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Jan 16 2024

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA COUNTY OF COLLETON	COURT OF GENERAL SESSIONS FOURTEENTH JUDICIAL CIRCUIT
State of South Carolina, v. Richard Alexander Murdaugh, Defendant.	Indictment Nos. 2022-GS-15-00592, -593, -594, and -595 **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
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