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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT AND HAMPTON COUNTIES
Court of General Sessions

The Honorable Clifford Newman, Circuit Court Judge

Appellate Case No. 2023-001493

State of South Carolina ……Respondent,

v.

Cory Fleming…….Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Cory Howerton Fleming was indicted by way of superseding indictments by the Statewide Grand Jury on March 10, 2023, and April 14, 2022, for events that occurred in Beaufort and Hampton counties. 2021-GS-47030, 2022-GS-47-02. He entered guilty pleas to all charges without negotiation or recommendation before the Honorable Clifton Newman on August 23, 2023, in Kingstree, South Carolina. On September 14, 2023, following a hearing, Judge Clifton Newman sentenced Fleming to a total of 13 years and 10 months. Fleming was represented by attorney Deborah B. Barbier. After a delay occasioned by the State's request for a restitution proceeding, this appeal now timely follows.

STATEMENT OF RELEVANT FACTS

Cory Fleming pleaded guilty to charges arising from his conversion of two client funds for his own personal use. Judge Clifton Newman presided over Fleming's guilty plea and sentencing. He also presided over the contentious double murder trial of Fleming's co-defendant, Alex Murdaugh, for which he was widely covered by various media outlets.[1] Prior to his state guilty plea and sentencing, Fleming pled guilty to a federal charge and was sentenced for the exact same conduct.

[1] The following is far from an exhaustive list: Hawes, Jennifer Berry. "Murdaugh cases overseen by SC Judge Clifton Newman, who rose from segregated schools to bench". *Post and Courier*.; Riddle, Lyn (2023-01-25). "Who is Clifton Newman? Meet the judge presiding over Alex Murdaugh's murder trial". *The State*. Noel, Melissa (March 6, 2023). "Black Excellence: Meet The Divine 9 Judge Who Rose From Segregated Schools To Presiding Over The Alex Murdaugh Trial". *Essence Magazine*. Jonathan Drew and, Michael Kunzelman (March 3, 2023). "Murdaugh judge's own legal story unfolded in South Carolina". *The Associated Press*; Helling, Steve. "What to Know About South Carolina Judge Who Sentenced Alex Murdaugh to 2 Life Terms in Prison." People Magazine (March 3, 2023). *See also* Judge Newman opens up about Alex Murdaugh trial; https://www.today.com/video/judge-clifton-newman-opens-up-about-alex-murdaugh-trial-183767621503 (interview with Craig Melvin on the Today show) (*last visited* January 29, 2024).

The state and federal charges brought against Mr. Fleming were investigated by the South Carolina Attorney General's Office, SLED, the FBI, and the United States Attorney's Office for the District of South Carolina. The State indicated at Fleming's guilty plea that its investigation into his conduct began around the time that his co-defendant, Alex Murdaugh, reported being shot by an assailant. Tr. 7. Federal and State law enforcement began an investigation into missing funds from Murdaugh's law firm. This investigation of Alex Murdaugh ultimately uncovered wrongdoing on Fleming's part. Specifically, Fleming was charged with misappropriating funds, along with Murdaugh, from two settlement accounts, the Satterfield account and the Michelle Pinckney account. The Satterfield account contained insurance proceeds arising from the death of Ms. Satterfield that belonged to her estate on behalf of her two sons. The Michelle Pinckney account contained proceeds from various insurance policies in connection with Mr. Fleming's representation of Michelle Pinckney and her son, Hakeem Pinckney.

After deciding to cooperate and assist law enforcement and prosecutors, Fleming was given a deadline by the United States Attorney's Office of May 22, 2023, to make a plea decision. On May 25, 2023, facing prosecution in both state and federal courts for the exact same conduct, Fleming made the very difficult decision to plead guilty to both the federal and state charges. He was given no guarantees of a specific sentence in either court but trusted that he would be treated fairly in both state and federal courts.

In the federal action, a lengthy and detailed Presentence Report was prepared by the United States Probation Office, which analyzed all the evidence in both the Satterfield and Pinckney matters. The Satterfield matter was the subject of the federal charge, but the Pinckney matter was

also considered without objection to be Relevant Conduct[2] and the loss amount calculated for the Sentencing Guidelines purposes included both the Satterfield and Pinckney loss figures.

On August 15, 2023, Fleming was sentenced in federal court to 46 months' imprisonment to be followed by three years of supervised release. In arriving at a 46-month sentence, United States District Judge Richard M. Gergel weighed the factors of 18 U.S.C. § 3553(a);; denied Fleming's Motion for a Downward Variance; and sentenced Fleming within the Sentencing Guideline range which was 10 months higher than the national average. Judge Gergel ruled that his federal sentence should be served concurrently with any state prison sentence but recognized that he did not have control over the state proceedings. Judge Gergel also specifically requested that the transcript of the federal proceedings be provided to the state circuit court. Fleming filed a copy of the federal sentencing transcript as an exhibit to his state sentencing memorandum. (State Sentencing Mem. Ex. 1). Fleming relied on the transcript as support for several of his mitigation arguments.

At the state sentencing hearing, four hours into the sentencing hearing and immediately prior to sentencing, Judge Newman stated that he had not read the transcript of the federal

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[2]"Relevant Conduct," as understood by the Federal Sentencing Guidelines has three dimensions: a temporal dimension, which focuses on the totality of a defendant's conduct from the planning stages of the offense to the post-offense behavior that bears on the possible guideline adjustments of obstruction and acceptance of responsibility; an accomplice-attribution dimension, which focuses on the conduct of others who act in concert with the defendant and for which the defendant should be held accountable at sentencing; and a third dimension that incorporates both of the other two dimensions and permits the court to look beyond the actual offense of conviction to the entire range of a defendant's similar offense behavior. Once the court has determined the offense conduct guideline most applicable to the offense of conviction, it is this composite of the defendant's conduct and related information that essentially determines the appropriate guideline sentencing range. *See Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines (From United States Sentencing Commission Reprint Series, V I, June 1992, P 3-39 -- See NCJ-140271).*

sentencing because he did not defer to the federal court system in making his sentencing decisions. (Tr. 94, 96).

STANDARD OF REVIEW

When reviewing a sentencing issue, an appellate court will interfere with a circuit court judge's sentencing decision only in rare and unusual circumstances in light of the broad discretion afforded to the circuit court judge on such matters. *State v. Ferguson*, 221 S.C. 300, 307, 70 S.E.2d 355, 358 (1952); *see State v. Sidell*, 262 S.C. 397, 398, 205 S.E.2d 2, 3 (1974) ("A broad discretion is allowed the trial judge in imposing sentence within the legal limits."); *see also State v. Franklin*, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976) ("A trial judge generally has wide discretion in determining what sentence to impose."). A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law or a factual conclusion without evidentiary support. *In re M.B.H.*, 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010).

Appellate courts in South Carolina have "no jurisdiction on appeal to correct a sentence alleged to be excessive when it is within the limits prescribed by law in the discretion of the [sentencing] judge, and is not the result of partiality, prejudice, oppression or corrupt motive." *State v. Scates*, 212 S.C. 150, 154, 46 S.E.2d 693, 694 (1948).

> When considering whether a sentence violates the Eighth Amendment's prohibition on cruel and unusual punishments, the appellate court's standard of review extends only to the correction of errors of law. Therefore, this court will not disturb the circuit court's findings absent a manifest abuse of discretion. An abuse of discretion occurs when the circuit court's finding is based on an error of law or grounded in factual conclusions without evidentiary support.

State v. Mack, 441 S.C. 526, 535-36, 894 S.E.2d 820, 825 (Ct. App. 2023) (citing *State v. Finley,* 427 S.C. 419, 423, 831 S.E.2d 158, 160 (Ct. App. 2019) (citations omitted)).

The "prohibition against 'cruel and unusual punishments' safeguards an individual's right to protection from excessive sanctions, highlighting the essential principle that courts must

consider "the human attributes even of those who have committed serious crimes." *Finley*, 427 S.C. at 424, 831 S.E.2d at 161 (citing *Graham v. Florida*, 560 U.S. 48, 59 (2010)). "In this vein, sentences that are grossly out of proportion to the severity of the crime are unconstitutional." *Id.* Further, the Court has jurisdiction to correct a sentence that is the result of partiality, prejudice, oppression, or corrupt motive. *See Scates*, 2121 S.C. 150, 46 S.E.2d 693, *Kimbrough*, 212 S.C. 328, 46 S.E.2d 273; *Huffstetler*, 213 S.C. 319, 49 S.E.2d 585.

ARGUMENTS

During the federal sentencing, Judge Gergel asked defense counsel to provide a copy of the transcript of the federal sentencing proceedings to the circuit court.

> THE COURT: In fact, in many [cases where both the state and federal governments have jurisdiction over a case] they'll actually dismiss the state charges once the federal government has adopted the case. I can't control that. I told Mr. Fleming at his guilty plea I could not control that.
>
> But I intend, notwithstanding the fact that there are pending state charges, to impose a sentence which in my opinion is sufficient, but not greater than necessary, to accomplish the purposes of the law. I intend to articulate on the record those factors. ***And you should feel free to provide those to the state sentencing judge.***

Tr. 17 (emphasis added). Then, again, just before issuing his sentence in the federal proceeding, Judge Gergel indicated he wished a copy of the transcript be provided to the sentencing judge:

> THE COURT: I'm going to announce the sentence. And then I'm going to explain the Court's reasoning in reaching this sentence. And I do it, among other reasons, that I am, frankly concerned about the dual sovereignty issue. And it usually is not a factor. But, you know, and I've made no secret that I think there are certain things here were egregious conduct, misconduct. But it is equally bad to over-sentence people. And I'm concerned that we don't want a sort of mob rule setting—we don't tar and feather people anymore. And I've tried to weigh carefully what is a fair and reasonable sentence, sufficient, but not greater than necessary.
>
> ***And Ms. Barbier, I hope you will provide a copy of this sentencing hearing to Judge Newman so that he has the benefit of at least the federal court sentencing.***

Tr. 79-80 (emphasis added). Defense counsel attached a copy of the transcript to the sentencing memorandum filed in the circuit court both because Judge Gergel requested it and also as support for Fleming's mitigation arguments, as discussed below. (State Sentencing Mem. & Ex. A).

Judge Newman's inexplicable decision to purposefully not review this powerful and relevant mitigating evidence that was provided to him by defense counsel was a clear abuse of discretion. His decision starkly illustrates the judge's personal bias towards Fleming rendering the state sentencing proceeding constitutionally infirm. Accordingly, this case should be remanded for re-sentencing.

I. The circuit court judge abused his discretion when he refused to consider or even read relevant mitigation evidence that was offered by Fleming.

In South Carolina, it is well settled that a sentencing judge has great discretion in the kind of evidence that he may use to assist him in determining the punishment to be imposed. *State v. Quinn*, 430 S.C. 115, 125, 843 S.E.2d 355, 360 (2020) (citing *State v. Cantrell*, 250 S.C. 376, 379, 158 S.E.2d 189, 191 (1967)). It is proper for the trial judge, "to inquire into any relevant facts in aggravation or mitigation of punishment." *Id.* "Indeed, [he] is **obligated** to consider information material to punishment and may 'exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.'" *Id.* (emphasis added) (quoting *Cantrell*, 250 S.C. at 379, 158 S.E.2d at 191).

Here, the circuit court erred in failing to consider or even read relevant mitigation evidence presented by Fleming. In refusing to review this mitigation evidence, he denied Mr. Fleming the right to have his case heard by an impartial judge free of bias. Among other things, Fleming relied on the federal sentencing proceeding in arguing that he had been held accountable for the Pinckney matter in the federal prosecution because the federal government had determined that the Pinckney

matter was relevant conduct that was considered in sentencing. Accordingly, Fleming filed a copy of the transcript of the federal sentencing with his state sentencing memorandum that was filed in the state circuit court. Defense counsel also argued that the federal sentencing transcript showed that Fleming's misconduct in regard to the Pinckney matter had been considered as relevant conduct when he was sentenced on federal offenses.

Twice during Fleming's sentencing proceeding and just before he pronounced his sentence, Judge Newman indicated to the parties that he had not read the transcript of the federal court proceedings that was provided to him for purposes of mitigation by Fleming's defense counsel and at the direction of Judge Gergel.[3] Just prior to pronouncing Fleming's sentence, Judge Newman announced that he had not read the mitigation evidence offered by Fleming and informed the parties that he "[doesn't] defer to the federal court system for—in making my decisions." Tr. 94, 96. Later, he reiterated his position that he consciously chose not to read the mitigation transcript:

> "And most folks reminded me of what was said in federal court. Sort of a disregard to the dual sovereignty of a state court, I didn't read Judge Gergel's transcript—he's in a different system, a different sovereignty—I've never deferred to a federal court to guide my sentence as a state court Judge."

Tr. 96, ll. 2-6.

Here, Fleming filed considerable credible and relevant mitigation evidence, and the trial court expressly refused to consider or even read the relevant mitigating evidence. Notably, the State did not object to this mitigation evidence. The trial court violated Fleming's constitutional rights under the Eighth Amendment by refusing to even read the relevant mitigating evidence regarding the federal sentencing involving the same conduct. Accordingly, this Court must remand

[3] District Judge Gergel recognized that he had no control over the state court. (Federal Sentencing Tr. 17:4-6; 18:2-3). However, Judge Gergel requested that defense counsel provide the state circuit court with a copy of the federal sentencing proceedings. *Id.* at 80:8-10.

for a new sentencing proceeding. This is not a case where the circuit court judge did not adequately consider or improperly weighed mitigating evidence. Here, Judge Newman *refused* to consider or even read the mitigation evidence. Judge Newman's categorical refusal to read a 100-page transcript was an abuse of discretion, *Quinn*, 430 S.C. at 125, 843 S.E.2d at 360, which denied Fleming of the right to have an impartial judge meaningfully consider the trove of mitigating evidence that was contained within it. Judge Newman did not exercise his discretion when he rejected the mitigation evidence; rather, he abused his discretion by arbitrarily refusing to consider or even read the evidence.

A. **The transcript of the federal proceedings dispelled the argument advanced by the Attorney General's Office and attorney Justin Bamberg that the federal sentencing proceedings did not take into consideration the harm inflicted on the Pinckney family.**

At the state sentencing hearing, a common refrain from both the State and the Pinckney's attorney, Justin Bamberg, was that the federal sentencing proceeding did not take into account the full breadth of injury caused by Fleming's actions. However, had Judge Newman read the federal sentencing transcript, he would have seen this argument was unfounded.

At the state sentencing hearing, Attorney Waters told the court:

> "And I think it's important to point out that while there has been a resolution in federal court, that was only on the indicted Satterfield conduct because of the Statute of Limitations there. And I know that Mr. Bamberg will address, of course, that *we are here today for the first time for accountability as it relates to Ms. Pinckney alone*."

Tr. 34-35 (emphasis added).

Waters repeatedly led the court to believe that the federal sentencing did not address Ms. Pinckney's injuries:

> Independent accountability is warranted for Pamela Pinckney who, as Mr. Bamberg said, has convictions relating to the conduct victimizing her in this court. And while you may hear that in another proceeding they rolled that into a PSR, that's not the same thing. And we don't even get that. I don't know what's in that thing. It doesn't matter, though.
>
> A lawyer should not get one-stop shopping for victimizing multiple clients over the course of a decade. It's not "buy one, get one free." There should be independent accountability here today, consecutive accountability, for Ms. Pinckney. He should not get "buy one, get one free.

Tr. 43, 45 (asking again for consecutive sentencing so Fleming doesn't get "buy one, get one free."); p. 93 ("…it's not enough because of the difference that today is where there's the first real accountability, a real conviction, for Pamela Pinckney…").

Justin Bamberg, attorney for the Pinckney family, told the court the same thing: "[Ms. Pinckney] was not able to seek justice, criminal justice, for that. That's what today is for. It's her first opportunity after well over a decade." Tr. 35. And, "[t]his is their one chance, after over a decade, to get justice, your Honor. And we ask that this Court impose a sentence that is not only sufficient to, again, punish Cory Fleming—he's been-- he's got a federal sentence, again, but that has nothing to do with Ms. Pinckney. He has not been punished for that." Tr. 39; see also pp. 50-51 (stating that there was a resolution in federal court "only on the indicted Satterfield conduct" and that "we are here today for the first time for accountability as it relates to
Ms. Pinckney alone. ");p. 52 (stating "[i]t's her first opportunity."); p. 57 (arguing that "he's got a federal sentence, again, but that has nothing to do with Ms. Pinckney. He has not been punished for that.").

The impression left by the arguments of the Attorney General's Office and Justin Bamberg was highly misleading. A review of the federal sentencing transcript shows that the harm inflicted on the Pinckney family was very much addressed at that hearing and included as relevant conduct in determining the federal sentence.

The Assistant United States Attorney Emily Limehouse, however, explicitly stated the Pinckney conduct was included as relevant conduct:

> MS. LIMEHOUSE: That's correct. Your Honor. And we talk about Ms. Pinckney. The conduct related to Ms. Pinckney's thefts were not substantively charged in the Information because of statute of limitations. But under relevant conduct, we are able to hold Mr. Fleming responsible for his conduct both in calculating the appropriate loss amount and in fashioning a restitution order to make the victims whole.

Tr. 66.

The federal government put the factual basis of Fleming's crimes against the Pinckneys on the record during the sentencing:

> MS. LIMEHOUSE: … Ms. Pinckney's son, as you know, had died in a tragic accident, had been rendered a quadriplegic. She was unable to provide the care for him that she would have liked to given her own injuries. And her son then died in a tragic accident at a nursing home when he was supposed to be cared for by those individuals and instead another tragic accident led to his death.
>
> And rather than ensure that Ms. Pinckney received the funds related to the death of her son, Hakeem Pinckney, Mr. Fleming failed to disburse those funds for years. They sat in his trust account for a period of years. And he issued those funds in some instances directly to Mr. Murdaugh for his own personal enrichment. He used those funds to pay for chartered flights to the world series at Mr. Murdaugh's direction. And then he sent the money to Mr. Murdaugh's law firm who was, of course, unrelated to that specific claim that Ms. Pinckney's had as the estate beneficiary of the Estate of Hakeem Pinckney.

Tr. 66-67 (fed sentencing).

Ms. Pinckney addressed the federal district court and said she forgave Fleming. Tr. 58. Mr. Bamberg, despite arguing before Judge Newman that the federal court did not address Ms. Pinckney's injuries, also addressed the district court. Tr. 59. He commended Judge Gergel for his "amazing judgment [he has] shown through this entire process." Tr. 64.

Specifically addressing an argument advanced by the Attorney General's Office and victim-representative Bamberg during the state sentencing proceeding, Judge Gergel stated that he

"intend[ed] to articulate the basis of my sentence so that it will be clear that I am attempting to impose a full sentence, not a partial sentence, a full sentence." Tr. 18. Indeed, during the sentencing, Fleming addressed both the Satterfield's and the Pinckney's. Tr. 40 (fed). Again, the federal court indicated he was considering both sets of charges:

> THE COURT: Well, I think it is important. And I think it's been well documented. This is not new stuff. And it is— at one point, Mr. Fleming said for my conduct or series of—my action or series of actions, it's a series of actions here in both this and in the Pinckney case which deserve a conviction and a sentence.
>
> But I don't think it does us any good to overstate what he did. The facts as they exist are bad enough.

Tr. 54 (fed).

Had he not refused to read the transcript of the federal sentencing proceeding, Judge Newman could have taken into account the full extent to which the Pinckneys' harms were addressed in that court. Instead, choosing not to know what occurred in that courtroom, Judge Newman was left with the misleading arguments of the Attorney General's office and Justin Bamberg that the federal court did not meaningfully consider the harm inflicted on the Pinckney family, a conclusion wholly belied by the record. And then, relying on that misleading characterization of the federal court proceedings, Judge Newman imposed the lengthiest sentence on Fleming of ten years ***consecutive*** for the harm inflicted on the Pinckney family. Tr. 99-100.

Cory Fleming, having pleaded guilty to all his charges in both state and federal court, deserved to have his sentence meted out by a jurist who would meaningfully consider all the mitigation evidence provided to him. Instead, Judge Newman remained willfully, categorically, blind to a trove of mitigating evidence for no other reason than he did not believe he needed to consider it because it was a federal proceeding. Judge Newman wholly disregarded matters contained in a 100-page transcript which surely he must have known contained highly mitigating

evidence, which is why defense counsel offered it. Compounding this error is Judge Newman's failure to even inform defense counsel of this refusal until he informed everyone in the courtroom right before he pronounced his sentence. He did not even allow counsel an opportunity to object to his decision not to review the mitigation. Instead, he unilaterally and without any legitimate basis, denied Fleming of his right to be fairly sentenced by refusing to review mitigation provided to him.

B. **Fleming had the right to have Judge Newman consider, as mitigation, that Judge Gergel expressly wanted his thoughts and reasoning known to Judge Newman in support of the 46-month federal sentence he imposed for this same conduct.**

Judge Gergel, a highly regarded federal district judge, expressly indicated his desire that his reasoning be shared with the state court judge. Fleming had been sentenced in federal court on August 15, 2023, on a federal charge that arose out these events. It is powerful mitigation evidence on behalf of Cory Fleming that Judge Gergel expressly wished to share his thoughts about the appropriate sentence with the state court judge because, as the federal court made clear, it was concerned with the possibility of Fleming's being over-sentenced in the state court system. While Judge Newman was free to impose whatever sentence he believed was appropriate, it was error for Judge Newman to simply disregard mitigation evidence presented to him on behalf of Fleming by Fleming's counsel. *Quinn*, 430 S.C. at 125, 843 S.E.2d at 360 (holding that the court is "obligated" to consider information material to punishment) (emphasis added). In other words, he was free to agree or disagree with Judge Gergel, as was his prerogative, but his decision to remain blind and to wholly disregard that evidence that was provided to him by defense counsel violated Fleming's right to present evidence in mitigation and be sentenced by an unbiased jurist.

Judge Newman erred in categorically refusing to even consider that Judge Gergel wanted his reasoning known to him when defense counsel offered that evidence in mitigation.

C. **The federal sentencing transcript illustrated Fleming's willingness to accept responsibility for his actions and his cooperation significantly advanced the Government's investigations into others and conserved government resources.**

Had he read the transcript, Judge Newman would have known that Fleming pleaded guilty to an Information in federal court and did not put the government to its burden of securing an Indictment in this case. Tr. 18. Nor did Fleming object to any of the sentencing enhancements that applied in his case. Tr. 65 (fed). Had he read the transcript, Judge Newman also would have known that Fleming engaged in substantial cooperation with the federal government, which has led to other investigations. Tr. 18.

Had he not categorically refused to read the federal sentencing transcript, Judge Newman would have realized the Government represented to the federal court that Fleming "immediately disgorged" himself of the fees he unlawfully collected and the money he stole from the Satterfields, "in stark contrast" to other individuals the Government has prosecuted in connection with these events. Tr. 69. Judge Newman would have realized Fleming offered to proffer with the government in the Fall of 2021 very early in the investigation. Tr. 69. Judge Newman also would have realized Fleming engaged in two day-long interview sessions with the US Attorney's Office, the South Carolina Attorney General's Office, SLED, and the FBI where he fully cooperated in the federal investigation against himself and the criminal conduct of others. Tr. 70. The US Attorney's Office found him "credible" and "honest" after those sessions, and information he imparted to them included information not previously known to investigators which the Government characterized as "important." Tr. 70. The Government informed the federal court that his information provided significant assistance in other, on-going investigations. Tr. 70.

If he had read the transcript of the federal proceeding, Judge Newman would have realized too Fleming also fully cooperated with the Office of Disciplinary Counsel by formally submitting

his resignation of his law license in both South Carolina and Georgia, as the Government informed the district court. Tr. 70. The Government also expressed its appreciation that Fleming chose to remain publicly silent and refused all interviews during these proceedings unlike other defendants implicated in the Murdaugh crimes. Tr. 72. As the Government argued to the district court, Fleming's cooperation saved resources that otherwise would have been expended in preparing for and conducting a trial. Tr. 72. In light of this mitigation evidence that it deemed important, the Government requested a sentence at the "bottom of the guideline range." Tr. 73.

Judge Newman's refusal to read the transcript of the federal sentencing proceeding denied Fleming his right to have this valuable mitigation evidence concerning his cooperation and acceptance of responsibility considered at his state court sentencing hearing even though it was relevant and highly mitigating.

D. **Additional witnesses testified to the good acts of Fleming which Judge Newman was unaware of since he refused to read the transcript.**

There were additional witnesses who testified at the federal sentencing proceeding on behalf of Fleming who were not present at the state sentencing proceeding. In refusing to read the transcript, Judge Newman remained purposefully unaware of their highly mitigating testimony.

Jay Taylor testified he has known the Fleming family for more than 20 years, nearly 19 of which as a neighbor. Tr. 23. Through his business, he had direct dealings with Cory and found him to be "truthful and cooperative." He also related that Cory "has always been very community minded" and "constantly gave back his resources and treasures to various non-profit organizations." He supported a local child abuse prevention organization. Tr. 24. Since losing his license, Cory has been taking trade courses in the building industry and has been volunteering at the local food bank and building houses for Habitat for Humanity. Tr. 24.

Taylor told the court that he witnessed Cory raising his family in a healthy loving home and that his wife and family have stood beside him during these challenging times. Tr. 25. Cory makes it a priority to spend time with his parents. Tr. 25. Taylor and Cory participate in weekly Bible study. Tr. 25. He also told the court that, since these events, he has witnessed a softening of Cory's heart, "a new level of patience and tolerance, and a tremendous growth in his faith." Tr. 26.

Maria Noriega also addressed the court. She related a particularly touching story about Cory. She told of a woman, Ms. Marcella, whose husband died in a terrible car accident. Ms. Marcella could not read, and she could barely write. She, and her children, were in Mexico. Cory obtained a permit for her to be in the United States. He had Ms. Noriega travel to Mexico City to make sure Ms. Marcella had a bank account set up. When Ms. Marcella came to the United States, Cory made sure she had a place to stay. He had the children's money set up in a special account for them. The two boys are now in college, and they consider Cory to be their "guardian angel." Tr. 28. Ms. Noriega informed the court that he would "go that extra mile as a father and as a friend." Tr. 29. She believes he is "a great man, a father, a husband, and a human being. Tr. 29.

Tom Miller told the federal court that he loves "the kindness and goodness that [Cory] exudes and that he brings out in others." Tr. 36. He met Cory at the Beaufort Academy, where Cory's daughter attended school. Miller said he would hear students talk about Cory and how they believed Cory would really listen to them. He said the Fleming home was a frequent gathering spot for young people and that Cory connects with people. Tr. 37. Miller said that he knows Fleming's "deep and sincere repentance is clear." Tr. 38.

When he refused to read the federal sentencing transcript, Judge Newman denied Fleming the right to put forward to the court for consideration in sentencing him, highly relevant and

mitigating evidence about his character and generosity as related by people who have been directly impacted by his kindness. Even though there were people who testified on behalf of Cory at his state sentencing hearing, these additional witnesses provided powerful and important mitigation evidence that Cory deserved to have the judge consider. Judge Newman's inexplicable refusal to even read this highly mitigating evidence illustrates his deep and recalcitrant bias against Fleming.

II. Fleming's sentence violates his due process rights because it was the product of the circuit court judge's bias as evidenced by his failure to consider relevant mitigation evidence and his comments during the sentencing proceeding.

Fleming's sentence was a product of the bias of the circuit court. The notoriety of the related case of *State v. Murdaugh*, which Judge Newman also presided over, created spill-over bias directed towards Fleming in this case. During Fleming's sentencing hearing, Judge Newman referred to this case as "unimaginable" and "unprecedented" and "the greatest crime for a lawyer in the history of the State of South Carolina, certainly in the number of years being faced and the impact of the crimes on the citizens of the State." (State Sentencing Tr. 95:3-6). Further, he stated that this case was as "bad as it gets for a lawyer who has a prior record." (State Sentencing Tr. 97: 23-25). He then stated that although Mr. Fleming has no prior convictions – when "you carry on a scheme of over a decade, that's a record, a record that did not result in charges or convictions but a record of his life." (State Sentencing Tr. 97-98:2). Additionally, the circuit court made repeated extra-judicial remarks about the co-defendant Alexander Murdaugh and the cases. Not only were these statements inappropriate and evidenced bias against the defendant, but they were not disclosed to plea counsel**.**

The Eighth Amendment to the United States Constitution mandates: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. "The Eighth Amendment's prohibition of cruel and unusual punishment

'guarantees individuals the right not to be subjected to excessive sanctions.'" *Miller v. Alabama*, 567 U.S. 460, 467 (2012) (quoting *Roper v. Simmons*, 543 U.S. 551, 560 (2005).

> When considering whether a sentence violates the Eighth Amendment's prohibition on cruel and unusual punishments, the appellate court's standard of review extends only to the correction of errors of law. Therefore, this court will not disturb the circuit court's findings absent a manifest abuse of discretion. An abuse of discretion occurs when the circuit court's finding is based on an error of law or grounded in factual conclusions without evidentiary support.

State v. Mack, 441 S.C. 526, 535-36, 894 S.E.2d 820, 825 (Ct. App. 2023) (citing *State v. Finley,* 427 S.C. 419, 423, 831 S.E.2d 158, 160 (Ct. App. 2019) (citations omitted)).

The "prohibition against 'cruel and unusual punishments' safeguards an individual's right to protection from excessive sanctions, highlighting the essential principle that courts must consider "the human attributes even of those who have committed serious crimes." *Finley*, 427 S.C. at 424, 831 S.E.2d at 161 (citing *Graham v. Florida*, 560 U.S. 48, 59 (2010)). "In this vein, sentences that are grossly out of proportion to the severity of the crime are unconstitutional." *Id.*

"Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence." *Eddings v. Oklahoma*, 455 U.S. 104, 104 (1982). In *Eddings*, the trial court refused to consider the juvenile defendant's family history in a capital case because it "found that as a matter of law he was unable even to consider the evidence." *Id.* at 113. Because the "sentence was imposed without 'the type of individualized consideration of mitigating factors . . . required by the Eighth and Fourteenth Amendments in capital cases,'" the Supreme Court reversed and required on remand the trial court's consideration of the defendant's home life. *Id.* at 105 (quoting *Lockett v. Ohio*, 438 U.S. 586, 606 (1978)); *see also Jones v. Mississippi*, 593 U.S. 98 (2021) (citing capital cases requiring "the sentencer to consider mitigating circumstances when deciding whether to impose the death penalty."). Although these were capital cases, the Supreme Court has recently

expressly acknowledged that in non-capital cases "the defendant might be able to raise an Eighth Amendment claim under the Court's precedents" if the sentencer expressly refuses as a matter of law to consider relevant mitigating circumstances. *Jones v. Mississippi*, n. 7, s*upra*.

Due process demands that a judge be unbiased. *In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases."). Furthermore, a judge can and should be disqualified for "bias, [] a likelihood of bias[,] or [even] an appearance of bias." *See Ungar v. Sarafite*, 376 U.S. 575, 588 (1964); *see also Murchison*, 349 U.S. at 136 ("[O]ur system of law has always endeavored to prevent even the probability of unfairness.") The United States Supreme Court has made clear that, when the presiding judge is not impartial, there is a "structural defect[] in the constitution of the trial mechanism that "def[ies] analysis by 'harmless error' standards." *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991); *see also Edwards v. Balisok*, 520 US. 641, 647 (1997). Due process also may be offended if a judge sits in judgment and uses that proceeding to "give vent to personal spleen or respond to a personal grievance." *Offutt v. United States,* 348 U.S. 11, 14 (1954).

Ordinarily, when a judge's words or actions are motivated by events within the context of judicial proceedings, they are insulated from charges of bias. *Liteky v. United States*, 510 U.S. 540, 554-56 (1994). A judge's "ordinary efforts at courtroom administration," even if "stern and short-tempered," are "immune" from charges of bias and partiality." *Liteky* at 556. Recusal may be appropriate, however, when a judge's decisions, opinions, or remarks stem from an extrajudicial source—a source outside judicial proceedings. *Id*. at 554-55. Recusal is necessary when a judge's actions or comments "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Id*. at 555.

At the sentencing, Judge Newman made comments about this case and the unprecedented nature of his offenses as "unimaginable" and "unprecedented" and "the greatest crime for a lawyer in the history of the State of South Carolina, certainly in the number of years being faced and the impact of the crimes on the citizens of the State." (State Sentencing Tr. 95:3-6). Further, he stated that this case was as "bad as it gets for a lawyer who has a prior record." (State Sentencing Tr. 97: 23). He clarified that Fleming "has no prior convictions but when you carry on a scheme of over a decade, that's a record, a record that did not result in charges or convictions but a record of his life." (State Sentencing Tr. 97:24-25).

Judge Newman's comments were biased against Fleming. His comments about Alex Murdaugh are perhaps accurate; Murdaugh's offenses are unprecedented. Judge Newman's comments, however, illustrate that he improperly considered Murdaugh's unprecedented conduct when sentencing Fleming. Fleming is not Alex Murdaugh, and he is not responsible for the multitude of offenses, including murder, levied against Murdaugh. Fleming also does not have a record. Fleming admitted to his misconduct involving two clients – conduct similar to other South Carolina attorneys who have committed in the past and for which they have been punished far less severely.

For example, in 2010, attorney Samuel Crews was disbarred by the South Carolina Supreme Court for various misconduct, including misappropriating two clients' funds and using the funds for his personal use. *In re Crews,* 389 S.C. 322, 698 S.E.2d 785 (2010). He was also ordered to pay restitution in the of $86,922.41 to Client A and $1,221,769.80 to Client B, and $23,379.00 to the Lawyers' Fund for Client Protection. *Id.* at 342, 698 S.E.2d at 795. Both clients were in a vulnerable time in their lives. Client A had been referred to Crews by friends who were concerned about his health, *id.* at 326, S.E.2d at 787, and Client B was in the hospital and assisted

living for at least a year of time during which Crews represented him and misappropriated his funds. *Id.* at 329, 333, 698 S.E.2d at 789, 791. Regarding Client B, Crews was retained to probate the estate of Client B's wife. *Id.* at 329, 698 S.E.2d at 789. Crews drafted a durable power of attorney naming himself as attorney-in-fact for Client B, and among other things, he used this authority to withdraw over $330,000 from Client B's investment account, obtain a $100,000 line of credit, a $300,000 promissory note, and a credit card in Client B's name. *Id.* at 329-333, 698 S.E.2d 789-791. Crews then converted Client B's funds and property totaling over $1.2 million to his own personal use, including using the credit card to pay for clothing, pool supplies, repairs to his personal vehicle, meals, groceries, a camera, gun supplies, and dental care. *Id.* at 333 n.5, 698 S.E.2d at 791 n.5. All the while, Crews was also paid $273,750 in legal fees by Client B. *Id.* at 334, 698 S.E.2d at 791.

As the South Carolina Supreme Court noted that "[t]his matter involved the aggravated misconduct of an attorney who engaged in egregious, predatory behavior, taking advantage of and causing great detriment to his clients. [Crews] took vast, yet unchecked, power over the affairs of the clients at issue. [Crews] used these powers for his benefit, but to the detriment of the clients." *Id.* at 341-42, 698 S.E.2d at 795. Despite his egregious misconduct, which involved misappropriating over $1.3 million from two vulnerable clients through the use of various schemes, which was set forth in a published court opinion, Crews was not criminally prosecuted by the State or the federal government.

Another recent, federal attorney prosecution – other than the instant case - appears to be *United States v. Lord*, No 3:22-cr-00768-MGL (D.S.C. Mar. 21, 2023). Ray Lord, an attorney and former law enforcement officer, misappropriated $1.5 million in COVID relief funding. In 2020 and 2021, he submitted fraudulent loan claims on behalf of his law firm, a business that he owned

called Palmetto Safety Supply, and New Life Ministries of Irmo, according to the federal Indictment. The Government described Mr. Lord's conduct as "egregious." Mr. Lord pled guilty to wire fraud in violation of 18 U.S.C. § 1343 and was sentenced to 18 months in prison. *Id.*

Moreover, Judge Newman's failure to consider mitigation evidence and comments about the federal sentencing and Fleming frankly, evinces extreme judicial bias against Fleming. It is so corrosive to our state's legal system for a judge, particularly in a case as closely watched as this one, to *refuse* to even consider relevant mitigating evidence that was timely provided to him. Instead, Judge Newman consciously decided *he did not want to even read* about the mitigating evidence. There is only one way to interpret this behavior on the part of Judge Newman—that he was not engaged in an impartial and searching inquiry into the most appropriate sentence in this case. Instead, he affirmatively tilted the balance in favor of the State and without any warning to defense counsel. Litigants and their lawyers should be able to rely on their sentencing judges to fairly and impartially consider the evidence they—in good faith—provide to the court for its consideration. Indeed, it was only at the very end of the nearly four-hour proceeding that Judge Newman decided to inform the parties that he refused to read the transcript. *See Kersaint v. State,* 15 So. 3d 41 (Fla. 3d CDA 2009) (Disqualification of trial judge warranted where trial judge's statement would create a fear in the mind of a litigant that the trial judge had prejudged the sentence to be imposed). *Ex parte Brown,* 158 S.W.3d 449, 456 (Tex. Crim. App. 2005) (A defendant is denied due process during the punishment phase if a trial court arbitrarily refuses to consider the entire range of punishment and any mitigating evidence or imposes a predetermined sentence). *Benson v. Tharpe*, 685 So.2d 1363, 1364 (Fla. 2d CDA 1996) ("A trial judge's announced intention before a scheduled hearing, to make a specific ruling regardless of any evidence or argument to the contrary, is the paradigm of judicial bias and prejudice."); *Gonzalez v. Goldstein*, 633 So. 2d

1183 (Fla. 4th CDA 1994) (judge appropriately disqualified when judge indicated he would not listen to any evidence in mitigation and that he intended to sentence defendant to maximum period allowable under the guidelines).

Further, Judge Newman never fully articulated why he refused to read it. He indicated he thought the federal proceeding was wholly separate from the state proceeding. However, the fact of its separate sovereignty does not negate the mitigating quality of the information contained within the federal proceeding transcript. The federal proceeding was not wholly irrelevant merely because it occurred in another courtroom and was presided over by another judge. There was no question the federal proceeding related to this same conduct and to Fleming's sentence as a result of his illegal conduct. The 100-page transcript could not have been more clearly relevant. Judge Newman's refusal to read it is inexplicable and can only be explained by an obdurate refusal to consider any mitigating evidence that might have supported a lower sentence than the one he seemingly had prepared beforehand to impose. The reasonable inference from Judge Newman's conduct is that he had already planned to give a significantly more punitive sentence to Fleming than Fleming received in federal court and did not want to consider any additional evidence that may have changed his mind.[4] Judge Newman's conduct unconstitutionally tipped the scales in favor of the State, and this Court should remand to another judge for another sentencing.

This Court should hold that Cory Fleming's sentence is clearly excessive and violates the Eighth Amendment to the United States Constitution because it is the result of partiality, prejudice, oppression, or corrupt motive. Additionally, Fleming's sentence was imposed by a sentencing judge who abused his discretion by refusing to consider or even read highly relevant mitigation evidence that was presented to him by Fleming's trial counsel. Moreover, the failure to even

[4] Fleming's federal sentencing occurred one month earlier, on August 15, 2023.

consider this evidence and the comments made at the sentencing evince the judicial bias of the sentencing judge. Accordingly, the Court should remand for resentencing before an impartial judge.

CONCLUSION

Based on the foregoing, this Court should remand for resentencing.

Respectfully submitted,

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