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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appeal from Florence County
The Honorable D. Craig Brown, Circuit Court Judge

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THE STATE,

RESPONDENT,

v.

QUINTERRIS JAVON CARMICHAEL,

APPELLANT.

Appellate Case No. 2023-000162

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**FINAL BRIEF OF RESPONDENT**

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## APPELLANT'S ISSUE PRESENTED

### I.

Whether the trial court erred by refusing Appellant's request to individually poll the jurors, since a poll must be taken if a request for polling is made?

### II.

Whether the trial court erred by admitting a recorded custodial interrogation of Appellant, where Appellant invoked his right to counsel, but law enforcement, in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), told Appellant he could only have a lawyer if he "ha[d] one on retainer," since the resulting statement was not knowingly, voluntarily, and intelligently given?

### III.

Whether the trial court erred by admitting the testimony of one law enforcement officer, the based on other officers' interviews of witnesses in a Cadillac, Appellant and his codefendant were the only suspects developed, where Rule 802, SCRE, prohibits the introduction of hearsay absent an exception, since the testimony was inadmissible hearsay?

## STATEMENT OF THE CASE

Quinterris Javon Carmichael (hereinafter "Appellant") was indicted at the May 6, 2021, term of the Florence County grand jury for murder (2021-GS-21-00472) and possession of a weapon during a violent crime (2021-GS-21-00473). Appellant and co-defendant, Tirik Jacquan Johnson-Epps (hereinafter "Johnson-Epps"), were tried from January 23-27, 2023, before the Honorable D. Craig Brown, and a jury. Appellant was represented by William "Josh" Edgeworth, III. Gregory Ammons represented co-defendant Johnson-Epps. Assistant Solicitor J. Ryan White prosecuted the case on behalf of the State.

On January 27, 2023, Appellant and Carmichael were both found guilty of murder and possession of a weapon during a violent crime by the jury. (R. p. 514, lines 6-22). Appellant and Johnson-Epps were sentenced to life imprisonment for murder. (R. p. 536, lines 5-12). This appeal followed.

## STATEMENT OF FACTS

*The Murder*

At approximately 3:30 AM on September 13, 2019, Appellant and Johnson-Epps, along with two black females arrived at the Tiger Mart gas station and convenience store in Florence, South Carolina. The quartet had come from a club named "Willy's" and had been "partying a little bit." (R. p. 103, line 15; p. 196, lines 17-18). Kareem Jones, a friend of the victim who was with him that night, testified that Appellant approached he and the victim and asked if they "wanted smoke." (R.p. 242, line 23-p. 243, line 3). Appellant then proceeded to unleash a profanity laced tirade at Jones and the victim, stating that he would pop them out of their "f*****g shoes." (R. p. 87, line 22-p. 88, line 14).

Jones and the victim tried to ignore Appellant's outburst and diffuse the situation, opting to wait for the store clerk to serve them, but their efforts were to no avail. (R.p. 244, lines 2-10).

Appellant then turned the incident violent by striking Jones. (R.p. 244, lines 24-25). Jones did not strike back, fearing that Appellant had a gun. (R.p. 245, lines 1-6). At this point, Appellant, the victim, and Jones were standing together. (R.p. 245, line 9). The trio went behind the store, with Johnson-Epps following them. (R.p. 245, lines 19-24). From the surveillance footage, the jury was able to hear Jones say "ain't no way you're doing this in front of the camera." (R.p. 246, lines 16-18). Once they were around the corner of the Tiger Mart, Johnson-Epps opened fire on the victim, and Jones fled from the scene back to the victim's girlfriend's apartment where he and the victim had left from. (R.p. 246, lines 22-24; p. 247, lines 12-18).

Dr. Presnell, a forensic pathologist at the Medical University of South Carolina in Charleston, testified that the victim was shot up to 9 times. (R. p. 419, line 16). The lethal shot was a gunshot to the back of the head that went through the brain and exited through the left temple. (R.p. 419, lines 19-20). She would also testify that one of the shots that went through the stomach and intestines would also have killed the victim, but he was already dead when this shot went through his body. (R.p. 419, line 20-p. 420, line 1).

*Identification of Appellant and Carmichael as Suspects*

The State produced a substantial amount of evidence linking Appellant and Johnson-Epps to the shooting at the Tiger Mart. The first piece of evidence was video surveillance from the Tiger Mart on that evening. According to the lead investigator in the case, Officer Justin Chatlosh, police were able to identify Appellant "almost immediately" from the video surveillance footage. (R.p. 149, lines 2-16). After identifying Appellant, officers used social media to identify the other three passengers in the car, including Johnson-Epps. (R,p. 375, lines 2-9). Warrants were subsequently issued for the arrest of Appellant and Johnson-Epps. (R.p. 376, line 22-p. 377, line 11). When

Johnson-Epps was apprehended, he had shaved off the dreadlock hairstyle he wore at the time of the murder. (R.p. 379, lines 21-25).

Witness testimony also identified Appellant and Johnson-Epps as the perpetrators of the murder. Kareem Jones was with the victim the night of the shooting. When the surveillance video, State's Exhibit 3, was played in court, Jones identified himself, the victim, "Tirik" (Johnson-Epps), and "Man-Man" (Appellant) as the individuals in the footage. (R. p. 246, lines 5-12). Jones was struck by Appellant, and escorted around the corner by him, where Johnson-Epps would fire fatal shots at the victim. (R. p. 244, line 24-p. 246, line 24).

Kami Mitchell, an associate of Appellant's who had "sexual dealings" with him, was with Appellant and Johnson-Epps the night of the murder. (R.p. 101, lines 6-20). She testified that Appellant was known to use drugs, something he stated to Jones and the victim during his altercation with them. (R.p. 102, lines 7-8; *see* p. 87, lines 24-25). Mitchell detailed that Appellant and Johnson-Epps knew Jones and the victim from school. (R.p. 104-105). Mitchell testified that she attempted to corral Appellant back to the car so they could "go have sex". (R. p. 107, lines 6-7). Appellant, however, continued to escalate the situation, prompting Johnson-Epps and Mitchell to exit Mitchell's car. (R.p. 109, line 24-p. 110, line 8). Mitchell testified that Appellant and Johnson-Epps, both of whom she identified in court, went around the side of the building, which is where the murder eventually took place. (R.p. 111-116; *see* p. 117, lines 16-25).

Much the same, Tyrin Jones identified Appellant and Johnson-Epps as the perpetrators of the murder. Jones was with "Ty [Johnson-Epps], Man-Man [Appellant], and Kami [Kami Mitchell]" on the night of the murder. (R.p. 195, line 20-p. 196, line 14). She testified to owning the vehicle the quartet used that night, Johnson-Epps was the driver of the vehicle. (R.p. 197, lines 16-21). She stated that after Appellant hit Kareem Jones and began to proceed around the corner

with Kareem Jones and the victim, Johnson-Epps exited the vehicle and followed. (R. p. 201, line 23-p.202, line 17). Appellant, Johnson-Epps, Kareem Jones, and the victim were the only four individuals who went around the corner at the time of the murder. (R. p. 204, line 24-p.205, line 1).

Other evidence pinned Appellant and Johnson-Epps as the primary suspects in the murder. Officer Justin Feagin executed the search warrant on Johnson-Epps' residence. (R.p. 282, lines 17-20). Whitewashed jeans were photographed on the scene and seized by officer Feagin; they were secured by Feagin. (R.p. 287, line 22-p. 288, line 2). A portion of the pants with what appeared to be a blood stain was cut out and sent to SLED. (R.p. 289, line 17-p. 290, line 9). SLED analyst Sarah Zapata, a qualified expert on DNA analysis, testified that the blood spot from the jeans was compared with the victim's blood. (R. p. 324, lines 22-25). Using a two-scenario outcome—one scenario being the likelihood that the victim's blood was the one identified on the jeans and the other being that the blood on the jeans came from another, unidentified individual—Zapata concluded that it was *990 octillion* times more likely that the victim contributed to the blood profile than another individual. (R. p. 326, line 7-p. 327, line 3).

Moreover, Suzann Cromer, a SLED firearm and tool mark examiner in SLED's forensic services laboratory, testified that it was likely that all cartridges found on the scene around the victim's body were fired by the same gun. (R.p. 345, lines 23-25). Although the murder weapon was never found, and the bullets lodged in the victim were unable to be analyzed due to damage, Cromer, who has testified over 130 times as an expert in firearm examination at the state and federal level, stated with a high degree of certainty that the shell casings were from the same firearm. (R.p. 355, lines 2-7).

*Jury Polling*

After two hours of deliberation, the jury returned to court with a verdict. (R.p. 514, lines 1-2). Appellant was unanimously found guilty of murder and possession of a weapon during a violent crime. (R.p. 514, lines 6-14). Johnson-Epps was found guilty of the same crimes. (R.p. 514, lines 15-22).

Following the reading of the verdict, Judge Brown polled the jury by asking the jury members to raise their hand if the guilty verdict was and remained each juror's respective verdict. The record demonstrates that all jurors complied and that all twelve jurors raised their hand to individually confirm their verdict. (R. p. 514, line 23-p. 515, line 2). Defense counsel then moved for the court to poll the jurors individually. (R.p. 515, lines 5-8). A bench conference was held after Appellant's and Johnson-Epps' respective counsels motioned for individual polling. (R.p. 515, lines 11-13). It is unclear what occurred during the bench conference. However, after the conference, Judge Brown declined to poll the jury further. (R. p. 515, lines 14-21). Judge Brown stated that the raising of hands by each juror was "sufficient under the circumstances." (R.p. 515, lines 19-20). Further, he stated, "I've given an opportunity for them to respond pursuant to my question, and they've responded, and I think that's appropriate under the circumstances." (R.p. 515, lines 21-23).

The circumstances alluded to by the court are a likely reference to the numerous bizarre occurrences that took place during the trial. During pre-trial, and on the record, Mr. White stated that witnesses had been getting phone calls from "no caller ID numbers." (R.p. 75, lines 15-16). Mr. White stated that the people on the other end of those calls would simply say "do not go," after which they would hang up. (R. p. 75, lines 17-18). Phones also had to be confiscated from individuals in the gallery. (R.p. 137, line 12-p. 138, line 6).

One juror was dismissed because he was sent a Facebook message about the trial. The message read: "Eric, both [sic] them boys killed Mrs. Betty's grandson, bug son. Shot him 11 times and one in the head. I had to leave and go to work. Please give them the justice they deserve." (R.p. 140, lines 7-9). This juror was dismissed based on *Remmer v. United States*, which stated that when there's improper contact by a third party, there's a presumption of prejudice. Judge Brown ruled that only immediate family would be allowed in the courtroom because of concerns with jury tainting. (R.p. 177, lines 5-10).

Additionally, Mr. White alleged that Appellant used a jail phone to contact another individual. (R.p. 177, lines 18-19). He reportedly told another individual not to "worry about looking for Dee's [a juror who had been excused] girlfriend anymore." (R. p. 177, lines 20-21). Judge Brown then admonished the conduct of attendees, and potentially one of the defendants, stating:

> Well, the Court is vitally concerned and tremendously disturbed about what may be going on here. Therefore, I want to do everything within my power to protect the integrity of this process and ensure to the best of my ability that there is no improper contact by anyone with these jurors, that these defendants receive a fair and impartial trial, and that this jury decide his case based upon the evidence and testimony presented in this courtroom, uninfluenced by anything outside of this courtroom.

(R. p. 178, lines 5-13). Clearly, Judge Brown was concerned throughout the trial with issues of jury tampering and potential interference.

Judge Brown would state after the trial that there were things that happened during the trial that he had never seen in his thirteen years on the bench. (R.p. 532, lines 7-11). One juror was dismissed after stating she did not feel comfortable serving on the jury. (R.p. 533, line 2). During questioning by Judge Brown, the Judge stated that she appeared to be "shaken to the point that she was crying as she talked to me." (R.p. 533, lines 2-5). However, she stated that no one had reached out to her and Judge Brown respected that. (R.p. 533, lines 5-6). Nevertheless, she was released

from the jury panel, and an alternate was seated. This alternate was the one who received the Facebook message, which Judge Brown stated on the record did not come from either defendant based on the content. (R.p. 533, lines 7-9).

Moreover, because of these events, Judge Brown ordered that only immediate family would be allowed in the courtroom. (R.p. 533, lines 18-22). After that order, a "multitude of individuals" who were previously present did not reappear. (R.p. 533, lines 22-25). Judge Brown made the order to ensure that the proceedings were properly insulated from impropriety. (R.p. 534, line 1). One individual listed as a sibling of Appellant was not, in fact, his brother, which was confirmed by law enforcement. (R.p. 534, lines 5-8).

Regarding the phone call from Appellant, Judge Brown stated that he was unable to make out the entirety of the phone conversation, but he did hear certain parts where Appellant was discussing the "jury or a juror." (R.p. 534, lines 9-18). Judge Brown stated that the phone call from Appellant factored into his order to restrict access to the proceedings.

Additionally, after the case went to the jury, it was brought to the Judge's attention that four rounds of ammunition were found in the men's bathroom on the floor of the courthouse where the proceedings were being held. (R.p. 534, lines 19-22). This prompted Judge Brown to order law enforcement to evacuate the building and have all attendees come through "downstairs screening." (R.p. 534. lines 22-24). The courtroom was thoroughly searched by law enforcement and the US Marhsall's and local Sherriff's Office both brought in a dog to go through the courtroom. (R.p. 535, lines 3-9). Fortunately, no firearm was found at the courthouse. (R.p. 535, lines 9-10).

Regarding these many issues of potential impropriety, Judge Brown stated, "I'm putting all of that on the record in an effort to explain my limitations of who was in this courtroom as well as concerns I had throughout the trial." (R.p. 535, lines 10-13).

## STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. *State v. Elwell*, 403 S.C. 606, 609, 743 S.E.2d 802, 804 (2013). Therefore, this Court is bound by the trial court's factual findings unless the appellant can demonstrate that the trial court's conclusions either lack evidentiary support or are controlled by an error of law. *Id.* "Rulings on the admissibility of evidence are within the trial court's sound discretion and will not be disturbed on appeal absent an abuse of that discretion resulting in prejudice to the complaining party." *State v. LaCoste*, 347 S.C. 153, 160, 553 S.E.2d 464, 468 (Ct. App. 2001).

## ARGUMENTS

### I. The trial court committed reversible error under existing law, but juror polling should not be a structural error issue warranting per se reversible error review.

While the record demonstrates that each of the jurors individually confirmed their guilty verdict at the request of the trial court, and there is nothing within the record to suggest that Appellant's conviction was not unanimously reached and delivered, Respondent acknowledges that the trial court's ruling was reversible error in light of the South Carolina Court of Appeals holding in *State v. Wright* that was in effect at the time.

In *Wright* the clerk collectively asked the jury to individually assent to their verdict by a raising of their right hand. Each juror did so. This was then followed by an individualized polling request from defense counsel that was denied. The case at hand presents the same scenario, with the only difference being the trial court, rather than the clerk, posing the question to the jury. [1]

[1] At the time of trial, the State's petition for writ of certiorari in *State v. Wright* had been granted and was pending review at the time of Appellant's trial. (June 28, 2022 Order, Appellate Case No. 2021-000146).

In review of the issue in *Wright*, this Court found that the trial court's method of polling was insufficient and set forth the holding that a request for individualized polling requires that each juror be separately asked to verbally confirm the verdict in question. *State v. Wright*, 432 S.C. 365, 370, 852 S.E.2d 468, 472 (Ct. App. 2020), *aff'd*, 439 S.C. 101, 886 S.E.2d 206 (2023). This Court went on to hold that "[i]t is our firm view that depriving a defendant of his or her polling right is not a technicality, but a material and prejudicial error." *Id.* In so holding, this Court found that the denial of a requested individual polling of the jury is a "structural" error in a defendant's trial that constitutes "per se" reversible error. *Id.* at 372-73. Respectfully, this Court's application of the structural error doctrine in *Wright* was flawed.

The structural error in question is not whether a specified means of polling is conducted, but whether the defendant's right to a unanimous verdict conviction was protected. *Weaver v. Massachusetts*, 582 U.S. 286, 295, 137 S. Ct. 1899, 1907, 198 L. Ed. 2d 420 (2017) ("The structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial."). This Court acknowledged that jury polling was not, in and of itself, a *constitutional* right. *Wright*, 432 S.C. at 369, 852 S.E.2d at 470. It is merely a trial court right designed to protect the structural right to unanimous guilty verdicts. It is here that Respondent respectfully submits a per se finding of error fails – because the right *can be* proven protected even if the highly specific "verbal" approach is not used.[2] This Court's structural error analysis was therefore flawed.[3]

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[2] Under *Linder*, this was a right protected by the court to the satisfaction of the court, with discretion as to the manner of polling once such a trial court right was invoked. *State v. Linder*, 276 S.C. 304, 309, 278 S.E.2d 335, 338 (1981). While the Court in *Linder* framed the issue correctly, Respondent would respectfully submit that *Wright* drew the issue too narrowly to question whether polling was *optimal*, not whether the constitutional right to a unanimous verdict was ensured.

[3] The various forms of "structural error" addressed by courts, such as the denial of the right to an attorney, denial of the right to self-representation, and denial of the right to public trial, all share a

This Court's legal holding falters when a closer examination is taken of structural error, and how *Weaver v. Massachusetts* was applied in *Wright*. This Court first noted that *Weaver* offered a "rational way out" of the structural error/trial error dilemma by harkening to the 3-point analysis for identifying structural error, and finding all three points present in Wright's case.

*Weaver* instructs that a structural error can include instances where "the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest." *Id.*, 582 U.S. at 295. This Court asserted that Wright's case met this standard. Yet, assuring the jury reached a unanimous verdict of guilty *can only be considered* a right protecting against an erroneous conviction. Unanimity is the structural requirement, not the specific method of polling. The implementation of a per se error standard *as to the method of polling,* is to confuse the two and draw the issue too narrowly under *Weaver*.

*Weaver* next instructs that an error can be deemed structural if the effects of the error are simply too hard to measure. *Id.* The structural error is the right to unanimity of a guilty verdict. Such an error could not be more easily measured. If the right was not protected, the verdict was improper. However, even if this question were applied to the non-structural issue of polling methodology, this Court's analysis in *Wright* erred in the presumption that the unanimity needed to be *further* measured at all. The verdict was reported and each juror independently confirmed

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common characteristic of being binary in nature. They are either provided or not provided. Denial of a unanimous guilty verdict is likewise a binary structural error, but this Court's analysis in *Wright* strayed from a focus on whether that right was ensured, to whether the method of polling was optimal. Error can potentially arise in a trial court's handling of polling methodology, but to deem such per se reversible error is to is assign the right law to the wrong target. Per se reversible error should be reserved for cases where the right to unanimous verdict was not protected, not for cases where there is record proof of each juror's attestation to the verdict, but such was simply not obtained verbally.

that verdict in open court. Unanimity is the structural requirement, not the specific polling method, and per se reversal for such is improper.

Lastly, *Weaver* sets forth the notion that structural error does not necessarily lead to fundamental unfairness in every case. *Id.*, at 296. However, the denial of a the right to unanimity of a verdict will always be fundamental unfair. Here, as in *Wright*, the record set forth fundamental unfairness was avoided *because* the court conducted a polling of the jury to confirm each juror's verdict. Unanimity is the structural requirement, not the specific polling method, and the rule requiring per se reversal deserves reconsideration.

Respondent acknowledges that South Carolina jurisprudence, as it existed at the time of trial, requires reversal of Appellant's convictions and a remand for new trial. However, if this Court is interested in revisiting this issue, which Respondent urges, Respondent would seek to argue against precedent as detailed above.

## II. The trial court did not err in admitting Appellant's recorded interview.

Appellant was fully advised of his *Miranda* rights and he was not advised that his right to an attorney was only applicable to retained counsel. There is no error in relation to admitting Appellant's recorded interview.

The record demonstrates that Appellant was read his *Miranda* rights before questioning began. (State's Ex. 2, 5:10). During the reading of his *Miranda* rights he asked for clarification of his right to counsel by asking "I can get my lawyer up here right now?" to which Officer Shelley correctly stated that "if you have one on retainer, he can come up here." (State's Ex. 2, 5:30-6:00). This was an accurate response that juxtaposed the difference between the immediate availability

of an attorney on retainer, and the time that obtaining assigned counsel would require.[4] It was in no way an assertion that Appellant *only had the right to retained counsel,* and that point was made clear to Appellant moments later. To wit, Officer Shelley provided *further clarification* by explicitly stating that "any time you want a lawyer, you can ask for a lawyer. Now what you need to understand is, any time you ask us for a lawyer, we're done. I can't talk to you anymore. I can't hear anything you've got to say." (State's Ex. 2, 6:49-7:02). All of this took place during the reading of his *Miranda* rights and prior to substantive questioning. Appellant thereafter agreed to participate in a voluntary interview with police.

The trial court correctly concluded that the Appellant's question on whether "[he] can get [his] lawyer up here right now?" was not an unequivocal request for counsel. The trial court did express some initial concern regarding the mention of having an attorney on retainer, in isolation, but noted that the continued advisement of the right to counsel and the implications of invoking that right cured any such concern and made Appellant's statements thereafter voluntary and admissible. (R.p. 66-68).

The trial court's ruling was correct under *State v. Kennedy*, 333 S.C. 426, 430, 510 S.E.2d 714, 715 (1998) and its progeny. A defendant's request for an attorney must be unequivocal; Appellant's was not. *Id.* A defendant has the right to an attorney and may invoke that right to end questioning from police; Appellant was so informed.

**III. The trial court did not err in admitting the testimony of Investigator Chatlosh.**

Investigator Chatlosh did not provide any hearsay testimony. He was not asked questions that sought to elicit the out-of-court statements of another individual, and his responses to

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[4] Had Officer Shelley simply said "yes", as Appellant argues, he would have been misinforming Appellant because assigned counsel is not immediately available in the fashion that Appellant was asking.

questions did not include such. Instead, the *questions* objected to during trial (which are not evidence) sought information concerning the investigative efforts and development of suspects taken by police officers in this case in light of the interviews and information they had available. See *State v. Saltz*, 346 S.C. 114, 137, 551 S.E.2d 240, 252 (2001) ("[A]ttorney's questions do not constitute evidence."). Such fails the "out-of-court statement" element and the "admitted for the truth of the matter asserted" elements required to constitute hearsay. The trial court's holding was a proper application of S*tate v. Weaver*, 361 S.C. 73, 85, 602 S.E.2d 786, 792 (Ct. App. 2004), aff'd as modified, 374 S.C. 313, 649 S.E.2d 479 (2007) (holding that police officer's testimony that all the evidence pointed to the defendant, despite the conclusion being based on what witnesses told officers during the investigation, does not constitute inadmissible hearsay since the officer did not repeat the statements and his testimony was only his investigative conclusion reached in consideration of the evidence); see also *State v. Kromah*, 401 S.C. 340, 355, 737 S.E.2d 490, 498 (2013).

## CONCLUSION

For all the foregoing reasons, it is respectfully submitted that Appellant's conviction is subject to reversal under existing law, should this Court not wish to reconsider its holding from *State v. Wright*.

Respectfully submitted,

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**PROOF OF SERVICE**

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I, **Donna D'Alessio**, an employee of the Respondent and legal assistant to W. Joseph Maye, of counsel for the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Final Brief of Respondent has been forwarded to Appellant's counsel, Joanna K. Delany, Esq., via email today, October 14, 2024 to JDelany@sccid.sc.gov, and to her assistant at smcinnis@sccid.sc.gov.

I further certify that all parties required by Rule to be served have been served.

This 14th day of October, 2024.

*s/ Donna D'Alessio*

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