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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Supreme Court

On Petition for Writ of Certiorari to the Court of Appeals

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

Appellate Case No. 2024-001579

The State, ...Respondent

v.

Johnathan Olin Batchelor,.....Appellant.

PETITION FOR WRIT OF CERTIORARI

E. Charles Grose, Jr.
S.C. Bar Number 66063
The Grose Law Firm, LLC
305 Main Street
Greenwood, SC 29646
(864) 538-4466
(864) 538-4405 (fax)
Email: charles@groselawfirm.com

Attorney for Johnathon Batchelor

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CERTIFICATION OF COUNSEL

The Court of Appeals issued an opinion, on July 17, 2024, affirming Johnathon Batchelor's conviction and sentence (A. 1100-08). On August 21, 2024 (A. 1122-23), the Court of Appeals denied Mr. Batchelor's petition for rehearing (A. 1109-21).

QUESTIONS PRESENTED

I. The trial court erred 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. The Court of Appeals found constitutional error but held this error harmless. This Court should grant the writ and consider whether Mr. Batchelor suffered prejudice.

II. The trial court erred 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.

III. The Court of Appeals erred by failing to take judicial notice of Dustin Tiller's motion for a downward departure of his federal sentence.

IV. The trial judge erred 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.

V. The trial court erred as a matter of law by ordering a uniformed deputy, 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.

VI. The trial judge erred 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 and created an unfair risk that the jurors would decide the case based on evidence other than proof of the elements of the crime.

VII. The trial judge erred 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

VIII. The trial court erred—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 received evidence about serious bodily injuries and profanity.

IX. The trial court erred—in violation of the Sixth Amendment to the United States Constitution, Article I, Section 14 of the South Carolina Constitution, and statutory law, by not ordering disclosure 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.

X. The trial court erred 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[1]

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.

[1] A detailed Statement of Facts appears in the Final Brief of Appellant, A. 984-88.

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 consented 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 R. Keith 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 1-4, 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.

Mr. Batchelor appealed his conviction and sentence to the Court of Appeals of South Carolina. The Court of Appeals issued an opinion, on July 17, 2024, affirming the conviction and sentence. *State v. Batchelor*, Unpublished Opinion No. 2024-UP-262 (S.C. Ct. App. July 17, 2024). A. 1100-08. On August 21, 2024 (A. 1122-23), the Court of Appeals denied Mr. Batchelor's petition for rehearing (A. 1109-21).

STANDARD OF REVIEW

"In criminal cases, this Court only reviews errors of law." *State v. Gamble*, 405 S.C. 409, 415, 747 S.E.2d 784, 787 (2013) (citing *State v. Jacobs,* 393 S.C. 584, 586, 713 S.E.2d 621, 622 (2011). "[T]he admission of evidence is within the discretion of the trial court and will not be reversed by this Court absent an abuse of discretion." *Id*., 405 S.C. t 415-16, 747 S.E.2d at 787 (citing *State v. McDonald,* 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000)) "An abuse of discretion occurs when the trial court's ruling is based on an error of law." *Id.* "[T]his Court reviews questions of law de novo." *State v. Lawrence*, 439 S.C. 611, 616, 889 S.E.2d 557, 560 (2023) (citing *State v. Adams*, 409 S.C. 641, 647, 763 S.E.2d 341, 344 (2014)).

ARGUMENTS

I. The trial court erred 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. The Court of Appeals found constitutional error but held this error harmless. This Court should grant the writ and consider whether Mr. Batchelor suffered prejudice.

On March 17, 2017, Dustin 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 hoped 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 Mr. Tiller's testimony outside the presence of the jurors. 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 his federal sentencing, Mr. Tiller was housed in the Spartanburg County Detention Center, in the same dorm as Mr. Batchelor and attended the same Bible study. Mr. Tiller knew where Mr. Batchelor kept his legal materials. Mr. Tiller claimed Mr. Batchelor told him about meeting a redheaded girl at work, arguing with his wife, and his wife gaining weight after having a baby. Regarding this case, Mr. Tiller claimed Mr. Batchelor 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 Mr. Batchelor 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 and claimed that Mr. Batchelor 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 hoped for an additional downward departure in the future. R. 484-94.

Over objection, Mr. Tiller testified in front of the jurors. He repeated his testimony about his criminal history, most resent federal court conviction and sentence for conspiracy to traffic methamphetamine, his 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.

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.

The Court of Appeals found constitutional error but held, "On direct, although Tiller acknowledged that his plea counsel reviewed the plea agreement with him before he signed it, that he understood what it meant, and he explained what he thought the agreement meant, *Tiller never said what his plea counsel actually told him.*" A. 1103. (emphasis added). The court overlooked the cross-examining during the proffer of Mr. Tiller's proposed testimony, where he testified about the advice he received from his attorney:

> Q. Did you and Jim Bannister talk about how it would be helpful if you could provide information against people that weren't in your own case?
>
> A. It, it came up when I told him that, you know, I might have some information about a murder weapon. And he said well, if you have information then it could help you.
>
> Q. Okay. Well, when did that come up between you and Jim Bannister?
>
> A. When, after the conversation with me and Batchelor.

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> Q. Okay. Well, when did that come up between you and Jim Bannister?
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> A. When, after the conversation with me and Batchelor.

R. 486-87. Mr. Tiller, accordingly, waived his attorney client privilege. *See, 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 court should have allowed this cross examination in front of the jurors.

This Court of Appeals also held, "[W]hile the trial court may have erred in its other limitations of Appellant's cross-examination of Tiller, these errors do not warrant reversal." A. 1103-04. The court reasoned Mr. Batchelor "thoroughly cross-examined Tiller about the charges Tiller faced, his agreement to provide information about crimes, the benefits he had received from providing information, and his anticipation that his testimony at Appellant's trial would result in the solicitor speaking on his behalf and a further reduction of his sentence" and "was able to accomplish his primary objective by demonstrating Tiller's possible bias." *Id*. During the cross-examination during the proffer, Mr. Batchelor wanted to know what sentence Mr. Tiller hoped he would get in exchange for his cooperation in this case. Mr. Tiller evaded answering that questions. *See, e.g.*, R. 491-93.

As will be seen on Question III below, we know now that Mr. Tiller hoped for a time served sentence, and the jurors should have learned this information.

Mr. Batchelor should have been allowed to question Mr. Tiller about the 20-month sentence reduction he already received for his cooperation in this case, the Solicitor's participation in that sentence reduction hearing, and his hope to get out of federal prison in consideration of his testifying in Mr. Batchelor's case. *See, e.g., 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.").

This error was not harmless. 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)). The appellate 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). This Court should grant the petition and consider the prejudice to Mr. Batchelor.

II. The trial court erred 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. 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.

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. *See 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 the trial 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."). The Court of Appeals acknowledged but rejected these authorities. A. 1103.

This Court of Appeals held, "[T]he trial court did not have the discretion to evaluate Tiller's credibility and exclude his testimony based on a lack of credibility." A. 1102. This holding overlooks the larger due process concerns surrounding testimony of jailhouse informants. 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 Court of Appeals also held, "Tiller was a fact witness whose testimony the State presented to prove Appellant's guilt; therefore, these cases [cited by Mr. Batchelor] are not applicable to the present issue." A. 1103. This holding is inconsistent with the holding in *State v. Adams*, 430 S.C. 420, 428, 845 S.E.2d 217, 221 (Ct. App. 2020) ("reliability concerns Adams raises . . . were satisfied here by the witness competency standard and within the framework of § 17-23-175, which in essence requires a pre-trial taint hearing"). This Court should grant the petition and consider the role of trial courts in screening testimony of jailhouse informants.

III. The Court of Appeals erred by failing to take judicial notice of Dustin Tiller's motion for a downward departure of his federal sentence.

The opening paragraph of Question II of Mr. Batchelor's Initial Reply Brief stated:

> The State acknowledges jailhouse informant Dustin Tiller "obviously testified with the hope of a benefit – a downward departure." Brief of Respondent, at 16; *id*, at 17 (acknowledging Tiller hoped for a downward departure). It appears the informant's hope for a downward departure will become a reality. On March 10, 2022, the United States attorney filed a motion "to seal a forthcoming document related to sentencing." *United States v. Tiller*, Case No. 6:16-cr-00707-JMC, ECF No. 1310. The Court granted the motion on the same day. *Id*., ECF No. 1311. On March 11, 2022, the Government filed a sealed motion, which remains pending at the time of this initial reply brief. *Id*., ECF No. 1312. One day, Mr. Batchelor and the state judicial system will know the outcome of the sealed motion—*i.e*. whether Dustin Tiller receives an additional downward departure for his assistance in the prosecution of Mr. Batchelor.

A. 915 (footnote omitted). Contemporaneously with filing the reply brief, Mr. Batchelor designated the following to be included in the record on appeal the Government's Motion to Seal Forthcoming Document in *United States v. Tiller*, Case No. 6:16-cr-00707-JMC, ECF No. 1310; and the Docket sheet in *United States v. Tiller*, Case No. 6:16-cr-00707-JMC, as pertains to Dustin Tiller. A. 931.

The State moved to strike the reference to Mr. Tiller's apparent efforts to be resentenced. A. 934-37. Mr. Batchelor responded to the motion (A. 938-66), and the State replied (A. 967-71). The Court of Appeals granted the motion. A. 972. As set forth in the Response in Opposition to the Motion to Strike, the court below overlooked its inherent authority to take judicial notice of these documents. *See, e.g., Wise v. Wise*, 394 S.C. 591, 716 S.E.2d 117 (Ct. App. 2011) (the appellate panel could take judicial notice of claimant's prior civil action against employer); *State v. Arnold*, 361 S.C. 386, 390, n. 3, 605 S.E.2d 529, 531, n. 3 (2004) (taking judicial notice of distance between locations); *State v. Hunter*, 82 S.C. 153, 63 S.E. 685 (1909) (a trial court should take judicial notice of the remittitur from the Supreme Court); *S.C. Dep't of Soc. Servs. v. Janice C.*, 383 S.C. 221, 227, 678 S.E.2d 463, 467 (Ct. App. 2009) ("a court can take judicial notice of its own records, files and proceedings for all proper purposes including facts established in its records") (quoting *Freeman v. McBee*, 280 S.C. 490, 494, 313 S.E.2d 325, 327 (Ct. App. 1984)); *State v. Johnson*, 213 S.C. 241, 49 S.E.2d 6 (1948) (Supreme Court may take judicial notice of general order signed by presiding judge at conclusion of terms of courts of general sessions) *overruled on other grounds by State v. Jackson*, 301 S.C. 49, 389 S.E.2d 654 (1990).

Although "original judicial notice of adjudicative facts at the appellate level should be limited to matters which are indisputable," *Masters v. Rodgers Dev. Grp.*, 283 S.C. 251, 256, 321 S.E.2d 194, 197 (Ct. App. 1984), judicial notice of these court records is proper in this circumstance. Mr. Batchelor does not ask this Court to take notice of an adjudicative fact. His initial reply brief simply noted what appeared to be the filing of a motion for a downward departure, the timing of which suspiciously appeared connected to Mr. Tiller's testimony in this case. Significantly, "[o]n March 31, 2022, [Mr. Tiller's] sentence was reduced from 220 months to Time Served based on a motion pursuant to Federal Rule of Criminal Procedure 35(b)." *United States v. Tiller*, Case No. 6:16-cr-00707-TMC, ECF No. 1522. It appears this reduction in sentence was sealed, but Mr. Batchelor discovered the reduction of sentence when the United States Probation Officer petitioned the District Court revoke Mr. Tiller's probation. *Id*.

This Court should grant the petition and considerer whether the Court of Appeals should have taken judicial notice of Dustin Tiller's motion for a downward departure. Judicial notice of this information provides important context to Questions I and II.

IV. The trial judge erred 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 and citing *State v. Cheeseboro*, 346 S.C. 526, 538-39, 552 S.E.2d 300, 307 (2001) and *Arizona v. Youngblood*, 488 U.S. 51 (1988). R. 32. On October 29, 2021, the trial court convened a hearing on the motion. This hearing is

discussed in detail in the Final Brief of Appellant, A. 990-93. 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.

This Court of Appeals held:

> Appellant did not demonstrate any evidence of bad faith. The Spartanburg County Sheriff's Office (SCSO) believed the case was resolved prior to their destruction of the evidence because the SCSO destroyed the two bullet fragments after the direct appeal time expired from Appellant's Alford plea. In addition, Appellant could obtain evidence of comparable value. The defense was provided with a report detailing the specific features of each projectile and had the opportunity to examine the individual who examined the firearm evidence. Therefore, we find Appellant did not establish a due process violation.

A. 1101 (footnote omitted).

The Court of Appeals overlooked Mr. Batchelor's argument that 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." The Court of Appeals also overstated the information contained in the ballistics' report. The report does not contain enough information for an independent expert to form an opinion. Mr. Batchelor was prejudiced by not having the opportunity to conduct an independent examination. This Court should grant the petition and consider the question.

V. The trial court erred as a matter of law by ordering a uniformed deputy, 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 the law enforcement presence in the courtroom and expressed concern 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—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. 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). Prior to authorizing this show of force, this Court did not convene a hearing pursuant to *Deck*.

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." 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. 392-96.

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. 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.

The Court of Appeals' opinion misstates the question presented by referring to "the number of law enforcement officers in the courtroom was not excessive." A. 1101. The question presented is directed at the trial judge's decision to have a uniformed law enforcement shadow Mr. Batchelor while he testified, without first conducting a hearing

to determine whether this extreme security measure was warranted. *Deck*. Once this Court focuses on the precise questioned presented, the need to reverse becomes apparent.

The Court of Appeals' opinion also stated the issue was not preserved for appeal, even though the State never raised error preservation at trial, during the new trial motion hearing, or on appeal. In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court." *In re Michael H.*, 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004). *See State v. Oxner*, 391 S.C. 132, 134, 705 S.E.2d 51, 52 (2011) ("[A]ll this Court has ever required is that the questions presented for its decision must first have been fairly and properly raised to the lower court and passed upon by that court."). These requirements are satisfied regarding this question on appeal. This Court should grant the petition and consider the question.

VI. The trial judge erred 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 and created an unfair risk that the jurors would decide the case based on evidence other than proof of the elements of the crime.

Pre-trial, Mr. Batchelor moved to exclude evidence of his extramarital affair pursuant to Rules 403 and 404(b), SCRE. After hearing arguments, the trial judge determined the evidence to be admissible. R. 248-56, 310. 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. Mr. Batchelor, accordingly, did not object when the State began introducing this evidence.

The State, however, could not restrain itself, and Mr. Batchelor objected to State's Exhibits 53 though 59 under Rule 403, SCRE.[2] 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.

The Court of Appeals merely held, "[T]he trial court did not err in admitting the photographs and text messages as their probative value outweighed the risk of prejudice." A. 1105. In doing so, the court below did not address Mr. Batchelor's full argument. "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]

[2] *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.

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). The Court of Appeals never addressed the excessive amount of evidence the trial court allowed the State to introduce. This Court should grant the petition and consider the question.

VII. The trial judge erred 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. 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) ("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).

This Court of Appeals held:

> Appellant argues the trial court erred in admitting photographs that included the confederate flag. He asserts the danger of unfair prejudice substantially outweighed the probative value of the photographs. We disagree. The photographs were admitted to help the jury visualize the scene of law enforcement's search and the objects they took into evidence. The State did nothing to emphasize the flag images. We hold the trial court did not err in admitting the photographs as their probative value outweighed the risk of prejudice from the confederate flag objects in the background of the photographs.

A. 1106. This cursory analysis overlooks the fact that ***no*** evidence was collected from Mr. Batchelor's workshop. *See* State Ex. 38. Nor does it consider that the photograph from Mr. Batchelor's truck should have been cropped, allowing the same evidence to be presented in a non-prejudicial manner. *See* State's Ex. 31. This Court should grant the petition and consider the question.

VIII. The trial court erred—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 received evidence about serious bodily injuries and profanity?

Over objection, the trial judge declined to ask Mr. Batchelor's Request for voir dire numbers four, regarding evidence of serious bodily injuries, and six, regarding audiotape and videotape containing profanity. R. 36, 43-45. The Court of Appeals held, "[T]rial court did not abuse its discretion in finding its voir dire sufficiently ensured Appellant had a fair and impartial jury." A. 1106. The two cases primarily relied upon by the Court—*State v. Wise*, 359 S.C. 14, 596 S.E.2d 475 (2004) and *State v. Stanko*, 376 S.C. 571, 658 S.E.2d 94(2008)—are capital cases where the trial judge and counsel for the parties conduct extensive voir dire. The other two cases relied upon by the Court—*State v. Coaxum,* 410 S.C. 320, 327, 764 S.E.2d 242, 245 (2014) and *State v. Woods,* 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001)—involve jurors concealing information during voir dire. These cases taken together illustrate the necessity for trial courts to ask voir dire questions to elicit bias of jurors. *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").

This Court should grant the petition and consider the question. The bench and bar would benefit from this Court's guidance about the proper scope of voir dire in non-capital cases.

IX. The trial court erred—in violation of the Sixth Amendment to the United States Constitution, Article I, Section 14 of the South Carolina Constitution, and statutory law, by not ordering disclosure 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.

The Court of Appeals held, "Having reviewed the sealed records, we find the trial court accurately summarized Victim's therapy records and the records do not contain any exculpatory evidence or any evidence relevant to Victim's credibility." A. 1106-07. Without having reviewed the records, Mr. Batchelor is not in a position to respond to this holding. Mr. Batchelor respectfully requests this Court grant the petition and review the records. *State v. Blackwell*, 420 S.C. 127, 801 S.E.2d 713 (2017).

X. The trial court erred 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.

The Court of Appeals held, "[T]he trial court did not abuse its discretion in sentencing Appellant to thirty years' imprisonment and denying his motion to reconsider the sentence." A. 1107-08. In reaching this conclusion, this Court reasoned "the State did not bring any additional charges against Appellant and Appellant's sentence falls within the statutorily-prescribed sentencing limits." *Id*., at 9. As this Court observed:

> In the landmark decision of *North Carolina v. Pearce,*[3] 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.

CONCLUSION

For the foregoing reasons, this Court should grant the petition and consider the questions.

Respectfully Submitted,

By s/*E. Charles Grose, Jr.*
The Grose Law Firm, LLC

Attorney for Johnathon Batchelor

October 7, 2024.

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

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On Petition for Writ of Certiorari to the Court of Appeals

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

Appellate Case No. 2024-001579

The State, ...Respondent

v.

Johnathan Olin Batchelor,.....Appellant.

Certificate of Service

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:

Andrew Douglas Powell, Esquire
SC Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549
andrewpowell@scag.gov

Mark Reynolds Farthing, Esquire
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549
mfarthing@scag.gov

By s/*E. Charles Grose, Jr.*

E. Charles Grose, Jr.
The Grose Law Firm, LLC
305 Main Street
Greenwood, SC 29646
(864) 538-4466

October 7, 2024
Greenwood, South Carolina

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I certify that I served the Appendix (three volumes) 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:

Andrew Douglas Powell, Esquire
SC Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549
andrewpowell@scag.gov

Mark Reynolds Farthing, Esquire
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549
mfarthing@scag.gov

By s/*E. Charles Grose, Jr.*

E. Charles Grose, Jr.
The Grose Law Firm, LLC
305 Main Street
Greenwood, SC 29646
(864) 538-4466

October 7, 2024
Greenwood, South Carolina