credit Ms. Hill over the sworn testimony of any juror, it is likely that the hearing would consist only of Court-conducted *in camera* examination of jurors. This would also avoid potential Fifth Amendment issues regarding Ms. Hill. It is unlikely the State would agree to that since it is likely the State can prevail ***only*** if the Court finds Ms. Hill to be credible.

down to a swearing match . . . and because the missing testimony might have affected the jury's appraisal of the truthfulness of the state's witness and its evaluation of the relative credibility of the conflicting witnesses").

Currently, defense counsel anticipates identifying the trial transcript and exhibits from trial for use at the evidentiary hearing. However, until such time as the State provides Mr. Murdaugh with its discovery in this matter, his counsel is unable to provide the Court with a complete list of exhibits and witnesses, or a list of subpoenas he needs. Once the State produces its discovery, defense counsel will supplement this response immediately to provide a complete list, including a list of subpoenas he needs, if any are needed. It is likely much of the information he would otherwise seek by subpoena has already been compiled by the State. To the extent more subpoenas are needed, it would expedite the process if the Court were to authorize Mr. Murdaugh's counsel to issue subpoenas duces tecum returnable before the evidentiary hearing or, depending on the recipient, to issue the requested subpoenas itself. Mr. Murdaugh at present does not anticipate requesting a subpoena for documentary discovery regarding any deliberating juror but cannot be certain before receiving discovery from the State.

The State has had months in which to use the tools available to law enforcement to conduct discovery regarding this motion as well as to investigate the numerous independent complaints of wrongdoing against Ms. Hill. It will be well prepared to bolster its witnesses and to impeach witnesses favorable to the defense. Mr. Murdaugh has been unable to conduct any discovery whatsoever. All he has are voluntary statements made by jurors and other witnesses willing to talk to his lawyers and information published by journalists. To be prepared to go forward on the January 29 date set for the evidentiary hearing, he urgently needs the State to produce its discovery and to receive authorization to issue his own subpoenas as soon as possible.

**G. Jurors (and Judge Newman, if necessary) should be examined *in camera* by the Court, but other witnesses should be examined by counsel in open court.**

The default method of examining witnesses at an adversarial proceeding is through questioning by counsel for the parties. *See* Rule 614(b), SCRE ("***When required by the interests of justice only***, the court may interrogate witnesses." (emphasis added)). All witnesses should be so examined unless there is good cause to reserve examination to the Court. *Id.* Mr. Murdaugh believes good cause exists for the Court to conduct the examination of jurors, including the dismissed juror and alternate juror, itself, *in camera*, with a redacted transcript provided to the public. In addition to asking its own questions, the Court could accept suggested questions from the parties, in advance of the examination and during the examination, which the Court in its discretion may or may not ask. In addition to shielding jurors from appearing on television involuntarily, *in camera* examination is necessary because it will be difficult for a juror to testify without revealing personally identifying information like his or her name or the names of other jurors. By testifying *in camera*, jurors may speak freely with any personal information in their testimony redacted from the publicly available transcript. Further, jurors may be unsettled by being interrogated by the same lawyers they watched interrogate witnesses for six weeks. Examination by the Court avoids that issue.

The State agrees jurors should be examined by the Court, and has argued the Court should question them "with a mind to at least (1) whether the communication actually occurred and, if so, its context and substance; (2) the number of jurors exposed to the improper communication; (3) the weight of the evidence properly before the jury; and (4) the likelihood that curative measures were effective in reducing the prejudice." Resp. Opp'n Mot. New Trial 6. Only the first topic is appropriate. The only relevant subject for juror examinations is whether Ms. Hill made improper communications on the merits of the case, including anything serving to corroborate or refute

testimony on that subject. The number of jurors exposed to the communications is irrelevant so long as it is at least one deliberating juror. *See Parker*, 385 U.S. at 366. The "weight of the evidence properly before the jury" and "the likelihood that curative measures were effective in reducing the prejudice" are entirely irrelevant under the controlling legal standard, *see Cameron*, 311 S.C. at 207–08, 428 S.E.2d at 12, and appear to solicit testimony inadmissible under Rule 606(b) of the South Carolina Rules of Evidence.

If testimony is needed from Judge Newman, Mr. Murdaugh believes it should also be conducted by the Court *in camera*, to preserve the dignity of his judicial office.

Mr. Murdaugh does not believe good cause exists to examine any other witness, including Ms. Hill, in any fashion other than the traditional means of attorney questioning in open court. Ms. Hill especially is an elected public official accused of malfeasance in office, whom Mr. Murdaugh has accused of violating his constitutional rights in a criminal proceeding, and who has voluntarily provided an affidavit directly contradicting Mr. Murdaugh's claims. She does not need to be shielded from scrutiny in the same manner as anonymous jurors involuntarily summoned to serve. She is a witness against Mr. Murdaugh in a criminal case whom Mr. Murdaugh has a right to challenge in open court. *See* Rules 611(b) & 614(b), SCRE.[2]



[2] Additionally, although the Sixth Amendment Confrontation Clause does not apply to a motion for a new trial, *see, e.g.*, *United States v. Boyd*, 131 F.3d 951, 954 (11th Cir. 1997), Article I, § 14 of the South Carolina Constitution provides that "any person charged with an offense shall enjoy the right . . . to be fully heard in his defense by himself or by his counsel." This right would be violated if the Court were to credit Ms. Hill's testimony against Mr. Murdaugh without allowing his counsel the opportunity to challenge her testimony through cross-examination. *Cf. State v. Hester*, 137 S.C. 145, 134 S.E. 885, 899 (1926) (observing the "right to cross-examine is one which must remain inviolate," "[t]he power of cross-examination . . . certainly is one of the most efficacious, tests which the law has devised for the discovery of truth," and it is "[o]ne of the most inestimable rights by which a man may maintain his defense" (internal quotation marks omitted)). However, if the Court were to decide Ms. Hill's testimony cannot be credited, her testimony would not be relevant to any issue and Mr. Murdaugh would have no right to examine her.

**H. Counsel for non-parties should not be permitted to participate in these proceedings.**

Attorney Eric Bland has requested to participate in these proceedings as counsel for certain jurors who may be called to testify as witnesses. Mr. Murdaugh objects to Mr. Bland's request. This is a criminal proceeding brought by the State against the Defendant. Mr. Bland seeks a level of non-party participation (e.g., participating in status conferences) beyond even the rights afforded victims under Article I, § 24 of the South Carolina Constitution, and the jurors he represents are not crime victims. In discussing his request in the media, Mr. Bland stated on his podcast Cup of Justice, episode 61 (Dec. 26, 2023), that Justice Toal, the newly assigned presiding judge in this matter, "has friends sometimes to reward and enemies to punish" and "I worry about what procedures are going to be put in place, the fact that there was a status conference and you know I represent four jurors and I wasn't even told of that status conference, and I believe that my jurors have the right to legal representation in any type of proceeding dealing with Alex Murdaugh's verdicts where they're going to have their verdicts questioned." His stated intent is not to protect the personal interests of his clients as witnesses, but to advocate to sustain "their" verdict. To allow a publicity-seeking lawyer for non-victim private parties to intervene in this criminal case and advocate against Mr. Murdaugh as an additional opposing party would violate Mr. Murdaugh's procedural due process rights under Article I, § 3 of the South Carolina Constitution and the Fourteenth Amendment to the United States Constitution.

The jurors are simply witnesses with no more right to participate in this criminal proceeding than witnesses in any other criminal case. Unlike typical witnesses, they do have a right to a degree of anonymity so it could be appropriate to allow them to be heard through counsel if the Court were inclined to strip them of that anonymity. But neither party is asking the Court to do that, and the Court has made clear it is not inclined to do that. Mr. Murdaugh does not seek to subpoena telephone records or other personal records regarding them, and if he decided to do so

in the future, their lawyers of course could move to quash the subpoena. Otherwise, they have no cognizable interest in these proceedings, and if there is such an interest the Attorney General would be adequate to assert it.

The reason to hold an evidentiary hearing on Defendant's motion for a new trial is to protect Mr. Murdaugh's constitutional right to a fair judicial proceeding. It would defeat that purpose if the proceedings were allowed to devolve into a speaker's corner for lawyers who want to appear on television even more than they already do. Mr. Murdaugh therefore asks the Court to limit the participation of any witness-retained lawyer to the extremely limited role traditionally allowed to a lawyer representing an innocent bystander witness in a criminal case. Further, he requests that the Court order the Clerk of Court not to accept any filings in this matter from any non-parties without leave of the Court obtained prior to filing.

## III. Conclusion

For the foregoing reasons, Mr. Murdaugh respectfully submits that when Ms. Hill's jury tampering is proven at the evidentiary hearing, the Court must grant the motion for a new trial.

Respectfully submitted,

s/ Richard A. Harpootlian
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*Attorneys for Richard Alexander Murdaugh*

January 3, 2024
Columbia, South Carolina.

RECEIVED
**Jan 03 2024**
S.C. SUPREME COURT

# EXHIBIT A

(Emails from B. Hill to C. Waters, C. Jewell, & G. Ghent, February 21, 2023)

From: "Rebecca Hill" <rhill@colletoncounty.org>
Sent date: Tue, 21 Feb 2023 13:44:25 -0500 (EST)
Subject: Fwd: Website Inquiry -Murdaugh trial
To: "Creighton Waters" <CWaters@scag.gov>, "Carly Jewell" <CarlyJewell@scag.gov>, "Ghent, Charles" <cghent@sled.sc.gov>

***Rebecca "Becky" H. Hill***
*Clerk of Court*
*Colleton County*
*P.O. Box 620*
*Walterboro, SC 29488*
*(843) 549-5791 Ext. 1101*
*Cell: (843) 908-1462*

---------- Forwarded message ---------
From: **Do Not Reply** <noreply@jotform.com>
Date: Tue, Feb 21, 2023 at 1:00 PM
Subject: Website Inquiry -Murdaugh trial
To: <clerkofcourt@colletoncounty.org>

**Murdaugh trial**

| | |
|---|---|
| Name | Andy [redacted] |
| Email Address | [redacted] |
| Callback Number | [redacted] |
| To | Courthouse |
| Recipient | clerkofcourt@colletoncounty.org |
| Subject | Murdaugh trial |
| Message | For: Creighton Waters - forensic research witness is ignoring the standard crouching / stalking posture of a 6'3" person would use to quietly approach the target. His assumption assumes someone simply walking up to a target to shoot. On cross - ask what height the 300 blackout would be if stalking a target. |
| Embedded | Yes |





COLLETON COUNTY

From: "Rebecca Hill" <rhill@colletoncounty.org>
Sent date: Tue, 21 Feb 2023 15:44:10 -0500 (EST)
Subject: Fwd: Website Inquiry -Defense witness Mike Sutton
To: "Carly Jewell" <CarlyJewell@scag.gov>

here's another one.

***Rebecca "Becky" H. Hill***
*Clerk of Court*
*Colleton County*
*P.O. Box 620*
*Walterboro, SC 29488*
*(843) 549-5791 Ext. 1101*
*Cell: (843) 908-1462*

---------- Forwarded message ---------
From: **Do Not Reply** <noreply@jotform.com>
Date: Tue, Feb 21, 2023 at 3:25 PM
Subject: Website Inquiry -Defense witness Mike Sutton
To: <clerkofcourt@colletoncounty.org>

## Defense witness Mike Sutton

| | |
|---|---|
| Name | Mike [redacted] |
| Email Address | [redacted] |
| Callback Number | ([redacted] |
| To | Courthouse |
| Recipient | clerkofcourt@colletoncounty.org |
| Subject | Defense witness Mike Sutton |
| Message | I am a former paratrooper qualified US Army Veteran and left the service at a rank of Captain.<br><br>I regularly shoot AR15 style rifles and have assembled them, built them, changed barrels & calibers, handguards and components. I am very familiar both with the weapon platform as well as ballistics as I reload my own ammunition for AR-15 calibers.<br><br>This witness's testimony that the shooter had to be 5'2 - 5'4" is frankly pathetic. His projections rely solely on the assumption that the shooter was standing upright when shooting. He ignores the possibility(probability) that the shooter was either on one knee or standing but in a crouched position with his knees bent significantly. It is very likely an attacker would have been crouched low to conceal their presence at least at the start of the killings.<br><br>He also ignores that the actual rifle could have anywhere from a 7" to 24" barrel and if it was outfitted with a collapsible stock all of his assumptions would have to change.<br><br>I am hopeful you are ready to rebut these assertions as I find them laughable. |
| Embedded | Yes |





COLLETON COUNTY

Please Consider The Environment Before Printing this Message…

# EXHIBIT E

(Respondent's Brief)

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA<br><br>COUNTY OF COLLETON | ) | IN THE COURT OF GENERAL SESSIONS<br>FOR THE FOURTEENTH JUDICIAL CIRCUIT |
| State of South Carolina,<br><br>v.<br><br>Richard Alexander Murdaugh,<br><br>Defendant. | ) | Case Nos: 2022-GS-15-00592<br>2022-GS-15-00593<br>2022-GS-15-00594<br>2022-GS-15-00595<br><br>**STATE'S PRE-HEARING BRIEF IN OPPOSITION TO DEFENSE MOTION FOR A NEW TRIAL** |



Many of the legal and factual issues in contention have been addressed at considerable length by the State in its Response to Defendant's Motion for a New Trial and Motions to Strike filed November 7, 2023 (hereafter "State's Response to Motion"). The following is a summary of the various issues the State contends need to be litigated for the motion for a new trial.

## I. BURDEN OF PROOF: Murdaugh Must Carry the Burden of Proving Both that an Improper Contact Occurred with the Jury and that He was Actually Prejudiced Thereby.

First is the appropriate burden and standard to apply to a motion for a new trial based on allegations of improper contact with the jury by clerk of court or court official. Case law and general respect for the burdens of public service on a jury – particularly in a case as lengthy and complicated as this one – preclude jurors from being subjected to an invasive and burdensome inquiry as if they were themselves charged and on trial.

The burden rests with the movant, in this case Murdaugh, to prove that an improper contact occurred between at least one juror who deliberated and a non-juror, and further that he was actually prejudiced by that improper contact. Murdaugh must make a *prima facie* showing that he can meet that burden before an evidentiary hearing

may be granted, and as part of that showing must establish that he was not contemporaneously aware of the issue alleged and failed to raise it. **{See State's Response to Motion at 2-4}**. See also Rule 29, SCRCrimP ("Except for motions for new trials based on after-discovered evidence, post-trial motions shall be made within ten (10) days after the imposition of the sentence").

Murdaugh argues that because he alleges improper contacts by a court official, prejudice must be presumed under *Remmer v. United States*, 347 U.S. 227 (1954), and that the burden of proof thus shifts to the State to prove lack of any prejudice. However, *Remmer*'s "presumption of prejudice" standard was abrogated by the standard set in *Smith v. Phillips*, 455 U.S. 209, 215-16 (1982) (the remedy is the opportunity to prove actual bias); and in any event has been also recently rejected by the Supreme Court of South Carolina in *State v. Green*, 432 S.C. 97, 100, 851 S.E.2d 440, 441 (2020). Accordingly, Murdaugh bears the burden to show prejudice. **{See State's Response to Motion at 2-4}.**

## II. EVIDENTIARY HEARING IS UNNECESSARY: Because Murdaugh Has Failed to Make a *Prima Facie* Showing of Prejudice, No Evidentiary Hearing is Necessary.

Indeed, the State's next argument is that no further evidentiary inquiry is necessary as Defendant failed to make a *prima facie* showing required to necessitate an evidentiary hearing. Not a single juror who actually deliberated on the case indicates that their deliberations or verdict was in any way affected by the improper contacts alleged. The jurors were polled individually and affirmed their verdicts on the record. **{See State's Response to Motion at 21-22}.**

Murdaugh offers with his motion an affidavit from only one juror who deliberated: Juror 630. In the affidavit, Juror 630 attributes statements to Clerk Hill which resemble

arguments made by the State, but she does not claim she was influenced by Clerk Hill, but rather merely felt pressure from other jurors. Due process is not implicated by pressure upon one juror by other jurors. *See, generally State v. Franklin*, 341 S.C. 555, 534 S.E.2d 716 (Ct. App. 2000) (due process not implicated where other jurors verbally abused a holdout for at least four hours). Thus, Juror 630's affidavit is affirmatively inconsistent with a *prima facie* showing necessary for an evidentiary hearing. **{*See* State's Response to Motion at 19-20}.**

Juror 785 – the so-called "egg juror" and landlord to Juror 630 – did not participate in deliberations and was removed for her own violations of the court's instructions not to discuss the case with third-parties, and lack of forthcoming candor regarding those discussions. Further, when asked by Judge Newman at trial if Clerk Hill discussed anything about the case with anybody on the jury, Juror 785 replied **"not that I'm aware of." {*See* State's Response to Motion at 10-16; 20; 23} {Trial Tr. 5553, ll. 22-25}.** The affidavits in the defense motion on their own do not support a new trial and the motion should be denied on the pleadings.

Moreover, none of the other jurors who deliberated who spoke to SLED after Murdaugh filed his motion indicated their verdict was in any way based on anything but a fair consideration of the evidence, further supporting that the motion should be rejected on the pleadings. **{*See* State's Response to Motion at 21-22}.**

Nonetheless, Murdaugh argues that a hearing is necessary, seemingly in order to impeach Clerk Hill. That a potential witnesses may be impeachable is inconsequential to whether Defendant has made a *prima facie* showing. The jurors found Murdaugh guilty, affirmed their verdict when polled, and none have alleged Clerk

Hill influenced them. **{See State's Response to Motion at 24}**. Thus, no evidentiary hearing is necessary and the motion should be denied.

## III. JUDICIALLY CONDUCTED, LIMITED QUESTIONING: Should the Court Deem an Evidentiary Hearing Necessary, the Procedure should be Judicially Guided, and the Scope of Relevant Evidence is Limited

In the event the Court deems an evidentiary hearing necessary to resolve the motion, any inquiry to jurors should be limited and judicially conducted to minimize intrusion into the lives of those who performed such public service in this case. Assuming the Court rules as argued above that Murdaugh must show prejudice, the following questions to deliberating jurors, based in what the record on appeal reflects the trial court used in *State v. Green*, 432 S.C. 97, 851 S.E.2d 440 (2020), should be sufficient, with additional inquiry to be conducted only if necessary:

1. On March 2, 2023, did you answer when polled that your verdict was guilty on each of the charges?
2. As you were instructed to do by Judge Newman, was your verdict on March 2, 2023 based solely on the testimony, evidence, law, and arguments of counsel as presented at the trial?

This is sufficient to determine whether there was any improper effect on the verdict and minimizes intrusion on the jury, while preserving the focus of the proceedings upon the allegation actually raised by Murdaugh's motion. **{See State's Response to Motion at 5-6}.**

Rule 606(b), SCRE, also makes this principle clear:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear

upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

In the event any juror's answer to the above questions raises the need for additional inquiry, then additional inquiry would be warranted with questions from the Court, questions suggested to the Court by counsel, and questioning by counsel, as well as evidence from additional relevant witnesses.

Defendant wishes to make central his focus on the credibility of Clerk Hill as a potential witness, specifically in the context of a Facebook post supposedly involving Juror 785's ex-spouse. However, Juror 785's improper contact with third parties was the catalyst of the inquiry into the juror, and the trial judge specifically stated on the record that nothing to do with the Facebook post had anything to do with excluding the juror. **{Trial Tr. 5740-43}**. Every portion of Murdaugh's motion relating to Facebook posts is a red herring, and the State has moved to strike every part of the motion related thereto. ***{See* State's Response to Motion at 18-19}**.

Murdaugh attempt to challenge his own valid conviction cannot be a vehicle to issue witness subpoenas to those with no testimony relevant to the underlying question of whether improper contacts occurred and whether prejudice flowed therefrom. The relevant questions are for the jurors, and their questioning must be judicially directed if it must occur at all.

## IV. POTENTIAL EXHIBITS SHOULD BE LIMITED

The State proposes few exhibits are relevant in any potential evidentiary hearing. The State asks the Court consider as exhibits or otherwise part of the record the transcript of the trial, which in particular includes Judge Newman's repeated instructions

to the jury to base their decision solely on the evidence, the *in camera* hearings regarding the removal of Juror 785, and the jury's verdict and affirmation upon polling.

Depending on the Court's ruling as to the nature of the inquiry to be conducted and only if the results of any limited questioning of the jurors requires it, additional examination may be necessary from jurors and other witnesses. Exhibits could also include recorded interviews, written statements, and memoranda of interview with the jurors, as well as interviews and testimony from clerk staff, and others conducted by SLED following Murdaugh's motion for a new trial.

Finally, as the State noted during the conference call, it is prepared to share the post-trial interviews with Murdaugh's attorneys, but must request a protective order as discussed during the conference call and provided concurrently with this filing. The State also concurrently files a Motion for Reciprocal Discovery to be provided similar information gathered by the defense during the preparation of and subsequent to the filing of their motion for a new trial.

## CONCLUSION

WHEREFORE, the State respectfully requests that this Court summarily deny Murdaugh's motion for a new trial or, barring that, convene an evidentiary hearing consistent with that conducted in *State v. Green* and, upon hearing the testimony of the jurors and witnesses presented, find Murdaugh's allegations to be not credible and deny his motion for a new trial.

Should the Court desire more thorough briefing on any of the issues raised herein, or in the State's Response to Motion, the State will of course oblige.

Respectfully submitted,

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1/31, 2024

# EXHIBIT F

(Appellant's Second Brief)

| STATE OF SOUTH CAROLINA<br>COUNTY OF COLLETON | COURT OF GENERAL SESSIONS<br>FOURTEENTH JUDICIAL CIRCUIT |
|---|---|
| State of South Carolina,<br><br>v.<br><br>Richard Alexander Murdaugh,<br><br>Defendant. | Indictment Nos. 2022-GS-15-00592, -593, -594, and -595<br><br>**DEFENDANT'S PRE-HEARING BRIEF RE: MOTION FOR A NEW TRIAL** |

Defendant Richard Alexander Murdaugh, through undersigned counsel, pursuant to Rule 29(b) of the South Carolina Rules of Criminal Procedure, hereby re-submits this pre-hearing brief as the Court directed on January 4, 2024.

## I. Introduction

Mr. Murdaugh was indicted for the murder of his wife Maggie and son Paul on July 14, 2022. His murder trial began January 23, 2023. The presiding judge was the Honorable Clifton Newman. The trial ran for six weeks, ending with convictions on the evening of March 2, 2023, and sentencing on March 3, 2023.

On October 27, 2023, Mr. Murdaugh filed a motion for a new trial based on after-discovered evidence, having obtained leave from the Court of Appeals to suspend his appeal of his convictions to file the motion. His motion alleges that Rebecca Hill, the elected Clerk of Court for Colleton County, had extensive private communications with members of the jury during trial. This allegation was supported by sworn affidavits of jurors and a witness to juror interviews, testimony at *in camera* proceedings, and other evidence including Ms. Hill's own book. The subject matter of Ms. Hill's alleged communications was the evidence being presented at trial. Mr. Murdaugh alleges that an elected state official deliberately violated his constitutional right to a fair trial before an impartial jury. If that allegation is proven, the law requires a new trial.

On December 21, 2023, the Court instructed the parties to submit pre-hearing briefs by January 3, 2024. On January 4, 2024, the Court instructed the parties to resubmit their briefs answering the following questions directly:

1. List all potential witnesses you plan to call during the evidentiary hearing.

    a. List any objections or challenges you plan to make to opposing party's witnesses. I understand you may not have an exact list but you can predict the opposing side's intentions as far as witnesses.

2. List all exhibits you plan to introduce during the evidentiary hearing.

    a. Again, list any objection or challenges to opposing party's exhibits.

3. Clarify your argument as to whether the Defendant is entitled to new trial or not.

a. Specifically, clarify the argument you will make during the evidentiary hearing. I've already decided an evidentiary hearing will occur. The mere fact that I have set the matter to include an evidentiary hearing does not mean I have decided any issue in the case at the present.

4. Any procedural issues which you feel may affect the evidentiary hearing:

    a. Issues regarding the subpoena of specific witnesses.

    b. Your position regarding how the court should receive testimony. Whether any witness testimony should be in conducted in camera rather than in open court.

5. Any other issues regarding the conduct for the hearing of the merits of the motion.

Mr. Murdaugh submits this revised brief organized under the issues the Court identified. After his response to point number five, Mr. Murdaugh provides, for issue preservation purposes, responses to arguments the State asserted in its filed memoranda which the Court appears to have rejected or deemed moot.

**II. List all potential witnesses you plan to call during the evidentiary hearing.**

In a criminal proceeding, the State must produce evidence proving guilt beyond a reasonable doubt. The State has powerful investigative tools to marshal evidence against the accused. At trial, it is decided whether its evidence meets that demanding standard. Thus, the defendant typically does not need discovery beyond production by the State of the evidence against him. Similarly, in a civil proceeding, a party asserting a claim has the burden of production to produce evidence supporting its claim and the burden of persuasion to show it has met the legal standard for the relief it seeks. Thus, in civil litigation the adjudicative proceeding is preceded by a period of discovery, in which compulsory process is available to the parties to marshal the evidence they will present to the factfinder.

This is a criminal case, but the instant motion places Mr. Murdaugh in the position of a plaintiff in a civil proceeding. Mr. Murdaugh needs discovery because he has an affirmative case to prove. As the movant, Mr. Murdaugh has the burden of proving his claim for relief. Although no South Carolina case states the standard of proof applicable in this situation, the general rule for new trial motions based on unauthorized communications with jurors is that the standard of proof is a preponderance of the evidence. Mr. Murdaugh must make "'two showings, by a preponderance of the evidence: [1] [extrajudicial] contact or communications between jurors and unauthorized persons occurred, and [2] the contact or communications pertained to the matter before the jury.'" *E.g.*, *State v. Berrios*, 129 A.3d 696, 713 (Conn. 2016) (quoting *Ramirez v. State*, 7 N.E.3d 933, 939 (Ind. 2014)).

Yet it is the State, and not Mr. Murdaugh, which has had the opportunity to conduct discovery for the past several months regarding Mr. Murdaugh's claim using the tools available to law enforcement. It is well prepared to bolster its witnesses and to impeach witnesses favorable to the defense. Mr. Murdaugh has been unable to conduct any discovery whatsoever. All he has

had are voluntary statements made by jurors and other witnesses willing to talk to his lawyers and information published by journalists. He received discovery from the State less than a week ago. At present it is impossible for him to state with certainty which witnesses he will call and which documents he will introduce as exhibits during the testimony of those witnesses.

With that important caveat, at present, Mr. Murdaugh plans to call the following witnesses in his case-in-chief during the evidentiary hearing:

- Juror 254
- Juror 630
- Juror 741
- Juror 785
- Rhonda McElveen, Barnwell County Clerk of Court

The State must call Ms. Hill to deny the allegations that she tampered with the jury. Depending on Ms. Hill's testimony, Mr. Murdaugh might call some of the following witnesses as rebuttal witnesses:

- Laura Hayes, former deputy Clerk of Court in Colleton County
- Jeffrey Hill, former IT Director for the Colleton County Courthouse
- The Honorable Clifton Newman, retired Circuit Court Judge
- Tim Stone, ex-husband of Juror 785
- Timothy Stone, original poster of the FB message presented to Judge Newman during trial and included in the Court's Exhibit 4
- Lori Weiss, employee of the Clerk of Court in Colleton County

**A. List any objections or challenges you plan to make to opposing party's witnesses. I understand you may not have an exact list but you can predict the opposing side's intentions as far as witnesses.**

Mr. Murdaugh believes the State will call jurors, bailiffs, and court staff who were never or almost never in the jury room in which Ms. Hill made her jury-tampering statements, to present a cascade of witnesses saying they never heard Ms. Hill make inappropriate statements in the jury room, to imply by false logic that she therefore did not make such statements.

When the jurors retired from the courtroom during trial, they spread across two different rooms. Jurors 254, 572, 578, 589, 630, 741, and 785 were in the actual courthouse jury room. Jurors 193, 326, 530, 544, 729, 826, and 864 were in Judge Perry Buckner's office. Ms. Hill made her jury-tampering statements to jurors in the jury room. Mr. Murdaugh has no objection to the State calling other jurors who were in that room to testify that they never heard Ms. Hill make inappropriate statements. But Mr. Murdaugh objects to calling jurors who were in a different room to testify that they never heard Ms. Hill make inappropriate statements. There are millions of people in South Carolina who did not hear Ms. Hill say what certain jurors heard her say, because they were not in the room with them. Their testimony is not probative of whether Ms. Hill in fact said what several jurors have said she said when they were together in the same room at the same time and is therefore inadmissible. *See* Rule 401, SCRE (providing that evidence is relevant if it is probative of a material fact) & Rule 402, SCRE ("Evidence which is not relevant is not admissible."). Calling jurors who were in a separate office, or bailiffs or court staff who were stationed in different parts of the courthouse, is hardly more probative than calling jurors or court staff from other courthouses in South Carolina. Therefore, if the Court is inclined to allow the State to call jurors 193, 326, 530, 544, 729, 826, or 864, before allowing the State to ask any questions about what Ms. Hill may have said in the jury room it should require the State to lay a foundation that the juror was actually or at least usually in the jury room. *See* Rule 602, SCRE

("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.").

Further, Mr. Murdaugh will object to any questions posed to jurors that seek to invade the province of their deliberations in violation of Rule 606(b) of the South Carolina Rules of Evidence. Specifically, he would object to questions such as, "Would your decision have been the same if you had not been exposed to improper communications from the Clerk of Court, or any third party?"

Mr. Murdaugh also plans to call Rhonda McElveen, the Barnwell County Clerk of Court who assisted at the trial. The State presumably would object to her for the same reason Mr. Murdaugh objects to calling persons who were not in the jury room to say they never heard something allegedly said in the jury room—she was not in the jury room. Mr. Murdaugh however believes, based on her SLED interview, that she will corroborate expected juror testimony about Ms. Hill's statements because she will testify that Ms. Hill made substantively identical statements to her during trial, and because she received several complaints from court staff about Ms. Hill having inappropriate and excessive contacts with jurors. She therefore may have personal knowledge of facts probative of whether Ms. Hill made the statements jurors say she made. If the State objects to her testimony, Mr. Murdaugh would ask the Court to review her videorecorded interview with SLED and decide for itself whether her testimony would assist the Court as factfinder. If the Court does so, however, it is important to review the video recording of her entire interview and not the SLED memorandum summarizing it. As explained in the discussion of the mode of witness examination, *infra*, the State's memoranda summarizing witness interviews are sometimes grossly inaccurate, and when they are it is always in a manner that favors the State.

## III. List all exhibits you plan to introduce during the evidentiary hearing.

The caveat about not having discovery applies even more forcefully regarding exhibits since exhibits are, typically, obtained through discovery. With that important caveat, at present, Mr. Murdaugh plans to introduce the following exhibits in his case-in-chief during the evidentiary hearing:

- Affidavits of jurors 630 and 785.
- Recorded interviews with SLED of jurors 254 and 741, and Rhonda McElveen

It is impossible to specifically list all exhibits to be used in the cross-examination of Ms. Hill without knowing her testimony, but the categories of exhibits will be her emails, text messages, telephone records, her book, recordings of her public statements and media interviews, her affidavit in this matter, SLED's memorandum for her interview (her counsel would not permit SLED to record the interview), and Court's exhibit number 4 from trial regarding the Facebook post issue.

### A. Again, list any objection or challenges to opposing party's exhibits.

Reserving all objections to calling particular witnesses or asking particular questions, Mr. Murdaugh does not object to the use of witnesses' affidavits, written statements, or interview recordings as exhibits when examining the witness who gave the affidavit, statement, or interview. Mr. Murdaugh does not know what other documents the State may seek to introduce as exhibits.

The State may object that exhibits used to impeach Ms. Hill are inadmissible under Rule 608(b) of the South Carolina Rules of Evidence, which allows inquiry on cross-examination into specific instances of conduct probative of truthfulness or untruthfulness but prohibits proof of such instances by extrinsic evidence. But that rule does not apply to the witness's prior statements, which if denied may be proven by extrinsic evidence. Rule 613(b), SCRE; *see State v. Fossick*, 333 S.C. 66, 69–70, 508 S.E.2d 32, 33 (1998) ("The trial judge ruled the evidence inadmissible

for impeachment under Rule 608(b). . . . Since [the witness] denied the statement, the proffered extrinsic evidence was admissible under Rule 613(b). We conclude the trial judge erred . . . .”). Ms. Hill’s emails, text messages, book, media interviews, etc., are her own statements and so if she denies them are provable by extrinsic evidence. SLED’s interview memorandum similarly is a record of her prior statement, evidence of which is not hearsay because the State is a party-opponent, Ms. Hill is an elected state official, and her statement to SLED concerns a matter within the scope of her employment as a state official and was made during the existence of that employment. *See* Rule 801(d)(2)(D), SCRE.

## IV. Clarify your argument as to whether the Defendant is entitled to new trial or not.

### A. Mr. Murdaugh does not need to show actual bias on the part of any juror to obtain a new trial.

If Mr. Murdaugh proves his allegation that Ms. Hill communicated with the jury about the evidence presented during his murder trial, the standard for deciding whether to grant a new trial is ***not*** whether the Court believes the outcome of the trial would have been the same had Ms. Hill’s jury tampering not occurred. “A defendant in a criminal prosecution is constitutionally guaranteed a fair trial by an impartial jury, and in order to fully safeguard this protection, it is required that the jury render its verdict free from outside influence.” *State v. Johnson*, 302 S.C. 243, 250, 395 S.E.2d 167, 170 (1990) (internal quotation marks omitted). Where “‘[t]here was the private communication of the court official to members of the jury, an occurrence which cannot be tolerated if the sanctity of the jury system is to be maintained . . . a new trial ***must*** be granted unless it clearly appears that the ***subject matter*** of the communication was harmless and could not have affected the verdict.’” *State v. Cameron*, 311 S.C. 204, 207–08, 428 S.E.2d 10, 12 (Ct. App. 1993) (quoting *Holmes v. United States*, 284 F.2d 716, 718 (4th Cir. 1960)) (emphasis added). The law requires the “subject matter” of the communication to be harmless— “clearly” harmless. *Id.*

Otherwise, a new trial must be granted. Asking the jury what it wants for lunch is clearly harmless. Telling it not to believe the defendant when he testifies is not.

The issue before the Court is a structural issue in Mr. Murdaugh's trial, not a failure to impanel unbiased jurors. Where a new trial is sought based on biases or partiality jurors brought with them into the trial, required standard is to show actual bias, whether those biases were facts jurors concealed during voir dire (*e.g.*, *State v. Woods*, 345 S.C. 583, 550 S.E.2d 282 (2001)), were biases created by state action during voir dire (*e.g.*, *State v. Bryant*, 354 S.C. 390, 581 S.E.2d 157 (2003)), were biases resulting from jurors reading newspapers or other unauthorized materials during trial (*e.g.*, *State v. Stone*, 290 S.C. 380, 350 S.E.2d 517 (1986)) or initiating inappropriate communications during trial (*e.g.*, *Smith v. Phillips*, 45 U.S. 209 (1982)), or the like.

**The present case is different because a state official instructed jurors how to view the defense case outside the presence of the court, the Defendant, and his counsel**, and in other ways deliberately and surreptitiously used her official authority to direct the verdict to her preferred outcome. This is, fortunately, a vanishingly rate event, but it is one that requires a new trial.

The *Cameron* court's distinction between the communication being harmless and the subject matter of the communication being harmless and its requirement that a new trial be granted unless the latter is established recognizes that deliberate jury tampering by a court official cannot be cured or excused by the strength of the evidence presented at trial or jurors offering their own subjective opinions regarding their own biases. Even if every juror were to testify that he or she would have reached the same verdict regardless of Ms. Hill's tampering, a new trial is required if it is proven that Ms. Hill communicated with jurors about the merits of the evidence presented. Sustaining a conviction based on the Court's opinion the strength of the evidence against the accused regardless of improper external influences on the jury from court officials about the merits

of the case would effectively be a directed verdict for the prosecution—a statement that whatever happened at trial simply does not matter because the evidence can admit only one result regardless. That would constitute structural error. *Cf. Neder v. United States*, 527 U.S. 1, 34 (1999) (Scalia, J., concurring in part) (noting that even if "the judge certainly reached the 'right' result," "a directed verdict against the defendant . . . would be *per se* reversible *no matter how overwhelming the unfavorable evidence*," because "[t]he very premise of structural-error review is that even convictions reflecting the 'right' result are reversed for the sake of protecting a basic right" (emphasis in original)).

For example, in *Parker v. Gladden*, a bailiff told a juror in a murder trial "that wicked fellow, he is guilty." 385 U.S. 363, 363 (1966) (per curiam). The Supreme Court of Oregon held the statement did not require a new trial because it was not shown the statement prejudiced the outcome of the trial. The U.S. Supreme Court reversed, holding "[t]he evidence developed against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel," and "[w]e have followed the undeviating rule, that the rights of confrontation and cross-examination are among the fundamental requirements of a constitutionally fair trial." *Id.* at 364–65 (internal quotation marks and citations omitted).

In *Parker*, the state also argued that the bailiff's statement was harmless because ten members of the jury never heard his statement and Oregon law at that time allowed a guilty verdict by ten affirmative votes of the twelve jurors. The Supreme Court rejected that reasoning, and, after questioning whether the factual record supported that argument, stated that in "any event, petitioner was entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors." *Id.* at 366. That reasoning accords with the reasoning in *Cameron* 27 years later—the right being

protected is not the right to a "correct" verdict but the constitutional right to trial before a fair and impartial jury free from state officials' improper influences. What matters is what was in fact said to the jurors by the state official, not a counterfactual analysis of what probably would have happened had that not in fact been said.

Our Supreme Court more recently touched on this point in *State v. Green*, 432 S.C. 97, 851 S.E.2d 440 (2020). In *Green*, during jury deliberations a juror asked a bailiff "what would happen in the event of a deadlock, and he responded the judge would likely give them an *Allen* charge and ask if they could stay later." *State v. Green*, 427 S.C. 223, 229, 830 S.E.2d 711, 713 (Ct. App. 2019), *aff'd as modified*, 432 S.C. 97, 851 S.E.2d 440 (2020) (citation omitted). The Court of Appeals held the bailiff's comments were presumptively prejudicial because of his official position, but that the State rebutted that presumption by showing for various reasons that the remark did not in fact influence the outcome of the jury's deliberations. *Id.* at 236, 830 S.E.2d at 717. The Supreme Court affirmed but modified the decision to correct the Court of Appeals' reasoning. The communication was not prejudicial not because it did not in fact change the verdict, instead, it was not prejudicial because the subject matter of the communication was harmless: "The bailiff's actions here—though improper—did not touch the merits, but dealt only with the procedural question of how the judge might handle a jury impasse that apparently never materialized." *Green*, 432 S.C. at 100, 851 S.E.2d at 441. In other words, a bailiff presuming to tell the jury that if it is deadlocked, the judge will instruct them to keep deliberating is improper but likely harmless because the subject matter is procedural or logistical, rather than to the merits of the case.

Of course, the allegations in the instant motion—that a state official told the jury not to believe the defendant's defense or his testimony when he testified in his own defense—

indisputably regard the merits of the case. The extensive, deliberate, and self-interested jury tampering in which Ms. Hill allegedly engaged far exceeds the simple bailiff mistakes that forced a retrial in *Cameron*, where "a bailiff's misleading response to a juror's question about sentencing options compromised the jury's impartiality because it left the impression that their verdict could not affect the trial court's sentencing discretion," or in *Blake by Adams v. Spartanburg General Hospital*, where a bailiff told a juror "that the trial judge 'did not like a hung jury, and that a hung jury places an extra burden on taxpayers.'" *See State v. Green*, 427 S.C. at 237, 830 S.E.2d at 717–18 (citing 311 S.C. at 208, 428 S.E.2d at 12 and quoting 307 S.C. 14, 16, 413 S.E.2d 816, 817 (1992)).

**B. The State misstates the controlling legal standard and provides no authority supporting its mistaken position.**

In response to Mr. Murdaugh's motion for a new trial, the State incorrectly asserts that Murdaugh "must show both that the alleged improper communications occurred and that jurors were actually biased as a result." Resp. Opp'n Mot. New Trial 3 n. 2. The State can cite no authority supporting that proposition. The State's response includes citations to several cases purportedly supporting its position, but not one cited case actually supports it.

*State v. Kelly*, 331 S.C. 132, 502 S.E.2d 99 (1998): The State provides no parenthetical explanation of how *Kelly* supports its position because the case has nothing to do with the present motion. In *Kelly*, a juror was accused of misconduct, not a court official. During the guilt phase of a capital trial, a juror provided a pamphlet purportedly expressing God's views on capital punishment to other jurors in the jury room. The trial judge dismissed the offending juror but determined that a mistrial was not warranted because it was not relevant to the issues in the guilt phase of the trial and because "no other juror had been exposed to the contents of this pamphlet." *Id.* at 141, 502 S.E.2d at 104. The Supreme Court affirmed. Chief Justice Finney and Justice Toal

dissented, arguing "the inappropriate possession and use of the extraneous pamphlet by jury members so tainted the jury that its contents affected the ability of the jury to be fair and impartial at both the guilt and penalty phases of appellant's bifurcated trial." *Id.* at 150, 502 S.E.2d at 109. Regardless, as in the *Holmes* case that provides the controlling legal standard quoted in *Cameron*,

> ***Here there is more than jury misconduct in reading forbidden matter***. There was the private communication of the court official to members of the jury, an occurrence which cannot be tolerated if the sanctity of the jury system is to be maintained. When there has been such a communication, a new trial must be granted unless it clearly appears that the subject matter of the communication was harmless and could not have affected the verdict.

*Holmes*, 284 F.2d at 718 (emphasis added).

*Smith v. Phillips*, 45 U.S. 209 (1982): This case says nothing about the standard for granting a new trial when a state official tampers with the jury. In *Smith*, the prosecution failed to disclose that a juror had, during trial, applied for employment as an investigator in the prosecutor's office. The U.S. Supreme Court held "[t]his Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias," and agreed with the state courts and federal district court that no actual bias was proven at the hearing. *Id.* 455 U.S. at 214–15. It reversed the U.S. Court of Appeals for the Second Circuit on the issue of whether the prosecution's failure to disclose the letter was misconduct necessitating a new trial. But the issue in the instant motion is not whether a particular juror had an undisclosed bias or whether the prosecution concealed any pertinent information.

*State v. Green*, 432 S.C. 97, 851 S.E.2d 440 (2020): As explained above, in *Green* the Court held that an improper procedural comment by a bailiff to a jury was harmless because it did not bear on the merits. There is no suggestion in *Green* that a comment by a state official that did bear on the merits of the case could also be harmless. Any such assertion would be precluded by the U.S. Supreme Court's holding *Parker v. Gladden*, discussed above but notably not mentioned at

in the State's response despite also being discussed in Mr. Murdaugh's initial motion. The *Green* court did reasonably decline to extend the presumption in *Remmer v. United States* that "'any private communication, contact, or tampering . . . with a juror during a trial about the matter pending before the jury is . . . deemed presumptively prejudicial'" to situations where the communications at issue "did not touch the merits" of the case on trial. *Id.* at 99–100, 851 S.E.2d at 441 (quoting 347 U.S. 227 (1954)). Instead, it reversed the Court of Appeals application of *Remmer* prejudice and instead followed the reasoning of *Cameron*: the inquiry should focus on the subject matter of the improper communication rather than presuming all improper communications are prejudicial and then requiring the State to rebut the presumption even where the communications did not bear on the merits of the case. *Id.* at 99–101, 851 S.E.2d at 441. This has no relevance here because Ms. Hill's alleged statements to jurors indisputably bore on the merits.

*State v. Cameron*, 311 S.C. 204, 428 S.E.2d 10 (Ct. App. 1993): The State cites *Cameron* for the unremarkable proposition "[n]ot every inappropriate comment by a member of court staff to a juror rises to the level of constitutional error," Resp. Opp'n Mot. New Trial 3, but in a footnote claims Mr. Murdaugh's citations to *Cameron* for the controlling legal standard cite to a "portion of the opinion which does not state the legal standard, but rather quotes a portion of a 4th Circuit Court of Appeals opinion inconsistent with the standard acknowledged by *Cameron* and more subsequently clarified in *Smith* and most recently in *Green*," *id.* at 3 n.2. That assertion only makes sense if the State did not expect the Court to read the *Cameron* opinion. The entire portion of the *Cameron* opinion that follows its factual recitation is quoted below:

> The trial judge ruled that the jury properly decided that the length of sentence he might impose was not their concern. He further ruled that the short colloquy between the bailiff and the forelady could not have in any way influenced the jury to refuse to recommend mercy.

> A defendant in a criminal prosecution is constitutionally guaranteed a fair trial by an impartial jury, and in order to fully safeguard this protection, it is required that the jury render its verdict free from outside influences of whatever kind and nature. *State v. Johnson*, 302 S.C. 243, 250, 395 S.E.2d 167, 170 (1990); *State v. Wasson*, 299 S.C. 508, 511, 386 S.E.2d 255, 256 (1989); *State v. Salters*, 273 S.C. 501, 504, 257 S.E.2d 502, 504 (1979). The mere fact, however, that some conversation occurred between a juror and a court official would not necessarily prejudice a defendant. *State v. Goodwin*, 250 S.C. 403, 405, 158 S.E.2d 195, 197 (1967).
>
> In this case, "[t]here was the private communication of the court official to members of the jury, an occurrence which cannot be tolerated if the sanctity of the jury system is to be maintained. When there has been such a communication, a new trial must be granted unless it clearly appears that the subject matter of the communication was harmless and could not have affected the verdict." *Holmes v. United States*, 284 F.2d 716, 718 (4th Cir. 1960); *see Blake v. Spartanburg General Hospital*, 307 S.C. 14, 413 S.E.2d 816 (1992).
>
> While the trial court adequately instructed the jury on the verdicts of guilty with and without mercy, the jury was obviously confused as to the length of the respective sentences. In this case, the right to fix punishment or make a recommendation that would place punishment in the discretion of the court rested exclusively with the jury. *State v. Brooks*, 271 S.C. 355, 359, 247 S.E.2d 436, 438 (1978); *State v. McGee*, 268 S.C. 618, 620, 235 S.E.2d 715, 716 (1977). The bailiff's response to the forelady, that they should not worry if they were deadlocked because the judge was fair, was misleading. It tended to lessen the jury's sense of responsibility by implying that if they rendered a verdict of guilty without mercy, the judge had some discretion in sentencing. "Jurors are simply not to consider the opinions of neighbors, officials or even other juries." *State v. Thomas*, 287 S.C. 411, 413, 339 S.E.2d 129, 129 (1986) (quoting *State v. Smart*, 278 S.C. 515, 526, 299 S.E.2d 686, 693 (1982), *cert. denied*, 460 U.S. 1088, 103 S. Ct. 1784, 76 L. Ed.2d 353 (1983)).
>
> The appellant's conviction is reversed and the case is remanded for a new trial.
>
> REVERSED AND REMANDED.

311 S.C. at 205–08, 428 S.E.2d at 11–12. There is no standard "acknowledged" or otherwise stated in the above opinion other than "a new trial must be granted unless it clearly appears that the subject matter of the communication was harmless and could not have affected the verdict." Mr. Murdaugh has no idea what "*Smith*" case the State believes "more subsequently clarified" the legal standard. The only "*Smith*" case cited in the State's response is *Smith v. Phillips*, the irrelevant 1982 U.S. Supreme Court case discussed above that predated *Cameron* by eleven years. And as

discussed above, *Green* reversed a Court of Appeals decision to correct its reasoning to bring it in line with *Cameron*.

**C. South Carolina case law provides the controlling legal standard.**

As discussed above, the burden-shifting described in *Remmer* is not relevant to this case because the alleged communications were by a court official, to at least one deliberating juror, and inarguably pertained to the merits of the case being tried. This is because South Carolina case law—*Cameron*—provides the legal standard, not *Remmer*. If Mr. Murdaugh proves that the Clerk of Court engaged in surreptitious advocacy on the merits during trial, there is nothing for the State to rebut. A new trial is required. *See Cameron*, 311 S.C. at 207–08, 428 S.E.2d at 12.

U.S. Supreme Court decisions—in particular, *Parker v. Gladden*—control the decision here only insofar as they establish a "floor" below which the protections of South Carolina constitutional and decisional law cannot fall. As the Supreme Court of Utah recently stated in a case alleging improper jury contact by a bailiff: "Still, the Sixth Amendment right to an impartial jury was incorporated against the states through the Fourteenth Amendment in *Parker v. Gladden*, 385 U.S. 363, 364, (1966) (per curiam). As such, the Sixth Amendment forms the 'floor' below which the Utah Constitution's protections cannot fall." *Utah v. Soto*, 2022 UT 26, ¶ 21, 513 P.3d 684, 690 (parallel citations omitted).

Moreover, were *Remmer* controlling in this case, it would create a strong presumption of prejudice that the State must rebut. "In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties." *Remmer*, 347 U.S. at 229. This rule has not been abrogated by *Smith v. Phillips* or rejected by our Supreme Court in *Green*, as the State claims in its original prehearing

brief. "The scope and currency of the *Remmer* presumption has split the federal circuits, but it 'remains [a]live and well in the Fourth Circuit,' *United States v. Lawson*, 677 F.3d 629, 642 (4th Cir. 2012), and therefore controls our approach to the Sixth Amendment issue Green raises." *Green*, 427 S.C. at 235, 830 S.E.2d at 711 (Court of Appeals decision affirmed as modified in 432 S.C. 97, 851 S.E.2d 440). The Fourth Circuit explains that "[w]ith respect to the presumption of prejudice, we have recently observed, there is a split among the circuits regarding whether the *Remmer* presumption has survived intact following the Supreme Court's decisions in *Smith v. Phillips*, 455 U.S. 209 (1982), and *United States v. Olano*, 507 U.S. 725 (1993)." *Barnes v. Joyner*, 751 F.3d 229, 242 (4th Cir. 2014) (internal quotation marks and parallel citations omitted). "[W]e have held that the *Remmer* presumption is clearly established federal law . . . even after the Supreme Court's decisions in *Phillips* and *Olano*. *Id.* at 243.

In the referenced circuit split, the Second, Fourth, Seventh, Ninth, Tenth, and Eleventh Circuits continue to apply the *Remmer* presumption in cases involving external influences on jurors, while the Fifth, Sixth, Eighth, and District of Columbia Circuits have departed from the presumption. *United States v. Lawson*, 677 F.3d 629, 643 (4th Cir. 2012). However, a majority of circuits "hold that the *Remmer* presumption is still good law ***with respect to egregious external interference*** with the jury's deliberative process via private communication, contact, or tampering with jurors about the matter." *Connecticut v. Berrios*, 129 A.3d 696, 709 (Conn. 2016). In such cases, the First and Eighth Circuits join the majority position in applying the *Remmer* presumption. *Id.* at 710 (collecting cases). State courts generally do the same. *Id.* at 710–11 (collecting cases from Arizona, Illinois, Indiana, Maryland, Nevada, Oregon, and the District of Columbia).

South Carolina likewise "accord[s] with the approaches of the Second and Fourth Circuits with respect to serious, or not 'innocuous' claims of external influence, such as jury tampering."

*Id.* at 710. As explained above, that is exactly what our Supreme Court held in *Green*. "Our unwillingness to categorically apply the *Remmer* presumption of prejudice stems from our view that not every inappropriate comment by a bailiff to a juror rises to the level of constitutional error." *Green*, 432 S.C. at 100, 851 S.E.2d at 441. "The attempted bribery of a juror in *Remmer*—conduct which goes to the heart of the merits of the case on trial—is a far cry from the circumstances presented in this case," in which a bailiff's improper comment "dealt only with the procedural question of how the judge might handle a jury impasse that apparently never materialized." *Id.* And, again, *Parker* provides a floor regarding what the State can rebut under *Remmer*—while the State could in other circumstances perhaps show, for example, that a communication was harmless because it was only heard by a non-deliberating juror, where a state official's exhortations on the evidence presented at trial it was communicated to at least one deliberating juror the Court cannot overlook the offense by speculating that the outcome would have been the same regardless. See Parker, 385 U.S. at 363.

**D. In addition to juror bias issues, a state official's surreptitious advocacy to the jury outside the courtroom creates a structural error in the conduct of the trial.**

It has long been held to be a structural error for a state actor to engage in *ex parte* advocacy to the jury during trial. "The requirement that a jury's verdict must be based upon the evidence developed at the trial goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." *Turner v. Louisiana*, 379 U.S. 466, 472 (1965) (internal quotation marks omitted). "The evidence developed against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel . . . ." *Parker*, 385 U.S. at 364. In *Simmons v. South Carolina*, the U.S. Supreme Court similarly holds it is unconstitutional for the defendant to receive the death

penalty "on the basis of information which he had no opportunity to deny or explain." 512 U.S. 154, 161 (1994) (internal quotation marks omitted).

> The principle is ancient and foundational to our jury system:
>
> > In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as 'indifferent as he stands unsworne.' His verdict must be based upon the evidence developed at the trial. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall in 1 Burr's Trial 416(1807).

*Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (citations omitted). Indeed, what is now called the "*Remmer*" presumption is far older than the 1954 *Remmer* decision. "Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear." *Mattox v. United States*, 146 U.S. 140, 150 (1892).[1] Likewise,

> It is well settled, that it is not necessary to show that the minds of the jury, or of any member of it, were influenced. It is sufficient to show that intermeddling did take place, to set aside the verdict. Too much strictness cannot be exercised in guarding trials by jury from improper influence. It has been said that, "this strictness is necessary to give confidence to parties in the results of their causes; and every one ought to know that, for any, even the least, intermeddling with jurors, a verdict will always be set aside."- *Knight v. Freeport*, 13 Mass. 220.
>
> This is the language of the Supreme Court of Massachusetts in a civil cause. How much more important is it, to guard the purity of jury trials, against improper influence, when the matter at stake is the life or liberty of a prisoner.
>
> The authorities upon this point all agree; and, as they are very numerous . . . .

[1] *Maddox* has a "red flag" in Westlaw because it was superseded in 1975 by Rule 606(b) of the Federal Rules of Evidence on a separate issue regarding the admissibility of juror testimony to impeach the verdict. But it is still currently cited by federal appellate courts for the principle that when state officials communicate *ex parte* with the jury about the merits of the case during trial, a new is required. *E.g.*, *Tarango v. McDaniel*, 837 F.3d 936, 947 (9th Cir. 2016) ("*Mattox* and its progeny further establish that undue contact with a juror by a government officer almost categorically risks influencing the verdict.").

*Pope v. Mississippi*, 36 Miss. 121, 124 (Miss. Err. & App. 1858). For an even older example,

> An officer is sworn to keep the jury, without permitting them to separate, or any one to converse with them; for no man knows what may happen; although the law requires that honest men should be returned upon juries, and, without a known objection, they are presumed to be *probi et legales homines*, yet they are weak men, and perhaps may be wrought upon by undue applications. The evil to be guarded against, is improper influence; and when an exposure to such an influence is shown, and it is not shown that if failed of effect, then the presumption is against the purity of the verdict.

*Lord Delamere's Case*, 4 Harg. St. T. 232 (Eng. 1685) (In *Lord Delamere's Case* Henry, Baron Delamere was tried for high treason before the Court of the Lord High Steward on January 14, 1685. A text of the decision is available at text of the decision available at https://quod.lib.umich.edu/e/eebo/A63176.0001.001/1:3?rgn=div1;view=fulltext.).

Contrary to the State's position, our State Supreme Court has not abrogated or abandoned this foundational principle that when the State's officials engage in *ex parte* communications with the jury during trial about the merits of the case, a new trial is required. Nor has the U.S. Supreme Court opened a door that could allow states to abandon that principle. All that has happened is a sensible restriction of the principle to exclude improper communications that do not bear on the merits of the issue before the jurors. *See Green*, 432 S.C. at 100, 851 S.E.2d at 441.

**E. Mr. Murdaugh will argue that a preponderance of the evidence shows Ms. Hill made statements to at least one deliberating juror about the merits of the evidence presented at trial.**

If they testify consistently with their affidavits and witness interviews, Juror 630 will testify Ms. Hill said they should not be fooled by the defense and that they should watch Mr. Murdaugh's body language with suspicion when he testified in his own defense, Juror 785 will testify that Ms. Hill told them not to be fooled by the defense, Juror 741 will testify that Ms. Hill told them not to let the defense confuse or convince them, and Juror 254 will testify that Ms. Hill told them to watch Mr. Murdaugh's body language when he testified in his own defense. Ms. McElveen will

testify that some of those statements are substantively identical to statements Ms. Hill made directly to her during trial, and that staff were complaining to her about Ms. Hill's excessive contact with the jury. Any other jurors called to testify will only be able to state that they never heard those comments by Ms. Hill. The only witness to directly contradict the testimony of these jurors will be Ms. Hill, but even she admits she met with the jury foreperson "a few times" to discuss "jurors who were having a hard time with anxiety during the trial" and the foreperson's "ability to keep the peace within the jury room due to many large personalities."

Ms. Hill's denials should not be credited because her many acts of fraud and dishonesty, which will be explored and detailed during cross-examination, demonstrate that she has a character for untruthfulness. *Cf.* Rule 606(b), SCRE. With Ms. Hill's denials uncredited, the juror testimony will be uncontroverted. Moreover, Jurors 254, 630, 741, and 785 have not appeared on television or otherwise given interviews or sought any publicity for themselves. They have not sought any payment for their story. They did not seek to be placed on this jury, they have maintained their anonymity ever since, and they have nothing to gain from false testimony. Their testimony therefore should be credited over the testimony of a Clerk of Court who has been repeatedly caught seeking wrongful money and publicity from this case, even going so far as to writing a book about the case that was removed from publication for her plagiarism.

**V. <u>Any procedural issues which you feel may affect the evidentiary hearing:</u>**

**A. Issues regarding the subpoena of specific witnesses**

Mr. Murdaugh requests that the Court issue a subpoena for each of the jurors and witnesses identified in response to question number 1. He also requests that the Cout issue a forthwith order compelling the immediate production of documents subpoenaed by any party, so that the documents may be reviewed in advance of the hearing. Further, he requests that each party be

compelled to produce all documents received in response to a subpoena to the other party immediately upon receipt.

**B. Your position regarding how the court should receive testimony. Whether any witness testimony should be conducted in camera rather than in open court.**

Mr. Murdaugh believes good cause exists for the Court to conduct the examination of jurors *in camera*, with a redacted transcript provided to the public. In addition to shielding jurors from appearing on television involuntarily, *in camera* examination is necessary because it will be difficult for a juror to testify without revealing personally identifying information like his or her name or the names of other jurors. By testifying *in camera*, jurors may speak freely with any personal information in their testimony redacted from the publicly available transcript.

Mr. Murdaugh previously took the position that jurors should be examined by the Court rather than by counsel, with the Court accepting suggested questions from the parties, in advance of the examination and during the examination, which the Court in its discretion may or may not ask. Mr. Murdaugh's reasoning was that jurors may be unsettled by being interrogated by the same lawyers they watched interrogate witnesses for six weeks.

However, after receiving the SLED's video recordings and summary memoranda of juror interviews, Mr. Murdaugh's counsel are concerned that the Court may not have sufficient information to examine the jurors effectively. The interview memoranda are sometimes grossly inaccurate. For example, Ms. McElveen told investigators that court staff asked her to speak to Ms. Hill about her excessive contacts with jurors, including at Walmart, and that Ms. Hill was working on a book deal during trial and gave an author a seat with court staff in the well of the courtroom from where she could see sealed exhibits, overruling objections by stating "well they'll

just have to do what I want, today."[2] For some reason, none of that made it into the interview memorandum. Thus, to examine jurors effectively, the Court would at least need to watch the entire SLED interview for each testifying juror, and to the extent the jurors speak about other jurors or staff, the interviews for those other jurors or staff as well. With only 19 days before the evidentiary hearing, counsel is best equipped to review this information in preparation for questioning, rather than the Court.

The State originally argued jurors should be examined by the Court, and has argued the Court should question them "with a mind to at least (1) whether the communication actually occurred and, if so, its context and substance; (2) the number of jurors exposed to the improper communication; (3) the weight of the evidence properly before the jury; and (4) the likelihood that curative measures were effective in reducing the prejudice." Resp. Opp'n Mot. New Trial 6. Only the first topic is appropriate. The only relevant subject for juror examinations is whether Ms. Hill made improper communications on the merits of the case, including anything serving to corroborate or refute testimony on that subject. The number of jurors exposed to the communications is irrelevant so long as it is at least one deliberating juror. *See Parker*, 385 U.S. at 366. The "weight of the evidence properly before the jury" and "the likelihood that curative measures were effective in reducing the prejudice" are entirely irrelevant under the controlling legal standard, *see Cameron*, 311 S.C. at 207–08, 428 S.E.2d at 12, and appear to solicit testimony inadmissible under Rule 606(b) of the South Carolina Rules of Evidence.

In its original prehearing brief, the State moved away from its position in its response to the motion for a new trial, to argue that the Court should only ask jurors (1) if they voted guilty,

[2] Ms. McElveen was not a juror, of course, but is used as an example in this brief to preserve juror privacy. The point is the same for any SLED interview.

and (2) whether their verdict was "based solely on the testimony, evidence, law, and arguments of counsel presented at trial." Prehearing Br. 4. The State's position appears to be a repackaging of its argument that there should not be an evidentiary hearing at all, which the Court has rejected. Obviously, an evidentiary hearing has no point if no one is going to ask any juror whether Ms. Hill made the statements Mr. Murdaugh alleges she made. The State appears to agree that if jurors indeed will be asked substantive questions, it may be necessary for them to be examined by counsel. *Id.* at 5 (noting that "additional inquiry" would be "with questions from the Court, questions suggested to the Court by counsel, and questioning by counsel").

If testimony is needed from Judge Newman, Mr. Murdaugh believes it should also be conducted by the Court *in camera*, to preserve the dignity of his judicial office.

The default method of examining witnesses at an adversarial proceeding is through questioning by counsel for the parties. *See* Rule 614(b), SCRE ("***When required by the interests of justice only***, the court may interrogate witnesses." (emphasis added)). All witnesses should be so examined unless there is good cause to reserve examination to the Court. *Id.* Mr. Murdaugh does not believe good cause exists to reserve the examination of any witness to the Court, other than Judge Newman and possibly the jurors. Ms. Hill especially is an elected public official accused of malfeasance in office, whom Mr. Murdaugh has accused of violating his constitutional rights in a criminal proceeding, and who has voluntarily provided an affidavit directly contradicting Mr. Murdaugh's claims. She does not need to be shielded from scrutiny in the same manner as anonymous jurors involuntarily summoned to serve. She is a witness against Mr.

Murdaugh in a criminal case whom Mr. Murdaugh has a right to challenge in open court. *See* Rules 611(b) & 614(b), SCRE.[3]

## VI. Any other issues regarding the conduct for the hearing of the merits of the motion.

### A. Mr. Murdaugh needs wide latitude in impeaching Ms. Hill.

Ms. Hill has provided an affidavit that contradicts the sworn and unsworn statements of many jurors. As a result, Ms. Hill's credibility will be a central issue in this evidentiary hearing. For this reason, counsel requests wide latitude in examining Ms. Hill, if she is called as a witness by the State.

Mr. Murdaugh anticipates the only person who can directly contradict jurors who witnessed Ms. Hill's jury tampering is Ms. Hill.

Mr. Murdaugh therefore must present evidence corroborating Juror 630's testimony, including testimony from the alternate juror and Juror 785, who was dismissed on the last day of trial, and possibly testimony from court staff. He must also present evidence impeaching Ms. Hill.

Evidence impeaching Ms. Hill includes her emails, text messages, and telephone records, testimony from court staff, testimony and documentary evidence from persons involved in the production of her book, complaints against Ms. Hill and the results of investigations into Ms. Hill's wrongdoing. It includes evidence related to her involvement in the removal of Juror 785—not

[3] Additionally, although the Sixth Amendment Confrontation Clause does not apply to a motion for a new trial, *see, e.g.*, *United States v. Boyd*, 131 F.3d 951, 954 (11th Cir. 1997), Article I, § 14 of the South Carolina Constitution provides that "any person charged with an offense shall enjoy the right . . . to be fully heard in his defense by himself or by his counsel." This right would be violated if the Court were to credit Ms. Hill's testimony against Mr. Murdaugh without allowing his counsel the opportunity to challenge her testimony through cross-examination. *Cf. State v. Hester*, 137 S.C. 145, 134 S.E. 885, 899 (1926) (observing the "right to cross-examine is one which must remain inviolate," "[t]he power of cross-examination . . . certainly is one of the most efficacious, tests which the law has devised for the discovery of truth," and it is "[o]ne of the most inestimable rights by which a man may maintain his defense" (internal quotation marks omitted)). However, if the Court were to decide Ms. Hill's testimony cannot be credited, her testimony would not be relevant to any issue and Mr. Murdaugh would have no right to examine her.

because the removal itself is grounds for a new trial, but because Juror 785 has averred Ms. Hill was involved with her removal in an improper and dishonest way that, if true, would serve to impeach Ms. Hill's credibility. Both witnesses and documentary evidence regarding the allegedly fabricated Facebook post, which ultimately did not cause Juror 785 to be removed, and witnesses and documentary evidence regarding Juror 785's alleged statements to her tenants during trial, which ultimately did cause Juror 785 to be removed, are relevant to Ms. Hill's credibility. Evidence impeaching Ms. Hill includes evidence demonstrating her personal interest in the outcome of the trial and willingness to engage in obviously inappropriate conduct to further that personal interest. *See* Rule 606(c), SCRE ("Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.") For example, emails released to journalists in response to FOIA requests show that Ms. Hill was sending emails directly to prosecutors and law enforcement witnesses for the State during trial about the merits of testimony from defense witnesses under examination at that moment. Emails from B. Hill to C. Waters, C. Jewell, & C. Ghent (Feb. 21, 2023) (FITSNEWS_FOIA_000624 & _000861. Evidence impeaching Ms. Hill may also include testimony from Judge Newman.

There will be much evidence to present that impeaches Ms. Hill. The State may argue presenting it all would be cumulative or repetitive or otherwise unnecessary. But evidence is cumulative only when it "supports a fact established by the existing evidence." Evidence, Black's Law Dictionary (11th ed. 2019). So long as the Court is prepared to give Ms. Hill's testimony any weight, her lack of credibility is not "established" and evidence impeaching her cannot be

considered cumulative or repetitive.[4] Courts have underscored the noncumulative nature of additional evidence when a trial features a "swearing match" between witnesses on both sides. *See, e.g.*, *English v. Romanowski*, 602 F.3d 714 (6th Cir. 2010) (rejecting state court's conclusion that witness's testimony was cumulative; the state court "failed to recognize that the trial was essentially a swearing match" between witnesses on both sides); *Montgomery v. Petersen*, 846 F.2d 407, 413, 415 (7th Cir. 1988) (holding that, given the "swearing match" between the witnesses, the uncalled witnesses were not cumulative because they would have "directly contradicted the state's chief witness," while providing the defense with a disinterested alibi witness who could have caused the jury to "view[] the otherwise impeachable testimony of the twelve [defense] witnesses in a different light"); *Nealy v. Cabana*, 764 F.2d 1173, 1174 (5th Cir. 1985) (holding that counsel's failure to investigate and call alibi witnesses was prejudicial "[b]ecause the trial boiled down to a swearing match . . . and because the missing testimony might have affected the jury's appraisal of the truthfulness of the state's witness and its evaluation of the relative credibility of the conflicting witnesses").

**B. Counsel for non-parties should not be permitted to participate in these proceedings.**

Attorney Eric Bland has requested to participate in these proceedings as counsel for certain jurors who may be called to testify as witnesses. Mr. Murdaugh objects to Mr. Bland's request. This is a criminal proceeding brought by the State against the Defendant. Mr. Bland seeks a level of non-party participation (e.g., participating in status conferences) beyond even the rights afforded victims under Article I, § 24 of the South Carolina Constitution, and the jurors he represents are

[4] If the Court were to decide pre-hearing that it cannot credit Ms. Hill over the sworn testimony of any juror, it is likely that the hearing would consist only of *in camera* examination of jurors. This would also avoid potential Fifth Amendment issues regarding Ms. Hill. It is unlikely the State would agree to that since it is likely the State can prevail ***only*** if the Court finds Ms. Hill to be credible.

not crime victims. In discussing his request in the media, Mr. Bland stated on his podcast Cup of Justice, episode 61 (Dec. 26, 2023), that Justice Toal, the newly assigned presiding judge in this matter "has friends sometimes to reward and enemies to punish" and "I worry about what procedures are going to be put in place, the fact that there was a status conference and you know I represent four jurors and I wasn't even told of that status conference, and I believe that my jurors have the right to legal representation in any type of proceeding dealing with Alex Murdaugh's verdicts where they're going to have their verdicts questioned." His stated intent is not to protect the personal interests of his clients as witnesses, but to advocate to sustain "their" verdict. To allow a publicity-seeking lawyer for non-victim private parties to intervene in this criminal case and advocate against Mr. Murdaugh as an additional opposing party would violate Mr. Murdaugh's procedural due process rights under Article I, § 3 of the South Carolina Constitution and the Fourteenth Amendment to the United States Constitution.

The jurors are simply witnesses with no more right to participate in this criminal proceeding than witnesses in any other criminal case. Unlike typical witnesses, they do have a right to a degree of anonymity so it could be appropriate to allow them to be heard through counsel if the Court were inclined to strip them of that anonymity. But neither party is asking the Court to do that, and the Court has made clear it is not inclined to do that. Mr. Murdaugh does not seek to subpoena telephone records or other personal records regarding them, and if he decided to do so in the future, their lawyers of course could move to quash the subpoena. Otherwise, they have no cognizable interest in these proceedings, and if there is such an interest the Attorney General would be adequate to assert it.

The reason to hold an evidentiary hearing on Defendant's motion for a new trial is to protect Mr. Murdaugh's constitutional right to a fair judicial proceeding. It would defeat that purpose if

the proceedings were allowed to devolve into a speaker's corner for lawyers who want to appear on television even more than they already do. Mr. Murdaugh therefore asks the Court to limit the participation of any witness-retained lawyer to the extremely limited role traditionally allowed to a lawyer representing an innocent bystander witness in a criminal case. Further, he requests that the Court order the Clerk of Court not to accept any filings in this matter from any non-parties without leave of the Court obtained prior to filing.

## VII. Responsive arguments on decided or moot issues presented for issue preservation

### A. The Court must hold an evidentiary hearing.

The State's response argues Mr. Murdaugh has failed to show that he is entitled to an evidentiary hearing. Resp. Opp'n Mot. New Trial 19–21. The Court has instructed counsel that it has "already decided an evidentiary hearing will occur." Nevertheless, because the State has made the argument in a filed memorandum and no filed order has addressed it directly, Mr. Murdaugh provides the following rebuttal for preservation purposes. As the State correctly argued before the Court of Appeals, the standard to suspend the direct appeal and for leave to file a motion for a new trial is a prima facie showing of an entitlement for relief. Return to Motion to Suspend Appeal and for Leave to File Motion for New Trial, *State v. Murdaugh*, Appellate Case No. 2023-000392 (Sept. 15, 2023) (citing *State v. Butler*, 261 S.C. 355, 358, 200 S.E.2d 70, 71 (1973)). Mr. Murdaugh agreed that is the correct standard. Reply to the State's Return, *Murdaugh*, Appellate Case No. 2023-000392 (Sept. 21, 2023) (quoting *State v. Ford*, 301 S.C. 485, 491, 392 S.E.2d 781, 784 (1990) ("In order to obtain leave from this Court to move for a new trial based on after-discovered evidence, an appellant must make a *prima facie* showing that a new trial is warranted."). The Court of Appeals concluded that standard was satisfied when it granted the motion to suspend the appeal and for leave to file the instant motion. Order, *Murdaugh*, Appellate Case No. 2023-000392 (Oct. 17, 2023). There has been no material change to the law or to the record before the Court

(other than the discovery of yet more examples of Ms. Hill's dishonesty and malfeasance in office) since the Court of Appeals' order. It therefore is the law of the case that a prima facie case has been made. *Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997) ("The doctrine of the law of the case prohibits issues [that] have been decided in a prior appeal from being relitigated in the trial court in the same case."). Where a prima facie case is made, an evidentiary hearing is required. *Barnes v. Joyner*, 751 F.3d 229, 242 (4th Cir. 2014) ("[W]hen the defendant presents a credible allegation of communications or contact between a third party and a juror concerning the matter pending before the jury" the defendant has an "entitlement to an evidentiary hearing." (citing *Remmer*, 347 U.S. 227)). The Court therefore must hold an evidentiary hearing on the merits of the motion for a new trial.

**B. The State's motions to strike should be denied.**

In its response to the motion for a new trial, the State moves to strike (1) affidavits of paralegal Holli Miller, (2) anything statements regarding jury deliberations, and (3) any claims regarding Facebook posts, Ms. Hill's book deal, or "post-trial media interactions." It is unclear what purpose striking anything from the motion for a new trial would accomplish, given that it is the law of the case that a prima facie case has been made, that an evidentiary hearing therefore is required, that an evidentiary hearing has been scheduled, and that the motion will be decided on the evidence presented to the Court at the hearing and not on attorney argument made before the Court receives any evidence whatsoever. Nevertheless, since the State makes the argument, Mr. Murdaugh will briefly rebut it.

*First*, the affidavits of Holli Miller were offered only as evidence as to what certain jurors would say if called to testify at an evidentiary hearing. Of course, they are hearsay. All affidavits from persons who have not (yet) testified in court are hearsay. Rule 801(c), SCRE ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in

evidence to prove the truth of the matter asserted."). Hearsay is just an objection to the admissibility of evidence; it is not a basis to strike a filing. The purpose of Ms. Miller's affidavits was to help obtain an evidentiary hearing, which has been accomplished. Obviously, they cannot prove Mr. Murdaugh's is entitled to a new trial. Witness testimony in a courtroom will do that.

*Second*, there is no basis for the State's motion to strike references to jury deliberations. Juror 630's affidavit was freely given to support a public filing. Other jurors have spoken about the deliberations in national television interviews. Such statements may or may not be admissible as evidence at the merits evidentiary hearing, but Rule 606 of the South Carolina Rules of Evidence in no way supports striking public statements from a motion memorandum.

*Third*, the State correctly notes that the only relevance of the Facebook post Ms. Hill fabricated to remove Juror 785, her book plans, or her other post-trial actions, is to impeach Ms. Hill. The State argues attacking Ms. Hill's character is "an outlandish theory" against "a dedicated public servant" that is "Immaterial, Impertinent, and Scandalous" and so should be struck. That is incorrect. Ms. Hill likely is the only witness the State can offer who can directly contradict Juror 630's averments of jury tampering, and Ms. Hill has offered an affidavit doing exactly that. Resp. Opp'n Mot. New Trial Ex. A. Her credibility is the crux of the matter before the Court. The purpose of the evidentiary hearing is to allow the Court to decide whether it believes the word of Ms. Hill more than it believes the sworn testimony of one or more jurors. Anything that impeaches Ms. Hill is relevant. And the State's rhetoric about Ms. Hill being "a dedicated public servant" unfairly maligned has not aged well in the two months since the State filed its response, to put it mildly. Ms. Hill is alleged to have stolen money, illegally sold access to the courthouse, conspired with her son to conduct illegal wiretaps, and even had her book removed from publication because of her plagiarism.

## VIII. Conclusion

For the foregoing reasons, Mr. Murdaugh respectfully submits that when Ms. Hill's jury tampering is proven at the evidentiary hearing, the Court must grant the motion for a new trial.

Respectfully submitted,

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January 10, 2024
Columbia, South Carolina.

# EXHIBIT G

(Respondent's Second Brief)

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|---|---|---|
| STATE OF SOUTH CAROLINA<br><br>COUNTY OF COLLETON | )<br>)<br>) | IN THE COURT OF GENERAL SESSIONS<br>FOR THE FOURTEENTH JUDICIAL CIRCUIT |
| State of South Carolina,<br><br>v.<br><br>Richard Alexander Murdaugh,<br><br>Defendant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Case Nos: 2022-GS-15-00592<br>2022-GS-15-00593<br>2022-GS-15-00594<br>2022-GS-15-00595<br><br>**STATE'S REVISED PRE-HEARING BRIEF IN OPPOSITION TO DEFENSE MOTION FOR A NEW TRIAL** |

On Thursday, January 4, 2024, the Court requested further briefing from both parties to specifically address five issues:

1. List all potential witnesses planned to be called during the evidentiary hearing, and any objections or challenges you may raise to the opposing party's anticipated witnesses.

2. List all exhibits planned to be introduced during the evidentiary hearing, and any objections or challenges to the opposing party's exhibits.

3. Clarify the arguments as to whether Defendant is entitled to a new trial that will be made during the evidentiary hearing.

4. State any procedural issues which may impact the evidentiary hearing, in particular (a) issues regarding the subpoena of specific witnesses and (b) how the court should receive testimony and whether any such testimony should be conducted *in camera* rather than in open court.

5. State any other issues regarding the conduct for the hearing of the merits on the motion.

In response, the State here revises and expands its pre-hearing brief to address the specific questions of the Court, though not necessarily in the order as set forth above. Indeed, answers to the first and second questions raised by the Court are contingent on how the Court rules on the question of what standard and burden to apply to Defendant's motion. The scope of witnesses that the State intends to call depends, in

part, on who Murdaugh calls as movant, which in turn depends on how much Murdaugh most show to satisfy his burden of proof.

Therefore, the State's revised briefing below proceeds as follows:

1. BURDEN OF PROOF: Murdaugh must bear the burden of proof for his own motion and show that the material improprieties alleged actually occurred and that he was actually prejudiced thereby.

    a. Murdaugh contends otherwise, and argues erroneously that if the material improprieties alleged occurred, there is prejudice to him *per se*. The law does not support Murdaugh's argument.

    b. Because Murdaugh cannot show he was actually prejudiced by the material improprieties alleged, he is not entitled to a new trial. Furthermore, Murdaugh cannot show by that the material improprieties alleged actually occurred, and is thus not entitled to a new trial.

2. MOTION UNTIMELY: Additionally, Murdaugh's motion may be procedurally defective and untimely brought before the Court, given public statements of counsel at and around the time of its filing.

3. EVIDENTIARY HEARING UNNECESSARY: Notwithstanding the Court's clear statement of intent to hold an evidentiary hearing, the State argues for the purposes of preserving the issue that Murdaugh has failed to make a *prima facie* showing sufficient to justify an evidentiary hearing.

4. WITNESSES, EXHIBITS, AND PROCEDURE: Irrespective of burden, the State proposes that each of the twelve jurors who deliberated be polled by the Court. This inquiry should be conducted in open court, but in a manner to protect the identities of the jurors. If juror responses necessitate further inquiry, additional questioning may be warranted.

    a. EVIDENCE AND OBJECTIONS: If questioning of the jurors and the law applied does not resolve the motion, and if Murdaugh has not already done so, the State may call members of court and clerk staff to further establish no material improprieties occurred, SLED agents as necessary to explain their investigation, as well as the legal representative to two jurors to confirm Murdaugh was not dilatory in raising the issue to the court. The State will object to witnesses and exhibits whose testimony would serve only to impeach one or more other witnesses by proof of specific instances of conduct through extrinsic evidence, and whose probative value would be substantially outweighed by the danger of unfair prejudice, confusion of the issues, and undue delay and waste of time.

b. PROCEDURAL ISSUES: the Court should receive all testimony in open court, not in camera, but with limitations on media recording and broadcasting of the images or names of the jurors.

The State's revised brief follows.

## I. BURDEN OF PROOF: Murdaugh must carry the burden of proving both that an improper contact occurred with the jury and that he was actually prejudiced thereby.

First is the appropriate burden and standard to apply to a motion for a new trial based on allegations of improper contact with the jury by clerk of court or court official. Namely, if the conduct alleged is proven, (1) must prejudice be shown, and (2) if so, who must carry the burden of showing prejudice? The law, and consequently the State, focuses on the jury. Murdaugh focuses on Clerk Hill. Prejudice must be shown, and it is Murdaugh's burden to do so.

Criminal defendants have a right to a fair and impartial jury, and private communications or contact with jurors during a criminal trial about the matter pending before them may necessitate an evidentiary hearing and, if defendant can show actual prejudice, a new trial. *See State v. Kelly*, 331 S.C. 132, 141-42, 502 S.E.2d 99, 104 (1998) ("In a criminal prosecution, the conduct of the jurors should be free from all extraneous or improper influences. Unless the misconduct affects the jury's impartiality, it is not such misconduct as will affect the verdict."); *see also Smith v. Phillips*, 455 U.S. 209, 215 (1982) ("This Court has long held that the remedy for allegations of juror partiality is a hearing which the defendant has the opportunity to prove actual bias."); *State v. Green*, 432 S.C. 97, 100, 851 S.E.2d 440, 441 (2020) (unanimously declining to adopt *Remmer v. United States*, 347 U.S. 227 (1954) and its presumptive prejudice standard in every instance of improper contact, and reversing the lower court opinion

that did so.). The law holds jurors in high regard and presumes that they fulfill their duties as instructed, with solemn diligence, impartial contemplation, firmness, and conviction, and that they are not readily swayed from the proper fulfillment of their duties by every wind of opinion that blows around their ears. *State v. Grovenstein*, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999); *State v. Rowell*, 75 S.C. 494, 56 S.E. 23, 29 (1906); *see also United States v. Olano*, 507 U.S. 705 (1993) (quoting *Francis v. Franklin*, 471 U.S. 307, 324, n. 9 (1985)) (In declining to presume prejudice from the presence of alternate jurors during deliberations, explaining "we presume that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them."). "Objections to verdicts on the ground that one or more of the jurors has been subjected to outside influences must be looked at in a practical way and every case decided on its own facts." *Rowell*, 56 S.E. at 29. A simple jury poll may cure any procedural irregularities, and confirm that each juror approves of the verdict returned and that no one has been coerced or induced to agree to a verdict to which he or she does not actually assent. 89 C.J.S. Trial § 1002; *State v. Linder*, 276 S.C. 304, 308-09, 278 S.E.2d 335, 338 (1981).

The facts and opinion in *Rowell* are instructive. Rowell was convicted of manslaughter for shooting and killing a man armed with a stick in a drunk argument, right in front of a City of Florence police officer. *Rowell*, 56 S.E. at 28. Of relevance here, a juror provided an affidavit that while he was sequestered at a hotel overnight, a bailiff "talked about the case in his presence, and said that the defendant should be punished[.]" *Rowell*, 56 S.E. at 29. The trial court held that there was nothing presented

to show that the verdict was influenced by the bailiff's communications to the juror and denied the motion. *Id.* The Supreme Court of South Carolina affirmed the lower court's ruling on that issue, opined that "[w]here, without any misconduct on the part of the juror or the constable who had him in charge, an opinion was imprudently volunteered in the presence of the juror by another constable, we do not think it would be reasonable to reach the decision that the conclusion of this juror and the whole panel was influenced by it." *Id.* Moreover, the Supreme Court *did* reverse Rowell's conviction, not because of the imprudent opinion of the bailiff, but because of an erroneous jury instruction on fighting words and self-defense. *Id*.

**a. Murdaugh's attempts to distinguish the authorities on which the State relies are based on nothing more than his own willful blindness to their explicit applicability.**

Murdaugh, in an attempt to critique the law as set forth above, expresses that the State has cited "no authority" to support its position, and otherwise feigns confusion throughout. Murdaugh's confusion may generously be prescribed to his strategically myopic focus on Clerk Hill, rather than on the actual legal question of whether he was convicted of brutally murdering his son and wife with a shotgun and a rifle by an impartial jury free from improper influence.

The admonitions of *State v. Kelly*, 331 S.C. 132, 502 S.E.2d 99 (1998) are as binding in the present matter as in any case involving the provision of extraneous information, commentary, or guidance. "In determining whether *outside influences* have affected the jury, relevant factors include (1) the number of jurors exposed, (2) the weight of the evidence properly before the jury, and (3) the likelihood that curative measures were effective in reducing the prejudice." *Id.*, 331 S.C. at 63, 502 S.E.2d at 628 (emphasis added). The present matter concerns allegations of outside influences

on the jury and whether they affected them. Both the majority and the dissenting minority analyzed the actual prejudice of the pamphlet retained and introduced by the juror at question in *Kelly*; the dissent's ultimate conclusion was not that analysis for actual bias was improper, but that "[w]hen considered in its totality, the compelling conclusion is that the outcome of both phases of appellant's trial was influenced by cumulative bias on the part of his jury." *Id.*, 331 S.C. at 157, 502 S.E.2d at 112 (Finney, J., Toal, J. dissenting).

Murdaugh also expresses confusion about the relevance of *Smith v. Phillips*, 45 U.S. 209 (1982), despite citing to the same language as set forth in the parenthetical himself in his Motion for a New Trial as authority to support his argument that he was entitled to the hearing now scheduled. *See Id.* at 215 ("The Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias."); *compare* Motion for a New Trial at 9-10 (citing same). *Smith* explores *Remmer v. United States*, 347 U.S. 227 (1954), on which Murdaugh previously relied, and abrogates *Remmer* to the extent which it may be relied upon for the proposition that prejudice must be presumed where external influences are brought upon the jury:

> This Court recognized the seriousness of not only the attempted bribe, which it characterized as "presumptively prejudicial," but also of the undisclosed investigation, which was "bound to impress the juror and [was] very apt to do so unduly." Despite this recognition, and a conviction that the "[t]he integrity of jury proceedings must not be jeopardized by unauthorized invasions," the Court did not require a new trial like that ordered in this case. Rather, the Court instructed the trial judge to "determine the circumstances, the impact thereof upon the juror, and whether or not [they were] prejudicial, in a *hearing* with all interested parties permitted to participate."

*Smith* at 215-16. That *Smith* abrogates *Remmer*'s "presumption of prejudice" standard and places the burden of showing actual prejudice on Defendant is recognized by multiple federal circuit courts. *See United States v. Pennell*, 737 F.2d 521, 532-33 (6th Cir. 1984) (concluding that *Smith* "so changed the rules relating to unauthorized communications with jurors that the presumptive prejudice standard . . . no longer governs" and that *Remmer*-as-reinterpreted-by-*Smith* provides for "a hearing in which the defendant has the opportunity to prove actual bias."); *United States v. Williams-Davis*, 90 F.3d 490, 494-99 (D.C. Cir. 1996) (reviewing *Remmer* in the context of *Smith*, *Pennell*, and *Olano*, before affirming the lower-court's inquiry into whether any particular intrusion into the jury showed enough of a 'likelihood of prejudice' to justify assigning the government any burden); *United States v. Sylvester*, 143 F.3d 923, 933-94 (5th Cir. 1998) (reviewing *Remmer* in the context of *Smith*, *Olano*, and *Williams-Davis*, before concluding "[w]e agree that the *Remmer* presumption of prejudice cannot survive *Phillips* and *Olano*. Accordingly, the trial court must first assess the severity of the suspected intrusion; only when the court determines that prejudice is likely should the government be required to prove its absence."); *see also Criminal Procedure – Jury Tampering – Ninth Circuit Holds that Glaring by Government Agents May Trigger Presumption of Prejudice. – United States v. Rutherford, 371 F.3d 634 (9th Cir. 2004)*, 118 Harv. L. Rev. 2445 (2005) (critiquing application of *Remmer* presumption to mere staring by a federal agent and noting rejection of *Remmer* in part or whole by authorities above).

Admittedly, many circuits continue to apply the *Remmer* presumption of prejudice, either in part or in whole, pending a more explicit statement from the

Supreme Court of the United States that it is overruled, and avoid addressing the continued applicability of *Remmer* if they can do so. *See United States v. Scull*, 321 F.3d 1270, 1280 n.5 (10th Cir. 2003) (acknowledging other circuits already concluded *Remmer* presumption was abrogated, but resolving to continue applying it for want of a Supreme Court case expressly stating as much); *see also Tong Xiong v. Felker*, 681 F.3d 1067, 1076-78 (9th Cir. 2012) (declining to apply the *Remmer* presumption to the observations made by three jurors of the defendant in a court hallway, let alone a *per se* prejudice standard, although treating it as otherwise controlling for any unauthorized communication between a juror and a witness or interested party); *United States v. Tejeda*, 481 F.3d 44 (1st Cir. 2007) (acknowledging circuit split, but that "[a]lthough we too have questioned *Remmer*'s continuing vitality, . . . we need not decide today whether, or to what extent it remains good law. Here . . . the facts simply do not warrant the application of a *Remmer* presumption."); *Parker v. Head*, 244 F.3d 831, 839 n.6 (11th Cir. 2001) (acknowledging and summarizing circuit split over continued viability of *Remmer* presumption, but not deciding issue because even applying the presumption resulted in denial of *habeas* relief); *Barnes v. Joyner*, 751 F.3d 229 (4th Cir. 2014) (holding North Carolina state post-conviction court contravened clearly established federal law by failing to follow *Remmer*'s rebuttable presumption approach *and* requirement that hearing be held on juror misconduct claim).

However, it is not necessary for this Court to resolve a federal circuit split regarding the continued viability of *Remmer* because, as it may concern criminal adjudication in this state, the Supreme Court of South Carolina resolved that split when it reversed the Court of Appeals' application of the *Remmer* presumption to an instance

of a bailiff communicating improperly with a juror regarding the case before them, even as both courts reached the same ultimate conclusion that the conviction was valid and no prejudice existed. *State v. Green*, 432 S.C. 97, 99-100, 851 S.E.2d 440, 441 (2020); *see also State v. Aldret*, 333 S.C. 307, 313-14, 509 S.E.2d 811, 814 (1999) ("[W]e hold the burden is on the party alleging premature deliberations to establish prejudice[,]" functionally syncing the burdens for internal and external misconduct allegations.).

Of course, Murdaugh also attempts to stand *Green* on its head. "There is no suggestion in *Green* that a comment by a state official that did bear on the merits of the case could also be harmless." Defendant's Pre-Hearing Brief Re: Motion for a New Trial at 7. *Green* limits the applicability of *Remmer* to cases where a bog-standard prejudice analysis of the particular facts and circumstances, if proven true by evidence presented by the movant, would reach the same conclusion as that which would be presumed, which thus obviates the existence of a legal presumption—to continue calling it a "presumption" only serves to confound the law. *Cf. Fryer v. Fryer*, 9 S.C. Eq. (Rich. Cas.) 85, 95 (1832) ("It is too much the practice to convert mere matters of evidence into rules of law; and, under the specious names of badges and presumptions, compel courts and juries to draw inferences, according to artificial rules, against their real belief."). Furthermore, even if *Green* leaves *Remmer* any room for more than procedural effect in South Carolina (i.e. a hearing is necessary upon a *prima facie* showing of such a communication), it would do so to apply a *Remmer* presumption in precisely the circumstance of "a comment by a state official that did bear on the merits of the case," which would be rebuttable by showing the comment to be harmless. Murdaugh's analysis of *Green* is muddied by his indecision as to whether he should

argue that he is entitled to a *Remmer* presumption—as he once desired—or an unfounded and unprecedented application of *per se* prejudice.

Finally, Murdaugh cites to *Parker v. Gladden*, 385 U.S. 363 (1966), and argues it represents that the statement of "that wicked fellow, he is guilty" cannot be harmless. However, *Parker* is factually distinguishable because he was able to do what Murdaugh cannot: "one of the jurors testified that she was prejudiced by the statements[.]" *Parker* at 365. The issue in *Parker* then became whether Oregon's dreadful law that permitted a non-unanimous jury verdict to sustain a conviction meant there was no prejudice—the Court rejected that argument, and then rejected the non-unanimous verdicts in a fractured opinion decades later. *Parker* at 365; *see, generally Ramos v. Louisiana*, 590 U.S. __, 140 S.Ct. 1390 (2020) (holding constitution requires unanimous verdicts to convict a defendant of a serious offense). In this case, Murdaugh has presented an affidavit from a single juror who deliberated, and that juror prescribed her verdict to pressure from other jurors—not anything Clerk Hill allegedly said.

**b. Murdaughs' proffers two mutually exclusive standards, neither of which are supported by either controlling authority or good sense.**

As noted above, instead of the State's straightforward and reasonable conclusion that movant must carry the burden of his own claims, Murdaugh contends each of two inconsistent standards apply. Most ambitiously, Murdaugh argues that if it is shown that a court official engaged in improper, private communications with members of the jury, such communications would constitute a "structural error." "Structural defects affect the entire conduct of the trial from beginning to end, whereas trial errors occur during the presentation of the case to the jury and may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was

harmless beyond a reasonable doubt." *State v. Jenkins*, 412 S.C. 643, 650-51, 773 S.E.2d 906, 911 (2015) (quoting *State v. Mouzon*, 326 S.C. 199, 204, 485 S.E.2d 918, 921 (1997)) (cleaned up). "Differentiating between structural and trial errors serves to enforce procedural safeguards while ensuring that inconsequential, technical errors do not result in a new trial." *Id.*, 412 S.C. at 651, 773 S.E.2d at 911 (quoting *State v. Chavis*, 412 S.C. 101, 115, 771 S.E.2d 336, 343 (2015) (Hearn, J., dissenting)). "Most errors that occur during trial, including those that violate a defendant's constitutional rights, are trial errors that are subject to harmless error analysis." *Id*. (citing *State v. Rivera*, 402 S.C. 225, 246, 741 S.E.2d 694, 704 (2013)).

Framing the allegation raised as one of a "structural" error subject to *per se* prejudice is wholly without precedential support. The Supreme Court of South Carolina has already explicitly rejected *per se* prejudice in the context of external influence on a jury. *See State v. Aldret*, 333 S.C. 307, 313-14, 509 S.E.2d 811, 814 (1999) (citing *United States v. Olano*, 507 U.S. 725, 736-38 (1993)) ("Given that we have not found automatic reversal warranted even in cases of external influences on a jury's verdict, we decline to do so in the cases of internal misconduct consisting of premature deliberations."); *Blake by Adams v. Spartanburg General Hosp.*, 307 S.C. 14, 18, 413 S.E.2d 816, 818 (1992) ("[A] bailiff's remarks to a juror are not per se grounds for setting aside a jury verdict. The test is whether the verdict was solely the result of honest deliberation on the case as publicly developed at trial, or whether there is reason to suppose outside influences entered into it as a factor. Every case of this kind must be decided on its own facts."). That the alleged external influencer was a court official is of no consequence—indeed, many of the cases dealing with the subject involve bailiffs, as

seen in the facts of the cases explored above. Murdaugh's only citation in "support" follows a tortuous reimagining of the Court's ability to consider the strength of the evidence against him as an ability to direct a verdict of guilty against him, and even then to a case concerning a jury instruction which omitted an element of an offense. Defendant's Pre-Hearing Brief Re: Motion for a New Trial at 3 (citing *Neder v. United States*, 527 U.S. 1, 34 (1999) (Scalia, J. dissenting[1])). Indeed, the application of *per se* prejudice has been rejected even by the jurisdictions which still consider a *Remmer* presumption. *See, e.g. Tejeda*, 481 F.3d at 50 (declining to apply structural error analysis to a claim of juror bias, adding in a footnote that it would be inconsistent with *Remmer*); *Tong Xiong*, 681 F.3d at 1077 (rejecting dissent's argument for *per se* prejudice as inconsistent with *Remmer*). Finally, analysis of Murdaugh's allegations as "structural error" would be fundamentally inconsistent with the standards set forth in *Kelly* and *Green*—there is no point to considering the impact on the jurors, the number of jurors exposed, the strength of the evidence, or questioning jurors as commended by the court in *Green* if prejudice from an improper communication is *per se*.

The State cannot overstate the impossibility of the structural-*per se* prejudice standard suddenly insisted upon by Murdaugh. Neither the State nor the judiciary can prevent in all instances jurors from being confronted with uninvited communications from third-parties, even if jurors were again treated like prisoners like in the days of old.[2] In Murdaugh's construction, defendants themselves could anonymously call jurors, or direct others to do so, with threats or comments upon the merits of the trial and thereby

[1] Scalia concurs in part and dissents in part, but that portion of the opinion relied upon by Murdaugh is very much in dissent. Murdaugh's citation implying that it was concurring is mildly misleading.
[2] Even our prison inmates have cell phones, to the State's chagrin and public's bloody and narcotic detriment.

invalidate the proceedings at a whim. Any unwanted text message, any shout from a crowd, or even any inadvertent eavesdrop on a conversation between people at the courthouse could invalidate days, weeks, or months of proceedings. The gears of justice turn slowly now, but in Murdaugh's construction they would stop forever for him and anybody else facing trial for a serious crime. The Constitutions of this State and the United States provide for justice, not such injustice.

More conservatively, Murdaugh relies upon *State v. Cameron*, 311 S.C. 204, 208, 428 S.E.2d 10, 12 (Ct. App. 1993), which is itself inconsistent with his "structural error" argument,[3] and argues that if it is shown that a court official engaged in improper, private communications with members of the jury, "a new trial must be granted unless it clearly appears that the subject matter of the communication was harmless and could not have affected the verdict." Defendant's Pre-Hearing Brief Re: Motion for a New Trial at 2; Motion for a New Trial at 10. *Cameron* is a divided Court of Appeals opinion, and thus cannot control over of the standards articulated by the Supreme Court of the United States in *Smith v. Phillips* and the Supreme Court of South Carolina in *Kelly*, *Green*, and *Rowell*. The opinion is also not entirely consistent internally; it both acknowledges that "[t]he mere fact . . . that some conversation occurred between a juror and a court official would not necessarily prejudice a defendant," and quotes a Fourth Circuit opinion declaring that the same "cannot be tolerated[.]" *Cameron*, 311 S.C. at 207-08, 428 S.E.2d at 12. Furthermore, the Fourth Circuit opinion in *Holmes v. United States*, 284 F.2d 716 (4th Cir. 1960), however persuasive it may have been to the divided Court of Appeals in *Cameron*, is itself not controlling. *Johnson v. Williams*, 568

[3] Murdaugh, undeterred, nonetheless argues *Cameron* supports his assertion the issue he brings is structural.

U.S. 289, 305 (2013) ("[T]he views of the federal courts of appeals do not bind [a state supreme court] when it decides a federal constitutional question[.]"); *Limehouse v. Hulsey*, 404 S.C. 93, 744 S.E.2d 566 (2013) ("Although this Court often defers to Fourth Circuit decisions interpreting federal law, . . . it is not obligated to do so in view of the lack of uniformity amongst the federal circuits."); *Ins. Fin. Servs., Inc. v. S.C. Ins. Co.*, 282 S.C. 144, 146, 318 S.E.2d 10, 11 (1984) ("[The Supreme Court of South Carolina] is not bound by the rulings of the Circuit Court of Appeals . . ."). Finally, the conclusion in *Cameron* does not at all appear to rely upon any presumptions, but rather turns on the forelady's testimony to the trial judge which reflected that both she and the rest of the jury were actually confused by the bailiff's statement in the course of their deliberations. *Id*., 311 S.C. at 209, 423 S.E.2d at 12 (Goolsby, J., concurring) ("Clearly, the jury, judging from what both the bailiff and the forewoman testified to, had forgotten or, at the very least, were confused about the trial judge's instructions regarding the effect of each of the two verdicts of guilty.").

Murdaugh is particularly sardonic in responding to the State's own string-cite to *Cameron* as support for the proposition that "[n]ot every inappropriate comment by a member of the court staff to a juror rises to the level of constitutional error[,]" a quotation from *Green*, but does not contest it. The "unremarkable proposition" is of considerable import in the present matter because the jurors disagree as to what, *if anything*, Clerk Hill ever said to any of them. As noted in the State's Response to Defendant's Motion, some jurors acknowledge neutral admonitions to pay attention, which can hardly prejudice anybody. *See* State's Response to Defendant's Motion at 21-22, Exh. B. Murdaugh also appears befuddled by the State's citations to *Smith v. Phillips*, 455 U.S.

209 (1982) as *Smith*, despite it being the only *Smith* case cited in the entirety of the State's Response, and despite its full citation on the preceding page. As set forth above, an explicit statement from the Supreme Court of the United States that movant must show actual bias in a claim of juror impartiality, whatever the source of that impartiality, at the same time as it considers *Remmer* in its history of so requiring, is hardly "irrelevant." To the contrary, *Smith* is controlling.

**c. Murdaugh cannot meet his burden because no credible evidence exists to show Clerk Hill made any comments to jurors regarding the merits of the case and because the jurors themselves refute that they considered anything but the evidence properly before them.**

The burden rests with the movant, in this case Murdaugh, to prove that an improper contact occurred between at least one juror who deliberated and a non-juror, and further that he was actually prejudiced by that improper contact. The subject matter of the communication is but one factor in determining whether prejudice exists. The personal and professional characteristics of the alleged external influencer is but another factor in determining whether prejudice exists. The jurors themselves, under the procedure commended by *Green*, may attest to their compliance with the instructions of the Court to consider only the evidence and arguments properly presented, and that their verdict was based solely thereon, and that testimony may be taken together with all of the *Kelly* factors to determine whether Murdaugh has met his burden of showing actual bias. Murdaugh insists on any other standard because he knows he cannot satisfy that set forth by law, and because that failure will frustrate his hope of putting anybody other than himself on trial through the scheduled evidentiary hearing.

Thus, in summary, the State's argument is that Murdaugh is not entitled to a new trial because he cannot present any evidence that any juror was improperly influenced, because the jurors each individually affirmed at trial and again in written and video recorded statements that the verdict was their own and free of external influence, and because Clerk Hill did not exert or attempt to exert any improper influence on the jury.

## II. MOTION WAS NOT TIMELY FILED: statements by Murdaugh's Counsels and associate suggest he knew of the allegations raised in his Motion for a New Trial and was dilatory in raising them to the Court's attention.

Additionally, Murdaugh's motion is arguably procedurally deficient. A review of the motion does not reveal precisely when or how it is he learned of the claims he now raises. Before the Court of Appeals, Murdaugh only provided an affidavit to that effect as required by *State v. DeAngelis*, 256 S.C. 364, 182 S.E.2d 732 (1971), upon prompting by the State, and even then only begrudgingly and with complaint. The State has reason to believe Murdaugh's affidavit is untruthful, and not merely because Murdaugh himself has proven to be extraordinarily untruthful at trial and throughout his entire life.

Where a defendant knows or could have known of a constitutional issue at the time of trial, the defendant is obliged to timely raise that issue to the Court's attention or else waive it on future appeals. *State v. Powers*, 331 S.C. 37, 42-43, 501 S.E.2d 116, 118 (1998); *State v. McWee*, 322 S.C. 387, 472 S.E.2d 235 (1996); *State v. Byram*, 326 S.C. 107, 113, 485 S.E.2d 360, 363 (1997); *see also State v. Aldret*, 333 S.C. 307, 315, 509 S.E.2d 811, 815 (1999). Except for motions for new trials based on after-discovered evidence, post-trial motions must be made within ten days after the imposition of the sentence. Rule 29(a), SCCrimP. Where a defendant does not learn of a constitutional violation until after trial, the defendant is obliged to seek relief within one

year of the actual discovery of the violation or when it could have been discovered through reasonable diligence, or within one year of the sending of the remittitur from appeal. *See* Rule 29(b), SCCrimP (as much in the context of after-discovered evidence);[4] S.C. Code Ann. § 17-27-45 (in the context of the Uniform Post-Conviction Procedure Act).

Murdaugh's counsels have made *numerous* statements to various media outlets indicating they were potentially aware of an issue with the jury at and about the time of trial. In a press conference on the steps of the Court of Appeals on September 5, 2023, counsel Harpootlian, responding to a question as to whether the defense saw the alleged conduct during the jury view or found out about it after the fact, replies "I think… we observed it… I was there, I watched it."[5] Later at that same press conference, when a reporter asked if they approached the jurors or vice-versa, counsel Griffin replied that "[i]mmediately in the aftermath of the verdict, we had received information that we needed to look into what happened in the jury room."[6] In one interview with Good Morning America on September 6, 2023, counsel Griffin states that "soon after the trial… actually, as soon as the verdict was rendered, we had gotten some indication from folks in the courtroom that there was something untoward that had happened in the jury room. We didn't know exactly what, um, and we went on a campaign to find out what."[7]



[4] Murdaugh submitted his Motion for a New Trial pursuant to Rule 29(b), SCCrimP.
[5] Accessible at https://www.youtube.com/live/myuNfAevjAw?si=Vshu_NMu2-JLFxPf&t=200 at 3:19 as of January 10, 2024.
[6] Accessible at https://www.youtube.com/live/myuNfAevjAw?si=lVDeYxQDfv9LkwHT&t=311 at 5:10 as of January 10, 2024.
[7] Accessible at https://www.goodmorningamerica.com/news/video/alex-murdaugh-attorneys-call-new-trial-102955711 at 0:12 as of January 10, 2024.

Later on September 6, 2023, attorney Joseph M. McCulloch, Jr., who represents two jurors who provided affidavits to Murdaugh, stated to Court TV that he came to be involved with the jurors "because [he] was asked to be," (though he does not disclose who asked) initially for the purpose of protecting jurors from swarming press attention

If Murdaugh's counsels were indeed informed of the allegations immediately after the verdict, before sentencing, then Murdaugh was obliged to raise his concerns to the Court immediately, even if the concerns were at that time ill-defined or inchoate. If Murdaugh's counsels directed McCulloch to speak to jurors, or even insinuated a desire for such to occur in the fashion of a king complaining of a turbulent priest, McCulloch may be an agent of Murdaugh under the law.

Murdaugh and his counsels, at the hearing scheduled for Tuesday, January 16, 2024, should be required to explain the inconsistency between their statements to the media regarding the time of their discovery of the allegations and the affidavit submitted by their client. If counsels did indeed know of these claims at the time of trial, the motion for a new trial is untimely filed and must be denied.

## III. EVIDENTIARY HEARING IS UNNECESSARY: because Murdaugh has failed to make a *prima facie* showing of prejudice, no evidentiary hearing is necessary.

The State acknowledges the Court's decision to proceed with an evidentiary hearing. Nonetheless, in order to ensure this issue is preserved, and because the same arguments go to the question of whether Murdaugh has met his burden of showing actual prejudice, the State retains and restates here its arguments that no such hearing is necessary.

No further evidentiary inquiry is necessary as Defendant failed to make a *prima facie* showing required to necessitate an evidentiary hearing. Not a single juror who

actually deliberated on the case indicates that their deliberations or verdict was in any way affected by the improper contacts alleged. The jurors were polled individually and affirmed their verdicts on the record. *See* State's Response to Motion at 21-22.

Murdaugh offers with his motion an affidavit from only one juror who deliberated: Juror 630. In the affidavit, Juror 630 attributes statements to Clerk Hill which resemble arguments made by the State, but she does not claim she was influenced by Clerk Hill, but rather merely felt pressure from other jurors. Due process is not implicated by pressure upon one juror by other jurors. *See, generally State v. Franklin*, 341 S.C. 555, 534 S.E.2d 716 (Ct. App. 2000) (due process not implicated where other jurors verbally abused a holdout for at least four hours). Thus, Juror 630's affidavit is affirmatively inconsistent with a *prima facie* showing necessary for an evidentiary hearing. *See* State's Response to Motion at 19-20.

Juror 785 – the so-called "egg juror" and landlord to Juror 630 – did not participate in deliberations and was removed for her own violations of the court's instructions not to discuss the case with third-parties, and lack of forthcoming candor regarding those discussions. Further, when asked by Judge Newman at trial if Clerk Hill discussed anything about the case with anybody on the jury, Juror 785 replied **"not that I'm aware of."** *See* State's Response to Motion at 10-16; 20; 23; Trial Tr. 5553, ll. 22-25. The affidavits in the defense motion on their own do not support a new trial and the motion should be denied on the pleadings.

Moreover, none of the other jurors who deliberated who spoke to SLED after Murdaugh filed his motion indicated their verdict was in any way based on anything but

a fair consideration of the evidence, further supporting that the motion should be rejected on the pleadings. *See* State's Response to Motion at 21-22.

Nonetheless, Murdaugh argues that a hearing is necessary, seemingly in order to impeach Clerk Hill. That a potential witnesses may be impeachable is inconsequential to whether Defendant has made a *prima facie* showing. The jurors found Murdaugh guilty, affirmed their verdict when polled, and none have alleged Clerk Hill influenced them. *See* State's Response to Motion at 24. Thus, no evidentiary hearing is necessary and the motion should be denied.

## IV. WITNESSES, EXHIBITS, AND PROCEDURE: the evidentiary hearing procedure should be judicially guided questioning of jurors who deliberated, followed as necessary by other witnesses called by the parties, but the scope of relevant evidence is limited.

Each of the twelve jurors who deliberated must be called as witnesses before the Court to affirm the verdict in order to satisfy Murdaugh's burden of prejudice. Any inquiry to jurors should be limited and judicially conducted to minimize intrusion into the lives of those who performed such public service in this case. Assuming the Court rules as argued above that Murdaugh must show prejudice, the following questions to deliberating jurors, based in what the record on appeal reflects the trial court used in *State v. Green*, 432 S.C. 97, 851 S.E.2d 440 (2020), should be sufficient, with additional inquiry to be conducted only if necessary:

1. On March 2, 2023, did you answer when polled that your verdict was guilty on each of the charges?

2. As you were instructed to do by Judge Newman, was your verdict on March 2, 2023 based solely on the testimony, evidence, law, and arguments of counsel as presented at the trial?

This is sufficient to determine whether there was any improper effect on the verdict and minimizes intrusion on the jury, while preserving the focus of the proceedings upon the

allegation actually raised by Murdaugh's motion. *See* State's Response to Motion at 5-6.

Rule 606(b), SCRE, also makes this principle clear:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

In the event any juror's answer to the above questions raises the need for additional inquiry, then additional inquiry would be warranted with questions from the Court, questions suggested to the Court by counsel, and questioning by counsel, as well as evidence from additional relevant witnesses.

**a. EVIDENCE AND OBJECTIONS: the scope of the witnesses the State intends to call is contingent upon this Court's rulings, but may include the jurors who deliberated, jurors who did not deliberate, clerk staff, court staff, law enforcement, and others with knowledge.**

The State addresses the types of witnesses and anticipated objections below. However, a list of potential witnesses and exhibits is sent separately as it contains sensitive identifying information.

**1. <u>Deliberating jurors</u>**

Procedurally, the State contends the evidentiary hearing should begin with the previously suggested short polling of each juror as to their verdict. The results of that examination will determine first, whether further inquiry should occur, and second, the relevance of specific witnesses and specific subjects to that inquiry. *See, generally*

Rule 611(a), SCRE (court has reasonable discretion to control mode and order of interrogating witnesses and evidence); *State v. Green*, 432 S.C. 97, 100, 851 S.E.2d 440, 441 (2020) (affirming trial court's "deft handling" of contact with bailiff through limited inquiry to jurors). If there is no indication of any prejudice then there is no need for further inquiry. *See State v. Aldret*, 333 S.C. 307, 509 S.E.2d 811 (1999) (defendant has the burden to demonstrate prejudice from allegations of internal misconduct by or external influence on jury).

Only in the event a juror's response necessitates further inquiry, would the State have specific objections to certain witnesses and specific objections to portions of certain witnesses' testimony. This list of course cannot be exhaustive and will ultimately depend on how the testimony and evidence develops at any hearing.

First, the State would generally object to any inquiry to the jurors beyond that which is allowed by Rule 606, SCRE. That rule prohibits any inquiry into internal jury discussions, mental processes, mind or emotions, and discussions. Our state appellate courts have repeatedly indicated that any judicial inquiry beyond whether "extraneous improper information" affected the jury is improper unless it goes to fundamental fairness. *See State v. Aldret*, 333 S.C. 307, 509 S.E.2d 811 (1999) (defendant must demonstrate prejudice from allegations of internal misconduct such as premature deliberations, and defendant was not only procedurally barred from failing to timely raise the issue), *State v. Hunter*, 320 S.C. 85, 463 S.E.2d 314 (1995) (inquiry proper where juror claimed racial prejudice influenced verdict); *See also State v. Zeigler*, 364 S.C. 94, 610 S.E.2d 859 (Ct. App. 2005) (finding that although jurors submitted note asking defendants to testify, trial judge's charge and affidavits did not indicate any juror based

the decision on a defendant's lack of testimony); *State v. Franklin*, 341 S.C. 555, 324 S.E.2d 716 (Ct. App. 2000) (internal pressure from jurors, including "screaming" and calling one "stupid" and other names, was insufficient to raise concerns of fundamental fairness to invade internal deliberations of verdict). Indeed, as the Court of Appeals noted in *Franklin*:

> But the integrity of the jury system is jeopardized any time a court finds it necessary to intrude into the internal deliberation process. Such an inquiry should not be lightly made.

*State v. Franklin*, 341 S.C. 555, 562, 534 S.E.2d 716, 720 (Ct. App. 2000).

Therefore, assuming further inquiry is necessary based on a polling of the jurors, it should be limited to issues raised, and only if those issues go to extraneous prejudicial information or internal deliberative processes that fit in the narrow category of fundamental fairness. In the event a juror's response to the polling necessitates additional inquiry, that inquiry should also assess whether there was prejudice under the law. *See Aldret*, 333 S.C. at 313-14, 509 S.E.2d at 312 (automatic reversal not required for either external influence nor internal juror misconduct, and burden is on defendant to show prejudice); *Zeigler*, 364 S.C. at 111-12, 610 S.E.2d 868-69 (even if jurors thought defendant should have testified none said that was the reason they found the defendant guilty).

Jurors should be required to stay until polling is completed, and be subject to recall in the event that development of additional issues during the evidentiary hearing require more inquiry as to specifics within the above-defined confines of the law.

### 2. Alternate, excused, or removed jurors

The State would first object to the testimony from any alternate or removed juror under Rules 401 to 403, SCRE, since they did not deliberate and thus were not part of the verdict under attack. Certainly, there is no relevance and any non-deliberating juror should not be allowed to speculate on the effect of any alleged external or internal conversation on jury deliberations or the verdict. *See also* Rule 606, SCRE.

In the event that a non-deliberating juror, Juror 785, who was removed by Judge Newman for talking to her husband and tenants about the case in violation of the judge's instruction, is allowed to testify to alleged external influence because of developments during the polling and initial inquiry to the deliberative jurors, the State would seek to admit as an exhibit the entirety of the trial transcript containing the *in camera* examination of Juror 785, the spouse, and the tenants, as well as Judge Newman's ruling on the issue finding the juror should be removed for her violation of instructions.

The State would object under Rules 401-403, SCRE to any testimony from Juror 785 as to her claims as to interactions with Clerk Hill, specifically as to paragraphs 3 through 11 but also any similar or related claims, because none of them involve alleged interaction with or discussion with any deliberating juror. *See also* Rule 606(b), SCRE.

The State would generally object to any hearsay from Juror 785's claims about conversations she had after the trial with people such as Daindridge or Webb.

Aside from the discussion of the issue in the transcript, the State would object to testimony regarding the so-called Facebook issue under Rules 401-403, SCRE, since Judge Newman did not rely upon it in excluding the juror.

Unless the proper foundation is laid and joined by any issue following polling of the deliberative jurors, the State would also generally object to discussion of these and similar issues from any removed or alternate juror, as the case may necessitate, as: (1) improper character evidence under Rule 404 and 405, SCRE, as any character trait is not pertinent; (2) Rule 608, SCRE (setting out proper impeachment and limiting the use of extrinsic evidence); Rule 609, SCRE (allowing impeachment for certain crimes for which a witness has been convicted); Rule 613, SCRE (setting forth foundational requirements for use of prior inconsistent statements); and Rule 801-804, SCRE (hearsay). This list is not intended to be exhaustive and will depend on how the testimony and evidence develops.

**3. <u>Clerk of Court Hill</u>**

Again, only if the initial polling of the jurors requires further inquiry, then Clerk Hill may be called to testify by either party depending on allocation of the burden.

Various allegations have been made involving the Clerk both in the defense motion and in public reporting. Some of these include supposed manufacturing of a Facebook post, supposed conversations with the removed Juror 785, plagiarism as to the book about the trial, a wiretapping arrest of her son related to his county employment, and investigations into use of government office for private gain. Generally, again, the State would object to relevance under Rules 401-03, SCRE, to any testimony of or examination about any alleged conduct that occurred outside of the time period of the trial, and any conduct that does not involve interaction with a deliberative juror. For example, the Facebook issue was not relied upon by Judge Newman to exclude Juror 785, and her claims as to conversations with Clerk Hill did not

involve any other deliberating juror. Any claims as to plagiarism or wiretapping or use of office for personal gain occurred after trial and are similarly irrelevant.

Unless the proper predicates exist or a foundation is laid, the State would generally object to examination of these and similar issues, as: (1) improper character evidence under Rule 404 and 405, SCRE, as any character trait is not pertinent; (2) Rule 608, SCRE (setting out proper impeachment and limiting the use of extrinsic evidence); Rule 609, SCRE (allowing impeachment for certain crimes for which a witness has been convicted); Rule 613, SCRE (setting forth foundational requirements for use of prior inconsistent statements); and Rule 801-804, SCRE (hearsay). This list is not intended to be exhaustive and will depend on how the testimony and evidence develops.

**4. Courthouse staff**

Again, only if the initial polling of the jurors requires further inquiry, then other courthouse staff, such as the jury coordinator, other clerks, and bailiffs, may be called to testify.

As before, the State would submit their testimony should be limited to allegations of extraneous influence or any other permissible juror inquiry, and as before, depending on whether proper predicates exist or a foundation is laid, the State would object to relevance under Rules 401-03, improper character evidence under Rules 404 and 504, improper impeachment under Rules 608, 609, and 613, and hearsay, among others, inasmuch as inquiry is sought into issues that do not directly address permissible issues regarding the deliberative jurors.

### 5. Other Witnesses

Other witnesses could become relevant, but depending on the nature of the inquiry and the issues joined after polling of the deliberative jurors. For example, Attorney Joe McCullouch was present as a media commentator but also represented Juror 785 shortly after trial (if not before the end of trial), and may be relevant as to when the defense first became aware of these allegations. If the Facebook issue is deemed relevant, testimony from judicial or external witnesses may be necessary to explain the manner in which the issue arose. Similarly, testimony may be needed from the tenants of Juror 785, as well as the person who sent the email upon hearing from a coworker that Juror 785 was talking about the case and expressing an opinion during trial – which was why she was excluded. If the book issue is relevant testimony may be needed as to the manner in which that issue arose. Finally, SLED agents from the trial, into the allegations against Juror 785, and from the investigation following the defense motion may need to be called depending on the evidence otherwise allowed.

### 6. Credibility

In the end, though, assuming there is inquiry beyond polling of the jurors, and conflicting evidence arises on the issues, including impeachment evidence, it will be for this Court to decide credibility and to determine based on those findings: (1) whether misconduct occurred, and (2) whether Murdaugh can show prejudice. *See State v. Aldret*, 333 S.C. 307, 509 S.E.2d 811 (1999) (defendant must demonstrate prejudice from allegations of internal misconduct or external influence), *State v. Hunter*, 320 S.C. 85, 463 S.E.2d 314 (1995) (rejecting claims from juror about supposed racial bias and coercion, noting no evidence it affected the verdict and the juror agreed guilty was her

verdict when polled); *State v. Zeigler*, 364 S.C. 94, 610 S.E.2d 859 (Ct. App. 2005) (finding that although jurors submitted note asking defendants to testify, trial judge's charge and affidavits did not indicate any juror based the decision on a defendant's lack of testimony); *State v. Covington*, 343 S.C. 157, 539 S.E.2d 67 (Ct. App. 2000) (where there was conflicting information regarding whether extraneous information was brought to the jury about defendant, trial court properly resolved the credibility issues and found defendant failed to prove misconduct by either clear and convincing or preponderance); *State v. Franklin*, 341 S.C. 555, 324 S.E.2d 716 (Ct. App. 2000) (affirming trial court's rejection of claims from one juror about threats and verbal abuse from the others did not rise to the level of internal misconduct such as to raise a due process claim).

In the end:

> In a criminal prosecution, the conduct of the jurors should be free from all extraneous or improper influences. Unless the misconduct affects the jury's impartiality, it is not such misconduct as will affect the verdict. The trial court has broad discretion in assessing allegations of juror misconduct. Relevant factors to be considered in determining whether outside influences have affected the jury are the number of jurors exposed, the weight of the evidence properly before the jury, and the likelihood that curative measures were effective in reducing the prejudice. Generally, the determination of whether extraneous material received by a juror during the course of the trial is prejudicial is a matter for determination by the trial court.

*State v. Kelly*, 331 S.C. 132, 141–42, 502 S.E.2d 99, 104 (1998).

Here, Juror 785 was removed prior to deliberation, the Judge properly instructed the jury, and the jurors all indicated guilty was their verdict after polling. There will be no credible evidence this verdict was based on anything but the evidence, law, and permissible argument at the trial.

**b. PROCEDURAL ISSUES: the Court should receive all testimony in open court, not *in camera*, but with limitations on media recording and broadcasting of the images or names of the jurors.**

There is a presumption of courtroom openness that applies to post-trial hearings involving allegations of alleged juror misconduct. *Ex parte The Greenville News, et. al.*, 326 S.C. 1, 482 S.E.2d 556 (1997). Restrictions on the general openness of the courts are allowed if essential to preserve higher values and they are narrowly tailored to serve that interest. *Id.*

In this case, some reasonable restriction on the general openness of the courts is necessary because of the unprecedented public interest in this case, and judicial interest in protecting these jurors from unreasonable intrusion and respecting their public service – particularly in a case as lengthy and complicated as this one. Like trial, arrangements should be made for the jurors to be able to report offsite and be transported to the courthouse by law enforcement or court personnel, so they will not have to walk through the public entrances where they may be filmed or approached by media or gallery members. Additionally, jury room(s) inaccessible to the public should be made available for the jurors during pendency of the hearing.

Any examination of the jurors during the hearing should be with any media and gallery members present under strict order not to record, photograph, report, or broadcast their faces or any potential identifying or private information. Cell phones or any other recording device should be prohibited from any gallery member in the court room except for legitimate media members approved by the Court. The only live video or audio feed allowed to be broadcast in real time should be from an approved pool feed, which should have safeguards built in including an appropriate delay with the pool feed provider under instructions to monitor and black out from broadcast any portion of

the feed inadvertently recorded which would violate these restrictions and the jurors' privacy. See generally Rule 605(f), SCACR (generally addressing trial court's discretion to control media presence in courtroom and providing that members of the jury should not be photographed, and requiring pooling arrangements when more than two media outlets have given notice).

If other witnesses become necessary, similar protection of their identities or some of their testimony may be necessary in order to protect the identities of the jurors.

Of course, the Court could and should exercise reasonable discretion to add or modify any restrictions as the hearing develops in order to protect the judicial interest in preventing unreasonable intrusions on juror privacy, while still honoring the general openness of matters occurring in court.

While subpoenas should be allowed in order to secure the attendance of jurors and other possible witnesses that may become necessary for the evidentiary hearing, depending again on this Court's decisions as to the manner of inquiry and the evidence that develops at the hearing, subpoenas beyond that for such things as jurors' phone records should not be allowed absent good cause shown. This Court always retains discretion to allow further inquiry depending on evidence that develops at the hearing, including supplemental productions or hearings if necessary.



{*Conclusion and signature on following page*}

## CONCLUSION

WHEREFORE, the State respectfully requests that this Court deny Murdaugh's motion for a new trial or, barring that, convene an evidentiary hearing consistent with that conducted in *State v. Green* and, upon hearing the testimony of all twelve jurors who deliberated and witnesses presented, find Murdaugh's allegations to be not credible, find Murdaugh has failed to meet his burden of proof as to both the factual allegations and prejudice therefrom, and deny his motion for a new trial.

A list of potential witnesses and exhibits is sent separately as it contains sensitive identifying information.

Respectfully submitted,

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January 10, 2024

# EXHIBIT H

(Appellant's Reply Brief)

| STATE OF SOUTH CAROLINA<br>COUNTY OF COLLETON | COURT OF GENERAL SESSIONS<br>FOURTEENTH JUDICIAL CIRCUIT |
|---|---|
| State of South Carolina,<br><br>v.<br><br>Richard Alexander Murdaugh,<br><br>Defendant. | Indictment Nos. 2022-GS-15-00592, -593, -594, and -595<br><br>**DEFENDANT'S REPLY TO THE STATE'S PRE-HEARING BRIEF** |

Defendant Richard Alexander Murdaugh, through undersigned counsel, hereby replies to the re-submitted pre-hearing brief the State submitted to the Court but did not file or otherwise make available to the public, pursuant to the Court's direction on January 4, 2024.

## I. Introduction

On October 27, 2023, Mr. Murdaugh filed a motion for a new trial based on after-discovered evidence, having obtained leave from the Court of Appeals to suspend his appeal of his convictions to file the motion. His motion alleges that Rebecca Hill, the elected Clerk of Court for Colleton County, had extensive private communications with members of the jury during trial. This allegation was supported by sworn affidavits of jurors and a witness to juror interviews, testimony at *in camera* proceedings, and other evidence including Ms. Hill's own book. The subject matter of Ms. Hill's alleged communications was the evidence being presented at trial. Mr. Murdaugh alleges that an elected state official deliberately violated his constitutional right to a fair trial before an impartial jury. If that allegation is proven, the law requires a new trial.

On December 21, 2023, the Court instructed the parties to submit pre-hearing briefs by January 3, 2024. Mr. Murdaugh submitted a 21-page brief (approximately 19 pages excluding caption and signature block). The State submitted a 7-page brief, which excluding the caption and signature page was only 5 pages long, half of which was dedicated to arguing that the Court should not hold an evidentiary hearing at all even though the Court has already set the evidentiary hearing

dates. On January 4, 2024, the Court instructed the parties to resubmit their briefs answering the following questions directly:

1. List all potential witnesses you plan to call during the evidentiary hearing.

    a. List any objections or challenges you plan to make to opposing party's witnesses. I understand you may not have an exact list but you can predict the opposing side's intentions as far as witnesses.

2. List all exhibits you plan to introduce during the evidentiary hearing.

    a. Again, list any objection or challenges to opposing party's exhibits.

3. Clarify your argument as to whether the Defendant is entitled to new trial or not.

a. Specifically, clarify the argument you will make during the evidentiary hearing. I've already decided an evidentiary hearing will occur. The mere fact that I have set the matter to include an evidentiary hearing does not mean I have decided any issue in the case at the present.

4. Any procedural issues which you feel may affect the evidentiary hearing:

    a. Issues regarding the subpoena of specific witnesses.

    b. Your position regarding how the court should receive testimony. Whether any witness testimony should be in conducted in camera rather than in open court.

5. Any other issues regarding the conduct for the hearing of the merits of the motion.

The Court further stated, "I understand that you may not want these particular details on the public record until the evidentiary hearing or the status conference. You are welcome to send the revised briefs to me directly without filing."

On January 10, 2024, Mr. Murdaugh filed his revised brief, 32 pages long, making it available to the public. The State submitted its revised brief, 31 pages long directly to the Court, with a cover email stating, "We are electing at this time to just send the brief to the Court and defense counsel rather than filing." The State's revised brief, six times longer than its publicly

available brief, contains many novel legal arguments purporting to explain why the Court should avoid determining whether Ms. Hill tampered with the jury during the trial. What it lacks is any claim that the facts will show Ms. Hill did not tamper with the jury during the trial.

The State's new brief is organized under four top headings, "Burden of Proof," Motion Untimely," "Evidentiary Hearing Unnecessary," and "Witnesses, Exhibits, and Procedure," to which Mr. Murdaugh replies below (except for the State's argument against holding an evidentiary hearing, which the Court has already decided will occur).

## II. Reply to State's "Burden of Proof" arguments.

Mr. Murdaugh does not have a burden to prove. Where there

> In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

*Remmer v. United States*, 347 U.S. 227, 229 (1954). Mr. Murdaugh argues this "burden shifting" under *Remmer* is irrelevant in this case because where a state official communicates to the jury about the merits of the case before it, our Court of Appeals subsequently sharpened and simplified the standard:

> In this case, there was the private communication of the court official to members of the jury, an occurrence which cannot be tolerated if the sanctity of the jury system is to be maintained. When there has been such a communication, a new trial must be granted unless it clearly appears that the subject matter of the communication was harmless and could not have affected the verdict.

*State v. Cameron*, 311 S.C. 204, 208, 428 S.E.2d 10, 12 (Ct. App. 1993) (internal quotation marks and alteration marks omitted).

The *Cameron* standard is slightly different than the standard in *Remmer* in that it restricts the presumption to egregious cases of external influence but does not admit the possibility that such egregious cases could be harmless. *Cf. Connecticut v. Berrios*, 129 A.3d 696, 709–11 (Conn. 2016) (collecting federal and state cases when discussing majority position that "the *Remmer* presumption is still good law with respect to egregious external interference with the jury's deliberative process via private communication, contact, or tampering with jurors about the matter").[1] In that, it presages our Supreme Court's holding in *Green*: "The attempted bribery of a juror in *Remmer*—conduct which goes to the heart of the merits of the case on trial—is a far cry from the circumstances presented in this case. The bailiff's actions here—though improper—did not touch the merits . . . ." *State v. Green*, 432 S.C. 97, 100, 851 S.E.2d 440, 441 (2020). But, of course, the logic of *Cameron* does directly follow the reasoning of *Parker*, *Remmer*, *Mattox*, and a line of cases extending to early English law predating our Republic by centuries. *See* Def.'s Revised Prehearing Br. 18–20 (citing, *inter alia*, *Parker v. Gladden*, 385 U.S. 363 (1966) (per curiam); *Remmer*; *Mattox v. United States*, 146 U.S. 140 (1892); *Lord Delamere's Case*, 4 Harg. St. T. 232 (Eng. 1685)).

Mr. Murdaugh argues those cases nevertheless are not, technically, relevant because this Court is a trial court called upon to follow *Cameron*, not to agree with it. The State, however, broadly offers four arguments against application of the *Cameron* standard in this case. Each is unavailing.

*First*, the State argues this Court should ignore published appellate authority that is directly on point because *Smith v. Phillips* purportedly abrogated *Remmer*, and that *Green* recognizes this

[1] Mr. Murdaugh's revised pretrial brief emphasized language in this quote but inadvertently failed to provide parenthetical noting he added the emphasis.

by "unanimously declining to adopt *Remmer* . . . and its presumptive prejudice standard in every instance of improper contact." State's Second Prehearing Br. 3–4 (citing *Smith v. Phillips*, 455 U.S. 209 (1982) and *State v. Green*, 432 S.C. 97, 851 S.E.2d 440 (2020)). As Mr. Murdaugh argues extensively in his revised brief, that is not correct. There is a circuit split on the issue and the Fourth Circuit takes the majority position in rejecting the State's argument: "We cannot accept the Commonwealth's argument that the presumption of prejudice attaching to extrajudicial communications was overturned by the Supreme Court in *Tanner v. United States*, 483 U.S. 107 (1987), or *Smith v. Phillips*, 455 U.S. 209 (1982)." *Stockton v. Virginia*, 852 F.2d 740, 743–44 (4th Cir. 1988) (parallel citations omitted).[2] The South Carolina Supreme Court is not obliged to follow the Fourth Circuit's position on this split, but South Carolina courts often defer to the Fourth Circuit in such situations. *See Limehouse v. Hulsey*, 404 S.C. 93, 108–09, 744 S.E.2d 566, 575 (2013). The Court of Appeal's *Green* opinion expressly discussed the circuit split. 427 S.C. 223, 235, 830 S.E.2d 711, 717 (Ct. App. 2019), *aff'd as modified*, 432 S.C. 97, 851 S.E.2d 440 (2020). Our Supreme Court affirmed the decision as modified without rejecting Fourth Circuit case law, instead stating "[w]e are not persuaded that the *Remmer* presumption of prejudice applied here" and "we decline to adopt the *Remmer* presumption of prejudice in every instance of an inappropriate bailiff communication to a juror"—which would be a very tortured way of saying the *Remmer* presumption of prejudice no longer applies at all. *Green*, 432 S.C. at 100–101, 851 S.E.2d at 441. *Green* of course does not say that; rather, it says *Remmer* does apply in certain

[2] Significantly, Justice O'Connor explicitly stated in her concurring opinion in *Smith*, that the Court's holding did not foreclose the use of presumptive implied bias in appropriate cases. 455 U.S. 209, 224, 102 S. Ct. 940, 949, 71 L. Ed. 2d 78 (1982)

cases, just not in cases in which the state actor's actions "though improper—did not touch the merits" of the matter before the jury. *Id.*

*Second*, the State argues "*Parker* is factually distinguishable because" in *Parker* "one of the jurors testified that she was prejudiced by the statements." State's Second Prehearing Br. 10 (citing 385 U.S. at 365). The State fails to note that in the very next sentence the Court went on to hold that "Aside from this [referring to the testimony of the juror that she was prejudiced], we believe that the unauthorized conduct of the bailiff involves such a probability that prejudice will result that it is deemed inherently lacking in due process." *Id.* (internal quotation marks omitted). In other words, as discussed in *Cameron* and *Green*, when a state actor's communication concerns a harmful "subject matter" or the "merits" of a criminal case, it does not matter whether the jurors say they were prejudiced.

*Third*, the State argues that framing a state official's intentional jury tampering during trial as a structural error is without procedural support. Mr. Murdaugh will not repeat in this Reply his discussion of the many cases that provide such support. *E.g.*, Def.'s Revised Prehearing Br. 18–20; *see also Parker*, 385 U.S. at 365 ("[W]e believe that the unauthorized conduct of the bailiff 'involves such a probability that prejudice will result that it is deemed inherently lacking in due process.'" (quoting *Estes v. Texas*, 381 U.S. 532, 542–43 (1965))).[3] Mr. Murdaugh merely adds that the issue here is not whether a juror engaged in misconduct, not whether some member of the public engaged in misconduct, not whether a defendant engaged in misconduct, and not even

[3] In identifying deliberate jury tampering by a state actor during a criminal trial as structural error, *Parker* quotes from its opinion in *Estes* issued the previous year, which more fully stated: "It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process." 381 U.S. at 542–43. That is the definition of structural error.

whether a bailiff made an unguarded statement that he should have known a juror would hear (as in *State v. Rowell*, 75 S.C. 494, 56 S.E. 23 (1906)[4]). The issue is whether an elected state official using the power of her office to enter the jury room during trial to advocate against the defendant to promote her own interests is a structural error in the conduct under the trial, under the principle that all evidence and argument presented to the jury must be presented in the courtroom. *Turner v. Louisiana*, 379 U.S. 466, 472–73 ("In a constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel.").

The State complains that this sort of tampering happens so commonly that it "cannot overstate the impossibility" of considering it a structural error. State's Second Prehearing Br. 12. That exactly reverses the issue. To the undersigned's knowledge, nothing like Ms. Hill's conduct has ever happened before this case. Most likely it will never happen again. The impossibility should be found in excusing Ms. Hill's conduct with post hoc reasoning that her tampering probably did not change the outcome of the trial. If Ms. Hill's misconduct is excused, then truly anything goes.

*Fourth*, the State argues this Court should simply ignore the controlling precedent of *Cameron* because a judge dissented, because it was somehow abrogated by *Smtih* eleven years before it issued, or because its reasoning is otherwise flawed. Of course, a dissenting opinion in no way changes the trial court's obligation to faithfully follow controlling precedent. *Cameron*

[4] The State relies heavily on *State v. Rowell* in support of its position. This 117-year-old case decision is inapposite because the *Rowell* decision predates the incorporation of the Sixth Amendment right to an impartial jury to the states through the due process clause of the Fourteenth Amendment by *Parker v. Gladden*, 385 U.S. 363, 364 (1966). In other words, *Parker* abrogated *Rowell* on this point.

was cited and discussed with approval in the Court of Appeal's *Green* decision, which contrasted the harmless bailiff conduct there with the conduct requiring a mistrial in *Cameron*. 427 S.C. at 237, 830 S.E.2d at 717. Our Supreme Court affirmed that decision as modified without mentioning *Cameron* at all. If the Supreme Court meant to overrule *Cameron*, it would have said so. Instead, it corrected the Court of Appeals reasoning to conform with the reasoning in *Cameron*. *Cameron* post-dates *Smith* by eleven years and so could not have been abrogated by it. If *Cameron* court misapprehended the meaning of *Smith* as to the issue before it (it did not), that would simply mean *Cameron* was wrongly decided, which is not an issue for the trial court's consideration. Neither is the State's complaint that the *Cameron* opinion purportedly "is also not entirely consistent internally." Trial courts do not reject controlling precedent because they disagree with the appellate court's reasoning—appellate courts correct trial courts' errors, not the other way around.

*Cameron* sets forth the controlling legal standard:

> In this case, there was the private communication of the court official to members of the jury, an occurrence which cannot be tolerated if the sanctity of the jury system is to be maintained. When there has been such a communication, a new trial must be granted unless it clearly appears that the subject matter of the communication was harmless and could not have affected the verdict.

311 S.C. at 208, 428 S.E.2d at 12.[5] That decision has not been overruled by any later decision of our Supreme Court or the United States Supreme Court. It therefore is binding authority which this Court must follow faithfully. If the State disagrees with the standard set forth in *Cameron*, it can explain why in its appellate brief and seek leave for oral argument against precedent on appeal. *See* Rule 217, SCACR.

[5] The State appears to have dropped its claim that the standard Mr. Murdaugh quotes from *Cameron* is not in fact the one and only standard set forth in *Cameron*. *Compare* State's Second Prehearing Br. 14 *with* State's Initial Prehearing Br. 3 n.2.

## III. Reply to State's "Motion Untimely" arguments.

The State argues,

> Murdaugh's motion is arguably procedurally deficient. A review of the motion does not reveal precisely when or how it is he learned of the claims he now raises. Before the Court of Appeals, Murdaugh only provided an affidavit to that effect as required by *State v. DeAngelis*, 256 S.C. 364, 182 S.E.2d 732 (1971), upon prompting by the State, and even then only begrudgingly and with complaint. The State has reason to believe Murdaugh's affidavit is untruthful, and not merely because Murdaugh himself has proven to be extraordinarily untruthful at trial and throughout his entire life.

State's Second Prehearing Br. 16. This argument is unsound for four reasons.

*First*, there is no legal requirement for an affidavit from Mr. Murdaugh stating that he did not know Ms. Hill was tampering with the jury during his trial. The State relies exclusively on an out-of-context, cherry-picked quote from *State v. DeAngelis*, a 52-year-old case that has never been cited for that proposition. 256 S.C. 364, 182 S.E.2d 732 (1971). *DeAngelis* affirmed a trial court's denial of a motion for a new trial, in which the defendant sought a "new trial" as a device to challenge his own guilty plea that occurred after a jury was empaneled but before trial commenced. *Id.* at 368–69, 182 S.E.2d at 733. His motion for a "new trial" was supported only by two affidavits from other persons criminally involved in the crimes for which he was accused and one from his own attorney. *Id.* at 369–71, 182 S.E.2d at 734. The trial court determined that, among other issues, an affidavit was at least needed from the defendant, given that he was challenging his own decision to plead guilty, and it denied the motion for a new trial. *Id.* at 371, 182 S.E.2d at 734–35. The Supreme Court affirmed. *Id.* at 372, 182 S.E.2d at 735. In 52 years, the fact-specific decision in *DeAngelis* has never been cited by any court for the proposition that a motion for a new trial always requires an affidavit from the defendant, regardless of the circumstances or the factual basis for the motion.

Mr. Murdaugh refuted this argument in the Court of Appeals, but to avoid delay additionally provided an affidavit from Mr. Murdaugh stating the obvious, that he did not know of the Clerk of Court's improper communication with the jury until after the trial concluded. That affidavit states, in its entirety,

> I, Richard Alexander Murdaugh, after being duly sworn, depose and state that I did not have any knowledge or information that the Colleton County Clerk of Court, Rebecca Hill, or anyone else, had communications with the jury during the trial in the above-captioned matter about the evidence, jury deliberations, and the other matters identified in the proposed Motion for New Trial filed as an exhibit in the Court of Appeals, until after the jury rendered its verdict and I was sentenced.

Exhibit A to Reply to State's Return to Motion to Suspend Appeal, *State v. Murdaugh*, Appellate Case No. 2023-000392 (Sept. 21, 2023).

The State now asserts it "has reason to believe Murdaugh's affidavit is untruthful," which necessarily means that it believes Mr. Murdaugh had knowledge during trial that Ms. Hill was communicating with the jury outside the courtroom to secure his conviction for murder but remained silent about that fact until six months after his conviction and sentencing. State's Second Prehearing Br. 16. Since he was in custody during the trial, he could only have learned that from his counsel. So, the State says Mr. Murdaugh's lawyers told him Ms. Hill was tampering with the jury, and he agreed the best course of action would be to remain silent, be convicted and sentenced for murdering his own family, then file a post-trial motion six months later. No reasonable person believes that.

*Second*, the State claims Mr. Murdaugh's motion for a new trial is defective because it does not indicate how or when he learned of the allegations contained therein. Again, this argument was refuted in the Court of Appeals. The "how" is that jurors and other witnesses spoke to Mr. Murdaugh's counsel after the trial. The "when" is on or about the dates on the affidavits regarding those interviews. Mot. Exs. A, F, H to Ex. 1 (affidavits from witnesses dated August 14, August

18, and August 13, 2023, respectively); Mot. Exs. B ¶ 1, J ¶ 1 to Ex. 1 (affidavits from defense paralegal regarding interviews with jurors stated to have occurred on August 6, 2023); Mot. Ex. G ¶ 2 to Ex. 1 (affidavit from defense attorney regarding Facebook download conducted at a witness interview stated to have occurred on August 18, 2023). If the Court is so inclined, it can ask the witnesses to confirm when they were first contacted by Mr. Murdaugh's counsel.

*Third*, the State's assertion that Mr. Murdaugh's counsel should have immediately filed a frivolous motion for a new trial the moment they first heard any unsubstantiated rumor about jury issues is absurd. The State provides many quotes from media statements by Mr. Murdaugh's counsel (which explicitly state that rumors were first heard *after* the trial), but even those quotes include the statement "We didn't know exactly what, um, and we went on a campaign to find out what." State's Second Prehearing Br. 17. Of course, the State does not really believe defense counsel could or should have immediately filed a motion after trial demanding a new trial because they heard rumors giving them "some indication from folks in the courtroom that there was something untoward that had happened in the jury room" without first investigating "exactly what" actually happened. The proper course of action was to investigate the rumors. That is what Mr. Murdaugh's counsel did, but no one would speak with them until Ms. Hill published her book. As Mr. Griffin stated to the media in the press conference the State repeatedly cites, *see* State's Second Prehearing Br. 17 n.5, n.6, n.7, after Ms. Hill published her book, "That zone of silence collapsed, and jurors were upset about that, the ones we talked with, and they were more than willing to come forward."

*Fourth*, the State makes this argument for an improper purpose. As the State itself explains, its purpose is to obtain discovery into how the defense learned about Ms. Hill's jury tampering, a subject that has nothing to do with whether Ms. Hill actually engaged in jury tampering. The State

wants an examination of Mr. Murdaugh's lawyers and attorney Joseph M. McCulloch, Jr., who represents certain jurors who have given statements the State does not like, to establish that Mr. McCulloch is a sinister "agent of Murdaugh." *Id.* at 18. It is incredible that the State would argue, in the same brief, both that the Court should inquire into how Mr. Murdaugh's lawyers learned about Ms. Hill's jury tampering and that the Court should ***not*** inquire into whether Ms. Hill actually tampered with the jury. *Compare* State's Second Br. 18 *with* State's Second Br. 20–21. It is rather unlikely any juror would vote to convict Mr. Murdaugh of murdering his own family, then immediately decide to corruptly work with Mr. Murdaugh's counsel to overturn the verdict, all while maintaining his anonymity and seeking no money or publicity for himself. It is rather more likely that the Clerk of Court who has stolen public money, sold access to the courthouse, conspired to engage in illegal wiretapping, invented a fictitious Facebook post in an attempt to have a juror removed, covertly used the defense's trial graphics contractor as a spy during and after trial, sent *ex parte* emails to the prosecution with suggestions for impeaching the defense's expert during the testimony of the expert, organized juror appearances on national television, published a book on the trial that was withdrawn from publication because she plagiarized a reporter covering the trial, is the subject of multiple ethics commission and criminal investigations, and who was not even allowed to have a county credit card because of her history of misappropriation of funds, engaged in self-interested jury tampering and her distasteful self-promotion finally caused jurors to come forward.



## IV. Reply to State's "Witnesses, Exhibits, and Procedure" arguments.

The State argues that the jurors should only be asked two questions:

> 1. On March 2, 2023, did you answer when polled that your verdict was guilty on each of the charges?

> 2. As you were instructed to do by Judge Newman, was your verdict on March 2, 2023 based solely on the testimony, evidence, law, and arguments of counsel as presented at the trial?

State's Second Prehearing Br. 20. According to the State, no juror should be asked if Ms. Hill tampered with the jury if the jurors testify that they obeyed the trial judge's jury charge. A juror would need to confess to willfully disregarding Judge Newman's instructions as a prerequisite to even ask what Ms. Hill did or did not do. The State even wants a leading "As you were instructed to do by Judge Newman" appended to the question just to make sure the jurors know how they should answer. This argument should be rejected for four reasons.

*First*, an evidentiary hearing is required, and the purpose of an evidentiary hearing is not merely to poll the jury again. The purpose is to allow the party with the burden of production the opportunity to produce evidence meeting the burden of persuasion required (here, a preponderance of the evidence) to obtain the relief it seeks. If Mr. Murdaugh is not allowed to ask jurors if Ms. Hill actually said what he alleges she said, he will not have been afforded that opportunity and no evidentiary hearing will have been held, violating not just generally controlling appellate case law, but also the controlling appellate law of ***this*** case. *See* Def.'s Revised Prehearing Br. 29–30 (explaining why the law of the case requires an evidentiary hearing).

*Second*, the State claims that our Supreme Court in *Green* approved the trial court only asking these two questions when investigating improper contact by a bailiff with jurors during trial by a state official. State's Second Prehearing Br. 20. Of course, the trial court in *Green* asked the jurors whether the bailiff said anything to them, and if so, what was said, and this Court should do likewise regarding Ms. Hill. In *Green*, Judge Hocker asked every juror if they had direct communications with the bailiffs, even after they answered "no" when asked whether their verdict was influenced by any communication with any bailiff. *See* Record on Appeal 555–77, *State v.*

*Green*, Appellate Case No. 2017-001332 (attached as **Exhibit A**). When there was a communication, he asked what the communication was. *Id.*

*Third*, the second proposed question violates Rule 606(b) of the South Carolina Rules of Evidence. A version of the question was asked in *Green*, but the Rule 606(b) issue was not before the Court of Appeals. 427 S.C. 223, 236 n.3, 830 S.E.2d 711, 717 (Ct. App. 2019), *aff'd as modified*, 432 S.C. 97, 851 S.E.2d 440 (2020) ("Not before us is the issue of how far a trial court can go in questioning jurors post-verdict without crossing the bounds of Rule 606(b), SCRE."). The Supreme Court decision modifying the Court of Appeals opinion has no discussion of Rule 606(b). *See generally Green*, 432 S.C. 97, 851 S.E.2d 440 (2020).

The Fourth Circuit explained, in a case cited by the Court of Appeals in *Green*:

> The rules of evidence make it difficult for either party to offer direct proof of the impact that an improper contact may have had on the deliberations of the jury. *See* Fed. R. Evid. 606(b); *Mattox*, 146 U.S. at 149, 13 S.Ct. at 53 (quoting *Woodward v. Leavitt*, 107 Mass. 453 (1871)) ("the evidence of jurors as to the motives and influences which affected their deliberations, is ***inadmissible either to impeach or to support the verdict***"). The right to an impartial jury belongs to the defendant, however; thus a rebuttable presumption of prejudice attaches to the impermissible communication. While juror testimony concerning the effect of the outside communication on the minds of the jurors is inadmissible, the state may rebut the presumption of prejudice through whatever circumstantial evidence is available, including juror testimony on the facts and circumstances surrounding the extraneous communication. This circuit has held in the civil context that the party supporting the jury's verdict must overcome the rebuttable presumption of prejudice that attaches once an impermissible contact with the jury has been established. *Haley v. Blue Ridge Transfer Co.*, 802 F.2d 1532, 1535–37 (4th Cir.1986). If this was true in the civil context, it would appear no less applicable to a criminal trial.

*Stockton v. Virginia*, 852 F.2d 740, 743–44 (4th Cir. 1988) (emphasis added); *cf.* Rule 606, SCRE note (stating "[t]he language of this rule is identical to the federal rule"). Another federal case cited by the Court of Appeals in *Green* observes, "The rule forbidding the questioning of jurors concerning the impact of improper communications is the law not only in this circuit but in every

other circuit in which the question has arisen." *Haugh v. Jones & Laughlin Steel Corp.*, 949 F.2d 914, 918 (7th Cir. 1991) (collecting cases).

Thus, the Court cannot ask jurors to testify as to the effect Ms. Hill's communications had on their minds as they deliberated in the jury room, either directly or through the backhanded leading question the State proposes. Mr. Murdaugh has no burden to show prejudice; rather, the State must use circumstantial evidence to show the communications did not prejudice the outcome. It could do so, for example, by showing the communications never reached the ears of a deliberating juror. That is unlikely in a case where a deliberating juror has submitted an affidavit stating she heard the communications. Where, as here, the communication is from a state official in a criminal case and did reach at least one deliberating juror, *Cameron* greatly simplifies the issue for the State: The State must show that the communication did not bear on the merits of the matter before the jury, which is exactly what our Supreme Court held the State accomplished in *Green*. 432 S.C. at 100, 851 S.E.2d at 441. If the communications did not bear on the merits, the State has no burden to prove anything. *Id.* If they did, the result is a structural error requiring a new trial. *See Cameron*, 311 S.C. at 208, 428 S.E.2d at 12; *see also Parker*, 385 U.S. at 365 ("[W]e believe that the unauthorized conduct of the bailiff 'involves such a probability that prejudice will result that it is deemed inherently lacking in due process.'" (quoting *Estes v. Texas*, 381 U.S. 532, 542–43 (1965)).

*Fourth*, the State's reasoning has no limiting principle and leads to absurd results. By the State's reasoning, no defendant has a right to a trial free from jury tampering by a state official, no matter how extreme, if jurors testify that they would have reached the same verdict regardless. According to the State, if Ms. Hill had the jury room decorated like a grade-school classroom with colorful signs saying "Murdaugh is guilty," that would not violate Mr. Murdaugh's right to a fair

trial (at least not in any way he could enforce) so long as jurors did not testify that they voted guilty because of the décor. If Ms. Hill entered the jury room with a firearm and threatened the jurors with death unless they voted to convict, according to the State that would not violate Mr. Murdaugh's right to a fair trial (again, at least not in any way he could enforce) so long as the jurors testified that they bravely obeyed the trial judge's jury charge.

* * *

The State then proceeds to object to testimony from any non-deliberating juror, even those who were percipient witnesses to Ms. Hill's jury tampering. The State's reasoning is such jurors cannot testify as to the impact on deliberations. As explained above, no juror can do that. This objection is just another example of the State desperately trying to prevent the Court from determining the truth of Mr. Murdaugh's allegations. The percipient witnesses to Ms. Hill's misconduct in the jury room are of course relevant to an evidentiary hearing in which Mr. Murdaugh has the burden to prove her misconduct.

The State also asserts various unexplained Rule 403 objections. Rule 403 objections are irrelevant in a cause tried to the bench. *See, e.g.*, *Schultz v. Butcher*, 24 F.3d 626, 632 (4th Cir. 1994) ("Rule 403 was designed to keep evidence not germane to any issue outside the purview of the jury's consideration. For a bench trial, we are confident that the district court can hear relevant evidence, weigh its probative value and reject any improper inferences.").

The State objects to any impeachment of Ms. Hill based on conduct during the trial (the "Facebook issue") or outside the time of the trial. It is impossible to respond to general assertions of rules of evidence not tied to specific possible evidentiary proffers. Mr. Murdaugh discussed possible evidentiary objections in his revised prehearing brief which he will not belabor again here, Def.'s Prehearing Br. 3–8, but generally notes Rule 608(b) allows, within the discretion of

the Court, inquiring on cross-examination into the witness's character for untruthfulness, Rule 405(a) allows inquiry into specific instances of conduct on cross-examination where a person's character trait is at issue, Rule 608(c) allows a party to offer proof of bias or any motive to misrepresent for impeachment purposes, and Rule 613(b) allows use of extrinsic evidence of a prior inconsistent statement for impeachment if the prior inconsistent statement is denied.

The State provides specific examples of the "Facebook issue," plagiarism, and criminal wiretapping as "irrelevant." Plagiarism about the trial itself in the book that led to this motion, of such a degree as to cause the book to be pulled from publication, certainly is relevant to whether Ms. Hill's word can be taken over the word of anonymous jurors who have not money or fame from their participation in this case. The same is true of criminal wiretapping in response to, of all things, ethics complaints from her own employees. As for Facebook, discovery Mr. Murdaugh has received from Colleton County only within the last few days ***proves*** Ms. Hill fabricated the Facebook post and then lied to Judge Newman about it. Ms. Hill received an email from someone in Indiana watching the trial livestream online through a Facebook link. There was a Facebook chat in which someone claiming to be the ex-husband of a juror said his ex-wife was telling people she was on the jury and had already decided Mr. Murdaugh was guilty. The first and last names of the juror were included in the post, leaving no doubt the juror at issue was ***not*** Juror 785. The Indiana spectator emailed a screenshot of the chat message from her cell phone to Ms. Hill.

Ms. Hill did not act on the email because the juror at issue purportedly was going to vote guilty, which conformed to her interests. But Ms. Hill believed Juror 785 might not vote guilty, based on the conversations with the jury foreperson to which she admitted in her interview with SLED. The emailed Facebook post gave her the idea to invent one about Juror 785, which she would say she saw on the "Walterboro Word of Mouth" group instead of having received it by an

email she would otherwise be asked to produce. When Judge Newman asked her to produce the Facebook post about Juror 785 to him, she lied and said it had been deleted. In fact, the "real" Facebook post was still sitting in her email. This is proven by the fact that defense counsel obtained a copy of it when they obtained her emails from Colleton County. She enlisted her staff to assist in her corroborating her lie to Judge Newman that she had seen it posted somewhere but it was subsequently deleted. She even sold that lie for money in her now-withdrawn plagiarized book. The reason she lied was that her illegal private conversations with the jury foreperson made her believe Juror 785 might vote not guilty and she wanted to remove her from the jury. This information must be relevant to whether Ms. Hill is once again lying when she denies tampering with the jury.

## V. Conclusion

For the foregoing reasons, Mr. Murdaugh respectfully submits that when Ms. Hill's jury tampering is proven at the evidentiary hearing, the Court must grant the motion for a new trial, and that the State's arguments to the contrary are without merit.

Respectfully submitted,

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January 15, 2024
Columbia, South Carolina.

# EXHIBIT A

(Excerpt from *State v. Fabian LaMichael R. Green* Record on Appeal)

**VOLUME II of II**



STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appeal from Laurens County
Donald B. Hocker, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

FABIAN LAMICHAEL R. GREEN,

APPELLANT

APPELLATE CASE NO 2017-001332

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RECORD ON APPEAL

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courtroom at this time.

(Whereupon, these individuals as indicated by the Court exited the courtroom.)

THE COURT: I am going to have them sworn in but I will take care of that, I will take care of that. And, Johnny, he can be just on the other side of the door.

(Whereupon, Juror, Ameca Thomas entered the courtroom.)

THE COURT: Ms. Thomas, if you will have a seat, I am going to swear you in.

AMECA THOMAS, being first duly sworn, testified as follows:

THE COURT: Again, I just want to make sure your guilty verdict on both charges was that and is that still your verdict in the case?

MS. THOMAS: Yes, sir.

THE COURT: Okay. Is your verdict based one-hundred percent on the evidence and testimony and the law presented at this trial?

MS. THOMAS: Yes, sir.

THE COURT: Okay. Was your verdict influenced in any way whatsoever by any communications that you may have had with any of the bailiffs or any other person outside of the twelve member jury?

MS. THOMAS: No, sir.

THE COURT: All right. If you had any communications, if you had any communications with any of the bailiffs can you relay to me what those communications were, if you had any.

MS. THOMAS: Did not have any.

THE COURT: Okay, alright, okay. Thank you, Ma'am. I am going to put you in another room, then bring everybody else, it is still going to be a little bit. I eventually will bring the whole jury back in before I release you. If you can assist, Madam Clerk, on that.

(Whereupon, Ms. Thomas exited the courtroom.)

(Whereupon, Juror, Rachel Hughes entered the courtroom.)

THE COURT: Have a seat and I just need to have you sworn in and ask you a couple of questions.

RACHEL HUGHES, being first duly sworn, testified as follows:

THE COURT: Can you give me your name, please.

MS. HUGHES: Rachel Hughes.

THE COURT: Ms. Hughes, I just need to ask you again, the verdict of guilty on both charges, was that and is it still that, your verdict in this case?

MS. HUGHES: Yes, sir.

THE COURT: Okay. Was your verdict based one-hundred percent on the testimony, evidence and the law presented

in this case?

MS. HUGHES: Yes, sir.

THE COURT: Okay. Was your verdict in any way influenced by any communications that you may have had with any of the bailiffs in this case or anybody outside of the twelve member jury?

MS. HUGHES: No, sir.

THE COURT: Have you had any communications during this week with any of the bailiffs or any third party outside of the twelve member jury?

MS. HUGHES: No, sir.

THE COURT: Alright. Thank you, go to another room, I will bring the whole group back out after I do this individually. Okay. Thank you, Ma'am.

(Whereupon, Ms. Hughes exited the courtroom.)

(Whereupon, Juror, Jacqueline Noffz entered the courtroom.)

THE COURT: Have a seat and I just need to have you sworn in.

JACQUELINE NOFFZ, being first duly sworn, testified as follows:

THE COURT: Give us your name, please.

MS. NOFFZ: Jacqueline Noffz.

THE COURT: And, Ms. NOffz, your verdict of guilty on both charges, was that and is that still your verdict in

this case?

MS. NOFFZ: Yes, sir.

THE COURT: Okay. Was your verdict based one-hundred percent on the testimony, evidence and law presented in this case?

MS. NOFFZ: Yes, sir.

THE COURT: Okay. Was your verdict in any way influenced by any communications that you may have had with any of the bailiffs or any third party outside of this twelve person jury?

MS. NOFFZ: No, sir.

THE COURT: Did you have any communications with any of the bailiffs or with any third parties outside of the twelve member jury?

MS. NOFFZ: No, sir.

THE COURT: Alright. Thank you, Ma'am. She will tell you where to go.

(Whereupon, Ms. Noffz exited the courtroom.)

So far my questions in keeping with our conversation?

MR. SHAFFER: That's correct, Your Honor.

MR. MOWRY: Yes, sir.

(Whereupon, Juror, Benjamin Bryson entered the courtroom.)

THE COURT: Just have a seat in that first seat and I need to have you sworn in.

BENJAMIN BRYSON, being first duly sworn, testified as follows:

THE COURT: State your name, please.

MR. BRYSON: Benjamin Bryson.

THE COURT: Okay, Mr. Bryson, you can put your hand down. Your verdict on guilty of both charges, was that and is that still your verdict in this case?

MR. BRYSON: Yes, sir.

THE COURT: Was your verdict or is your verdict based one-hundred percent on the testimony, evidence and the law presented in this case?

MR. BRYSON: Yes, sir.

THE COURT: Okay. Was your verdict influenced, by any means, in any communications that you may have had with any of the bailiffs in this case, or any third party outside of the twelve person jury?

MR. BRYSON: No, sir.

THE COURT: Did you have any communications with any of the bailiffs or with any third party outside of the twelve person jury?

MR. BRYSON: No, sir.

THE COURT: Thank you very much, sir. You can go back, she is going to show you where to go.

(Whereupon, Mr. Bryson exited the courtroom.)

(Whereupon, Juror, Daniel Schrantz entered the

courtroom.)

THE COURT: Have a seat and I need to have you sworn in.

DANIEL SCHRANTZ, being first duly sworn, testified as follows:

THE COURT: Give me your name, please.

MR. SCHRANTZ: Daniel Nicholas Schrantz.

THE COURT: Okay. And your verdict of guilty on both of the charges, was that and is that still your verdict in this case?

MR. SCHRANTZ: Yes, sir.

THE COURT: Alright. Was your verdict and is your verdict based totally, one-hundred percent, on the testimony, evidence and law presented in this case?

MR. SCHRANTZ: Yes, sir.

THE COURT: Was your verdict influenced in any manner whatsoever by any communications with any of the bailiffs or any third party, not a part of the twelve person jury?

MR. SCHRANTZ: No, sir.

THE COURT: Have you had any communications with any of the bailiffs or any third party, not a part of the twelve person jury?

MR. SCHRANTZ: No, sir.

THE COURT: Thank you very much, sir. She will show you where to go.

(Whereupon, Mr. Schrantz exited the courtroom.)

(Whereupon, Juror, Shannon Byers entered the courtroom.)

THE COURT: Come on in and have a seat and I need to have you sworn in, Ma'am.

SHANNON BYERS, being first duly sworn, testified as follows:

THE COURT: Have a seat. Concerning your verdict of guilty on both charges, was that and is that still your verdict in this case?

MS. BYERS: Yes, sir.

THE COURT: Was your verdict and is your verdict based one-hundred percent on the evidence, testimony and law presented in this case?

MS. BYERS: Yes, sir.

THE COURT: Was your verdict influenced in any manner whatsoever by any communications with any of the bailiffs or any third party not a part of the twelve person jury?

MS. BYERS: No, sir.

THE COURT: Did you have any communications with any of the bailiffs or any third party, not a part of the jury?

MS. BYERS: No. Not about the case.

THE COURT: Tell me, did you have any communications with the bailiffs?

MS. BYERS: Just if we could walk outside.

THE COURT: Okay. Anything else other, can we take a break. I know that there was a break requested today, this afternoon.

MS. BYERS: Right.

THE COURT: Any other communications?

MS. BYERS: No.

THE COURT: Thank you very much, Ma'am.

(Whereupon, Ms. Byers exited the courtroom.)

(Whereupon, Juror, Velvet Boston entered the courtroom.)

THE COURT: I just need to have you sworn in.

VELVET BOSTON, being first duly sworn, testified as follows:

THE COURT: Your verdict of guilty on both charges, was that and is that still your verdict in this case?

MS. BOSTON: Yes.

THE COURT: You hesitated, are you sure?

MS. BOSTON: Yes.

THE COURT: Was and is your verdict based one-hundred percent on the testimony, evidence and law presented in this case?

MS. BOSTON: Yes.

THE COURT: Okay. Was your verdict influenced in any manner whatsoever by any communications with any of the

bailiffs or any third party not connected with the twelve person jury?

MS. BOSTON: No.

THE COURT: Did you have any communications with either any of the bailiffs or with any third party, not a part of the twelve person jury?

MS. BOSTON: No.

THE COURT: Thank you, Ma'am. She will show you where to go.

(Whereupon, Ms. Boston exited the courtroom.)

(Whereupon, Juror, Stacy Ruff entered the courtroom.)

THE COURT: Have a seat right here, Ma'am. Thank you. I need to have you sworn in.

STACY RUFF, being first duly sworn, testified as follows:

THE COURT: Your verdict of guilty in this case on both charges, was that and is that your verdict in this case?

MS. RUFF: Yes, sir.

THE COURT: Was and is your verdict based one-hundred percent on the testimony, evidence and law presented in this case?

MS. RUFF: Yes, sir.

THE COURT: Was your verdict influenced in any manner whatsoever by any communications with any of the bailiffs

or any third party not a part of the jury?

MS. RUFF: No, sir.

THE COURT: Did you have any communications with any of the bailiffs or with any third party not a part of the jury?

MS. RUFF: No, sir.

THE COURT: Okay, thank you, Ma'am.

(Whereupon, Ms. Ruff exited the courtroom.)

(Whereupon, Juror, Octavius Wheeler entered the courtroom.)

THE COURT: Have a seat here and I need to swear you in.

OCTAVIUS WHEELER, being first duly sworn, testified as follows:

THE COURT: Your verdict of guilty on both charges in this case, was that and is that currently your verdict in this case?

MR. WHEELER: Yes, sir.

THE COURT: Is that a, yes sir?

MR. WHEELER: Yes, sir.

THE COURT: Okay. Was and is your verdict based one-hundred percent on the testimony, evidence and law presented to you in this case?

MR. WHEELER: Yes, sir.

THE COURT: Was your verdict influenced by any

communications with any bailiffs or any third party not connected with the jury?

MR. WHEELER: No, sir.

THE COURT: Did you have any communications with any of the bailiffs or with any third party not a part of the jury?

MR. WHEELER: No, sir.

THE COURT: Okay, thank you, she will show you where to go. Oh, we need your name for the record.

MR. WHEELER: Octavius Wheeler.

(Whereupon, Mr. Wheeler exited the courtroom.)

(Whereupon, Juror, Garrett Pace entered the courtroom.)

THE COURT: Come on around, sir, and have a seat right there. I need you to raise your right hand, let me swear you in, please.

GARRETT PACE, being first duly sworn, testified as follows:

THE COURT: Your verdict of guilty on both charges, was that and is that currently your verdict in this case?

MR. GARRETT: Yes, sir.

THE COURT: Was and is your verdict based one-hundred percent on the testimony, evidence and law presented to you in this case?

MR. GARRETT: Yes, sir.

THE COURT: Was your verdict influenced in any way, with any communications with any of the bailiffs or any third party not connected with the jury in this case?

MR. GARRETT: No, sir.

THE COURT: Did you have any communications with any of the bailiffs or with any third party not a part of the jury in this case?

MR. GARRETT: Not on the case, no.

THE COURT: Did you have any communications with any of the bailiffs or any third party?

MR. GARRETT: Just in a professional manner, yes.

THE COURT: Need to tell me what those communications were.

MR. GARRETT: Just walking in, telling to come in, come out. Did I talk to them, yes.

THE COURT: Anything related to this case?

MR. GARRETT: No, sir.

THE COURT: All right. And your name?

MR. GARRETT: Garrett Pace.

THE COURT: Mr. Pace, thank you, she will show you where to go.

(Whereupon, Mr. Pace exited the courtroom.)

(Whereupon, Juror, Jocelyn Ellis entered the courtroom.)

THE COURT: I need to swear you in, would your raise

your right hand, please, Ma'am.

JOCELYN ELLIS, being first duly sworn, testified as follows:

THE COURT: Your name?

MS. ELLIS: Jocelyn Ellis.

THE COURT: And, Ms. Ellis, your verdict of guilty on both charges in this case, was that and is that currently your verdict in this case?

MS. ELLIS: Yes, sir.

THE COURT: Was and is your verdict based one-hundred percent on the testimony, evidence and law presented to you in this case.

MS. ELLIS: Yes, sir.

THE COURT: Was your verdict influenced in any manner with any communications with any of the bailiffs and any third party not a part of the jury in this case?

MS. ELLIS: No, sir.

THE COURT: Did you have any communications with any of the bailiffs or with any third party not a part of the jury in this case?

MS. ELLIS: No, sir.

THE COURT: Thank you, Ms. Ellis, she will show you where to go.

(Whereupon, Ms. Ellis exited the courtroom.)

(Whereupon, Juror, Christopher Vaughn entered the

courtroom.)

THE COURT: Have a seat, I need to swear you in.

CHRISTOPHER VAUGHN, being first duly sworn, testified as follows:

THE COURT: And your name again?

MR. VAUGHN: Chris Vaughn.

THE COURT: And, Mr. Vaughn, your verdict of guilty on both charges in this case, was that and is that currently your verdict in this case?

MR. VAUGHN: Yes.

THE COURT: Was and is your verdict in this case based one-hundred percent on the testimony, evidence and law presented to you in this case?

MR. VAUGHN: Absolutely.

THE COURT: Was your verdict influenced in any manner, in any way, by any communications with any bailiffs or any third party not a part of the jury in this case?

MR. VAUGHN: No, Your Honor.

THE COURT: Did you have any communications with any of the bailiffs or with any third party not a part of the jury in this case?

MR. VAUGHN: Absolutely not, Your Honor.

THE COURT: Thank you, sir, she will show you where to go.

(Whereupon, Mr. Vaughn exited the courtroom.)

THE COURT: I think that is the last one, Madam Clerk?

MADAM CLERK: Yes, sir.

THE COURT: Okay. What I am going to do is bring the jury back out, thank them for their service, give them the little spill that I give and, but before they come in we can certainly bring everybody back into the courtroom and then excuse the jury. And then we can, I can hear any matters you need to raise, you need to hold up first?

MR. SHAFFER: Well, Your Honor, I thought we were going to question the two bailiffs as well. That is part of my motion for a mistrial, I would like to question both of them.

THE COURT: Okay, alright, we can do that then. Which one do you want first?

MR. SHAFFER: It doesn't matter, whichever one.

THE COURT: Okay.

MR. MOWRY: Technically, Your Honor, I think the more important thing with this is the, is the answers from the jury.

THE COURT: Right. And I agree. I think that is controlling as far as how they responded to my questions. However, for there to be a complete record and since we did have some informal talks with the bailiffs and I will

allow some, and I will allow you to conduct some limited examination of both Mr. Easley and Mr. Bolt, just so we can have a record even though I have to agree with the State that I think the answers from the jury are, would be controlling in this case. But I want to have a complete record and I don't want to prevent you from not having a complete record.

MR. SHAFFER: Okay, Your Honor.

THE COURT: Are you satisfied with you conducting this?

MR. SHAFFER: Yes, Your Honor.

MR. MOWRY: Your Honor, if we could, on the motion for a mistrial, if we could do that also with a cleared courtroom so that is not--

THE COURT: Sure, I don't have a problem with that. Since we are talking, you know, if, because I typically on motions for a new trial I give the Defense lawyer, if it is a guilty verdict, ten days to make any motions for a new trial. I will be glad to give that time for motion for a mistrial as well.

MR. SHAFFER: And, Your Honor, I actually to do a--

THE COURT: Excuse me?

MR. SHAFFER: I am happy to do it if the Court would like me to within ten days. I think I can make it sufficiently. I already have one realm for a mistrial

being the previous juror issue from the first day.

THE COURT: Right.

MR. SHAFFER: I was also going to move based off of this. But I, I am happy to do it either way. I am happy to do it orally or in writing.

THE COURT: No; we can do it now. I offer that if counsel wants some time to get their thoughts together. But, no, I, we can do it now, we can do mistrial motion now, new trial motion now. That is not a problem, I just offer that.

MR. SHAFFER: I should be able to do it now, Your Honor.

THE COURT: Okay. Alright, let's, can you bring, let's just bring Mr. Bolt in and you can examine him and then we will bring Mr. Easley in. Okay.

(Whereupon, Bailiff, Johnny Bolt entered the courtroom.)

THE COURT: Mr. Bolt, I need to have you sworn in and just put something on the record concerning your communications with us back in-chambers.

JOHNNY BOLT, being first duly sworn, testified as follows:

THE COURT: And I am going to allow, he is going to conduct just some limited questions, so I am going to allow Mr. Shaffer to do that.

EXAMINATION BY MR. SHAFFER

By Mr. Shaffer:

Q Mr. Bolt, during your time as a Bailiff working on this case you said, am I correct in saying that you had some communication with jurors?

A Not really communication, just other than the fact that when we went on break and outside there was concern that they just asked me about, well they didn't really ask me, just kind of came out, one individual kind of brought up something that was involved, why did we have so many, because I could sense there was some fear amongst them, you know, because, and anyway I told them they were for protection, for the Judge, the victims, for the jurors and they didn't have anything to worry about. But they had some, for some reason they had a lot of concerns as far as fear was concerned. And that is when, because I, I had one girl, one juror had asked me, says I want to ask you something. I said, as long as it has nothing to do concerning the trial. Because I have been doing this long enough to know that I am not suppose to communicate about nothing about what the trial or what, you know, goes on and everything. So basically, fear of some things that was noticed in the courtroom as far as some pointing to the jurors going up and down the hall.

Q What do you mean by pointing at jurors going up and

down the hall?
A Well, one of them, it wasn't me but one of the other Bailiffs had told me that one of the jurors had, not the jury, one of the Defendant's member would point at them going, you know, going up and down the hall. Said, you know, like that, you know.
Q The Defendant's family member?
A Yes.
Q Do you have any details of which juror this was?
A No sir, I don't. Because I am used to pretty much standing here. And then, of course, they see some things that is going on in the courtroom as far as, you know, like they had to take, I think on two different occasions, had to take a family member, you know, escort them out of the courtroom, I think making some kind of hand motions or some kind of something which I didn't even see. I had to ask later what was going on. Somebody raised their hand so they took them out.
Q Did any, at any point during their deliberations did they ever mention to you that they may be deadlocked?
A No, no. But they just, the Foreman did say, what happens if we can't reach a, reach a, you know, that, we can't reach any verdict. And I said, well, the Judge will give you some details on that if something happens, that you will need to write him a note and I will have to take

it to him.
Q Okay. Did you ever tell them anything about an Allen Charge?
A Well, I was familiar and I said, well, he will give an Allen charge, you know, because I have been doing a lot, I have seen this and I just mentioned, you know, that is usually the procedure that they do. And I said, yeah, he would probably give you an Allen charge. I said, well, he will just give you a charge and probably want to see if, see if you can stay later, something or another, of that nature.
Q Okay. Specifically related to the Allen charge, do you recall the exact words that you said to the juror?
A I just mentioned name, Allen charge, and that, that he may give them an Allen charge if they need.
Q And you told them they may have to stay later?
A I said once we give them the Allen charge, it is based on what he told them.
Q Okay. And that they would have to go back and stay later and deliberate?
A I didn't, I don't recall saying that.
Q What did you say specifically, because you just said something about, if they gave you, you told them that the Judge would probably give them an Allen charge?
A I mentioned the Allen charge, I did know what that

was. I said an Allen charge, he may give you an Allen charge, you may have to, well I did say, he may ask you to stay and stay later. I think that is what I said.

Q No further questions.

THE COURT: Okay. All right, Mr. Bolt, if you will go on out and ask Mr. Easley to come in, please.

(Whereupon, Mr. Bolt exited the courtroom.)

(Whereupon, Bailiff, Mike Easley entered the courtroom.)

THE COURT: Mr. Easley, I just need to have you sworn in and Mr. Shaffer is going to ask you some questions.

MIKE EASLEY, being first duly sworn, testified as follows:

EXAMINATION BY MR. SHAFFER

By Mr. Shaffer:

Q It is Mr. Easley, correct?

A Yes.

Q Mr. Easley, did you have any communication with any juror about this case?

A About the case, no sir.

Q Okay. Did you have any communication with any of the jurors about my client's family?

A There were questions asked to me by the jury.

Q What did they ask you?

A They would come to me, when they were coming in in

the mornings, one of them said that she felt uncomfortable in the hallway, that the Green Family had been walking in front of her and they stopped and turned around and pointed at her. I had jurors this week ask where the family was, are we going to be alright when we leave the building. Other than that that is the gist of everything.

Q Did you, did you communicate in any way back with them about the Green Family?

A Just that they would, everything would be alright because we would make sure that there were no problems.

Q Okay. Did you have any communication or do you have any knowledge about whether or not the jury was deadlocked?

A No, I could not know what their--

Q Did anyone ever tell you anything about an Allen charge coming from the jury?

A Coming from the jury, no.

Q Okay. What about coming from Mr. Bolt, what did Mr. Bolt tell you about the Allen charge?

A Mr. Bolt never said anything to me personally about the Allen charge. I know what it is and I know the purpose of it.

Q Okay. And did Mr. Bolt tell you anything about being deadlocked?

A No.

Q The jurors being deadlocked?
A No.
Q No further questions.
THE COURT: Thank you, Mr. Easley.
(Whereupon, Mr. Easley exited the courtroom.)
MR. MOWRY: Quite frankly, Your Honor, I think, as far as Mr. Easley is concerned, that is exactly what the Bailiffs are here for. They are here to receive jury concerns and deal with those.
THE COURT: I understand. Let's go ahead and, let's cut the jury loose, let me bring them in, thank them for their service and going to cut them loose and then we will take up your mistrial motion and then if you want to renew your new trial motion with everybody back in we can do that. Because I image your new trial motion is just going to be raising issues that you have already raised anyway.
MR. SHAFFER: Yes, Your Honor.
MR. MOWRY: Do you want the family in here for this, Your Honor.
THE COURT: Let's go ahead and leave them out so we don't go back and forth.
MR. MOWRY: Alright.
(Whereupon, the jury came into open court at approximately 7:11 p.m.)
THE COURT: In about two minutes, ladies and

gentlemen, I am going to cut you loose, how about that, is that good news. Let me just tell you a couple of things. First of all, the verdict that you reach in this case matters, doesn't mean anything to me, doesn't matter whether you find somebody guilty, it doesn't matter if you find somebody not guilty. What matters to me is that you perform your jury duty conscientiously, that you take it seriously, that you work hard and that you follow all of my instructions and you have done that. And that is what is important to me. As I told you early on this week and I think maybe one of the lawyers eluded to it, how high a responsibility it is to serve on a jury. And we take it very seriously and I believe you have taken it very seriously as well. And so I appreciate that. It is a tough job, I have never personally served on a jury, naturally I won't ever serve on a jury. But I know that it is tough just being a part of the judicial process in the roll that I am. But even though it has been tough and it has been hard and it has been long hours and now it is 7:15 on a Friday night, I hope that you can say that you have experienced something, learned something that you didn't know before. And that even though it is extremely difficult, very hard to find someone guilty of serious criminal charges, I hope that you can still say that it has been a good experience for you in some respect, I am

not saying everything would be a good experience but at least in some respects. And that maybe some time down the road you would not be adverse to serving on a jury again, whether it is in the criminal arena or whether it is in the civil arena. I am going to Greenwood next week and try a civil case. So, I thank you, I would like to, as you are exiting, I like to shake the hands of my jury. Madam Forelady, you need to hang around for just a minute because you have to sign the back of both of the indictments. So if you will just kind of hang, I tell you what, if you would go to the, come around and get with Ms. Lancaster. When you exit, just hang around here because the Clerk has your checks. Don't make big plans for the check. We will be engaging in the sentencing phase of this trial in just a little bit. If you would like to stay around for that you are more than welcome to, you certainly don't have to. You are more than welcome to. If you do they will assist you in coming back around and sitting in the very back of the courtroom, just let the deputies know that and they can assist you with that. Okay. So, just exit and hang around so the Clerk can hand you your checks.

(Whereupon, the jury was excused from open court at approximately 7:15 p.m.)

THE COURT: We still need to keep the courtroom clear

and let's go ahead and do the mistrial motion and then we can maybe take a short little break and finish up everything else.

MR. SHAFFER: Your Honor, obviously in-chambers, before the jury came back, we were informed about essentially Mr. Bolt's communication with the jury, the jurors or a juror, I am not sure how many it was. Your Honor, I would, I guess I moved in-chambers for a mistrial based off of that. Your Honor, I think that he is entitled to, yeah, he is sufficiently entitled to a trial by a jury that is free of improper influences. I site to a case called Holmes versus United States which is a Fourth Circuit case from 1960. It is 284, F.2d, 716. And it is a case involving, you know, similar facts, because it is a little bit different issue. It is whether or not, basically a court person, someone in the court informed the jurors of where someone was being housed at, that they were being housed in pretrial detention somewhere. I very quickly read it, I haven't read the entire thing but essentially the Fourth Circuit, that that was, that was a Constitutional violation. There is some South Carolina cases that address this issue mainly dealing with things about asking a question. I think that Mr. Bolt's questions, I guess his response to their question, you know, what happens if we can't reach a verdict. Well, the

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| STATE OF SOUTH CAROLINA<br><br>COUNTY OF COLLETON | )<br>)<br>) | IN THE COURT OF GENERAL SESSIONS<br>FOURTEENTH JUDICIAL CIRCUIT |

| | |
|---|---|
| The State of South Carolina,<br><br>Plaintiffs,<br><br>vs.<br><br>Richard Alexander Murdaugh,<br><br>Defendant. | Indictment Nos. 2022GS1500592 – 00595<br><br>**CERTIFICATE OF SERVICE** |

I, Richard A. Harpootlian, attorney for the Defendant, with offices located at 1410 Laurel Street, Columbia, South Carolina 29201, hereby certify that on January 15, 2024 did serve via email the following document to the below mentioned person:

Document: Defendant's Reply to the State's Pre-Hearing Brief

Served: Creighton Waters, Esquire
Office of The Attorney General
Rembert C. Dennis Building
Post Office Box 11549
Columbia South Carolina 29211-1549
cwaters@scag.gov

s/Richard A. Harpootlian
Richard A. Harpootlian

# EXHIBIT I

(Prehearing Transcript)

State of South Carolina )
) In the Court of General Sessions
) Fourteenth Judicial Circuit
County of Colleton )
2022-GS-15-0592
2022-GS-15-0593
2022-GS-15-0594
2022-GS-15-0595

The State of South Carolina, )
)
)
vs. ) Transcript of Record
)
)
Richard Alexander Murdaugh. )
)
)

January 16, 2024
Columbia, South Carolina

B E F O R E:

The Honorable Jean H. Toal, Judge

A P P E A R A N C E S:

Alan M. Wilson, Attorney General
Donald J. Zelenka, Deputy Attorney General
Samuel Creighton Waters, Senior Assistant Deputy AG
Johnny E. James, Assistant Attorney General
John P. Meadors, Assistant Attorney General
Attorneys for the State

Richard A. Harpootlian, Esquire
James M. Griffin, Esquire
Phillip D. Barber, Esquire
Attorneys for the Defendant



Elizabeth B. Harris, CVR-M-CM
Circuit Court Reporter

# I N D E X


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## E X H I B I T S

| No. | Description | ID. | Ev. |
|---|---|---|---|

No exhibits introduced

THE COURT: This is a prehearing procedure in the matter of State against Richard Alexander Murdaugh. It's case numbers 2022-GS-15-00592 through 00595. Defendant Murdaugh was indicted for the murder of his wife, Margaret Brandstetter Murdaugh, and his son Paul Bennett Murdaugh, and related weapons charges. His trial began on January 23, 2023. The presiding judge was Clifton Newman. After six weeks of trial, on the evening of March the 2nd of 2023, the jury returned a verdict of guilty on all four indictments, on which the defendant was sentenced on March 2023 to two consecutive terms of life imprisonment.

Notice of appeals of his convictions and sentences were filed by defendant Murdaugh's attorneys on March 9, 2023, with the South Carolina Court of Appeals. The transcript in this very lengthy trial took several months to produce, even in draft form. Before the attorneys received the final transcript, on September the 5, 2023 defendant filed with the Court of Appeals a motion to suspend his appeal and for leave to file a motion for a new trial with accompanying affidavits and transcript excerpts. After further defense and state filings, on October 17, 2023, the Court of Appeals granted appellant Murdaugh's motion to suspend the appeal and to remand this case to the circuit court to allow defendant Murdaugh to file a motion for a new trial.

On October 17, 2023, defendant Murdaugh received the final trial transcript and very shortly thereafter filed a motion for new trial in the Colleton County Clerk of Court's office. Subsequently, Judge Clifton Newman recused himself from further proceedings in this matter.

On December 16, 2023 -- excuse me, on December 18, 2023, Chief Justice Donald W. Beatty signed an order appointing or directing that the Honorable Jean Hoefer Toal, retired Chief Justice of South Carolina, be assigned exclusive jurisdiction for the limited purpose of presiding over defendant's motion for a new trial. I promptly contacted counsel in this case and set deadlines for briefing and arguments of the new trial motions. The new trial motions were set to be argued on January the 23rd -- 30th and 31st of 2024. And after several rounds of pretrial briefs having been submitted to me, I also set today's date for a procedural prehearing.

Before I begin, may I say that we certainly welcome members of the media, and I thank publicly attorney Jay Bender for agreeing to be the voluntary media coordinator for this matter, as he did for Judge Clifton Newman on the trial of this matter.

Cell phones are normally not permitted at all in our courtrooms, but the press have been allowed to bring in certain cell phones and laptops and electronic devices

because of the nonjury nature of this portion of the proceedings. But if any device rings or sounds to receive a call or to receive an email or a message, that device will be confiscated, and the owner will be asked to leave the courtroom. So, please now, if you haven't already, check your electronic devices and be sure that they will not sound during the time that these proceedings take place.

Major topics to be covered today have been addressed by me and discussed with counsel in a short pretrial conference in my chambers, and counsel may have certain things that they will put upon the record as we proceed through these topics that deal with what should be covered.

The first topic is, is an evidentiary hearing necessary at all. The State took the position the answer to that was no. Obviously, the defendant not. I have set an evidentiary hearing because I felt like we had to have some brackets on that time that we'll spend on this matter, but I have made no conclusive decisions beyond that on matters affecting the arguments the State makes about the procedural posture of this matter.

The next topic would be the burden of proof. Who has the burden of proof in this matter, and what must be shown to meet that burden of proof, and what must then be shown to contest what has been shown and proved?

The third topic is procedural defects, most specifically a contention by the State that this motion is untimely because of what was known before a verdict was rendered, accepted, and the jury polled.

And finally, we need to discuss witnesses: juror witnesses, the clerk of court of Colleton County, Ms. Hill, and other witnesses, and exhibits.

I note that at least one attorney in the room is an attorney for some of the jurors, and other jurors may have other attorneys. When I get to the portion of this discussion when we talk about specific witnesses, and if I am asked to hear from attorneys for the witnesses, I will at least consider that request. I don't know where we will be at that time in terms of what has been decided, but I will at least inquire about that.

To that end, if you have not already, during the first break be certain that all of you, the lawyers participating at counsel table and any other lawyers that feel they may have some interest in the proceedings that would warrant comment by them, please give your cards or information about your contacts to our court reporter, Ms. Harris.

With that, Mr. Harpootlian, you are the moving party. You may proceed.

MR. HARPOOTLIAN: If it please the Court, Your Honor, you raised -- I assume you want to go in the order in which

you just ---

THE COURT: I would.

MR. HARPOOTLIAN: Okay. You raised a number of legal issues, from whether we've waived -- I forget the order that you just took them, but Mr. Griffin is going to address those *in seriatim* based on what you said just a moment ago. As to the witnesses and the jurors, I will be handling that portion of the argument today.

THE COURT: Very good.

Mr. Griffin, we'll hear from you now.

MR. GRIFFIN: Yes. Thank you, Your Honor. The, the first issue that you've asked us to address is, is an evidentiary hearing necessary, and the answer to that question is very straightforward, is yes. Under, under established case law and the Supreme Court, the Fourth Circuit, and the South Carolina Supreme Court under *Remmer*, a *Remmer* hearing is absolutely necessary where there has been credible evidence presented that there's been an improper third-party contact with the jury prior to their deliberations that, that, frankly, whether it goes to the merits or not, a *Remmer* hearing is absolutely necessary. And, and, and, we believe that the Court of Appeals decision in this case contemplated a *Remmer* hearing.

In a *Remmer* hearing, evidence is presented as to, to what outside influences, if any, were brought to bear upon

the jury. We have in our motion for a new trial submitted affidavits of one deliberating juror, one alternate -- excuse me -- and then a -- and then another affidavit of a witness to an interview of an alternate wherein all three statements are consistent and, and -- in that they heard Ms. Hill, the clerk of court, prior to deliberations and, frankly, before the defense put on their case, Ms. Hill instructed do not be fooled by the defense. That's what the sworn statements say. And secondly, before Mr. Murdaugh took the stand, Ms. Hill advised one deliberating juror and two alternates at least watch his demeanor, which is an indication of, you know, he's going to lie.

And so then the question becomes factually did those contacts happen. And, and then, you know, we proceed from there as to what the burden of proof is after that. But the threshold, are we entitled to evidentiary hearing? The law is crystal, Your Honor.

THE COURT: Thank you, sir.

Mr. Waters for the State.

MR. WATERS: Thank you, Your Honor. May it please the Court? Your Honor, obviously you've addressed the issue of whether an evidentiary hearing is necessary. The State certainly understands that. It is incumbent upon us, though, based on the law to preserve our arguments as to procedural bar, and those are twofold.

The first one, of course, is that a motion for a new trial must be filed within ten days of the verdict unless there's after-discovered evidence. And I think an initial inquiry that needs to be determined is when the defense first learned of these particular allegations. In conversations with the defense -- and they said they were going to give me an answer -- that they may have had conversations with Juror 785 prior to her being represented, which was only a couple of days after trial. So, if that is the case and they were aware of these allegations, then we would want to argue to Your Honor and preserve the issue that this is not after-discovered evidence, and that there's a procedural bar in that regard.

Secondly, we made the argument that the affidavits on their face, the only deliberating juror indicated -- and that's 630 -- in that affidavit only said that she voted guilty. She had questions but voted guilty because she felt pressured by other jurors. And, of course, the law is crystal clear in multiple cases that that's sort of internal debate. It's actually in Rule 606(b) that that's not any sort of misconduct or anything that is an appropriate venue or mechanism to attack the verdict.

So, for that reason we've argued that their showing in their motion for a new trial is insufficient based on the case law for an evidentiary hearing because there is on its

face no sufficient allegation of prejudice. That being said, of course, we fully understand and expect the evidentiary hearing will go forward, and we'll be happy to address burden of proof after the defense makes their arguments.

THE COURT: Very good.

With respect to -- well, Mr. Griffin, anything in reply?

MR. GRIFFIN: Your Honor, it does not appear that the State takes a position contrary that a *Remmer* hearing is required. They're arguing that we have waived the right to that hearing. There's no evidence in the record of that, I can assure the court. We did not know of, of this information within ten days after the trial, and, and when we learned of it, we promptly acted.

MR. WATERS: Well, in conversations with Mr. Harpootlian and Mr. Griffin, they were going to actually look into that and look at their paralegal's notes. So, I fully rely on, trust the defense to give me a fair answer to that question. And then again if there's an issue to be raised, we would raise that. We're not conceding anything. We just wanted to preserve our issues.

THE COURT: I don't think we need to go back and forth many times about this. I think I understand your position. Here is my decision on the matter.

First of all, this is not -- I am not conducting a *Remmer* hearing. *Remmer* is a 1954 decision of the United States Supreme Court that deals with question of influence of the jury and a motion for a new trial on the basis of after-discovered evidence of that influence. I rely on the South Carolina decision of our Supreme Court authored by Justice Kittredge, *State v. Green*, and the *Green* decision specifically says that *Remmer* is not the guidance that South Carolina trial judges should look to in conducting hearings on after-discovered evidence.

Now, that says nothing about what the burden of proof should be, and I don't intend to say anything thereby. But I do intend tell to you right away that I will be relying on South Carolina's jurisprudence and South Carolina's jurisprudence specifically on what must be proved in a hearing of this nature and who bears the burden of that proof.

All right, and that leads me to the very next topic that we will now take up, which is the burden of proof.

Mr. Griffin.

MR. GRIFFIN: Yes, Your Honor. The -- as, as we cited in, in our papers, we believe that the controlling case in this instance, based on discovered conduct as alleged, and that is conduct of court official -- here the clerk of court having communication with the jury about the

substance or the merits of the case -- that the standard to be applied is, is not *Green* because *Green*, Justice Kittredge says that the contact by the bailiff was about a procedural issue, not about the merits of the case. Here we're dealing specifically with the merits of the case and the -- and the Court of Appeals decision in *State v. Cameron* we believe is the controlling standard.

And in *State v. Cameron* -- and that was decided in 1993, and, and the Court says in citing *Holmes v. United States*, which is a Fourth Circuit opinion, says:

> In this case, there was a private communication of a court official to members of the jury, an occurrence which cannot be tolerated if the sanctity of the jury system is to be maintained. When there has been such communication, a new trial must be granted unless it clearly appears the subject matter of the communication was harmless and could not have affected the verdict.

Now, now, we strongly believe that is the standard, is the question was the subject matter of the communication harmless and that it could not have affected the verdict. And, and we are -- that's our position on the standard.

Your Honor, if, if, if Your Honor looks to a different standard, we, we, we believe that *State v. Green*, the measure of *State v. Green*, you can't look just at Justice

Kittredge's opinion. You to look -- because, because he complimented the Court of Appeals decision. And the Court of Appeals decision absolutely applied the *Remmer* standard of the burden of production is on the defendant, but when the defendant produces evidence of a substantive communication to the jury by any third party -- that's, that's what *Remmer* is, by any third party -- that, that then there is a presumption of bias and that the State then has to overcome that presumption, produce strong, clear and convincing evidence that it was harmless. And, and, and that was the standard that the Court of Appeals applied in the *State v. Green*. And in *State v. Green* the Court of Appeals says that this is the standard of the Fourth Circuit, and we follow the Fourth Circuit law in this area.

Now, Justice Kittredge says that the communication by the bailiff, which essentially said if, if you're deadlocked, which they never were and never became deadlocked, then the judge may ask you to stay longer. I mean, that was the communication by the bailiff in *Green*, and Justice Kittredge said that did not go to the merits of the case. Justice Kittredge didn't throw out the *Remmer* presumption standard in *State v. Green*, Your Honor.

And it's important that the Court of Appeals decision, looking to the Fourth Circuit because, as Your Honor knows, this case -- and, and I would encourage the court to look

at the *Holmes* decision out the Fourth Circuit which we cite which applies to *Remmer*. It applied to *Remmer* in a *habeas corpus* case when they said *Remmer* is the clearly established law in the Fourth Circuit, and it vacated a death penalty conviction out of North Carolina because the North Carolina courts did not follow *Remmer*. And, and so the Court of Appeals decision in *Green* says we look to *Remmer*. Justice Kittredge says, you know, we're not going to apply the *Remmer* decision here because it didn't go to the merits.

What we have in this case and what we have, you know, presented through proffer on the affidavits, something that goes to the heart of the merits. It's the defense. It's the credibility of the defendant's testimony. And so we, we do have the burden of production, but we do believe that, that the standard in *Cameron* is we just have to show that the subject matter of the communication, that it was material to the case, and that then the burden shifts to the defendant to prove that it was harmless -- excuse me, the burden shifts to the State to prove it was harmless.

THE COURT: Thank you, sir.

MR. GRIFFIN: That -- that's what we believe the standard is.

THE COURT: Mr. Waters.

MR. WATERS: Your Honor, as you -- and I'm going to

walk through some of the cases in South Carolina to -- that address this issue. But as Your Honor is aware, of course, when we deal with these issues, we have two types. We have internal misconduct, and our courts have been reluctant -- Rule 606 says this as well -- to delve into that unless there are concerns of fundamental fairness like racism and things like that. And then there's external, allegations of external influence and that sort of thing, and that's what we're dealing with here today.

And to quote *State v. Grovenstein*, which is a 1999 case of the State Supreme Court, it cites *Aldret* and *Kelly* and says:

> We have consistently held that defendant must prove prejudice in these sorts of claims.

And if we walk through all of the case law, our court has been very careful and as much said so in *Aldret*, which was an internal case, to sync the analysis and the -- and the standards between those two, and consistently held that the defendant has to show prejudice. It's their burden to do so.

In *Blake*, 1992, the Court held:

> I don't presume prejudice, and the test of the courts was whether or not the verdict was solely the product of honest deliberation or whether it was the product of outside influence.

We go over to *State v. Kelly*. The Court -- of course Your Honor concurred with Chief Justice Finney's dissent in that case. But in that case, there was a pamphlet in the grand jury room. Clearly an external influence was alleged there, and ultimately in that case the court held that the defendant failed to show prejudice from that particular external influence.

In *State v. Grovenstein*, in this instance it was clearly external. There was an alternate who was present in the jury room and even took a preliminary vote with the jurors. So, clearly an external influence, far more that is even alleged in this case. That juror was removed, a curative instruction was given, but ultimately the Court was very clear: That we have consistently held the defendant must prove prejudice. Again, the burden being on the defendant.

In *Bryant*, this was a capital case, one that I argued from way back when, and in that instance, there was a police investigation, background investigation into death-qualified jurors in a capital case. Clearly external. The trial court conducted an inquiry with questions submitted by the parties as well, and ultimately noted that it was the defendant's burden to prove actual bias on the part of the jury.

In *State v. Pittman*, another case that I argued before

Your Honor, in that particular case there was a juror who had a conversation with his wife and with a bartender, and ultimately again the Court held that the defendant failed to meet the burden of prejudice because the wife's comment was the defendant was not guilty, and the comment to the bartender took place after deliberations had begun.

And then of course in *Green* in 2020, Your Honor just commented on that, and the Court clearly held that the *Remmer* presumption of prejudice doesn't apply here. And then, of course, went on to note that the defendant bears the burden of proving, proving prejudice.

And *Cameron* is a case that they rely on a lot, and I would say this about *Cameron*. And then *Cameron*, of course, goes on to say that the mere fact of any official communication does not mean necessarily that the jury was prejudiced and went on again to do a prejudice analysis and a harmless error analysis.

*Covington* is a Court of Appeals case from 2000. In this particular case, there were jurors who supposedly knew the defendant and knew some external information about whether or not he had previous difficulties with his wife. That was clearly external information. Again, the Court held that the defendant failed to show prejudice.

So, the case law in South Carolina, both from our state Supreme Court as well as our state Court of Appeals,

it's clear. It's in sync. It's uniform that it's the defendant's burden to show prejudice, and that's, of course, only after there's a determination that any sort of extraneous influence occurred. And that would be the State's position, that it is the defendant's burden.

And again we can address at the appropriate time what the State's position is as to the order in which the evidentiary hearing should go.

THE COURT: Thank you, sir.

Mr. Griffin, any reply?

MR. GRIFFIN: Yes, Your Honor. There is a tremendous difference in the law as to how the court analyzes juror misconduct as in *Kelly*, where the juror reaches out to her pastor, gets a pamphlet, brings it into the jury room, and, and that was found during the course of the trial.

The trial judge removed Juror O, who had gotten a pamphlet, voir dired every, every juror to ask what affect that had and could they put that out of their mind and deliberate. So, that happened during the middle of the trial, but it was juror misconduct. All the cases that he cited, the State relies upon, are juror misconduct cases, not, not unauthorized third-party communication that goes to the heart of the Sixth Amendment right by defendant to confront his accusers, to, to cross-examine witnesses who present evidence. And, and when a third party makes an

improper contact with the deliberating jury before they deliberate, that falls at the heart of the Sixth Amendment, which is a different, different animal altogether than, than where a juror engages in misconduct. And that's where you get to *Cameron*. That's where you get to *Green*, which, which *Green* says it was a procedural communication, not, not a merits communication.

And, and, Your Honor, in *Bryant* -- well, I would note Your Honor dissented in *Kelly*, but in, in *Bryant*, no jurors were interviewed, as best we can tell by the -- by the record. But in *Bryant*, it was a death penalty case. Law enforcement -- I believe it was Horry County -- questioning the jurors' relatives and friends and trying get their belief as to whether they believed in the death penalty. Apparently that -- some of that kind of leaked back to one juror or maybe -- but, but there's -- there was no record saying that jurors were prejudiced by that. But the Court said that behavior cannot stand, and we find prejudice based on conduct, not on the jurors' testimony. And, and they didn't use the word presumption, but they found prejudice.

And, and I don't want to get caught up in this issue of, of do we have to establish prejudice. I think prejudice is established, but the question -- it has to be established, but the question is, is it presumed under the

circumstances. And if it's presumed under the circumstances, what does the State have to rebut? And, and so, you know, prejudice is a touchstone, but the question is evidentiary presumption. Here where there is a third-party communication that goes to the merits of the case, the law is crystal clear that there is a presumption of prejudice, and the State has the burden of proving it's harmless beyond a doubt.

THE COURT: Thank you, sir.

MR. GRIFFIN: Thank you.

THE COURT: All right, Mr. Waters, you know, I'm not going to go back and forth a million times, but if you want to have a short comment in addition.

MR. WATERS: Very short, Your Honor. He said that these were not external influence cases, and every one of them that I listed was. Your Honor, *Blake* was bailiff. *Kelly* a pamphlet. Again, it was an external piece of information coming in. *Grovenstein*, it was an alternate; again, that's an external influence. *Bryant* was police investigation. *Pittman* was a bartender and a wife's comment. *Green* was a bailiff, and so -- and *Covington* was, you know, evidence that was not submitted at trial but the jurors were aware of. So, clearly all of those were external influence cases, Your Honor.

THE COURT: All right. I do not regard *State v.*

*Cameron* as the guidance that needs to be used by me in making a determination about this case. It's a Court of Appeals case. Since that case in 1993, there have been several cases, including *Green*, *Aldret*, and others, that very specifically talk about this issue of what the burden is on a motion for a new trial on the basis of after-discovered evidence that involves tampering or alleged tampering of the jury.

All those cases say that prejudice must be proved, not presumed, and it may very well be that that is what's going to be shown. But for purposes of what the defendant must show as the case goes forward to an evidentiary hearing, the presumption simply by the contact -- which we don't have any sworn evidence about except in the area of one juror at this time -- presumption is not the way to examine this issue, but rather specific evidence about what was said, when it was said, and how it was perceived by the juror is what I believe is required by *State v. Green* and other cases. And, therefore, that is the approach I will take.

All right, the next area of inquiry is the procedural argument of the State that this matter was untimely made.

Mr. Waters.

MR. WATERS: Yes, ma'am, Your Honor, and again we have raised the issue, as we talked about earlier, that we

believe that there is at least an inquiry as to a procedural bar that if the defense was aware of these allegations during the ten days, then it is not after-discovered evidence and the motion is untimely.

And additionally we also, as I previously expressed, would raise the issue that affidavits on their face are insufficient to put in play at an evidentiary hearings, and there are multiple cases that have -- in the State that held -- I think *Yarborough* is one of those -- that held that where those -- that showing was not made, that the trial court properly denied an evidentiary hearing. So, we would just preserve those issues, understanding the Court's plan, procedure that you previously expressed.

THE COURT: All right. All right, Mr. Griffin or Mr. Harpootlian, let me say, I will say to the defense -- I mean, to the State that I believe that issue needs further exploration. So, I am not prepared to rule that this matter is untimely in the least. We're going to have a hearing on this matter at which time this issue will be further explored. So, the State has preserved its position, but you need not argue about that matter at this time.

MR. HARPOOTLIAN: Thank you, Your Honor.

THE COURT: And now the matter that, to me, is the heart and soul of what we're doing today is the witnesses,

the exhibits, and procedure needed with respect to the witnesses. And the witnesses at least are the jurors and the clerk of court, Ms. Hill. What I'd like each side to explore with me is how those witnesses should be presented, who should present them, and how they should be questioned, and whether there are any brackets or limitations that should be imposed on what these witnesses are asked. And I will begin with the jurors, which is really the heart and soul of the matter. Other witnesses are very secondary to the first issue, which is the jurors themselves.

Mr. Harpootlian, you are the moving party, and you may proceed.

MR. HARPOOTLIAN: Your Honor, we agree all twelve jurors should testify. We -- I think both sides agree Your Honor should question those jurors.

The only question is -- I mean, not the only question. The first question would be as Your Honor questions these jurors, would you -- would you -- in all the cases the judge questions, would you want suggestions from us as to what additional questions we have after they respond to your questions, raise additional questions? That's number one.

Number two, each one of these jurors except -- of the original twelve, I think all have been interviewed. Maybe two have not been interviewed by SLED and given statements,

recorded statements. The rest have all given recorded statements, and then SLED prepared a memorandum of interview. We have reviewed all these videos and the MOI, and I can tell the court that the MOIs aren't consistent in many instances with what was said on the video to the extent that information was left out.

Now, if Your Honor is going to be very restrictive and, and did the clerk communicate something to you and did it affect your decision, I guess that's what we're hearing from Your Honor when you're following *State v. Green*. If you're going to say that, ask those questions, I mean, there's some of these jurors who indicated they heard the clerk say what the, the, the juror that gave the affidavit for us say, and I think they're going to say it didn't affect them, which is fine. If it affected that one juror, we think that's enough, and that juror has obviously given an affidavit to us.

The alternate which was excused and the -- he called her the egg lady, but she was also excused: the alternate because she wasn't needed, the egg lady because the judge found that she had had contact with people and discussed the case. They further indicated that the clerk said what we say she said, and we believe they should be examined. We'll be happy to do that, or the Court could do that.

So, there are witnesses, and then we have the clerk

herself. I talked to her lawyer this morning, who indicated she has not made a decision as to whether or not she will assert any constitutional right not to testify, and obviously that could be on a question-by-question basis maybe. I don't know. I mean, we're not ready to argue what the standard is on the Fifth Amendment at this point. But if she does testify, there are literally thousands of emails we were furnished last week by Colleton County, some information furnished by SLED this morning, and the attorney general which might be utilized. I can't say right now it would or wouldn't, depending on her answer, to impeach, contradict. And so it's, it's -- I can't tell you what exhibits it would be or we would do because I don't know what her answers are going to be.

We believe we should be able to examine her as a hostile witness. We, we should be able to call her as a witness because the burden is on us, as Your Honor has just enunciated.

Now, the only other thing I would say is this. Even if Your Honor determines that a piece of evidence or a question is not admissible for your consideration, for purposes of the appellate record, we believe we ought to be able to make a proffer. So, it may be that you allow -- Your Honor allows us to go forward and then in your decision decide it's not relevant, in your decision decide

you didn't consider it or whatever, but stop and go is going to elongate that hearing dramatically. And again, since you're the finder of fact, you can decide not what a jury is going to hear but what you, you -- it matters to you.

So, we think the examination of the clerk should be wide open, and we think that the exhibits we would use to impeach her, we would attempt to keep it relevant to the specific issues in this case.

I mean, her son has been -- for instance, her son has been indicted for, for wiretapping. There seems to be some inference, what we read in the paper -- we don't have any specific knowledge -- that she was aware of that, and that wiretapping was in relation to some ethics complaint about her. That's not relevant; we're not going to ask her about that. Now, we're continuing to examine whether or not there is some connection there, and we're, we're investigating that. But at this point, I will tell you that's not where we're going.

Where we are going, by way of example, is we have been furnished an email that she, she got on February 24th from somebody which was a photo, a screenshot of a, a -- looks like a posting on some sort of Facebook page where the ex-husband of a juror -- not the egg lady -- alleges that his ex-wife was talking about the case, and she was going

to vote guilty because she hates men.

Now, we, we know she got it. We know she got it on February 24th, yet on the morning of February 27th she tells in the -- in the chambers, the hearing we were all present at, that she had seen a Facebook page posting by egg lady's ex-husband alleging that she was talking about the case. She didn't think he was guilty. That Facebook page has never been produced, and then she produced a, a Facebook posting she said by the egg lady's husband. Turns out to be a guy I interviewed in Georgia apologizing for what he had posted on Friday night which concerned his wife's aunt meddling in their marriage. I think that's fertile ground for cross-examination. Your Honor may disagree with me, but I still would like to put those items into evidence for the appellate record at the time.

The last thing I would say is this. In terms of Your Honor questioning the jurors, we need instructions from you as to whether you want -- when you finish with a juror, do you want us to submit questions to you? Do you want -- I doubt you're going to let us question them. How is that process going to work, and will that be done someplace -- would be done in this courtroom? Will be done somewhere else? And if the jurors will be questioned outside of this courtroom, will there be a way for the public to hear what they have to say?

Beg the court's indulgence.

(A PAUSE.)

MR. HARPOOTLIAN: Beg the court's indulgence.

(A PAUSE.)

MR. HARPOOTLIAN: And Mr. Griffin correctly points out it's not just what they heard, may have heard from the clerk, but did any of the other jurors -- for instance, egg lady, we keep calling her, gave an affidavit indicating Becky said things like don't be fooled. Watch the body language. Watch, watch his body language as he testifies, Mr. Murdaugh. Did she relate that to any other jurors? It's not just what -- was it -- did it -- or did the sitting juror or the alternate in the...

Beg the court's indulgence.

(A PAUSE.)

MR. HARPOOTLIAN: One other point. In the memorandum of interview, now the clerk's private lawyer, Mr. Lewis, objected to any videotaping or audio taping of the clerk when she was interviewed. But in the memorandum of interview, she -- that is the clerk -- indicated she had conversations with the forelady outside the presence of the rest of the jury about what was going on in the jury room. Obviously, I would cross-examine her on that, but it may be necessary if she testifies to things that are inconsistent in that MOI for us to call the SLED agent that did the

interview to corroborate the MOI.

The MOI may be introduceable in and of itself as an exception to hearsay rule, but I believe it would -- may be necessary for us to call the SLED agent.

We're not going -- and, Your Honor, we're not -- you've indicated you're not going to want to know what -- any sort of summaries of those interviews by the jurors when we talked back in chambers or necessarily the MOIs. You want your own fact-finding with the jurors. To the extent that they contradict those, we may put all of that in the record for appellate purposes. And if you want, want to see those before you have this hearing, we can obviously put those -- we could put those in the record today or have those available for you, both the MOIs and the videos or -- we're, we're -- obviously, we're going to do whatever you tell us to do, but we're looking for some guidance as to if there's anything we can get you prior to that evidentiary hearing concerning those memorandum of interview by the SLED agents and the videotapes, whatever you -- whatever you instruct us to do.

Beg the court's indulgence.

(A PAUSE.)

MR. HARPOOTLIAN: Your Honor, we mentioned and Mr. Griffin reiterated to me just now, obviously you don't need to tell us that -- this today because we're not going to be

doing the questioning, but there is the consideration of 606(b) and the, the incursion into deliberations. At some point -- we don't need to know that today -- but at some point prior to you questioning the jurors, we'd like you to enunciate what your position is on that.

THE COURT: You're going to have to outline that a little bit more for me. What part of 606(b) are you discussing?

MR. HARPOOTLIAN: Well, it says:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations, or to the effect of anything upon that, or any other juror's mind as -- or emotions as to influence a juror to assent to or dissent from the verdict.

THE COURT: All right, sir, and what are you saying that imports for this proceeding?

MR. HARPOOTLIAN: Well, I mean, for instance, if we show, if we prove to you that the clerk said do not be fooled or, you know, watch, watch Murdaugh's testimony, watch the body language, referring -- he was lying, he would be lying, one of the issues is if, if the juror who sat during deliberations who said that she -- that the clerk said that, did she discuss that with any other

jurors? Did she infect the jury? Does this allow you to do that?

THE COURT: Well, you certainly -- if you go to 606(b), it gives you some guidance about that. It says:

> Upon inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations, or to the effect of anything upon that, or any other juror's mind or emotions influencing the juror to assent or dissent from the verdict or indictment, or concerning the juror's mental processes; except a juror may testify on the question of whether extraneous prejudicial information was improperly brought to the juror's attention, or whether any outside influence was improperly brought to bear upon any juror. Nor may -- nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which juror will be precluded from testifying be received for these purposes.

I take that to give us the guidance we need about the parameters of the questions.

MR. HARPOOTLIAN: But, but if -- again, the juror that gave us the affidavit, would she be asked did you discuss

that during deliberations, did she do that?

THE COURT: That apparently is very questionable under the terms of 606, and I intend to abide by that. The way those questions have been asked in the many cases I have reviewed is to ask the juror whether that's still their verdict. If they're asked about improper contact and they talk about improper contact, then the way to pursue it beyond that for the judge is to ask about the impact on the verdict, not on the deliberations themselves. That may be a small slice of difference, but I think it's very important to understand that no one, not myself or anyone else, is going to be asking the jurors about the specifics of their deliberation, and the rule is quite clear about that.

MR. HARPOOTLIAN: Okay, and, and, and is it clear that you will not be using the SLED interviews or MOIs to attempt to impeach.

THE COURT: I told you when -- when that was brought to my attention in our chambers conference this morning I haven't made my mind up about that. I don't know what's in those summaries or anything else, and we're going to have to discuss that, but again I'm going to be doing the questioning at this point, Mr. Harpootlian.

MR. HARPOOTLIAN: Yes. Yes, Your Honor.

THE COURT: And I am trying to perceive what you all

are asking, and I'm going to go to the State now and what their reaction is to what you said.

MR. HARPOOTLIAN: Thank you, Your Honor.

THE COURT: Mr. Waters.

MR. WATERS: Thank you, Your Honor. May it please the Court? Your Honor, again we would concur with what Your Honor just said about Rule 606 and, of course, all the cases that we've talked about, and the need to show prejudice. And obviously when you're talking about external influence, that prejudice would be an appropriate subject to inquire into the jurors as whether or not there was an impact on the verdict.

And we, of course, have suggested to Your Honor not only based on the cases that, that should be judicially conducted in a manner the protects the privacy of those jurors and protects the privacy of their identities. These jurors were drafted into service, and this inquiry, of course, has to happen, but it needs to be conducted in a manner that respects their privacy and should be, of course, judicially conducted.

We have suggested those, those two questions. If we look at the *Bryant* case, the *Bryant* case specifically talks about the fact that, depending on how the examination goes, there could be questions suggested by the parties. And obviously I think we would need to cross that bridge if and

when that needs to be crossed. And that starts with the -- with the Court's inquiry to those jurors and only if something arises that needs further inquiry could that be addressed at that point. And that could be even a discussion from counsel with the Court as to what additional questions may be proper.

You know, when the State first became aware of these allegations, the first thing that we did was ask SLED do an independent investigation, and the goal was good, bad, or ugly to get to the bottom of what, if anything, happened. And the result of that is why we are still here today. And that is that in speaking with the jurors that spoke to us, that the balance of the evidence, as well as in talking to the clerk's staff, was that there was no impact on any verdict. There was nothing unprofessional or untoward that happened that had any affect on the verdict. And so when we did that inquiry and that is what the jurors said, that is why we're here today, and that's what this hearing is going to address.

The only juror that we have is the one who filed the affidavit, that 630, and even she -- or that person said that she, you know, eventually voted guilty because she felt pressured by the other jurors. Did not even mention any external impact. And so unless she'd going to change her story, that is what was in her affidavit. So, the

balance of the evidence is the reason why we're here today and, and why this hearing needs to take place.

Your Honor, as far as inquiry to those jurors, again there could be a need that the parties would suggest questions. And it could be, depending on how things go, that the affidavits or maybe even the recordings, all of which have been provided to the defense, full recordings of those interviews of any potential witness in this case has been provided to the defense, it could be that issues could, could arise from either the State or the defense as to impeachment. And we can address those issues as they arise under the appropriate rule, 608, 613, and the like, dealing with not only prior incon -- state -- inconsistent statements but other evidence that would be properly impeached.

Ultimately, I do need to address one thing as it -- as it deals with all this, and that is the defense's contention that somehow the clerk is a party opponent in this particular case, and we believe that that is incorrect. Obviously, there is a hearsay exception or a non-hearsay determination in the evidentiary rules, I believe in 801, that exclude statements of the party opponent. But just because the clerk is an elected official and of the State does not make them a party opponent in the way that term is defined. A party opponent

is an active litigant before the case, and that is, I think, a difference. So, we would certainly say that, that hearsay rules would still be in effect as it relates to Ms. Hill and any testimony that she may provide.

I know there's been some discussion about the order in which the witnesses may be called and whether or not Ms. Hill would be a hostile witness. And obviously that's under Rule 611 and, I believe (c), which would allow leading questions, you know, if a person is hostile. I think, again, at this point I don't know that any showing necessarily has been made, but I understand the defense may raise that point. We may have some arguments at that time. But I, I don't know that there's been such an identification between Ms. Hill and the State that would allow, A, her to be identified as a party. I mean, that's far out of bounds, but also that she would be applicable -- to allow defense leading questions under 611(c).

Your Honor, in looking at the type of examination that would need to happen here, and again the issue also was -- arose of the Fifth Amendment, and I know that the defense would like to brief that issue. We're happy to respond. We don't know exactly how that might arise in the course of any examination. We need to cross that bridge again when we get there. We would say, though, that the Fifth Amendment is question specific, and so again it may be

something that this Court has to rule, as is in any sort of evidentiary presentation, question by question based on any objection by the party. So, it's kind of hard to say that -- exactly what the blanket position would be until we actually get to, to that determination.

Ultimately, the defense referred to some information provided this morning. Actually, both sides exchanged last night their communications with the clerk during the course of the trial. So, both, both sides did that last night and that there were a lot of communications with the defense as well. So, again, and I just want to point that out in the -- if there's any sort of allegation or, or insinuation that the State's not providing information, we've been very diligent about providing any and all information to the defense. And if any additional information arises, we will continue to do so. But both sides exchanged that last night.

And, of course, there's been some reference in their filings as to emails that were forwarded from the clerk to me and to my paralegal, and they've actually even listed me on the -- on the witness list. And, Your Honor, as we've had a chance to peruse the defense communications with the clerk, there is just as much communication and offers of help. It was just a uniform, across-the-board courteousness that's reflected from those. So, we think

that that's a non-issue, and we think that that should not be something that arises during the course of this evidentiary hearing, at least as it would require communication from -- or testimony from attorneys.

Your Honor, ultimately as we look at the inquiry that will need to be conducted, as the State had made clear, it starts with the jurors and only if something arises in that inquiry, further inquiry to those jurors may be necessary. And that could be in discussion with the parties, as I've stated before.

And then I know Your Honor has indicated that the clerk should testify, and we certainly understand that. The clerk filed an affidavit denying any of these allegations, and so again as we address the clerk's testimony, the State would have objection to some of the information I believe the defense would propose to examine her on. We believe that an inquiry should be limited to what is appropriate and relevant impeachment but not should be just a far-ranging fishing expedition or full, full inquiry into a lot of subjects that have come up since the trial that we believe are not relevant to any inquiry that is before the court here now.

Obviously, Rules 404, 401, 402, and 403, as well as -- which, of course, address relevance and 403 objections. 404 addresses other crimes or wrongs or acts. Rule 606 --

or, excuse me, 608 which addresses, you know, inquiry into other specific acts and impeachment, and Rule 613 which talks about prior inconsistent statements, all those rules potentially could come into play depending on the nature of the testimony and the nature of the inquiry.

But there have been allegations since the trial about the book, about this wiretapping case, about investigations into alleged use of office for improper gain, but again all those are subsequent to the trial. So, again, depending on how the testimony goes, the State would raise appropriate objections at that time to limit the inquiry to what is appropriate for what is before the Court, and that is what occurred during the trial. So, we would make those particular evidentiary objections as things developed.

Ultimately, that would be the State's position. I know that we're trying to put as much meat on the bones as we can at this particular point in time. But I think the reality is, is that the Court's inquiry to the jurors will really determine the nature of the inquiry that needs to proceed from there. And at that point, the State would, you know, take the positions that I've outlined here today.

THE COURT: Any reply?

MR. HARPOOTLIAN: Please the court, Your Honor? 404, it's somewhat ironic the State is quoting 404, Your Honor. One of the exemptions to 404 -- I know this will be

surprising to Mr. Waters -- is motive, as if he'd never heard that before. He told me this morning one of the assistants that worked for Ms. Hill during this trial was told by Ms. Hill during the trial that a guilty verdict would be good for sales of the book. Motive: selling books.

So, we believe we should be able to get into that; we should be able to ask Ms. Hill about it. If she denies it, to call that witness, that assistant, and have her testify that she was told that. I mean, why would a clerk do what we've alleged she did we think is important for Your Honor in terms of credibility and context. That's number one.

Number two, Your Honor, I think we've all agreed. You're going to ask the questions, whether we've agreed or not, and we do agree with that. The question is going to become as we go through that process how, if a juror says X and they said in their interview Y or if they've said to us Y or didn't include it in their original affidavit, and you don't ask that question initially, how are you going to handle -- or do you care how we suggest to you a further question? Because, as Your Honor sees this morning, the back and forth can go on for a while, and we certainly don't want that to go on with a juror. So, we're going to need some guidance on that. I'm not expecting that guidance this morning.

But the last thing is we -- as these jurors are examined, I need to understand a little bit about the logistics. Are we going to do it in this courtroom? Are we going to do it in another courtroom? Is the public going to be able to hear the responses? Will there be an audio feed if we do it somewhere else? Are you not -- are you going to have cameras turned -- do it in this courtroom and have cameras turned off? And we're obviously not to refer to jurors by their names, even though three of these jurors went on the *Today Show* and another went on ABC. They were all in the courtroom when the judge had them brought in at the end. They were in the courtroom, all except for one of them, for the verdict. Cameras were there then.

Again, I'm sensitive to their anonymity, but I don't know that any of them have any real anonymity anymore. Saying that, I think it's important not only for Your Honor to hear their answers but the public to hear their answers. Thank you.

THE COURT: All right, sir.

MR. HARPOOTLIAN: Thank you.

THE COURT: With respect to the jurors first as witnesses, I will be doing the questioning of the jurors, and I will notify the parties pretty promptly what I intend to ask the jurors. The ambit of what I will be asking them

is informed by the question of whether improper contact was made with them, and whether it affected their verdict.

I understand that you on the defense side have views about what further should be asked of jurors on two levels. One, as a predicate to what you want to do with the clerk herself in examining her, and two, as a means of further attacking the credibility of the clerk and her testimony.

I have not seen any of the SLED material or memoranda concerning the State's summary of these interviews and so forth. I will be open to receiving that if it's done promptly because we've got a hearing coming up the 29th, and I want there to be plenty of time to revise any current ideas about who to subpoena, who to call as witnesses, and who has to do that.

But I can tell you that I am very, very reluctant to turn this hearing about juror contact into a wholesale exploration of every piece of conduct by the clerk alleged to have been improper on its own, indicative of her or characteristics of personality, or anything of that nature. This is a very focused inquiry that deals with this jury and what impact contact, if any, had on this jury. So, I am very mindful of the limited nature of it. As I say, I'm not excluding submission in advance of information that would take the questions beyond the limited questions I initially indicated. But I will be very hesitant about any

of those questions as it involves propounding those questions to the jury.

As it involves questions to Ms. Hill similarly, this is not a time to explore every mistake or incorrect statement or false statement that ever has been made by this witness. I am the judge of the credibility of this witness for purposes of this new trial motion. I don't think it's necessary, nor do I think it's proper, to explore each and every impropriety alleged to have been committed by the clerk. At the same time, what specifically should be asked is something that I will look at as I look at the submissions that are made before the hearing takes place about what is requested be allowed as topics for questioning of the clerk and what exhibits should be used.

I can't imagine allowing thousands of emails to be made exhibits in this process, either emails sent by her to attorneys in the case, to other court officials in the case, or to other individuals during the course of the trial of the case. I certainly will try to preserve the appellant posture of defense in this regard, but I will put certain limitations on just a wholesale exploration of every problematic piece of conduct, ethical dealings with the county, and so forth. This is a very focused inquiry about this jury and its ability to render the verdict it

rendered in an impartial manner.

So, I say that to tell you that when the clerk is offered -- and I think the clerk is going to have to be offered as a witness. The whole allegation revolves around the contention that the clerk made contact with the jury about matters material to their verdict, that that contact was improper, and that it impacted their verdict. There is a whole lot more that Mr. Harpootlian has indicated he'd like to explore that I regard as totally extraneous to the inquiry that we've maintained. I'm not going to allow those questions to be asked by way of proffer and then have the clerk answer those questions and have that be the proffer, although I consider them irrelevant questions. We're not going to handle the case in that way.

If I exclude a certain question from being asked, then the proffer will be whatever in writing is chosen to be offered in that regard, but I will not conduct a hearing where there's a whole side hearing in which every question desired is asked and will required to be answered or dealt with in some other way. I don't think that is an appropriate use of this very targeted hearing that I'm directed to have.

I also think it makes a great deal of difference whether the questions that are being asked relate to the clerk's conduct at the time this case was tried as opposed

to other conduct at a later time or in connection with other things than the trial of this case.

So, I will be looking very carefully before we conduct this hearing and try to give the parties as much advice as I can about what I would find to be acceptable topics to pursue. I think you're entitled to that. But I also think the record of the case is not to be used as a platform to explore each and every fault of each and every witness, whether it be the juror or the clerk, and I'm not going to have the hearing conducted in that manner. I think there are other ways of preserving topics that I rule should not be pursued than having those questions asked and answered even though I've ruled that they are not proper in the hearing.

So, I hope that explains kind of where I am on the subject of how questions are asked. And, therefore, some of the suggestions that are made in the filings you've made with me about the additional witnesses you'd like to call and subpoena, I think we need to be sure we're all on the same page about what is acceptable in evidence and what is not. But I can tell you that I would not allow the subpoenaing and examination of attorneys in this case, of the judge who heard the case, or any of those type of witnesses. This case is very focused on the jurors and the clerk of court as I see it.

Now, it's about 11:15 or close to it. I'm going to do this. I'm going to take a break for a minute. Let's take until 11:25 as a break, and in that time I would hope that you formulate the other things you think we need to look at by way of the specifics of how this matter is to be conducted.

I will then do two things when I come back. Ask you for further ideas, both sides, as to who should be called, get very specific about who can be called and who cannot, who should offer these witnesses. And I would also at that time ask those who represent potential witnesses in this matter to come forward and have conversation with me about your position on behalf of your clients.

I think that's generally important because as we have the actual hearing itself, I've never heard of a situation where a witness can have their lawyer actively participate in the examination of the witness in a proceeding in which the witness is being offered. So, I would not allow that, but I think we can protect the legal positions that attorneys for witnesses want to take and need to take and want to put upon the record by pursuing the way I just outlined, and I'll be prepared to do that when we return.

All right, Court will be in recess.

(OFF THE RECORD.)

THE COURT: Please be seated. Before we proceed

further, a few other things that you've been asked about that I want to clarify before we then go forward with a more specific look at how witnesses will be questioned.

First of all, how the jurors will be questioned, everything will be done in open court. The jurors will be referred to by number. The Court TV cameras which are the ones used to film these proceedings will not be allowed to focus on the image of the jurors as witnesses, and if there's some need to further obscure the way they are presented, we can talk about that, but they'll be examined right here in the courtroom as the other witnesses would be. And I've kind of looked to a little bit of exchange we'll have with attorneys for the jurors to see what we can work out about how exactly the jurors are presented, but everything will be on the record here in open court with measures taken to ensure the privacy of the jurors.

No photographs would be permitted of the jurors or anything of that nature. And I believe if I announce that in advance, the press that are present and press that have covered this proceeding throughout have been respectful of the judge's request, and I am very confident they will be in this matter as well.

With respect to the alternate jurors, I will question only the jurors who sat and considered this case. So, the alternate who was dismissed, was dismissed by the trial

judge, that alternate did not participate in any way in the deliberations in this case. There's nothing that has been brought to my attention about anything the alternate might have done that was improper at all in terms of communications with fellow jurors; nothing's been alleged in that regard. So, my focus will be on the jurors that heard this case and not on either that alternate or any other alternate juror that is been proposed for questioning. I will not permit that.

With witnesses or testimony, I do not allow -- let me explain about proffer. Proffer will be a written proffer by the party to satisfy the limitations of my ruling, but there will not be some examination as to proffer. The proffer will be a written proffer by the attorneys in accordance with their positions about witnesses and testimony.

With regard to the subpoenaing of witnesses, the parties should subpoena these witnesses, and when it comes to the jurors, I would urge that the parties, the state and the defendant, jointly deal with the issue of subpoena of these witnesses. I do not think it is the court's place to subpoena witnesses or order witnesses' appearances.

This case is driven by the parties and their positions. The initial position of defense was that only certain jurors should be called; the state said no jurors

should be called but if you do, all should be called. All who sat on the case should be called. If the parties can't agree on how that subpoena should be accomplished, I'm sure -- let me know, and I will try to take some measures in that regard.

The concept I would have is that jurors would be -- would report to a place that I will specify, and when they report, they would be taken to a room with appropriate supervision by court personnel and then called individually to recite their testimony, and when their testimony was complete, they would simply take their place in the jury box until all were questioned. And then if there were any questions further by me that would be made collectively to the jury, I could do that. And if there are any further questions submitted to me by the parties that I chose to question, I would do that. And then when all of that was complete, the jurors would be allowed to be dismissed. So, that is how I would handle the juror witness portion of this. And, of course, I know I'm going to take some commentary from each side about that. That's why I talk about this in advance.

The other witness that surely needs to be called because of the allegations made is the clerk of court. The State has submitted a preliminary affidavit by the clerk of court, and the defense has many areas that they want to

explore for the court. Again, I would like for the parties to develop some joint way of subpoenaing the clerk of court, and if I need to be a part of that, then I'm sure the parties will let me know.

But I say this for the benefit particularly of the attorney for the clerk of court to know that I would expect that the clerk of court will be called as a witness in these proceedings 29th, 30th, and 31st if necessary.

You will be using the same courtroom for these proceedings, this courtroom, and 3B will be used as an overflow for the press. Excuse me, 3A is the one over here, and that's the one I will be using to conduct the hearing. This courtroom we're sitting in now will be an overflow courtroom for press with, I'm sure, Court TV monitor that's available for them to monitor the proceedings if there's not enough room. Based on the attendance today, might be plenty of room but we'll see. We'll have this as -- I will try to figure out a way to be sure that the broadcast in here of the proceedings will not interfere with the conduct of the hearing past this partition next door.

I will trust Mr. Bender to work with the press and the overflow courtroom in accordance with the rules I'm going to set forth here and anything else that may come up that needs my attention. I think that covers it at the present

time.

So, the first thing I'd like to do is to get some clarity from the attorneys as to what further more, for the parties, as to what further more needs to be discussed, and then after that we will explore the attorneys for the jurors and the attorney for Clerk Hill. Any other issues that still need developed?

Mr. Harpootlian.

MR. HARPOOTLIAN: Please the court, Your Honor. I'm trying to make sure I understand what you just ruled. Are you ruling we cannot call the alternate juror or the so-called egg lady to corroborate what was said to the sitting jurors as they were all told at the same time?

THE COURT: I'm not sure I understand your question, but I'm telling you that I want -- these jurors, these alternates would be called apparently to testify as to what the clerk said.

MR. HARPOOTLIAN: Yes.

THE COURT: At the present time, I see no necessity for them to be called to say what the clerk said because we're talking about what the clerk said to the remaining jurors, those who actually sat upon the case. The corroboration is something I don't think I need at this time. I think I'm perfectly capable of evaluating what the jurors tell me and I'll do that. I think I'm also

perfectly capable of evaluating the credibility of Ms. Hill and the jurors, for that matter.

MR. HARPOOTLIAN: Well, Your Honor, for us to -- and then you say you wouldn't allow a proffer of that except in writing.

THE COURT: Yes. I'm not going to have a courtroom proffer of any kind. If you want to proffer what would be offered by means of affidavits, copies of emails, or anything else you want to, that's fine, but I'm not going to have a courtroom proffer, no. I think you're -- the only reason for the proffer would be to preserve your right to appeal. I believe your right to appeal my ruling will be perfectly be preserved, frankly, if you didn't have a proffer, but even more so if you supply an in-writing proffer.

MR. HARPOOTLIAN: Well, I'm trying to determine whether an affidavit is sufficient for an appellate court, federal or state, when the state won't have an opportunity to examine that witness. I mean, they've given -- we can get more detailed affidavits. And, you know, these people are witnesses to what the clerk said to the jury that deliberated. I don't understand how that can't be relevant to Your Honor's decision.

I understand there's two steps; one, did she make the statement; two, was it prejudicial. These witnesses

corroborate she made the statement.

THE COURT: Well, of course, that's what you say. So far I haven't seen any of that. If that's what you say and you offer it to me in some form that I can evaluate it, I may revisit that decision.

MR. HARPOOTLIAN: Okay.

THE COURT: At the present time ---

MR. HARPOOTLIAN: Okay.

THE COURT: But at the present time, I see nothing that prompts me to think I need to have people who did not sit on the case talk about what they think the clerk said to other people when I've got the direct people to whom it's said that I will question.

MR. HARPOOTLIAN: Well, Your Honor, we did submit an affidavit, but I have no problem going back ---

THE COURT: You submitted one alternate affidavit.

MR. HARPOOTLIAN: Right.

THE COURT: And one affidavit of a dismissed alternate. I'm aware of that.

MR. HARPOOTLIAN: Right. So.

THE COURT: And that doesn't prompt me to change what I've just said to you at all.

MR. HARPOOTLIAN: If we could be more, more -- I understand what the questions are you have, and I would only put those folks up to deal with those very limited,

very limited issues that you described, put them up in ten minutes.

THE COURT: Well, again, I'm not going to rule in a vacuum. I'll see what you say, and I'll rule upon it.

MR. HARPOOTLIAN: We'll get affidavits and file them with the Court.

THE COURT: Very good.

MR. HARPOOTLIAN: Thank you.

MR. WATERS: Your Honor, just one issue as to logistics. Obviously, these jurors are down in Colleton County and we're up here in Richland County. I've spoken to SLED, and in as much as we need -- you know, there may be jurors who need transport, you know. SLED has certainly agreed to have twelve cars if we need to to make sure that they're individual. They can come in through the garage, and obviously they would be brought up to a jury room. I think Your Honor indicated they could be in a jury room with a bailiff in there, make sure that no one is talking about their testimony and that sort of thing. But also so that they don't have to come in through the public entrance and that sort of thing. So, that would be ---

THE COURT: I think that would be a good solution and, of course, to satisfy the concerns that the defense may have, you could even have a member of the defense team or one of their employees ride with them. Or if you can agree

upon sworn statement by the agent or person that does drive them that they, A, will not say anything and B, did not say anything, then that may cure the problem, too. I think you all can work that out. I do think having proper transport would, first of all, be a comfort to the witnesses themselves, the jurors themselves, but if they can arrange something otherwise, of course they'd be free to do that. But to the extent it is a burden on them, yes, I think it's a good idea. And in all events, I would want arrangements to be made to have the jurors come to the parking garage in this building and be escorted up in a private way into their assembly room.

MR. WATERS: Yeah. Absolutely, Your Honor, and we will -- I'm sure SLED -- I've already spoken with them about that, have uninvolved agents who will be under strict instructions not to discuss the case and happy to have them sign affidavits for whatever.

THE COURT: Very good. All right, anything further before I go to the lawyers for the jurors? All right.

MR. HARPOOTLIAN: Your Honor, only one other point and that is you've asked us to give you exhibits that we would use.

THE COURT: Yes, sir.

MR. HARPOOTLIAN: Having not asked or had the opportunity to ask Ms. Hill a single question, I don't -- I

can't tell you -- there's not thousands of emails. I would use probably five.

THE COURT: I'm just going on some of the descriptions that were in the filing y'all have made to me.

MR. HARPOOTLIAN: Well, we've received thousands of emails from Colleton County based on the subpoena we sent; we received hundreds of pages from the AG's office and SLED.

THE COURT: It will make it a lot simpler if it's a small number and a discrete number by submitting them to me. Again, I told you I would evaluate that when I get it.

MR. HARPOOTLIAN: Of course, I don't think you can evaluate them until she testifies.

THE COURT: I think you're going to have to trust that I am going to do some evaluating before she testifies.

MR. HARPOOTLIAN: Okay, and, Your Honor, you know, she's given an affidavit denying any of these statements.

THE COURT: She has.

MR. HARPOOTLIAN: So, these alternate jurors that have been dismissed, would you allow us to call them to impeach her if that's what she testifies to?

THE COURT: At the present time, the answer to that is no, as I've indicated, but again I'm not going to rule in a vacuum. I would hope that what you all would do is send me a pretty specific idea of what you want and how you want me

to permit it. So, I'm not going to rule on something I haven't seen yet, which is your proposal as to how exactly these witnesses and alternates are to be used.

MR. HARPOOTLIAN: All right. We'll get more extensive affidavits from those alternates.

THE COURT: Okay. That's fine or descriptors of some sort from you as to what you intend to do. I'm not going to dictate how you do it, but I'm going to have to have a lot more than just generalities that have been discussed in these briefs in order to permit such.

MR. HARPOOTLIAN: Well, I think we're going to need affidavits for appellate purposes, if nothing else. My description to you is not evidence.

THE COURT: Oh, I agree but, you know, again I will tell you how I'm going to accept a proffer. How you -- what you put in the proffer, written proffer, is up to you. I don't want to dictate that or manage it.

MR. HARPOOTLIAN: Well, I just want to say that we're hopefully going to get affidavits from these folks.

THE COURT: Yes, sir.

MR. HARPOOTLIAN: Much more descriptive that the original affidavits.

THE COURT: All right, sir.

MR. HARPOOTLIAN: Thank you.

THE COURT: All right.

MR. WATERS: Your Honor, may I consult with counsel very briefly?

THE COURT: Certainly.

(A PAUSE.)

MR. WATERS: Your Honor, one of the things that was discussed earlier was the independent SLED investigation that was done. There were recordings of some of these interviews.

THE COURT: Yes, sir.

MR. WATERS: And analyzed, prepared, and were meant to be summaries. I know Your Honor mentioned earlier that you would be open to receiving those.

THE COURT: Sure. I'll be glad to review any of that.

MR. WATERS: Discussed that with counsel, and I believe they said, well, we want to send the ones we want to send. I think if Your Honor is amenable to that, we would just add Your Honor to the discovery upload that was provided to the defense so that that information is available to the Court for whatever purposes the Court deems necessary.

THE COURT: Can I ask this first? Would that discovery upload include your interviews, the tape of the interviews, as well as your summary of them?

MR. WATERS: Yes, ma'am.

THE COURT: All right. I will ask you to let my

clerk, Eva Diaz, talk with you afterwards about how to send me something of that volume.

MR. WATERS: Sure.

THE COURT: Our court IT has a lot of barriers in our system to us receiving even conventional websites and web tools for examining, in volume, documents, and so I will want her to interact with you all about exactly how I am to receive that material, but yes, I will be happy to receive it.

MR. WATERS: We, we'd be happy to get flash drives to provide, provide it that way, if that makes sense.

THE COURT: That might be the better way to do it because, again, I can very easily examine a flash drive even though it takes a long time, and particularly if you are kind enough to provide an index at the front of the flash drive as to where these various materials are located. That might be better than using one of these web document sources since so many of them are excluded from our system.

MR. WATERS: We'll prepare one and have a copy for you, Your Honor, and Ms. Diaz, your clerk.

THE COURT: That would be good.

MR. WATERS: Thank you.

THE COURT: All right. All right. Now, on my list I have in the courtroom at this time Mr. Bland, who

represents certain of the jurors; Mr. McCulloch, who represents certain of the jurors; and Mr. Lewis represents Ms. Hill. Are there others in the courtroom who represent jurors or Ms. Hill?

Mr. RICHTER: Thank you, Your Honor. Ronnie Richter. I'm Eric Bland's partner.

THE COURT: Running a little fast for me.

MR. RICHTER: Ronnie Richter, Mr. Bland's partner.

THE COURT: Oh. Right.

Any others?

All right, well, then we'll begin with you, Mr. Bland. If you and Mr. Richter would come forward?

MR. BLAND: May it please the Court, Your Honor? Ronnie and I represent four jurors who rendered verdicts in this case.

THE COURT: I would like their numbers off that -- only if that doesn't violate the attorney-client privilege, and you may give them to me now or later.

MR. BLAND: Can I give them to you later?

THE COURT: Yes.

MR. BLAND: I've got them now. I just -- our job, we want to preserve their anonymity.

THE COURT: I understand.

MR. BLAND: Two, we want to make sure they are not harassed, and three, we want to make sure that the verdicts

of their conscience remain, and that is not only because they voted guilty. If they voted not guilty, we'd feel the same way.

After hearing what Your Honor has established by the way of procedures, we've very comfortable with what you have established to protect their anonymity and that they're not harassed.

Ronnie came up with a good suggestion. May you renumber the jurors 1 through 12, and that way because there has been some public disclosure of the jurors' numbers in some of those emails, they were -- the big batch of emails that Mr. Harpootlian referenced. So, maybe we cross reference with the chart 1 through 12 and their juror numbers.

But as far as the questioning goes, there's no need for us to, to be part of this. You're going to make the questions. You've indicated you're going to preserve their anonymity -- that they can't be photographed, they can't be on videotape -- and that's about all we have.

MR. RICHTER: Again, Your Honor, I would amplify I certainly respect and appreciate the significance of the issues before you. And, and I respect your decision that you're going to make this public. I would have asked you to make the jury portion closed courtroom and, Your Honor, only, only for this reason.

That I don't know what the jurors are going to say, and I don't know what you're going to rule, but let's just say in a hypothetical setting that because Juror Number 9 said something that you believe deprived Mr. Murdaugh of his right to a fair trial, you're going to grant him a fair trial -- a new trial. I, I would hate for there to be any negativism for somebody to back trace to who was Juror Number 9 because the public has very firm opinions about this matter, and I wouldn't want that person to be subject to any kind of public scrutiny. So, I would have asked of you that for the juror portion of it we do closed courtroom; that the press would be present; that their likeness, both voice and face, be muddled just as an additional safeguard. But I certainly appreciate the safeguards you have put in place, and I respect your ruling. I throw that out for consideration.

And on a broader perspective, I know that you've had this experience as well, Your Honor. It's becoming more and more difficult in this state to seat a jury, and I can't think of anything more injurious to jury service from a broader perspective than to see, you know, jurors who've given up six weeks of their lives being pulled back in for a process like this, as necessary as it is. So, I, I worry that the process, we handle it as gingerly as possible so not to further prejudice our ability to get jurors going

forward.

THE COURT: Thank you, sir. What I will do is this. I think your suggestion of renumbering is a good one. It's something that my clerk and I have talked about between the two of us as well.

In every proceeding I've ever seen where a juror was questioned, in every case I've ever read where jurors were questioned because of allegations either during trial or posttrial that they had been tampered with, those proceedings have been in open court. And I don't feel it would be appropriate for me to have some kind of *in-camera* proceeding even if it included the attorneys, as it would have to, and even if it included members the press but not the general public. I don't think that is in keeping with the public nature of trials in this state and the public nature of court proceedings.

However, I think we could make some protective arrangements for when they testify and their ability to be dismissed after they've testified that would protect them from being set upon to the best extent possible. So, that is -- that is the way I will handle it, and I hope, all things on balance, that that as protective as you think it needs to be.

MR. RICHTER: We trust you, Your Honor.

THE COURT: All right, sir.

MR. BLAND: Your Honor, on behalf of our clients, we will accept service of the subpoena so that they don't have to served.

THE COURT: Well, that's great and, of course, you don't represent all of them.

MR. BLAND: No. Our four.

THE COURT: Your four, but that's great and it may very well be that these parties are going to be able to work out something with respect to some of the rest of them. I don't know, but I appreciate that on behalf of the ones you represent.

MR. BLAND: Do you want me to come up and tell you our juror numbers, or you want me to wait?

THE COURT: No, sir. I don't need that this moment.

MR. BLAND: Okay. Thank you.

MR. RICHTER: Thank you, Judge.

THE COURT: Yes, sir.

Mr. McCulloch.

MR. McCULLOCH: Would you like me here or there?

THE COURT: Go to the podium, please, sir.

MR. McCULLOCH: Your Honor, I believe some of the Court's rulings today, they've satisfied several of the things I was going to mention. One was, of course ---

THE COURT: And how many jurors do you represent?

MR. McCULLOCH: I'm sorry, Your Honor. I represent

Number 785 and 630 as a deliberating juror, and the other juror was the removed juror.

THE COURT: Right. Now, with respects to the replaced juror, I think my ruling about the ambit of any testimony from that juror satisfies any requirements you've made. I've ruled that I will not hear testimony from that juror, alternate juror at the present time.

Now, Mr. Harpootlian is going to submit additional information as regards your client. I'd ask him to submit that information to you as well, and then I'll see if there's any revision of the position I take about that.

You also represent one sitting juror, so you may continue.

MR. McCULLOCH: Your Honor, the other juror was not an alternate. She was actually a seated juror.

THE COURT: Sitting juror.

MR. McCULLOCH: Who was removed at the end.

THE COURT: Oh.

COURT REPORTER: I need Mr. McCulloch to speak up, please.

THE COURT: You need to speak up some, Mr. McCulloch.

MR. McCULLOCH: I don't get that much, Your Honor.

THE COURT: Yes, sir.

MR. McCULLOCH: Your Honor, if you'll indulge me just a moment? I think much of what you've said today bears on

the quote that I'm taking from the response of the State which was filed and is part of your record, and my letter of November 10th responding to that filing is also a part of your record. The state said that:

> Jury duty is this cornerstone civic duty. Needless exposure to jurors to litigative stress and impeachment by zealous attorneys in a case especially of this public exposure can only serve to discourage the citizens from willingly participating in jury -- in this civic duty.

Your Honor, I am delighted with your ruling that you'll be asking the questions. I've been subject to your interrogative skills in my appearances before the Supreme Court. So, I'm pleased with that, and I checked that off my list.

I would like, Your Honor, for you to take judicial notice that there have been excessive public comments by -- and I -- and I have to say, Your Honor, in my letter of November 10th, I took Mr. Waters, who signed the letter, to task for labeling one of my clients, one of these jurors, as dishonest. I think I didn't -- I wasn't pleased with that. I think that discourages civic participation. I would ask the Court to admonish the litigants, the attorneys ---

THE COURT: I'm not going to -- Mr. McCulloch, let me

stop you there. I am not aware of any of what you're talking about in terms of comments about the jurors or otherwise. So, that's just not something I'm going to take into account by listening to it or by taking any judicial notice of it. I don't know what I would be taking judicial notice of; I do not know anything about what you're talking about.

MR. McCULLOCH: Well, Your Honor, both my letter and the response of the State are part of the record which you obviously have not gotten to yet. My only request is either admonish lawyers and officers of the court in this courtroom and outside of this courtroom who represent people to be cautioned that, that we -- that this is a search for the truth, not an effort to protect the verdict nor an effort to discourage people from participation, and negative commentary does that, or runs the risk of doing that. That's all I have to say.

THE COURT: I understand and I decline to instruct or admonish participants in this procedure in any way about what you say.

MR. McCULLOCH: Thank you. Your Honor, next, like Mr. Richter and Mr. Bland, I appreciate your efforts. I suspect is that we will decline a ride to the courthouse, but I would ask the Court to consider allowing the jurors who don't -- choose not to ride with SLED agents to be

permitted entry and exit from the courthouse that would involve -- relieve them of the necessity of coming through the front door.

THE COURT: I think I've already said I will make arrangements for juror witnesses to report to the basement where the law enforcement station is, and they will be appropriately directed to the assembly room.

MR. McCULLOCH: Your Honor, lastly, if I understand your ruling or discussions about the process that occurred here -- this may run at odds with Your Honor, and I'm not arguing with you. But I am of the belief that this litigative stress earlier referenced could be avoided and the public media not denied their opportunity to, to gain access and knowledge of the proceedings by not exposing these jurors to a crowded gallery, a full gallery of press by allowing its recording through -- I understand Court TV will be the pool camera. That is to say that I have actually in my history participated in proceedings that involved the questioning of jurors which was done *in camera*. So, I, I don't think it's without any precedent, but I would obviously respect your ruling. But I would ask you to consider or reconsider that no damage would be done to the right of the public to know and participate in the proceedings, but you could accomplish the same thing by allowing the, the pool camera and avoid the distraction and

the imposition of that on these jurors.

THE COURT: I hear what you're saying, and I'm not inclined to change the ruling I have made at the present time, but I'll keep an open mind about it as we make pretrial preparations for the hearing. At the present time, the jurors will be examined in the courtroom, as I have indicated, with the appropriate identity protection.

MR. McCULLOCH: Thank you, Your Honor, and subject to your rulings, I will have both of my clients available for these parties as they might be needed subject to your subsequent rulings.

THE COURT: Thank you.

MR. McCULLOCH: Thank you.

MR. RICHTER: Your Honor, do you expect all jurors to be present for all three days?

THE COURT: No. Let me make it very clear that I expect the jurors to be the first witnesses to be called in these proceedings. And the jurors would testify, and then they would be dismissed. They would not be required to stay for the rest of the proceedings at all. So, that is very much a part of my thought of what it takes to protect their identities. They would be protected as best I can, and the ability of others to come and beset them with questions as they leave would be protected.

MR. BLAND: Do you -- do you expect that you could get

through all twelve in one day, or should I tell them -- because a couple will have to take off of work.

THE COURT: Yes, I do.

MR. BLAND: Okay. Thank you.

THE COURT: All right, and, Mr. Lewis.

MR. LEWIS: Your Honor, I'll be brief. In light of your rulings, I don't think you need much from me. The only thing that I'll add is I'll have Ms. Hill available for you as the parties need, and I'll be happy to accept service to alleviate one issue for this Court.

THE COURT: All right, sir. Thank you for that, and before you leave the podium, let me just consult with the lawyers. I'm not going to ask them to examine you. That wouldn't be fair at all, but I'm going to ask them if there's anything else I need to inquire of before I let you go.

As I understand it, the subpoena -- and we would have a formal subpoena of Ms. Hill -- would be placed in your hands as her attorney, and you would assure her appearance, and I appreciate that very much.

MR. LEWIS: Absolutely.

THE COURT: Is there anything else on behalf of Mr. Murdaugh?

MR. HARPOOTLIAN: Thank you, Your Honor, and just in an effort to try to expedite this matter, I'd have two

questions. One, will Ms. Hill meet with Mr. Griffin and I?

MR. LEWIS: I'll evaluate that.

MR. HARPOOTLIAN: You'll have to evaluate it? Okay. That's all I need to ask. And secondly, should we have her here on that Monday or wait? I mean, we could be doing the jurors most -- all day.

THE COURT: She should be here as court begins.

MR. HARPOOTLIAN: All right. Thank you.

MR. WATERS: Nothing from the State, Your Honor.

THE COURT: All right.

MR. LEWIS: Thank you, Your Honor.

THE COURT: I'll go over my checklist one more time, but I think I covered everything I want to cover. I'll come to each of you in a moment.

Yes, just, just to clarify other witnesses, as matters now stand, witnesses in this proceeding would be jurors and Ms. Hill. So, I want to be sure that we're all understanding what's going on in that regard. I would not allow the attorneys to be called. I am unclear about the mention in some of the papers that SLED investigators would be asked to testify or any other witnesses, so I'm going to go one more time. I want to get real specific so you will understand what you need to prepare for by way of in-court examination and what you need to prepare for by way of submitting proffer.

All right, first of all for the defendant.

MR. HARPOOTLIAN: Please the Court, Your Honor? Just a couple of issues. One, we don't know who we're going to call to impeach Ms. Hill because we don't know what she's going to say. So, it's difficult for us. I mean, we -- I mean, once she testifies, at that point we'd say we'd like to call so-and-so and so-and-so and such-and-such and such-and-such, number one. So -- or maybe no one. I mean, she may concede every issue we have. For instance, she did tell, according to the State, she did tell one of her assistants, one of the people helping her, you know, I hope he's found guilty because it will help book sales. Now ---

THE COURT: I hope that's the last time you're going to repeat that until I ask for it again, Mr. Harpootlian. I've told you that I can't imagine a situation in which I would go that far, a statement like that, and she may well have said it. If it goes to anything I'm asked to consider, it would be to her credibility. And I'll evaluate whether I think that's even proper to ask, but let's move on from that.

MR. HARPOOTLIAN: So -- but there are other questions concerning her credibility.

THE COURT: Yes, sir.

MR. HARPOOTLIAN: 404 motive. If she -- I mean, if she did this, it is a crime and so, you know, the questions

of why she would have done this extraordinary act, and we can argue this at another time, but in terms of being -- the reason I mention it is for us to proffer those people not knowing what she may, may -- the question may get asked. She may admit it. There's no witness that needs to be called.

So, it's difficult for me to game this out. I don't think I've ever been asked to list witnesses I would call to, to impeach somebody if they lie under oath. I have never heard of such a thing, but I will attempt to do the witnesses we would call prior to Ms. Hill's testimony. That's all I think I can do, if that makes sense.

THE COURT: It doesn't make complete sense to me because this is not the trial of Ms. Hill. And issues about motive and so forth and the possible commission of crimes are not what this inquiry is about. It is about her contact, if any, with the jurors and what she said. So, I will be treading very carefully with a good deal of what you say about what you might or might not ask.

But I am going to ask all the parties to be pretty specific with me about what I ask, I should be asking the jurors, and I can make a decision in advance as to what I am going to do about that and what is going to be, at least by general topic, pursued with witnesses.

MR. HARPOOTLIAN: Yes, Your Honor.

THE COURT: And the reason I do that is because it gives me the opportunity to then consider what rulings I would make and move the proceedings along in an orderly way.

MR. HARPOOTLIAN: Well, Your Honor, it may be premature for me to note this for the record, but we would except your ruling on that.

THE COURT: All right, sir.

MR. HARPOOTLIAN: Secondly, Mr. Murdaugh has been unable to review any of the discovery material in this case because of the confidential -- confidentiality order prohibits him -- us to distribute to him while he's in jail. We don't have time in the next less than two weeks to go sit down with him and review everything.

Would Your Honor allow him to have them? And the materials are not as to the evidence in the underlying case. It's as to juror issues. And while he's no longer a lawyer, he was a lawyer at one point and can -- and evaluate this and be of assistance to us if he has an opportunity to review that material.

THE COURT: You're speaking to me about something in a complete vacuum as far as I'm concerned. So, I can't really evaluate what you haven't been able to review with him and what you have been able to review with him.

As I understand what you're telling me is I have

received certain information as the attorney for defendant that I have not been able to show defendant for defendant's review because of a confidentiality order.

MR. HARPOOTLIAN: Yes, Your Honor.

THE COURT: I can't imagine that. I think what you may be saying is Mr. Murdaugh has not been able to keep for himself while I'm not there confidential material.

MR. HARPOOTLIAN: That's correct.

THE COURT: Well, that is something common to many folks who are under incarceration and are limited in the kind of materials that they can receive and keep in their possession when they are not with their lawyer. So, this is not an issue where he's being deprived of the ability to consider material that you have received. This is a question of whether he can have that material in his possession when you are not there or your representatives are not there and study upon it and so forth.

I can't control what the limitations of the Department of Corrections are, nor can I control what limitations may have been put on the confidential material because of the fear that it would be -- it would fall into other hands. So, I'm not going to rule in the abstract on things. I would have to have something that was pretty specific.

But I can tell you this. I would certainly not order that these materials be wholesale given to him for him to

take back to his cell and have in his possession because I don't know who might see them, were that the case. And if they are confidential materials, that would be an extreme risk of breaching the confidentiality of materials to do that because of his situation. And his situation is as it is not of my making or yours.

MR. HARPOOTLIAN: Your Honor, we'd only note for the record this. Much of the material received has been within the last two weeks. This hearing is scheduled for two weeks from yesterday.

THE COURT: Yes, sir.

MR. HARPOOTLIAN: We've been -- and you've given us more stuff we have to do between now and that hearing. There's nobody to go sit with him at the jail, and time is limited as to when those, those people can visit. So, without him being able to view this material, I don't believe we can be effective and would be ineffective in representing him.

THE COURT: Well, I understand that those are wise statements for an attorney to make to preserve your position on the record. It doesn't change my view of how we should proceed in this matter at all.

MR. HARPOOTLIAN: Well.

THE COURT: I think you will be able to -- if there are deficits in what you have been able to do with your

client, you will place those contingents on the record, and the appellate courts of the state will have adequate chance to review them.

MR. HARPOOTLIAN: Well, Your Honor, would you consider continuing the hearing on the 29th to allow us to meet with the client to effectively review these materials?

THE COURT: No, sir.

MR. HARPOOTLIAN: Okay.

THE COURT: Thank you.

MR. HARPOOTLIAN: We respectfully except your ruling.

THE COURT: I understand.

MR. HARPOOTLIAN: Thank you.

THE COURT: Mr. Waters.

MR. WATERS: I don't have much to address, Your Honor. The initial question Your Honor asked was about SLED agents being listed on the potential witnesses. You know, again, Your Honor, when these allegations were first raised, we instructed SLED to do an independent investigation, good, bad, or ugly, and only because of the results of that investigation are the reason why we're standing here and litigating these issues before Your Honor.

Ultimately, the only way that SLED agents could potentially be testifying, again when we filed our response, we didn't know exactly the parameters the Court would rule. The only way I can see them potentially

testifying is in the event there is an excepted witness by Your Honor that there was some sort of prior inconsistent statement under Rule 613 or some other permissible inquiry. But I think Your Honor's rulings as to the, the nature of the inquiry we're going to conduct would probably remove or make it very unlikely that may be.

THE COURT: All right. Anything further?

MR. WATERS: Nothing from the State, Your Honor.

MR. HARPOOTLIAN: Nothing from -- nothing from the defense, Your Honor.

THE COURT: I say to attorneys for both sides the Court is deeply grateful for the very fine materials you have submitted so far. This is an extreme amount of work in a very truncated period of time, and I appreciate the burdens this places upon you.

Mr. Harpootlian, I particularly thank you as a member of the General Assembly for not interposing your immunity because you are in session, and I respect that. I set these matters after consultation with y'all so that I could fulfill my obligations to the Court, as expressed in Chief Justice Beatty's order, but I realize that I'm doing that with your extreme cooperation in light of your other duties, and I appreciate it very much.

MR. HARPOOTLIAN: Thank you, Your Honor.

THE COURT: I look forward to further submissions from

the parties and the hearings commencing January 29th. Court will be in recess.

MR. WATERS: Thank you, Your Honor.

MR. HARPOOTLIAN: Thank you, Your Honor.

(OFF THE RECORD.)

THE COURT: Parties, just one moment. I asked Ms. Harris before these matters commenced to please expedite, even if it's in a rough form and not in the perfect form that the court reporters like to produce their transcripts, I asked her to produce a rough copy of the transcript just as soon as she possibly could for both sides. I hope you all will consider without me having to order it sharing the expense of this production, this early production of the rough copy of this matter. She will be in touch with you, and you may be in touch with her with regard to the rough transcript of these proceedings.

Court will be in recess.

**--- END OF TRANSCRIPT OF RECORD ---**

CERTIFICATE

I, THE UNDERSIGNED ELIZABETH B. HARRIS, CERTIFIED VERBATIM OFFICIAL COURT REPORTER FOR THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR COLLETON COUNTY, SOUTH CAROLINA, ON THE 16TH DAY OF JANUARY, 2024.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST IN ANY PARTY HERETO.

*/S/Elizabeth B. Harris*, CVR-M-CM

COLUMBIA, SOUTH CAROLINA

JUNE 17TH, 2024

# EXHIBIT J

(R. Harpootlian's Letter, January 25, 2024)