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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions
R. Keith Kelly, Circuit Court Judge

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Appellate Case No. 2022-000160

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The State, .....Respondent,

v.

Johnathan Olin Batchelor,.....Appellant.

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# FINAL BRIEF OF APPELLANT

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Did the trial court err as a matter of law by ordering a uniformed deputy, wearing body armor, and visibly carrying two sets of handcuffs, to escort Johnathan Batchelor to the witness stand, stand next to Mr. Batchelor during his testimony, and escort Mr. Batchelor back to the defense table, without conducting a hearing required by the Fourteenth Amendment to determine whether these unusual and enhanced security measures were necessary under the specific circumstances of this case and specific characteristics of Mr. Batchelor?

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Did the trial judge err as a matter of law by not limiting the State's presentation of evidence about Johnathan Batchelor's extra-material affair with Sydney Allen, when the probative value of this excessive amount of cumulative evidence was substantially outweighed by the danger of unfair prejudice, confused the issues, mislead the jurors an created an unfair risk that the jurors would decide the case based on evidence other than proof of the elements of the crime?

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Did the trial court err—in violation of the Sixth Amendment to the United States Construction, Article I, Section 14 of the South Carolina Constitution, and statutory law, by not ordering disclose of counseling records of Stephanie Batchelor when Johnathan Batchelor moved for disclosure of these records in order to be able to confront and cross-examine Ms. Batchelor?

*Question IX*

Did the trial court err by imposing a sentence of thirty years imprisonment, which is the maximum sentence allowed for attempted murder, when both the Solicitor and the Court of General Sessions previously agreed that a sentence of eighteen years in the Department of Corrections was sufficient, when the sentence imposed following trial punished Johnathan Batchelor for exercising his rights to seek post-conviction relief and a jury trial?

## STATEMENT OF CASE

For an incident occurring on January 7, 2016, the State charged Johnathan Batchelor with attempted murder of his wife Stephanie Nicole Batchelor. On January 5, 2018, Mr. Batchelor pled guilty, pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), before the Honorable J. Derham Cole. Jennifer E. Wells represented the State. Travis A. Moore represented Mr. Batchelor. Judge Cole sentenced Mr. Batchelor to thirty years

imprisonment, suspended on the service of eighteen years, followed by probation for five years. R. 144-70.

On December 13, 2018, Mr. Batchelor filed an application for post-conviction relief ("PCR") alleging his trial "counsel was ineffective on an array of issues in the case," including failing "to fully investigate," failing to "challenge or limit any of the [State's] alleged evidence, failing to "build any type of defense," and recommending Mr. Batchelor accept an illegal sentence. R. 3-21. On March 29, 2019, the State filed its return and consent to post-conviction relief. R. 22-29. On April 18, 2019, the Honorable Grace Gilchrist Knie granted Mr. Batchelor "post-conviction relief on the grounds that the sentenced [sic] imposed is illegal under S.C. Code Ann § 16-3-29 and *State v. Johnson*, 343 S.C. 693, 541 S.E.2d 855 (2001). R. 1-2.

After the grant of post-conviction relief, Mr. Batchelor proceeded to trial before the Honorable Keith R. Kelley and a jury. Ms. Wells represented State, and undersigned counsel represented Mr. Batchelor. Jury selection occurred on October 25, 2021 (R. 194-222), the trial judge heard pre-trial motions on October 29, 2021 (R. 224-98), and the trial lasted from November 1 to 4, 2021 (R. 299-783). The jurors convicted Mr. Batchelor of attempted murder (R. 772), and Judge Kelley imposed a sentence of imprisonment for thirty years. R. 780.

On November 13, 2021, Mr. Batchelor moved for a new trial and, in the alternative, for the trial judge to reconsider the sentence. R. 127-42. The trial judge convened hearings on December 8, 2021 (R. 865-84) and February 3, 2022 (R. 885-91) The trial judge denied the post-trial motions on February 3, 2022 but did not issue a written order. R. 886-89. This appeal follows.

## STATEMENT OF FACTS

Johnathan and Stephanie met in 2010 and married on September 21, 2012. In January 2016, Johnathan Batchelor was a mechanic at Spartanburg Dodge. He worked from 8:00 a.m. to 5:00 p.m. His wife, Stephanie Nicole Batchelor,[1] worked at Kay Jewelers in the Westgate Mall as a floor salesperson. She worked from 4:00 or 5:00 p.m. to 9:00 or 9:30 p.m. She normally followed a co-worker to the bank to make the bank deposit before returning home around 9:30 or 9:45 p.m. They lived in a house they purchased together with their two sons, ages one and three. They used various strategies for daycare for their children. Johnathon fed the children around 6:00 or 7:00 p.m. and put them to bed around 8:30 p.m. After putting the children to bed, Johnathon would watch TV or "play on the play station." After Stephanie got home, it was not unusual for Johnathan to go to the 7-11 convenience store to get a snack or rent a move from the Redbox. They usually went to bed around 11:30 p.m. or midnight. R. 364-65, 387-89, 656-61.

On January 7, 2016, Johnathan woke up at 7:00 a.m., got to work at 8:00 a.m., and left work at 4:30 p.m. Johnathan went straight home because Stephanie was keeping their two sons and his sister's son. Stephanie had to be at work at 5:00 p.m. Johnathan's sister picked up her son at 5:30 p.m. Johnathan put his sons to bed at 8:30 p.m. At 9:23 p.m., Stephanie called Johnathan, and they talked for thirteen minutes while Stephanie drove home. When Stephanie was about to pull into the driveway, Johnathan started taking a shower. Johnathan normally takes a thirty-to-forty-five-minute shower, using hot water,

[1] Johnathan and Stephanie met in 2010 and married on September 21, 2021. R. 364, 658.

because he has a bad back and a bad knee from years of "manual labor and improper lifting." "The hot water helps soothe the pain." R. 661-64.

When Johnathan got out of the shower, he did not see Stephanie in the house. He went to the back door, where the kitchen is located, and did not see Stephanie's car in the garage. Johnathan opened the door and saw blood on the ramp leading to the door. Johnathan heard Stephanie calling his name. Johnathan ran to her and called 911. Johnathan stayed on the phone for ten or eleven minutes. It took a long time for the police and EMS to arrive. After EMS arrived, Johnathan called Stephanie's aunt to watch the children and went back into the house to get the keys to his truck to go to the hospital. Law enforcement interviewed Johnathan before he went to the hospital. R. 355, 664-66, 676-78. Defense Exhibit 1.[2]

Spartanburg County Deputy Kristin Malpass was the first law enforcement officer to arrive at the Batchelors' home. She arrived within ten minutes of the 911 call. Johnathan, who appeared to be in shock, "flagged" her down and "took" her to Stephanie, who was "lying face down in the grass in the side yard," wrapped up in a blanket. Stephanie "appeared to be very tired, very distraught, and at some points annoyed." Stephanie identified herself, provided her date of birth, engaged in "a little bit of conversation," and reported she felt like she was shot. Stephanie repeatedly told Deputy Malpass she did not know what happened to her.[3] After EMS took Stephanie to the hospital, Deputy Malpass

[2] Defense Exhibit 1 is a USB drive containing the audiotape of the 911 call and a portion of the videotape from Deputy Malpass' body worn camera. The State objected to Mr. Batchelor presenting this evidence, but the trial judge overruled the objections. R. 666-75.

[3] Stephanie acknowledged she did not identify anyone as the person who shot her. R. 378.

walked through the Batchelors' home, checked on the children, and observed the tub in the master bathroom was wet. R. 334-58; State's Exhibits 1 to 15, R. 800-11.

Spartanburg County Sheriff Office Investigator William Gary interviewed Stephanie at the hospital before she went into surgery. Stephanie was not able to tell the investigator anything about what had happened to her. R. 400-03. Investigator Gary interviewed Johnathan for thirty minutes on January 8, 2016. Johnathan gave consent for law enforcement to examine Stephanie's cellphone and informed Investigator Gary that examining the phone would show that he and Stephanie had been "arguing about her engagement ring being lost." According to Investigator Gary, during this conversation, Johnathan became a suspect. R. 422-25.

Stephanie was in a medically induced coma for a week.[4] She woke up confused and "couldn't really talk" because of a tracheotomy. R. 379-81.

At trial, Stephanie testified differently from what she told Deputy Malpass. After getting off work at Kay Jewelers and assisting with the bank deposit, Stephanie talked to Johnathan while she drove home. She pulled into the driveway, waited for the garage door to open, and pulled into the garage. She unbuckled the seatbelt, sat for a minute listening to the radio, and reached for her pocketbook and cellphone. Stephanie claimed Johnathan "flung open" the car door and "pulled" her out of the car. She walked up the ramp that leads to the door. She claimed Johnathan hit her "over and over" with a long orange baseball bat. She claimed Johnathan dragged her "face up" by her feet "out of the garage to the side of the house." She claimed Johnathan disappeared, "reappeared at her feet," and

[4] Dr. Brian Thurston testified about Stephanie Batchelor's injuries and treatment. R. 616-32.

shot her. Her memory is "kind of fuzzy," but Stephanie recalls hearing Johnathan direct the first responders to their house and Deputy Malpass talking to her. R. 369-70, 374-81.

On cross-examination, Stephanie acknowledged talking to law enforcement several times. Stephanie recalled talking to Deputy Malpass, understanding her questions, and telling the first responder that she did not know what happened to her. Stephanie claimed not to recall the conversation with law enforcement on January 18, 2016, when she told law enforcement that Johnathan was not the person who attached her, even though law enforcement believed Johnathan was the assailant.[5] It wasn't until January 25, 2016, that Stephanie finally claimed Johnathan attacked her. R. 389-93, 397.

The Spartanburg County Sheriff's office processed the crime scene for evidence. They took photographs and collected evidence. Law enforcement located Stephanie's car on the side or the road, near a bridge over the Tyger River, 1.5 miles from the Batchelors' home. Travis Woods, a first responder with the fire department, arrived at the location of the car. The car was still running, and Mr. Woods turned off the ignition. According to Investigator Gary, it takes three minutes to drive from the house to the location of the car and driving from the house to the location of the car and walking back to the house takes twenty-five minutes, fifteen seconds. Law enforcement deployed a canine tracking team but was unable to track the perpetrator. The dive team searched the river but did not find any evidence. Law enforcement took the car to an impound lot for evidence processing. R. 404-22, 437-38, 443-46, 504-27.

[5] Stephanie did acknowledge making inconsistent statements about whether she parked inside the garage or outside the garage on the driveway. R. 391.

During the investigation, law enforcement collected DNA samples from the steering wheel of Stephanie's car and gunshot residue swabs from Johnathan and Stephanie. Law enforcement collected two projectiles—one at the Batchelor residence and one from the pathology department at Spartanburg Regional Hospital. None of the forensic evidence pointed to Johnathan Batchelor. There was not any gunshot residue on Johnathan's hands. The DNA on the steering wheel of the Stephanie's car belonged to Stephanie and an unknown male. Both Johnathan Batchelor and Travis Woods, who turned off the ignition, were excluded as donors of this DNA evidence. R. 404-22, 446-49, 457-60.

Law enforcement also collected two projectiles. One projectile was found at the Batchelor residence "between the driveway and the garage," which was described as a .38 caliber projectile. The other projectile was recovered from Ms. Batchelor at Spartanburg Regional Hospital, which was described as a 9mm projectile. Greenville County analyzed the two projectiles. The Firearms/Tool Mark Report did not definitively identify the caliber of the bullet. Rather, the report identified each projectile as "a caliber 38/9mm fired bullet specimen." The report concluded two projectiles "bear similar but insufficient microscopic marks to permit a positive identification to each other." R. 137-38, 233-41, 415-20, 448-49, 458, 650-52.

Without any forensic evidence, the prosecution relied on an extra-material affair between Johnathan Batchelor and Sydney Allen as evidence of motive. This evidence will be discussed in Section V below. The State also relied on the jailhouse informant testimony of a convicted drug trafficker. This evidence will be discussed in detail in Sections II and III below.

## STANDARD OF REVIEW

"In criminal cases, this Court sits to review errors of law only and is bound by factual findings of the trial court unless an abuse of discretion is shown." *State v. Blackwell*, 420 S.C. 127, 136, 801 S.E.2d 713, 718 (2017) (internal citations and quotations omitted). "An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law." *Id*.

Before a federal constitutional error can be held harmless the reviewing court must be able to declare a belief that it was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967). "Whether an error is harmless depends on the circumstances of the particular case. No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the result of the trial." *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (internal quotations omitted) (quoting *State v. Key*, 256 S.C. 90, 93, 180 S.E.2d 888, 890 (1971)). This Court does "not to question whether the State proved its case beyond a reasonable doubt, but whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict." *State v. Reyes*, 432 S.C. 394, 406, 853 S.E.2d 334, 340 (2020) (citing *State v. Tapp*, 398 S.C. 376, 389-90, 728 S.E.2d 468, 475 (2012). In cases like this one, when "credibility" is the "most critical determination" for jurors to make in the case, the error is not harmless. *State v. Jennings*, 394 S.C. 473, 480, 716 S.E.2d 91, 95 (2011).

## ARGUMENTS

### *Question I*

**Did the trial judge err as a matter of law by denying Johnathan Batchelor's motion to dismiss when the law enforcement destroyed the physical evidence in the case without providing Mr. Batchelor with his due process opportunity to independently examine two projectiles to establish that two weapons were used in the assault on his wife, thereby contradicting the State's theory of the case and establishing his actual innocence?**

On June 17, 2021, Mr. Batchelor moved the trial court "for an order dismissing this case based on law enforcement's destruction of all of the physical evidence in this case," identifying the appropriate standard:

> To establish a due process violation,[6] a defendant must demonstrate (1) that the State destroyed the evidence in bad faith, or (2) that the evidence possessed an exculpatory value apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means.

R. * (quoting *State v. Cheeseboro*, 346 S.C. 526, 538-39, 552 S.E.2d 300, 307 (2001)). In his pre-trial brief, Mr. Batchelor additionally called the trial court's attention to *Arizona v. Youngblood*, 488 U.S. 51 (1988). R. 32.

On October 29, 2021, the trial court convened a hearing on the motion. After Mr. Batchelor's *Alford* plea, there was "communication within the sheriff's office about whether or not the evidence needed to be retained," and "the decision was made to destroy the evidence" before the one-year statute of limitations for Mr. Batchelor to file an application for post-conviction relief.[7] Mr. Batchelor called the trial court's attention to

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[6] U.S. Const. Am. XIV; S.C. Const. Art. I, § 3.

[7] "An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later." S.C. Code Ann. § 17-27-45(A).

S.C. Code Ann. § 17-28-320 which requires "[a] custodian of evidence must preserve all physical evidence and biological material related to the conviction or adjudication of a person for" certain offenses. Although the statute does not

> specifically list attempted murder, it does list murder and several other crimes. And construing that in favor of Mr. Batchelor and against the state that evidence should have been preserved under that statute as well.

Mr. Batchelor argued he "is prejudiced" for two reasons. First, two projectiles collected for evidence were "destroyed" and he "will not be able to have those examined by an expert." He noted that the discovery contains "speculation" and "opinions" about the evidence that he could not refute without "actually being able to examine the fragments or the projectiles." Second, Mr. Batchelor noted his PCR application "raise[d] a number of grounds of ineffective assistance of counsel that are unadjudicated" and the "prejudice flowing from the prior representation put him in a particularly [] tough situation as far as being able to confront the evidence." R. 226-28.

The State acknowledged "the evidence was destroyed" but argued the evidence was destroyed pursuant to an evidence retention policy and not in bad faith. The State also argued the evidence did not contain exculpatory value that could not be obtained by other means, such as through the reports generated from examination of the evidence. The State argued, "We don't have things that are unknown." R. 228-33.

In response, Mr. Batchelor argued any "evidence retention policy" that does not respect the "well-known statues of limitations" for filing a PCR application and a federal petition for writ of habeas corpus "is a bad faith policy." Trial counsel reminded the trial judge that Mr. Batchelor wants to examine the "two projectiles, one which was found in the driveway and one which was removed from Stephanie Batchelor at the hospital. Law

enforcement described the projectiles as "different" types of ammunition. One projectile was found at the Batchelor residence "between the driveway and the garage," which was described as a .38 caliber projectile. The other projectile was recovered from Ms. Batchelor at Spartanburg Regional Hospital, which was described as a 9mm projectile. Greenville County analyzed the two projectiles. The Firearms/Tool Mark Report did not definitively identify the caliber of the bullet. Rather, the report identified each projectile as "a caliber 38/9mm fired bullet specimen." The report concluded two projectiles "bear similar but insufficient microscopic marks to permit a positive identification to each other." R. 233-41, 415-20, 448-49, 458, 650-52. Mr. Batchelor argued the exculpatory nature of this evidence is "readily apparent" because "actually having these bullets examined" could establish his innocence" or "a reasonable doubt," and he cannot get that evidence "from any other source other than actually having these bullets examined." The trial judge examined the ballistics report and took the motion under advisement. R. 137-38, 233-41.

On November 1, 2021, the trial judge denied the motion, finding the evidence was not destroyed in bad faith, the evidence did not possess "an exculpatory value apparent before the evidence was destroyed," and Mr. Batchelor "can obtain other evidence of comparable value by other means." R. 233-34.

The trial judge erred as a matter of law by not dismissing the case pursuant to *Youngblood* and *Cheeseboro.* As seen, the law enforcement investigation identified two different calibers of projectiles—a .38 caliber projectile and a 9mm projectile—that cannot be matched to the same gun. The Firearms/Tool Mark Report conflated these two different calibers in the description of the projectiles tested, which gives the reader of the report the false impression that the projectiles are identical calibers. The only way for Mr. Batchelor

to resolve this discrepancy would be for him to have an expert conduct an independent examination of the projectiles, but law enforcement destroyed this evidence. This Court, accordingly, should reverse the trial court and dismiss the charge.

### *Question II*

**Did the trial court err by failing to exclude the testimony of Dustin Tiller, a jailhouse informant, serving a federal court sentence for conspiracy to traffic methamphetamine, when the trial judge operated under the mistaken impression that the court lacked the authority to evaluate the reliability of the informant's testimony?**

Prior to trial, Johnathan Batchelor moved the trial court "to convene a hearing regarding the reliability and admissibility of [Dustin] Tiller's testimony and to issue an order excluding this testimony." R. 33-35. Mr. Tiller's federal court plea agreement (R. 48-62) and sentencing transcript (R. 66-124) were attached to the motion.

On March 17, 2017, Mr. Tiller entered into a plea agreement with the United States Attorney to plead guilty to one count of conspiring "to Possess with the Intent to Distribute 500 grams or more of" methamphetamine. R. 48-49. Based on the offense and his criminal history, Mr. Tiller faced "a mandatory term of life imprisonment, no probation, no parole, a fine of $20,000,000, plus a special assessment of $100." R. 49. Mr. Tiller entered his guilty plea on March 23, 2017 (R. 64), and his sentencing hearing was delayed fifteen months until June 26, 2021 (R. 66).

Based on Mr. Tiller's cooperation, the government moved for a downward departure and planned to recommend a sentence of 240 months. R. 80. But, as Mr. Tiller's attorney candidly stated, "[T]ime creates new situations and puts new stuff into play. And that's exactly what happened here." R. 91. "[B]ecasue of the information that he provided related to Ms. Well's state [court] case" involving Mr. Batchelor, the United States Attorney "thought it was important to go a bit lower" and recommended the United States

District Court sentence Mr. Tiller to 220 months. R. 34. Indeed, Ms. Wells appeared in the District Court and spoke on Mr. Tiller's behalf. R. 70-74. Based on his participation in an investigation involving drug trafficking and corruption in the South Carolina Department of Corrections, Mr. Tiller hopes the government will bring a motion under Rule 35 of the Federal Rules of Criminal procedure to further reduced his sentence. R. 97, 99, 114, 121, 125.

The prosecutor proffered Dustin Tiller's testimony outside the presence of Johnathan Batchelor's jurors. Mr. Tiller was brought into the courtroom in full shackles, because he was serving a sentence in the federal penitentiary in Yazoo, Mississippi for conspiracy to traffic methamphetamine. Prior to his current conviction and sentence, Mr. Tiller had a state court conviction for trafficking drugs and another federal court conviction for trafficking drugs. Mr. Tiller acknowledged facing a mandatory sentence of life imprisonment, but he entered into a plea agreement with the United States Attorney for a reduced sentence. R. 463-77, 484-94; Court's Exhibit 4; State's Exhibit 64.

Prior to sentencing in federal court, Mr. Tiller was housed in the Spartanburg County Detention Center, in the same dorm as Johnathan Batchelor. They attended the same Bible study. Mr. Tiller was aware of where Johnathan Batchelor kept his legal materials. Mr. Tiller claimed Johnathan told him about meeting a redheaded girl at work, arguing with his wife, and his wife gaining weight after having a baby. Regarding the incident in this case, Mr. Tiller claimed Johnathan admitted he "went outside and hid," shot his wife "when she came into the garage," and thought she was dead. Mr. Tiller claimed that, when Johnathan returned from hiding the gun, his wife had "crawled" to the white Explorer. Mr. Tiller further claimed Johnathan "yanked" his wife out of the car, made it

look "like it was a robbery," and took the Explorer to the bridge to make it look like a "carjacking." R. 477-84, 607.

After Mr. Tiller came forward with the claim that Johnathan admitted to him that he tried to kill his wife, the United States Attorney reduced the government's recommended sentence from 240 months to 220 months. Jennifer Wells, the Solicitor who prosecuted Mr. Batchelor, spoke at Mr. Tiller's federal court sentencing hearing. Mr. Tiller hopes for an additional downward departure in the future. R. 484-94.

The trial court heard arguments on Mr. Batchelor's motion to exclude Dustin Tiller's testimony. In denying the motion, the trial judge declined to "weigh the evidence" and consider the reliability or credibility of any witness or any evidence," ultimately ruling "if there is any evidence at all, it goes to the jury and that's where it's going." Mr. Batchelor expressly "disagree[ed] with the Court not weighing the evidence as far as admissibility," noting that the trial judge had already done so when considering the State's motion to limit evidence of third-party guilt. R. 495-503.

Over objection, Dustin Tiller testified in front of the jurors in full shackles.[8] He repeated his testimony about his criminal history, most resent federal court conviction and sentence for conspiracy to traffic methamphetamine, and plea agreement, sentencing downward departure from mandatory life imprisonment, and the statements he claimed Johnathan Batchelor made to him at the Spartanburg County Detention Center. He also acknowledged knowing where Mr. Batchelor kept his legal materials. R. 565-87, 605-09; State's Exhibit 64, R. 449-63.

[8] A uniformed officer guarded Mr. Tiller during his testimony in front of the jurors. Later in the trial, this same uniformed officer guarded Johnathan Batchelor during his testimony before the jurors.

The trial judge limited Mr. Batchelor's cross-examination. The trial court prohibited Mr. Batchelor from asking Mr. Tiller questions about his conversation with his attorney, regarding the federal court sentence, based on the attorney-client privilege. Mr. Batchelor pointed out that Mr. Tiller already waived his attorney-client privilege by already testifying about those conversations. The trial judge also prohibited Mr. Batchelor from questioning Mr. Tiller about Ms. Wells appearing at his federal court sentencing hearing and his hopes Ms. Wells would assist him with an additional downward departure on his federal sentence. The trial judge allowed Mr. Batchelor to question Mr. Tiller about the United States Attorney reducing the government's sentencing recommendation by twenty months, but the trial court prohibited Mr. Batchelor from asking Mr. Tiller about how that twenty-month reduction was linked to his prior cooperation in Mr. Batchelor's prosecution. R. 587-614.

A wealth of research documents due process concerns surrounding jailhouse informant testimony that results in wrongful convictions. *See, e.g.,* Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55 (2008); Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 Golden Gate U. L. Rev. 107, 112 (2006); Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. Cin. L. Rev. 645 (2004); Ian Weinstein, *Regulating the Market for Snitches*, 47 Buff. L. Rev. 563, 577 (1999). The innocence project recommends:

> At minimum, before allowing for the admissibility of jailhouse informant testimony at trial, the court should make a finding relating to reliability and consider the following factors:
>
> - Complete criminal history of the jailhouse informant.
>
> - Any deal, promise, inducement or benefit that the offering party has or will make in the future to the jailhouse informant.

- Time, place and substance of the accused's statements allegedly heard by the jailhouse informant, time and place of their disclosure to law enforcement, and the names of all people who were present when the statements were made.

- Whether at any time the jailhouse informant recanted his or her statements and details of the recantation.

- Other cases in which the jailhouse informant provided testimony or information on other inmates and any benefits provided in those cases.

- Other information relevant to credibility.

R. 125-26.

The trial judge operated under the misconception that the court lacked the authority to weigh Mr. Tiller's testimony, consider the credibility of that testimony, and exclude the testimony from the trial. Although convening an *in camera* hearing regarding Mr. Tiller's testimony, the trial court declined to exercise its discretion to consider the admissibility of the testimony by stating trial courts do not weigh evidence and when there is a scintilla of evidence this Court allows jurors to consider it. *State v. Hawes*, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015) ("A failure to exercise discretion amounts to an abuse of that discretion."). In doing so this Court conflated the directed verdict standard with the standard for admissibility. *See, e.g., State v. Cherry*, 361 S.C. 588, 593-94, 606 S.E.2d 475, 478 (2004) ("If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury.").

The trial court also overlooked its gatekeeping function, which requires it to consider the reliability of the evidence. *See, e.g., State v. Cope*, 405 S.C. 317, 341, 748 S.E.2d 194, 206 (2013) ("[E]vidence of third-party guilt that only tends to raise a

conjectural inference that the third party, rather than the defendant, committed the crime should be excluded."); *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010) ("[T]he trial court must evaluate the substance of the [expert] testimony and determine whether it is reliable."); *State v. Tutton*, 354 S.C. 319, 325, 580 S.E.2d 186, 189 (Ct. App. 2003) ("To be admissible, a prior bad act must first be established by clear and convincing evidence.").

This Court, accordingly, should reverse the trial court, suppress the testimony of Dustin Tiller, and order a new trial.

### *Question III*

**Did the trial court err by limiting Johnathan Batchelor's cross-examination of Dustin Tiller—in violation of the Sixth Amendment to the United States Constitution and Article I, Section 14 of the South Carolina Constitution—by prohibiting Mr. Batchelor from questioning Mr. Tiller about his conversation with his plea counsel after waiving the attorney-client privilege by testifying about those conversations, prohibiting Mr. Batchelor from questioning Mr. Tiller about the Solicitor speaking in favor of Mr. Tiller at his federal court sentencing hearing, and limiting Mr. Batchelor's questioning of Mr. Tiller regarding the twenty-month reduction in his federal that he already received for his cooperation in Mr. Batchelor's prosecution?**

As seen in Section II above, the trial judge limited Johnathan Batchelor's cross-examination of Dustin Tiller. The trial court prohibited Mr. Batchelor from asking Mr. Tiller questions about his conversation with his attorney, regarding the federal court sentence, based on the attorney-client privilege, even after Mr. Batchelor pointed out that Mr. Tiller already waived his attorney-client privilege by already testifying about those conversations. E.g. *Floyd v. Floyd*, 365 S.C. 56, 90, 615 S.E.2d 465, 483 (Ct. App. 2005) ("Any voluntary disclosure by a client to a third party waives the attorney-client privilege not only as to the specific communication disclosed, but also to all communications between the same attorney and the same client on the same subject.")

The trial judge also prohibited Mr. Batchelor from questioning Mr. Tiller about Ms. Wells appearing at his federal court sentencing hearing and his hopes Ms. Wells would assist him with an additional downward departure on his federal sentence. The trial judge allowed Mr. Batchelor to question Mr. Tiller about the United States Attorney reducing the government's sentencing recommendation by twenty months but prohibited him from asking Mr. Tiller about how that twenty-month reduction was linked to his prior cooperation in Mr. Batchelor's prosecution. R. 587-614.

The trial court denied Mr. Batchelor his fundamental Sixth Amendment right to confront and cross-examine Dustin tiller. *See also* S.C. Const. Art. I, § 14; S.C. Code Ann. § 17-23-60. Although allowing cross-examination about the plea agreement with the United States Attorney, the trial court prevented Mr. Batchelor from cross-examining Mr. Tiller about how his cooperation in this case influenced the downward departure from a mandatory life without parole sentence.[9] Specifically, Mr. Batchelor wanted to question Mr. Tiller about the United States Attorney reducing the government's recommendation from 240 months to 220 months because of his cooperation in this case. Mr. Batchelor also wanted to question Mr. Tiller about Ms. Wells speaking on his behalf in Federal Court during his sentencing hearing. These limitations allowed the Solicitor to suggest to the jurors that Mr. Tiller did not gain anything from his cooperation in Mr. Batchelor's case and argue only the District Court Judge could further reduce Mr. Tiller's sentence. R. 749-50. While it is technically true that only the District Court Judge can reduce Mr. Tiller's sentence, this argument is misleading to the jurors because resentencing cannot occur

[9] Mr. Batchelor's proffer includes his cross-examination of Mr. Tiller during the *in camera* hearing and the transcript of Mr. Tiller's sentencing hearing attached as Exhibit D to his Tre-Trial Brief. R. 65-124, 601-02.

without a motion from the United Stated Attorney and the District Court Judge is required to consider all of the information presented in a sentencing hearing, which previously included Ms. Wells presentation and might include her presentation in the future. Mr. Batchelor could have cured this misleading argument through cross-examination. *See, e.g., State v. Blurton*, 342 S.C. 500, 512, 537 S.E.2d 291, 298 (Ct. App. 2000) ("The prosecutor accused Blurton of a recent fabrication, an accusation which could not have been seriously made if the trial court had properly admitted the taped telephone conversations between Blurton and Mayfield.") *reversed on other grounds by State v. Blurton,* 352 S.C. 203, 573 S.E.2d 802 (2002).

The Sixth Amendment to the United States Constitution and Article I, Section 14 of the South Carolina Constitution guarantee the right of an accused to confront and cross-examine the witnesses who testify against him. "Included in the Confrontation Clause protection is the right to cross-examine any State's witness as to possible sentences faced when there exists a substantial possibility the witness would give biased testimony in an effort to have the solicitor highlight to a future court how the witness cooperated in the instant case." *State v. Gillian*, 360 S.C. 433, 454, 602 S.E.2d 62, 73 (Ct. App. 2004) (internal quotations omitted) *affirmed as modified on other grounds*, 373 S.C. 601, 646 S.E.2d 872 (2007). *See also State v. Sims*, 348 S.C. 16, 25, 558 S.E.2d 518, 523 (2002) ("Because of the number of charges pending against [the witness] and the severity of the potential sentences, we find the evidence was probative on the issue of bias and should have been admitted."); *State v. Mizzell*, 349 S.C. 326, 334, 563 S.E.2d 315, 319 (2002) ("We believe the defendant's Sixth Amendment right to effective cross-examination in this case outweighs the right of the State to shield the jury from knowledge of the possible

sentence for a defendant who faces the same charges as a witness against him."). Because of the trial court's restrictions, Mr. Batchelor was "unable to cross-examine [Mr. Tiller] about the details of any understanding with the State that his cooperation would be communicated to the court." *Dean*, 427 S.C. at 106, 828 S.E.2d at 251.

This Court should reverse the trial court, order a new trial, and allow Mr. Batchelor to fully cross-examine Mr. Tiller.

### *Question IV*

**Did the trial court err as a matter of law by ordering a uniformed deputy, wearing body armor, and visibly carrying two sets of handcuffs, to escort Johnathan Batchelor to the witness stand, stand next to Mr. Batchelor during his testimony, and escort Mr. Batchelor back to the defense table, without conducting a hearing required by the Fourteenth Amendment to determine whether these unusual and enhanced security measures were necessary under the specific circumstances of this case and specific characteristics of Mr. Batchelor?**

Early in the trial, outside the presence of the jurors, Mr. Batchelor expressed concern about "more and more law enforcement" officers coming into the courtroom, noting "at one point we had three [officers] sitting by us and nobody sitting on the other side of the room" with "two more officers" sitting in the back of the courtroom," not including Investigator Gary who was present as a witness. Mr. Batchelor wanted to avoid "a show of force in the Courtroom" and was concerned about prejudice, similar to what occurred in *Deck v. Missouri*, 544 U.S. 622 (2005), if the jurors "believe all these officers are here just for him." R. 440-43.

Unbeknownst to Mr. Batchelor and undersigned counsel, the trial court decided that a uniformed law enforcement—the same officer that escorted Dustin Tiller to the witness stand—noticeably wearing body armor, carrying a firearm, and two pairs of handcuffs, to shadow Mr. Batchelor to the witness stand, stand over his shoulder during Mr. Batchelor's

testimony, and shadow Mr. Batchelor back to the defense table.[10] R. 693. This show of force was "plainly visible" to the jurors. *State v. Heyward*, 432 S.C. 296, 326, 852 S.E.2d 452, 467 (Ct. App. 2020). If fact, the trial court took up a separate matter of law outside the presence of the jurors during Mr. Batchelor's direct examination. The jurors walked within just a few feet of Mr. Batchelor and his guard when leaving and returning to the courtroom. R. 666-75. Prior to authorizing this show of force, this Court did not convene a hearing pursuant to *Deck v. Missouri*, 544 U.S. 622 (2005) (shackling in instant case was not shown to be specifically justified by circumstances, and thus offended due process).[11]

Outside the presence of the jurors, pursuant to *Deck*, Mr. Batchelor moved "for a mistrial based on the excessive show of force during [his] testimony." Trial counsel explained:

> At the beginning of [Mr. Batchelor's testimony], I didn't realize that the officer walked over and was standing over his shoulder during Mr. Batchelor's testimony. I didn't see that until later and at some points it looked like he was perhaps just standing by the door, but then what I did observe just a minute ago was him walking back in front of the jury next to Mr. Batchelor. And I don't know, but Mr. Batchelor says that there's, like, excessive number or two handcuffs coming out of the back of the officer's uniform with one of them already being opened. I wasn't in position with the way they were walking to observe that, but the jurors probably would have been. And so I'd like the Court to inquire into that a little bit more.

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[10] This procedure appears to be a regular custom in Spartanburg. One purpose of the law enforcement officer standing next to an accused when he testifies is to guard the door to the hallway leading to judges' chambers. R. 693. It appears Spartanburg follows this procedure rather than a less restrictive procedure of having a law enforcement officer guard the door from inside the hallway outside the notice of the jurors. In addition to this stated reasons, Mr. Batchelor notes Spartanburg County's "policy" of shackling all criminal defendants when jurors return a verdict, which would have occurred in this case but for Mr. Batchelor's objection based on *Deck.* R. 770.

[11] Although *Deck* involved shackling, the same due process concerns apply to the use of force in Mr. Batchelor's case.

R. 392-93.

The trial judge explained how the court instructed the officer to guard Mr. Batchelor:

> Well, I saw it and I'm the one that nodded for the officer to go over there because this door leads into judge's chambers area. And the officer looked at me and I nodded for him to go, that's exactly what he did, I wanted him to stand tight there by the door.

R. 393.

Trial counsel explained that while the court and counsel "were back in chambers reviewing" Defendant's Ex. 1, "the officers were sitting in the jury box, and nobody was standing by the door."[12] Counsel reminded the trial court about his earlier concerns about *Deck* and observed the trial court should have convened a hearing "so that [Mr. Batchelor] could have an opportunity to be heard and [the trial court] would have had to make certain findings under *Deck.*" Mr. Batchelor argued it was "too late" to cure the prejudice. R. 693-95.

The law enforcement officer guarding Mr. Batchelor confirmed he was carrying two sets of handcuffs—one as part of his uniform and the of for "when we have them[13] in the jail chains." R. 395.

Mr. Batchelor once again complained about the number of law enforcement officers in the courtroom. In addition to the uniformed officer assigned to Mr. Batchelor, a uniformed officer is assigned to the trial judge, whether in chambers or in the courtroom.

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[12] The officer was standing in front of the door leading the chambers. This same door leads to the jury room. The officer had to move out of the way when the jurors were excused for the courtroom for the trial court to handle the matter of law. R. 668-75.

[13] "Them" refers to Mr. Batchelor and Dustin Tiller. The same officer escorted Mr. Tiller, who was restrained in full body shackles, into the courtroom and stood next to Mr. Tiller during Mr. Tiller's testimony in front of the jurors.

The trial judge confirmed that there were "four uniformed officers in the Courtroom." The trial judge denied the motion. R. 695-96

Mr. Batchelor moved for a new trial based on the excessive show of force. He argued the State wanted the trial judge to read *Deck* "very narrowly," instead of considering "due process" regarding "what kind of security is visible [] to the jurors in the courtroom." He argued a "less restrictive, less obvious means could have been fashioned to accomplish the same security concerns," such as using restraints underneath clothing that are not visible to the jurors. An officer could have guarded the door to chambers from inside the hallway and outside the presence of the jurors. R. 132-33, 872-73.

"The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment." *Estelle v. Williams*, 425 U.S. 501, 503 (1976) (citing *Drope v. Missouri*, 420 U.S. 162, 172 (1975)). "The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." *Id.* "To implement the presumption, courts must be alert to factors that may undermine the fairness of the fact-finding process. In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." *Id*. (citing *In re Winship*, 397 U.S. 358, 364 (1970)). "Courts have, with few exceptions, determined that an accused should not be compelled to go to trial in prison or jail clothing because of the possible impairment of the presumption so basic to the adversary system." *Id*. at 504. "This is a recognition that the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment." *Id*. *Estelle* held, "[T]he State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in

identifiable prison clothes." *Id*. at 512. Likewise, under ordinary circumstances, a trial court cannot force a defendant to stand trial wearing visible shackles. *Deck; Illinois v. Allen*, 397 U.S. 337 (1970).

Although the Constitution "permits a judge" discretion to employ extra security measures, the trial court must "take account of special circumstances, including security concerns" to accommodate "the important need to protect the courtroom and its occupants;" provided that "any such determination must be case specific" and "should reflect particular concerns . . . related to the defendant on trial." *Deck*, at 633. Here, the trial judge did not make a "case specific" or defendant specific determination. Had the trial judge undertaken such an inquiry, then he would have made the same determination that he made prior to the announcement of the jurors' verdict when courtroom security brought Mr. Batchelor into the courtroom in "full body chains." Under Spartanburg County policy, "once a verdict is being passed down," defendants in custody "go into full restraints." Pursuant to *Deck*, Mr. Batchelor objected, and the trial court required law enforcement to remove the restraints. R. 770.

*Heyward, supra,* explained the burden of proof for a *Deck* violation.

> Where a court, without adequate justification, orders the defendant to wear shackles *that will be seen by the jury*, the defendant need not demonstrate actual prejudice to make out a due process violation. The State must prove beyond a reasonable doubt that the shackling error complained of did not contribute to the verdict obtained.

432 S.C. at 325, 852 S.E.2d at 467 (cleaned up) (citing *Deck* 544 U.S. at 635). Because the State cannot prove beyond a reasonable doubt that this show of force did not contribute to

the jurors' verdict, this Court should reverse the trial court and order a new trial.[14] The unusual security measures used by the trial court during Mr. Batchelor's testimony was a "constant reminder of [Mr. Batchelor's] condition" of incarceration with the unfair danger of "affect[ing] a juror's judgment." *Estelle,* at 504.

### *Question V*

**Did the trial judge err as a matter of law by not limiting the State's presentation of evidence about Johnathan Batchelor's extra-material affair with Sydney Allen, when the probative value of this excessive amount of cumulative evidence was substantially outweighed by the danger of unfair prejudice, confused the issues, mislead the jurors an created an unfair risk that the jurors would decide the case based on evidence other than proof of the elements of the crime?**

In his pre-trial brief, Johnathan Batchelor moved the trial court "to exclude evidence of his marital infidelity as improper character evidence" pursuant to Rule 404(a) and (b), SCRE. R. 32. The trial judge convened a hearing on this motion. Mr. Batchelor pointed out "the discovery is full of evidence and witness statements about marital infidelity," which Mr. Batchelor is not disputing "from a factual standpoint." The State argued why this evidence was relevant and necessary "to make this case make sense to the jury." Acknowledging the weakness of the State's case, the Solicitor represented "the state would struggle to try this case without being able to just talk about the fact that Mr. Batchelor was having an affair when this shooting happened." Mr. Batchelor and the prosecutor agreed this case "shouldn't be tried as a family court case." The trial judge took the motion under advisement. R. 248-56. Prior to opening statements, the trial judge ruled the State would be allowed to present evidence "about an extra material affair." R. 310.

[14] Before the trial judge ruled on the post-trial motions, via WebEx, Mr. Batchelor requested to "resume in the courtroom of the trial" to reenact and photograph the positioning of the officer in relation to Mr. Batchelor on the witness stand. The trial judge denied this request. R. 886.

Based on the trial court's ruling, Mr. Batchelor made a strategic decision to acknowledge the extra marital affair during his opening statement. R. 328-29.

Stephanie Batchelor was the first witness to testify about marital infidelity. About two weeks before the incident date, Stephanie took the children to the Chick-fil-A on the Ashville Highway. As she pulled through the drive-thru line, Stephanie "saw Johnathan walking with some woman named Sydney, just about holding hands with each other, laughing and giggling." Stephanie pulled beside then, rolled down the window, and asked what they were doing. Johnathan explained they had lunch with a group of friends from work and he was giving her a ride back to work. Stephanie and Johnathan discussed this situation at home. Johnathan stated nothing improper was occurring. R. 291-94. Based on the trial judge's prior ruling (R. 310) and having acknowledged the affair during opening statements (R. 253-54), Mr. Batchelor did not object to this testimony. Before they got married, Stephanie was aware that Johnathan had affairs and that her father had caught Johnathan having an affair while they were married. R. 393-94.

On January 27, 2016, law enforcement served a search warrant at the Batchelor's home. Johnathan's red pick-up truck was parked in the driveway, and Sydney Allen's minivan was parked inside the garage. Sydney Allen was inside the home. R. 425-30. Mr. Batchelor did not object to this testimony.

The State called Spartanburg County Sheriff's Office electronic forensics investigator Lindsey McGraw to testify about his examination of two cellphones belonging to Johnathan Batchelor and one cellphone belonging to Sydney Allen. The State entered multiple exhibits to detail the extra-marital relationship between Johnathan and Sydney. R.528-58. When the State moved to enter the entire cellphone extractions (State's Exhibits

60 to 63, Mr. Batchelor requested a sidebar where the State represented the jurors would not be looking through the entire data. R. 531, 532, 559. Mr. Batchelor did not object to State's Exhibit 52 because the three phone calls on that exhibit were "from the night of the incident." Mr. Batchelor did object to State's Exhibits 53 though 59 under Rule 403, SCRE. Mr. Batchelor remined the trial court about the pre-trial motion to exclude evidence of the affair under Rules 404(b) and 403, SCRE, including the trial court's assurance there would be "certain limitations" on the evidence to prevent the trial from turning into a "character trial" or "Family Court hearing." Mr. Batchelor remined the trial court that he "already acknowledged the affair" and "had not contested it at any point" during the trial. Mr. Batchelor accordingly sought to limit the State's evidence at State's Exhibit 52 because State's Exhibits 53 though 59 are "over the top" and turned the trial into "a Family Court type hearing that we were trying to avoid." The trial judge overruled the objection. R. 545, 549-50, 554-63.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. Even though evidence is admissible, the quantity of evidence can be prejudicial. *See, e.g., State v. Gillian*, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007) ("The amount of evidence regarding the specifics of the [separate] burglary was unnecessary."); *State v. James*, 355 S.C. 25, 583 S.E.2d 745 (2003) (Pursuant to statute providing that person is guilty of burglary in the first degree if person enters dwelling without consent and with intent to commit crime in the dwelling and the burglary is committed by person with prior record of two or more convictions

for burglary, probative value of all seven of defendant's prior burglary convictions was outweighed by the very great potential for prejudice to defendant).

*State v. Alexander* is an example of when relevant evidence should be excluded when the danger of unfair prejudice substantially outweighs the probative value of the evidence and defining "[u]nfair prejudice" as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991) (internal quotations omitted) (citing Fed. R. Evid. 403 advisory committee's note). Although decided prior to our State adopting Rule 403, SCRE, *Alexander* is often cited when interpreting Rule 403. *E.g. State v. Langley*, 334 S.C. 643, 647, 515 S.E.2d 98, 100 (1999) (reversing murder conviction).

Here, the trial court should have limited the State's presentation about the extra material affair. Mr. Batchelor did not contest this fact. Nor did he contest the fact that he initially lied to law enforcement about having the affair. The State's presentation of evidence far exceeded what was necessary to for a full presentation of its case. Here, the probative value of this excessive amount of cumulative evidence about the extra-marital affair was substantially outweighed by the danger of unfair prejudice by suggesting a decision on an improper and emotional basis. This evidence confused the issues, mislead the jurors, and created an unfair risk that the jurors would decide this case based on evidence of the affair and not proof of the elements of the crime. *See Alexander, supra*. This Court, accordingly, should reverse the trial court and order a new trial where the State's evidence about the extramarital affair will be limited.

## *Question VI*

**Did the trial judge err as a matter of law by not excluding photographs (State's Exhibits No. 31 and 38) that included the image of confederate flags when the probative value of the confederate flags was substantially outweighed by the danger of unfair prejudice to Johnathan Batchelor?**

At trial, the State moved to introduce photographs taken during the search of the Batchelor residence on January 27, 2016. R. 425-38. Pursuant to Rule 403, SCRE, Mr. Bachelor objected to State's Exhibits 31 and 38 because they showed multiple confederate flags. State's Exhibit 31 is a photograph of the inside of Mr. Batchelor's truck showing a confederate flag sitting on the center console. State's Exhibit 38 is a photograph of the inside of Mr. Batchelor's workshop. A clock with a confederate flag is visible in the center of this photographs. To the left of the clock, a confederate flag is visible hanging from a hook on the wall. The trial court overruled the objection at sidebar and later on during the trial outside the presence of the jurors. R. 430, 433, 440-43.

As seen above, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. In this case, the State and Johnathan Batchelor selected diverse jurors consisting of three black males, two black females, four white males, two white females, and one mixed race male.[15] R. 223. Thus, there is a danger of unfair prejudice to Mr. Batchelor that one or more of these jurors would decide this case bases on emotions generated from seeing these confederate flags. *See Alexander, supra.* See also *State v. Langley*, 334 S.C. 643, 648, 515 S.E.2d 98, 100 (1999)

[15] The alternates included a black female and a white male. R. 223.

("the victim's photograph [was] not relevant to proving the guilt of appellant" and should have been excluded); *State v. Livingston*, 327 S.C. 17, 20, 488 S.E.2d 313, 314 (1997) ("a photograph should be excluded if it is calculated to arouse the sympathy or prejudice of the jury or is irrelevant or unnecessary to substantiate facts"); *State v. Owens*, 427 S.C. 325, 334, 831 S.E.2d 126, 130 (Ct. App. 2019), ("What little relevance the photograph had was vastly outweighed by its danger of unfair prejudice.") affirmed by *State v. Owens,* 433 S.C. 482, 860 S.E.2d 357 (2021).

Here, evidence of the confederate had no probative value. The danger of unfair prejudice, therefore, substantially outweighs the probative value of these photographs. The trial court could have avoided the issue by redacting the photographs, as the trial judge did in other instances. *Compare* State's Exhibit 16 *with* Court Exhibit 3 (R. 360-63). Additionally, the State had photographs of Mr. Batchelor's workshop that did not depict confederate flags. *E.g.*, State's Exhibit 37, R. 819. This Court, accordingly, should reverse the trial court and order a new trial where the evidence of the confederate flags will be excluded.

## *Question VII*

**Did the trial court err—contrary to Sixth Amendment of the United States Constitution, Article I, Section 14 of the South Carolina Constitution, and S.C. Code Ann. § 14-7-1020—by not asking Johnathon Batchelor's request for voir dire numbers four and six inquiring whether there was anything about evidence of serious bodily injuries or hearing profanity that might cause the jurors not to be fair and impartial, when, as anticipated prior to trial, the jurors heard received evidence about serious bodily injuries and profanity?**

Prior to selecting jurors, Mr. Batchelor submitted his Request for Voir Dire. R. 41-46. At a sidebar during jury selection, Mr. Batchelor expressly requested the trial court ask

questions three, four, five, and six.[16] R. 43-44. The trial court asked questions three and five but not four and six. Request number four asked:

> You will hear testimony and may see evidence of serious bodily injuries. Is there anything about the nature of serious bodily injuries that would so affect you that you would not be able to remain fair and impartial? If so, please come forward and explain.

R. 43. The trial court erred by not asking the potential jurors this question. As anticipated, the jurors heard evidence that Stephanie Batchelor suffered multiple gunshot wounds to her head and chest. *See, e.g*., R. 616-30 They also viewed photographs and videotape of her injuries. State's Exhibits 3, 4, and 5. Dr. Brian Thurston testified the chest wounds were life threatening. He further testified he head would was so life threatening that he and the other medical providers did not expect Ms. Batchelor to survive. This testimony allowed the Solicitor to argue to the jurors that "it is a miracle" that Ms. Batchelor survived. R. 616-30.

Request number six asked:

> You may see and hear audiotape and videotape that uses profanity. Is there anything about the nature of profanity that would so affect you that you would not be able to remain fair and impartial? If so, please come forward and explain.

R. 43-44. The trial court erred by not asking this question. During the trial, it became necessary for Mr. Bachelor to introduce the 911 call and portions of the videotape from

[16] Mr. Batchelor also complained about the trial court qualifying Juror No. 78, who informed the trial court that might have difficulty hearing during the trial. R. 246-48. The trial judge ultimately made accommodations for the juror. R. 310-14. See e.g., *Bryant v. Stirling*, No. CV 1:13-2665-BHH, 2019 WL 1253235, at *1 (D.S.C. Mar. 19, 2019), *aff'd in part, rev'd in part and remanded sub nom. Bryant v. Stephan*, 998 F.3d 128 (4th Cir. 2021), *opinion vacated on reh'g en banc,* 17 F.4th 513 (4th Cir. 2021), and *order reinstated,* No. CV 1:13-2665-BHH, 2021 WL 5332407 (D.S.C. Nov. 15, 2021), and *aff'd sub nom. Bryant v. Stephan*, 17 F.4th 513 (4th Cir. 2021).

Deputy Malpass' body worn camera. R. 677; Defendant's Exhibit 1. The jurors accordingly heard audiotape and videotape that contained profanity.

Mr. Batchelor moved the trial court to order a new trial based on inadequate *voir dire*. R. 128-29, 869. The trial court denied this motion. R. 886-87.

Pursuant to the Sixth Amendment of the United States Constitution, Article I, Section 14 of the South Carolina Constitution, and S.C. Code Ann. § 14-7-1020, Johnathan Batchelor requested that the potential jurors be placed on their oath and asked questions to determine whether any potential juror "has any interest in the cause, has expressed or formed any opinion, or is sensible to any bias or prejudice." R. 42-43. Courts have long recognized the tricky nature of analyzing jurors' bias. *See Smith v. Phillips*, 455 U.S. 209, 221-2 (1982) (O'Connor, J., concurring) (recognizing that jurors may be incapable of acknowledging their own bias); *Crawford v. United States*, 212 U.S. 183, 196 (1909) ("Bias or prejudice is . . . an elusive condition of the mind . . . and it might exist in the mind of one . . . who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence"); *United States v. Burr*, 25 F. Cas. 49, 50 (D.Va.1807) (a person under the influence of personal prejudice "is presumed to have a bias on his mind which will prevent an impartial decision of the case, according to the testimony" for such person may declare that "notwithstanding these prejudices he is determined to listen to the evidence, and be governed by it; but the law will not trust him").

Mr. Batchelor requested the trial court's *voir dire* be guided by *Skilling v. United States*, 561 U.S. 358 (2010), where the District Court's *voir dire* included questions to determine whether the prospective jurors had formed any opinions about the accused and

issues involved in the case. R. 42-43. The Court in *Skilling* individually questioned all jurors providing affirmative responses and allowed counsel for the parties to ask follow up questions.

Because of the trial court failed to ask requests for *voir dire* numbers four and six, there is a real possibility that one or more of the jurors could not remain fair and impartial because of serious injuries and hearing profanity. This Court, accordingly, should reverse the trial court and order a new trial.

### *Question VIII*

**Did the trial court err—in violation of the Sixth Amendment to the United States Construction, Article I, Section 14 of the South Carolina Constitution, and statutory law, by not ordering disclose of counseling records of Stephanie Batchelor when Johnathan Batchelor moved for disclosure of these records in order to be able to confront and cross-examine Ms. Batchelor?**

Jonathon Batchelor moved the trial court for an order requiring disclosure of the following medical and mental health records of Stephanie Batchelor to include:

1. All records from the Spartanburg Regional hospitalization related to the charges in this case, regarding the consultation with the psychiatrist(s);

2. All records, since January 1, 2016, from psychiatrist, psychologists, therapists, counselors, or other mental health professions; and

3. All records, since January 1, 2016, from any medical provider that prescribed medication that has potential side-effects related to memory.

R. *. The motion noted that medical records of Ms. Batchelor, produced by the State, regarding the incident that gave rise to this case, demonstrate that she suffered a traumatic brain injury, appeared to have memory loss issues, and might have been prescribed medication that could have an effect on her memory. He argued this information is material to Mr. Batchelor's defense to develop evidence at trial related to the Ms. Batchelor's ability

to remember to underlying incident and, potentially, to respond the State's explanation of the victim's prior inconsistent statements. R *.

The trial judge conducted an in camera review of some of the records[17] pursuant to *State v. Blackwell*, 420 S.C. 127, 801 S.E.2d 713, 726 (2017). The trial judge denied the motion. The trial judge placed a copy of the mental health records, under seal, in the court records as Court Exhibit No. 1.[18] R. 308.

The trial judge erred by not disclosing these records. Normally, medical and mental health records are protected by federal law but can by court order. Additionally, our General Assembly expressly provides for discovery of mental health information under these circumstances:

> A provider shall reveal confidences when required by statutory law or by court order for good cause shown to the extent that the patient's care and treatment or the nature and extent of his mental illness or emotional condition are reasonably at issue in a proceeding.

S.C. Code Ann. § 19-11-95(D)(1). Although state law generally protects the confidentiality of mental health records, S.C. Code Ann. § 44-22-100, the right to confront a witness "may supersede a witness's rights or statutory privilege." *Blackwell*, 420 S.C. 127, 151, 801 S.E.2d 713, 726 (2017). *See also* U.S. Const. Am. VI and XIV; S.C. Const. Art. I, § 14. Under *Blackwell*, this Court "should conduct a hearing with the parties" to determine whether the witness' legal representative "consents to the disclosure of the privileged records." 420 S.C. at 801 S.E.2d at 727-28. If consent is withheld, then this Court "should

[17] The trial judge never obtained the records requested in requests numbers one and three.

[18] Mr. Batchelor designated Court Exhibit No. 1 as part of the Record on Appeal and will request an order from this Court for the exhibit to be transported to this Court for review.

review the contents of the records to determine whether disclosure is necessary for the conduct of proceedings before the court and that failure to make the disclosure is contrary to public interest." *Id.* (internal quotations omitted).

This Court should "assess the importance of the witness to the prosecution's case and whether the records contain exculpatory evidence, including, *but not limited to*, evidence relevant to the witness's credibility." *Id.* (emphasis supplied by court). This Court should reverse the trial court, disclose the records, and order a new trial.

### *Question IX*

**Did the trial court err by imposing a sentence of thirty years imprisonment, which is the maximum sentence allowed for attempted murder, when both the Solicitor and the Court of General Sessions previously agreed that a sentence of eighteen years in the Department of Corrections was sufficient, when the sentence imposed following trial punished Johnathan Batchelor for exercising his rights to seek post-conviction relief and a jury trial?**

As seen in the Statement of the Case above, Mr. Batchelor previously entered an *Alford*[19] plea to attempted murder, and the Court of General Sessions sentenced him to the recommended sentence of eighteen years imprisonment. R. 144-70. Mr. Batchelor's conviction and sentence were vacated in post-conviction relief. *Batchelor v. State*, Case No. 2018-CP-42-04276. R. 1-2.

Prior to sentencing, trial counsel pointed out that eighteen years was the active portion of Mr. Batchelor's sentence that was vacated by the grant of post-conviction relief. Mr. Batchelor argued that "a sentence beyond what was previously imposed [would be] punishing him for exercising his right to post-conviction relief in this case, unless there is some new evidence." He further argued there is no new evidence in this case. The State

[19] *North Carolina v. Alford*, 400 U.S. 25 (1970).

opposed the motion. The trial judge denied the motion and sentenced Mr. Batchelor to the maximum sentence of thirty-years imprisonment. R. 776-81.

Mr. Batchelor moved the trial court to reconsider the sentence and to impose and sentence not to exceed eighteen years. R. 134-35, 865-84. The trial court denied the motion.

As our Supreme Court observed:

> In the landmark decision of *North Carolina v. Pearce,*[20] the United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment prevented a trial court from penalizing a defendant for choosing to exercise his right to appeal. In order for the presumption of prosecutorial retaliation (or the "*Pearce* presumption") to apply, Petitioner must show there is a "reasonable likelihood" that retaliation was a motive behind bringing the additional charges. *Alabama v. Smith,* 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989); *State v. Fletcher,* 322 S.C. 256, 471 S.E.2d 702 (Ct.App.1996). Where no such "reasonable likelihood" exists, the defendant has the burden to prove actual retaliation. *Alabama v. Smith,* 490 U.S. at 800, 109 S.Ct. at 2205. In the instant case, there is a "reasonable likelihood" retaliation was a motive, and therefore Petitioner was entitled to the presumption.

*Patrick v. State*, 349 S.C. 203, 209, 562 S.E.2d 609, 612 (2002).

Here, "there is a 'reasonable likelihood' retaliation was a motive, and therefore Petitioner was entitled to the presumption." *Id.* In bond hearings in this case, the State noted its displeasure that the Attorney General's office consented to the PCR court granting Mr. Batchelor a new trial. R. 22-29. Two post-PCR court orders denying bond reference Mr. Batchelor's prior *Alford* plea. R. 140-43. The State did not present any evidence that was not available to it prior to the *Alford* plea.

[20] *North Carolina v. Pearce*, 395 U.S. 711 (1969), *modified by Alabama v. Smith*, 490 U.S. 794 (1989).

This Court, accordingly, should reverse the trial court and remand this case for a resentencing hearing with instructions for the trial court to impose a sentence not to exceed eighteen years.

## CONCLUSION

For the foregoing reasons, this Court should reverse the trial court and dismiss the charge. Alternatively, this Court should reverse the trial court and order a new trial.

Respectfully Submitted,

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September 6, 2023
Greenwood, South Carolina

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions
R. Keith Kelly, Circuit Court Judge

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Appellate Case No. 2022-000160

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The State, .....Respondent,

v.

Johnathan Olin Batchelor,.....Appellant.

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**Rule 211(b), SCACR Certification**

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I certify this Brief complies with Rule 211(b), SCACR.

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THE STATE OF SOUTH CAROLINA
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**Certificate of Service**

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I certify that I served this pleading on the State of South Carolina, by email, using counsel's primary email address listed in the Attorney Information System (AIS), as reflected below, on the date reflected below:

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