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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No.: 2017-CP-39-0428

John M. Burgess Appellant,

v.

Katherine Hunter Respondent.

**MOTION SEEKING JUDICIAL NOTICE
and
MOTION FOR LEAVE TO SUPPLEMENT RECORD**

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COMES NOW APPELLANT, by and through undersigned counsel, and files this, his Motion Seeking Judicial Notice pursuant to Rule 1101, SCRE and Rule 201, SCRE, and/or, his Motion for Leave to Supplement Record pursuant to Rule 212(b), SCACR, and as grounds would allege:

MOTION TO TAKE JUDICIAL NOTICE

1. In preparation for oral arguments to be held September 15, 2021, Appellant became aware of statements made by the Presiding Judge made subject by this Appeal (hereinafter referred to as “Presiding Judge”) while testifying at the Judicial Merit Selection Committee public hearing held on November 18, 2020.
2. At this public hearing, the Presiding Judge made (1) various statements and/or admissions regarding his temperament, (2) statements regarding personal issues that affected his temperament and that occurred immediately before the trial made subject by this Appeal, and (3) other statements regarding expressions, gestures, treatment of counsel, etc.
3. Appellant takes the position that because the underlying, alleged error in the instant Appeal centers on the conduct of the Presiding Judge, that public, sworn testimony from the Presiding Judge regarding his temperament, mental state, and use of gestures and expressions at or during the trial made subject by this Appeal are adjudicative facts such that the statements fall within the scope of Rule 201, SCRE.
4. Further, it is the Appellant’s position that because the statements and transcripts of the public hearing are available at:
<https://www.scstatehouse.gov/JudicialMeritPage/TranscriptInfo2020/November182020/TranscriptsAndExhibits.php>, and because the statements are given under oath, that, consistent with Rule 201(b), SCRE, such statements are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

5. It is also submitted that judicial notice may be taken at any stage of the proceeding, consistent with Rule 201(f), SCRE.
6. The Appellant has also considered the potential hearsay issues, if applicable, associated with the admission of out-of-court statements, however, the Appellant argues that the statements made by the Presiding Judge and offered by the Appellant fall within exception 803(8), SCRE in that they are public records and/or statements of public office setting forth the activities of that office.
7. It is, therefore, respectfully submitted that, because of the above, and because the Court is being supplied with the necessary information consistent with Rule 201(d), the taking of judicial notice of the Presiding Judge's offered testimony at the public hearing held by the Judicial Merit Selection Committee on November 18, 2020 is mandatory.

MOTION FOR LEAVE TO SUPPLEMENT RECORD

8. Alternatively, and/or in conjunction therewith, and in an abundance of caution, the Appellant seeks leave to Supplement the record to include portions of the transcript of the Presiding Judge from his testimony given at the Judicial Merit Selection Committee public hearing held on November 18, 2020.
9. Pursuant to Rule 212, ACR, Appellant seeks leave to include portions of the transcript centered on Presiding Judge's temperament, mental state, and use of gestures and expressions at or during the trial made subject by this appeal.

WHEREFORE, Plaintiff respectfully requests:

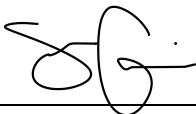
- (1) That the Court take judicial notice of the statements made the Presiding Judge at the Judicial Merit Selection Committee's public hearing held on November 18, 2020 regarding:

- a. Various statements and/or admissions regarding his temperament;
 - b. Statements regarding personal issues that affected his temperament and that occurred immediately before the trial made subject by this Appeal; and
 - c. Other statements regarding expressions, gestures, treatment of counsel, etc. by the Presiding Judge regarding;
- (2) That the Court grant leave to supplement the record with portions of the transcript of the Judicial Merit Selection Committee’s public hearing held on November 18, 2020 regarding the Presiding Judge’s:
- a. Various statements and/or admissions regarding his temperament;
 - b. Statements regarding personal issues that affected his temperament and that occurred immediately before the trial made subject by this Appeal; and
 - c. Other statements regarding expressions, gestures, treatment of counsel, etc. by the Presiding Judge.

And,

- (3) That the Court grant any further relief the Court deems just and proper.

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By: 

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For Appellant

September 9, 2021
Greenville, SC

MEMORANDUM OF LAW

In support of his Motion Seeking Judicial Notice, and pursuant to Rule 240, SCACR, Plaintiff respectfully submits that the Court should take judicial notice of the transcript of the Presiding Judge's testimony given at the Judicial Merit Selection Committee public hearing held on November 18, 2020 and to include such testimony regarding the Presiding Judge's (1) various statements and/or admissions regarding his temperament, (2) statements regarding personal issues that affected his temperament and that occurred immediately before the trial made subject by this Appeal, and (3) statements regarding expressions, gestures, and treatment of counsels.

TAKING JUDICIAL NOTICE

On November 18, 2020, the Presiding Judge was called to testify by the Judicial Merit Selection Committee as per the ordinary course of judicial selection and approval. At this public hearing, the Presiding Judge made various admissions and/or statements regarding his temperament, courtroom demeanor, dealings with counsel, and most notably, statements regarding tragic, personal issues that admittedly had an impact on his courtroom demeanor during the trial made subject by this appeal. Specifically, when asked about concerns regarding poor judicial temperament, lack of patience, callousness and lack of care, the Presiding Judge discussed a personal tragedy that, by his own admission, affected his mood and that he recognized that he had been "a little cantankerous during that time." *See* Exhibit A, p. 13, line 8 through 24. The Presiding Judge's personal tragedy, by his own testimony, occurred in June 2018. Upon information and belief, the Presiding Judge's first day back in the court was for the trial made subject by the action.

In the same Judicial Merit Selection Committee hearing held on November 18, 2020, the Presiding Judge, when questioned regarding facial expressions and gestures, further testified that

he did not believe that his “conduct was quite as egregious as that comment would indicate.” *See* Exhibit A, p. 13, line 25 through p. 14, line 11.¹ Again in the JMSC hearing, the Presiding Judge testified, “I just have never considered myself to have a temperament issue. I acknowledge over the last couple of years, because of the tragedy [occurring in June of 2018] that – because of my [personal tragedy], that I have – I recognize that now. And when I was in the middle of it, I didn’t even – I didn’t know it.” *See* Exhibit A, p. 23, lines 6 through 10.

Applicability of Rule 201, SCRE to Appellate Court

The undersigned has carefully considered the applicability of Rule 201, SCRE as it pertains to original judicial notice by the Court of Appeals. Rule 1101(a), SCRE states, in pertinent part, that “the term ‘judge’ in these rules includes... judges of the Court of Appeals.” There are no qualifying exceptions deterring this Court from taking original judicial notice of an adjudicative fact. Rule 201(f), SCRE offers further guidance, and reads, “Judicial notice may be taken at any stage of the proceeding.” Also, the notes to Rule 201, SCRE reads in pertinent part:

“Subsection (f) is consistent with prior case law in this State. *Cf.* *State v. Squires*, 311 S.C. 11, 426 S.E.2d 738 (1992) (Supreme Court took judicial notice that infrared spectroscopy process had gained general acceptance in the scientific community); *McCoy v. Town of York*, 193 S.C. 390, 8 S.E.2d 905 (1940) (Supreme Court took judicial notice of dangerous qualities of gasoline and kerosene).”

The Court in *E.L. Masters, Sr. v. Rogers Development Group, S.C., Inc.*, 283 S.C. 251, 321 S.E.2d 194 (Ct. of App. 1984) cautions that original judicial notice of adjudicative facts at the appellate level should be limited to matters which are indisputable. It stands to reason that so long as the threshold requirements for taking of judicial notice are met, the Appellate Court can take

¹ Note that the undersigned does not recall any involvement whatsoever in the Judicial Merit Selection Committee process; the undersigned does not recall making any comments or participating in any way with the selection process as a whole. Simply put, although the undersigned did receive notice and an invite to participate from the JMSC, the undersigned did not participate in any way.

original judicial notice of adjudicative facts. It is respectfully submitted that the Court of Appeals has clear authority to take original judicial notice of the statements and/or admissions made by the Presiding Judge at the public hearing held by the Judicial Merit Selection Committee on November 18, 2020.

Whether Threshold Requirements for Taking of Judicial Notice have been Met

Rule 201(a), SCRE and Rule 201(b), SCRE delineate the threshold requirements that must be met before judicial notice can be taken. First, the judicial notice must be of an adjudicative fact. Second, the judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. It is the Appellant's position that the testimony of the Presiding Judge at the public hearing held by the Judicial Merit Selection Committee on November 18, 2020 is both an adjudicative fact and one that is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Black's Law Dictionary, 11th Edition (2019) defines an adjudicative fact as "a controlling or operative fact, rather than a background fact; a fact that is particularly related to the parties to a proceeding and that helps the tribunal determine how the law applies to those parties." The Appellant's Appeal is centered on the temperament of the Presiding Judge as well as the prejudicial effect of facial gestures and expressions made by the Presiding Judge throughout the course of trial. It is respectfully submitted that, without question, testimony of the Presiding Judge regarding admissions as to his temperament during the pendency of the trial made subject by this Appeal, his mental state during the pendency of the trial made subject by this appeal, and his position regarding facial gestures and expressions during the pendency of the trial made subject by the

Appeal are all facts related to the parties to the proceeding and all facts that help this Court determine how the law applies to the parties in the instant matter.

Further, it is respectfully submitted that the statements and/or admissions by the Presiding Judge are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. The entirety of the transcript if available to the general public at <https://www.scstatehouse.gov/JudicialMeritPage/TranscriptInfo2020/November182020/TranscriptsAndExhibits.php> . Continuing, the testimony of the Presiding Judge at this public hearing is sworn and under oath to the extent that the veracity for truthfulness or accuracy cannot be questioned. The threshold requirements for taking original judicial notice of the statements and/or admissions made by the Presiding Judge at the public hearing held by the Judicial Merit Selection Committee on November 18, 2020 have been met.

Judicial Notice: Mandatory or Discretionary

It has long been held that Courts should take judicial notice of whatever is or ought to be known within the limits of their jurisdiction. *See State v. Broad River Power Co.*, 177 S.C. 240, 181 S.E. 41 (1935); *see also Stevenson v. Stevenson*, 276 S.C. 475, 279 S.E.2d 616 (1981). Rule 201, SCRE leaves less room for discretion: “A court *shall* take judicial notice if requested by a party and supplied with the necessary information.” *Id.* (emphasis added). The Appellant has supplied the necessary information to the Court by pointing the Court to the website in which the complete public transcript can be found as well as providing the Court with excerpts of the transcripts embodying the relevant testimony of the Presiding Judge as an Exhibit to this Motion. It is respectfully submitted that the taking of original judicial notice of the statements and/or admissions made by the Presiding Judge at the public hearing held by the Judicial Merit Selection Committee on November 18, 2020 is mandatory in nature pursuant to Rule 201(d), SCRE.

Potential Hearsay Issues Associated with Taking Judicial Notice

The undersigned has carefully considered the potential hearsay issues associated with taking judicial notice of the statements and/or admissions made by the Presiding Judge at the public hearing held by the Judicial Merit Selection Committee on November 18, 2020. The undersigned respectfully submits that the statements and/or admissions to which the Appellant seeks judicial notice, at a minimum, falls under the exception to hearsay found in Rule 803(8), SCRE. Specifically, Rule 803(8), SCRE reads:

“(8) Public Records and Reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel; provided, however, that investigative notes involving opinions, judgments, or conclusions are not admissible. Accident reports required by S.C. Code Ann. §§ 56-5-1260 to -1280 (1991) are not admissible as evidence of negligence or due care in an action at law for damages.” (Emphasis Added.)

The transcript, statements and/or admissions of which the Appellant seeks judicial notice is/are a record and/or report and/or statements of public offices setting forth the activities of the office or agency consistent with Rule 803(8), SCRE. While other exceptions may apply, the Appellant submits that the public records exception, at a minimum, applies. To wit, the undersigned respectfully submits that hearsay is not an impediment to the taking of judicial notice of the statements and/or admissions made by the Presiding Judge at the public hearing held by the Judicial Merit Selection Committee on November 18, 2020.

LEAVE TO SUPPLEMENT THE RECORD

Notwithstanding the aforementioned positions and arguments, the undersigned—in an abundance of caution—seeks leave from the Court to supplement the record to include excerpts and portions of the Presiding Judge’s statements and/or admissions made under oath at the public hearing held by the Judicial Merit Selection Committee on November 18, 2020. The Appellant moves so under Rule 212(b), SCACR.

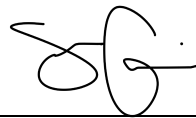
CONCLUSION

It is respectfully submitted that the threshold requirements for the taking of original judicial notice by the Court have been exceedingly met. The facts to which the Appellant seeks judicial notice are adjudicative in nature. The statements and/or admissions are in a form publicly available, reliable, and made under oath. Additionally, any potential concerns regarding hearsay are overcome by Rule 803(8), SCRE.

It is respectfully submitted that the Court should take judicial notice of the statements and/or admissions made by the Presiding Judge at the public hearing held by the Judicial Merit Selection Committee on November 18, 2020.

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For Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
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Edward W. Miller, Circuit Court Judge

Case No.: 2017-CP-39-0428

John M. Burgess Appellant,

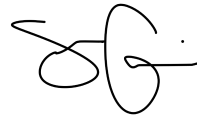
v.

Katherine Hunter Respondent.

PROOF OF SERVICE

I certify that I have served the Petition for Rehearing on Katherine Hunter by depositing a copy of it in the United States Mail, postage prepaid, on September 9, 2021, addressed to her attorneys of record: **David L. Moore, Jr., Esq., P.O. Box 1509, Greenville, SC 29602** and **Andrew F. Lindemann, Esq., P.O. Box 6923, Columbia, SC 29260**.

September 9, 2021



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PUBLIC HEARINGS

November 18, 2020

Judicial Merit Selection Commission

REPORTER: Patricia Bachand

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF RICHLAND)

3

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* * * * *

5

JUDICIAL MERIT SELECTION COMMISSION

6

TRANSCRIPT OF PUBLIC HEARINGS

7

* * * * *

8

BEFORE: SENATOR LUKE A. RANKIN, CHAIRMAN

9

REPRESENTATIVE G. MURRELL SMITH, JR.

10

SENATOR RONNIE A. SABB

11

REPRESENTATIVE CHRIS MURPHY

12

REPRESENTATIVE J. TODD RUTHERFORD

13

HOPE BLACKLEY-LOGAN

14

LUCY GREY MCIVER

15

ANDREW N. SAFRAN

16

J.P. "PETE" STROM

17

SENATOR SCOTT TALLEY

18

ERIN B. CRAWFORD, CHIEF COUNSEL

19

* * * * *

20

DATE: November 18th, 2020

21

TIME: 9:30 a.m.

22

LOCATION: Gressette Building, Room 105

23

1101 Pendleton Street

24

Columbia, South Carolina 29201

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REPORTED BY: PATRICIA G. BACHAND, COURT REPORTER

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1 you that part of our evaluative criteria that we take very
2 seriously both the letter and the spirit of the South
3 Carolina ethics laws. Any violation of those or appearance
4 of impropriety would be deemed very serious and weight --
5 worthy of heavy deliberations within our screening process
6 in the event that we would have to call you back.

7 Do you understand that this record will not
8 be closed until the formal release of the report of
9 qualifications? And so in the unlikely event that we would
10 need to call you back, you understand that we can do that,
11 correct?

12 MR. SHOEMAKE: Yes, sir.

13 CHAIRMAN RANKIN: All right. Shoemakes,
14 thank you all both for being here. And you'll see
15 Representative Rutherford tomorrow, perhaps. If I see you
16 on the road, I'll blow the horn.

17 MR. SHOEMAKE: Thank you, sir. I appreciate
18 it.

19 (Candidate excused.)

20 CHAIRMAN RANKIN: Based on a motion and
21 second, we are going to go into executive session at this
22 time.

23 (Off the record from 2:39 p.m. to 3:18 p.m.)

24 CHAIRMAN RANKIN: And we are back on the
25 record. During executive session, no votes were taken, no

1 decisions were made. And we are ready to proceed with the
2 next candidate. And that is Judge Miller, Sir, if you will
3 raise your right hand.

4 WHEREUPON,

5 THE HONORABLE EDWARD WALTER "NED" MILLER,
6 being duly sworn and cautioned to speak the truth, the
7 whole truth and nothing but the truth.

8 CHAIRMAN RANKIN: Have a seat. Before you
9 are the documents that you had previously prepared. And I
10 want to make sure that no additions or corrections need to
11 be made to those before we put them in the record.

12 JUDGE MILLER: Yes, sir. I think they're
13 fine.

14 CHAIRMAN RANKIN: All right. And no
15 objection to them being included?

16 JUDGE MILLER: No, sir.

17 CHAIRMAN RANKIN: Very well.

18 (EXHIBIT NO. 21 - JUDICIAL MERIT SELECTION
19 COMMISSION PERSONAL DATA QUESTIONNAIRE OF THE
20 HONORABLE EDWARD WALTER "NED" MILLER)

21 (EXHIBIT NO. 22 - JUDICIAL MERIT SELECTION
22 COMMISSION SWORN STATEMENT OF THE HONORABLE
23 EDWARD WALTER "NED" MILLER)

24 CHAIRMAN RANKIN: Judge Miller, you last
25 were screened with the JMSC, how long ago?

1 JUDGE MILLER: Six years.

2 CHAIRMAN RANKIN: Seems like weeks, perhaps,
3 right?

4 JUDGE MILLER: Yeah, time is flying by.
5 Yes, sir.

6 CHAIRMAN RANKIN: Very well. Well, welcome
7 back. And I just want to start by first reminding you how
8 we do this in our efforts to thoroughly investigate your
9 candidacy and your continued service on the bench. You're
10 aware that we focus on nine evaluative criteria. And we
11 also include your ballot box surveys, a study of your
12 application materials, a verification of your compliance
13 with the state ethics laws, a search of newspaper articles
14 in which your name appears, studies of previous screenings,
15 and a check for economic conflicts of interest.

16 There are three affidavits in opposition to
17 your campaign or your reelection -- we'll take those up
18 separately -- and those are met with witnesses, each
19 testifying.

20 Other than that, do you have anyone that you
21 have brought with you today?

22 JUDGE MILLER: No, sir, I do not.

23 CHAIRMAN RANKIN: Very well. All right.
24 You, sir, have the opportunity to make a brief opening
25 statement, if you'd like. Otherwise, we'll turn it over

1 for questions by staff and by members of the Commission.
2 The floor is yours.

3 JUDGE MILLER: Well, thank you very much,
4 Senator. I just would say that serving as a circuit judge
5 has been the highlight of my career. I find it to be a
6 challenge, and something that I thoroughly enjoy. And I
7 hope that you all will see fit to reappoint me to the
8 Commission, or nominate me for election. And I appreciate
9 you allowing me to be here. Thank you.

10 MR. CHAIRMAN: Very well. All right. Thank
11 you.

12 MS. WILKINSON: Good afternoon, Judge
13 Miller.

14 JUDGE MILLER: Yes, ma'am.

15 EXAMINATION BY MS. WILKINSON:

16 **Q. Judge Miller, what do you think your reputation**
17 **is among attorneys who practice before you?**

18 A. Well, I've been doing this for quite a while, so
19 I suspect it's a -- I've got a varied reputation, I would
20 think. But I hope that I'm viewed as fair and patient,
21 well versed in the subjects that come before me. And I
22 hope that I'm perceived as listening and being thoughtful
23 when I made a decision.

24 **Q. The Commission received 790 ballot box surveys**
25 **regarding you, with 65 additional comments. The ballot box**

1 surveys, for example, contained the following positive
2 comments:

3 "Judge Miller is one of that very best trial
4 judges in the state. He's smart, able to handle
5 contentious lawyers with ease. A nice -- he has a nice
6 touch with everyone in the courtroom, a good sense of humor
7 at just the right time, and a wonderful person. Judge
8 Miller has handled every hearing I have ever had before
9 him, in a very fair and reasonable manner. While I did not
10 get the result I hoped for, at every turn I've always felt
11 as though Judge Miller was trying to make the right
12 decision. Judge Miller is one of the best among the roster
13 of great judges in the Upstate. His ability and
14 willingness to address complex civil issues with a
15 pragmatic approach are qualities that make him an
16 invaluable part of the state court system. I would
17 enthusiastically welcome his return as a business court
18 judge in the Upstate."

19 Fourteen of the written comments did express
20 concern. Some of the comments indicated that you are
21 biased towards certain attorneys, and show favoritism in
22 the courtroom and in your rulings in the cases in which
23 these attorneys are involved. How would you respond to
24 those concerns?

25 A. Well, I -- I would disagree with that, with

1 respect to the findings. I don't deny that there are
2 attorneys that have appeared in front of me, who I
3 recognize as being excellent, outstanding attorneys, and
4 others who -- I mean, just to be perfectly honest, others
5 who I don't find to be quite as competent. But I do try to
6 treat every case fairly and make a decision based on the
7 merits of the case.

8 **Q. The majority of ballot box concerns indicated**
9 **that you have a poor -- the majority of ballot box concerns**
10 **indicated that you have poor judicial temperament, and that**
11 **you often exhibit a lack of patience and a sense of**
12 **frustration, and you can be at times callous and uncaring.**
13 **What response would you offer to the concerns regarding**
14 **your temperament?**

15 A. Well, I think that is a -- kind of a recent
16 development. In June of 2018, my wife of forty years died.
17 And I went through a low patch. She suffered from head and
18 neck cancer for twenty-six years. And I think that was a
19 very difficult time, and I'm not sure I even realized that
20 my mood, perhaps, had changed.

21 But I think I'm recovering from that. And but I
22 do think that's -- looking back on it, I recognize that I
23 think I was a little cantankerous during that time, I
24 guess.

25 **Q. Lastly, a few comments mentioned that your facial**

1 expressions and body language had indicated how you were
2 feeling about a case or a particular attorney or litigant.
3 How would you respond to the concerns raised about body
4 language and facial expressions?

5 A. Gosh, I don't know. I guess I could wear a mask.
6 I don't think that -- I know I -- I believe I know the case
7 that arose -- from which that comment arose, and it was
8 shortly after -- it was in June of 2018. I don't believe I
9 -- my conduct was quite as egregious as that comment would
10 indicate. I certainly try to be as impassive and even-
11 keeled as I can be in the courtroom.

12 MS. WILKINSON: Mr. Chairman, I would note
13 that the Upstate Citizens Committee reported Judge Miller
14 as qualified in the evaluative criteria of constitutional
15 qualifications, physical health, mental stability, and
16 experience. The Committee reported Judge Miller well
17 qualified in the evaluative criteria of ethical fitness,
18 professional and academic ability, character, reputation,
19 and judicial temperament.

20 Mr. Chairman, at this time, I would ask that
21 we move to the complaints.

22 CHAIRMAN RANKIN: All right. Judge Miller,
23 if you'll take a seat back there on the front row.

24 JUDGE MILLER: Yes, sir.

25 CHAIRMAN RANKIN: If you'll get right on the

1 Commission.

2 BY MS. WILKINSON:

3 Q. Judge Miller, you've heard Mr. Field's complaints
4 and Ms. Taillon -- Ms. Taillon's complaints. Did you
5 provide a written response to the Commission regarding
6 these complaints?

7 A. Yes, ma'am, I did.

8 Q. And how would you respond to those complaints
9 today?

10 A. Well, I would incorporate my written response.
11 And I never yelled or screamed in court. I may have gotten
12 firm, and I may have what he perceived as having a sharp
13 tone. This was after -- the way this case -- this case
14 originated out of Horry County.

15 There was a lawsuit filed here. Judge Baxley
16 transferred the case to Greenville County. Judge Few was
17 assigned the case. He took -- it was a complex case. He
18 took -- he handled the case. And the case was mediated, it
19 was set to be settled, and then Mr. Field filed his
20 grievance against Judge Few.

21 Judge Few recused himself. And shortly before
22 the settlement hearing, it was assigned to me. I didn't
23 seek it out. I didn't know Arthur Field, didn't know
24 anything about it.

25 I walked into the courtroom and it was filled

1 with -- there were 680 investors from all over the State of
2 South Carolina. It was not 40 million. I think I said
3 that, so I was in error. I think it was 38 and a half
4 million dollars that was criminal misappropriated from
5 these people.

6 They were very upset. I'm in the courtroom in
7 front of a lot of lawyers. There were -- I can't remember
8 all the lawyers that were in there. They were in -- they
9 were contained in the mediated global settlement agreement,
10 which I have right here, I can look it up.

11 But the Attorney General showed up because there
12 was an investigation going on. I had no idea about that.
13 And the case was very close to settling, but Mr. Field
14 refused to do it because he didn't want any records turned
15 over to it -- to the Attorney General.

16 So we had a meeting back in a jury room, with all
17 the lawyers and Mr. Field, who I believe was pro se, and I
18 insisted that any agreement that there be a provision that
19 his Fifth Amendment rights be protected. Which we did.

20 This is a long, convoluted case. And the case
21 settled. It was a class action and the case settled. A
22 receiver was appointed. My job, the only job I've ever had
23 in this whole eleven years, has been to monitor the
24 receiver.

25 So the state -- the Attorney General subpoenaed

1 the receiver, tried to subpoena the records. We got into a
2 -- I tried to defend and protect Mr. Field, pursuant to the
3 agreement, and I believe there was some accommodation
4 reached.

5 But what I -- what I remember about that part of
6 it was that corporate records are not -- do not have a
7 claim to the Fifth Amendment. So a number of those records
8 got turned over. He has claimed that I was -- or Ms.
9 Taillon claimed that I was the one that instigated -- or
10 was responsible for the indictment being issued. That is
11 totally false. The case progressed.

12 The receiver did a great job, I think. He's
13 still doing a great job, very thorough, trying to chase
14 down the assets.

15 MR. CHAIRMAN: Who is the receiver?

16 JUDGE MILLER: His name is Jerry Saad. He's
17 a -- he's a CPA in Greenville

18 A. Judge Few had arranged that he be appointed as
19 receiver. So at the settlement hearing, I followed through
20 with that and had him appointed.

21 I wasn't -- and it is my position, and I believe
22 Rule 66 would bear this out, and I think the case would
23 bear out, that the receiver acts as the arm of the court.
24 So any communication that I had with the receiver was not
25 ex parte.

1 Mr. Field seems to imply that I had some kind of
2 conspiracy against him. I did not. We were trying to
3 collect -- marshal the assets for distribution to the -- to
4 the victims or to the investors.

5 The CIF, his corporation, was modeled on Home
6 Gold. And it was very much -- I'm not the only judge to
7 have said that it was a Ponzi scheme and he was robbing
8 Peter to pay Paul. The South Carolina Revenue Board, I
9 believe, came in and said -- or Securities Commission said
10 -- stopped him from soliciting any more funds. And at that
11 time, he couldn't -- he couldn't rob Peter, and so he
12 couldn't pay Paul.

13 I mean, how much -- I'll be happy to keep going.
14 If there's specific allegations, I'd be -- I'll be happy to
15 answer them too. But I didn't yell at -- I believe I ever
16 yelled in court. I don't do that.

17 I look back in hindsight and there are some --
18 perhaps some unnecessary comments think made, that I
19 regret. And if I could go back and re-do it, I wouldn't
20 have used those particular -- that particular verbiage.

21 But Dr. Field, and this is outlined in the
22 various submissions from the attorney for the class and
23 from the receiver, obstructed most of his efforts to try
24 and collect funds. And it was very frustrating.

25 And with respect to the two -- the criminal

1 contempt in which I found him in direct criminal contempt,
2 by that time the second settlement agreement which settled
3 District Court cases, it's contained on the -- on the face
4 of the agreement, where he was -- Mr. Field was -- Dr.
5 Field was being sued in federal court.

6 There were -- I think two or three of those were
7 included in the global settlement. But in that settlement,
8 Dr. Field agreed to turn over the house, which was located
9 in a community in Greenville called Thornblade, that he
10 would list the receiver, CIF as a mortgagor on it.

11 He went -- there was some -- there was a hail
12 storm, there was damage to the roof. He got an estimate.
13 He found out that he could collect, and he went to the
14 insurance company and had CIF removed as a -- as a
15 mortgagor and as an insured.

16 He filed a claim. Somehow the lawyers for the
17 receiver found out about it, so he went back to State Farm
18 Insurance Company and got CIF reinstated and tried to
19 manipulate the administrative staff there to describe how
20 it happened, how they were removed and how they were put
21 back on.

22 Well, we -- he got up at a hearing, I can't
23 remember the exact date, and volunteered that it was some
24 clerical error on the -- caused by the insurance company.
25 So I said, "Okay. We're going to go find out."

1 And we did that. It turns out -- and in the
2 meantime, the check which was issued, and I have a copy of
3 it, for \$17,414 was sent to Dr. Field and his daughter, I
4 believe, and Ms. Taillon. They cashed the check.

5 They didn't tell CIF about it. And this was in
6 response to the -- right after the global settlement
7 agreement. When they found out about it, then we were able
8 to recover it. We had a hearing with the -- with the
9 insurance people. They testified. Dr. Field did not show
10 up at the hearing, and I held in contempt of court for
11 lying, and sentenced him to six months.

12 And I had not -- prior to that, I had not -- I'd
13 never imposed any sanctions on Dr. Field for any of his
14 conduct, which led the receiver and the attorneys to file
15 various motions to compel, or rules to show cause.

16 CHAIRMAN RANKIN: In regard, Judge Miller --

17 JUDGE MILLER: Yes, sir.

18 CHAIRMAN RANKIN: -- it's, again, our
19 purview here what do we have to work with --

20 JUDGE MILLER: Yes.

21 CHAIRMAN RANKIN: -- and again, the nine
22 evaluative criteria, as we try to distill what we're heard
23 and the voluminous records that have been submitted within
24 the realm of what is ours to address.

25 JUDGE MILLER: Yes, sir.

1 CHAIRMAN RANKIN: I have struggled to figure
2 out whether the complaint is one of temperament. And so if
3 -- which is a great concern of this body.

4 JUDGE MILLER: Yes, sir.

5 CHAIRMAN RANKIN: For a new judge, a judge
6 wannabe, temperament is an incredibly important thing.

7 JUDGE MILLER: Yes, sir.

8 CHAIRMAN RANKIN: Because again you are --
9 absent a magistrate level, you're what the majority of our
10 litigants, our jurors see on a day-to-day basic, for you to
11 give confidence to them about the state of the judiciary
12 are great concerns.

13 So if -- and I note that Mr. -- or Dr. Field
14 and Mrs. Taillon have left the room.

15 JUDGE MILLER: Yes, sir.

16 CHAIRMAN RANKIN: We're not broadcasting
17 this for anyone else to hear. So if they were here, maybe
18 we would get a "amen" or a thumbs up or a nod of the head.
19 So again, it is interesting that they've left. Maybe they
20 don't want to hear what you have to say.

21 But for at least our purposes, if this is a
22 temperament problem, where you are effectively -- again,
23 just kind of paraphrasing their theme, you're running
24 roughshod over them, being short, being -- struggling with
25 the -- your wife's illness and ultimate death, again, that

1 tragedy. If it is temperament, speak to us in our role as
2 trying to help discern whether you've got the right
3 temperament.

4 JUDGE MILLER: Okay. Yes, sir.

5 CHAIRMAN RANKIN: That was a long question.
6 But if you follow what I'm asking, it would help me at
7 least grapple with that. Again, if I'm correct and that's
8 their concern.

9 JUDGE MILLER: Yes, sir. I think that if
10 you -- there are thousands of pages of transcript. If you
11 were review all those pages, I think you would see that I
12 was respectful. I did -- I was courteous to them.

13 And so I did -- I acknowledge, I'm not going
14 to lie, that he was very frustrating. He frustrated all
15 the efforts of the receiver. And of course they came to
16 me, that's when I would be involved in it. I would hear
17 about the -- what he was not doing pursuant to the court
18 sanctioned settlement in which he agreed to do -- to help
19 and assist.

20 Additionally, all of the -- not all of it,
21 but the many times in these hearings, the victims of this
22 crime would be there. And they were actually the people
23 that I was concerned about. They were the ones that the
24 receivership is designed to benefit, and so I don't think
25 any -- any of them would complain about my temperament.

1 They were more interested in a pound of
2 flesh from Dr. Field. They were very, very upset about it.
3 And so I was trying to navigate a course between the class
4 and between trying to obtain and marshal the assets.

5 I don't -- I just have never considered
6 myself to have a temperament issue. And I acknowledge over
7 the last couple of years, because of the tragedy, that --
8 because of my wife's death, that I have -- I recognize that
9 now. And when I was in the middle of it, I didn't even --
10 I didn't know it. But I would not characterize myself as
11 having a bad temperament. But that's me.

12 And, you know, I'm not sure what anybody
13 else would say. I know that Dr. Field and his wife don't
14 like me. And I believe the reason that they filed this
15 complaint was the pending action is that the receiver has
16 filed -- has filed an action to domesticate the civil
17 judgment from South Carolina in Florida, so they are
18 pursuing the home in Florida.

19 The home in Florida was purchased by cash --
20 with cash in 2011. Arthur Field didn't move there in 2011.
21 He's been a South Carolina citizen until recently, until he
22 finished his probation. So they are -- they are pursuing
23 the case in Florida.

24 Dr. Field filed actions in federal court,
25 and they were dismissed. He has filed actions up here in

1 federal court, and it's been dismissed. So that is the
2 pending action that the receiver is pursuing at this time
3 is to have -- and why retired Chief Justice Toal is in the
4 case.

5 There is the Florida court, because of what
6 Dr. Field represented to the Florida court, thinks that the
7 South Carolina judgment is no good. So they are asking --
8 and he has referred it back to South Carolina for them to -
9 - for South Carolina to issue what is called a declaratory
10 order that says that, yes, it's a valid -- a valid judgment
11 -- civil judgment.

12 So when that was filed, they filed it at the
13 end of 2019. Couldn't have the hearing at that time
14 because of that legislative immunity. At the end -- and
15 then Covid was a part of this too. But then they asked for
16 a hearing again in -- the receiver asked for a hearing, and
17 we set a hearing. And then when I think all this -- these
18 actions got filed and that's when I heard about it again.

19 CHAIRMAN RANKIN: And, again, well off our -
20 - or out of our wheelhouse in terms of, again, these
21 criteria and what we're looking at --

22 JUDGE MILLER: Yes, sir. I'm sorry I --

23 CHAIRMAN RANKIN: No, no. I'm -- not your
24 response, but my question. And perhaps much of what we've
25 heard today, unless it deals with, again, one of the nine

1 areas that we look at. And for damn sure, not only you
2 made the newspaper, but Mr. Field -- or Dr. Field has as
3 well, so this is not some surprise outlier of subject.

4 Perhaps this complaint might be deemed as an
5 outlier, but -- and I guess for the record, let me just
6 say, in your years of servicing on the bench have you ever
7 had a complaint filed against you, other than Mr. Bryant's
8 two thousand --

9 JUDGE MILLER: You mean ODC?

10 CHAIRMAN RANKIN: ODC -- no, I'm talking
11 about before the Commission.

12 JUDGE MILLER: Oh, well, I did last time
13 with Mr. Bryant.

14 CHAIRMAN RANKIN: Other than Mr. Bryant?

15 JUDGE MILLER: No, sir, I have not.

16 CHAIRMAN RANKIN: So now, again, I'm
17 violating this, I'm kind of out of this -- out of our nine
18 areas. But I'm curious, has anybody -- either the
19 receiver, the victims, those who are seeking payment,
20 either one complained about your service, or more
21 importantly, taking Dr. Field's complaint that it won't
22 end, taking -- the receiver or the victims taking you to
23 task for just extending this for folly?

24 JUDGE MILLER: No, sir, I don't believe so.
25 And I think that the receiver file -- in the -- in the

1 submissions is an affidavit from the receiver, also
2 Attorney Stan Case from Spartanburg, and they -- I think
3 they have described my temperament and demeanor throughout
4 the course of the case.

5 And I acknowledge I am -- I am certainly not
6 perfect. And I -- this has caused me to do a lot of self-
7 examination. And I think that's a good thing. And I know
8 that there are ways and areas in which I need to improve.
9 And given the chance, I will -- I will certainly do that.

10 CHAIRMAN RANKIN: The comment that this
11 won't end, perhaps, is because the victims are still
12 seeking the be repaid.

13 JUDGE MILLER: Yes, sir. They -- I don't
14 believe the amounts -- I didn't bring an accounting with me
15 from the receiver, but I don't believe the amounts that Dr.
16 Field referenced are accurate. Most of the monies were --
17 they had -- the receiver had to sue, had to sell property,
18 and it -- it was arduous. And I believe that had Dr. Field
19 come forward and truly cooperated, this case would have
20 been over long ago. But that is not how it has played out.

21 CHAIRMAN RANKIN: Sharon, do you have any
22 more questions?

23 MS. WILKINSON: Mr. Chairman, I just want to
24 make sure that Judge Miller's written responses which he
25 had submitted to the Commission prior to this are made a

1 part of the record.

2 CHAIRMAN RANKIN: You don't object to that?

3 JUDGE MILLER: No, sir. I do not.

4 CHAIRMAN RANKIN: All right. Then they will
5 be made a part of the record. All right. Questions from
6 members of the Commission? Representative Smith.

7 REPRESENTATIVE SMITH: Let me just ask --
8 and I'm going to concentrate on Mr. Field. I was about to
9 call him Mr. Miller too. I won't make the same mistake.

10 So when Mr. Field filed a complaint against
11 you with the ODC in 2012, did he also make a motion to
12 recuse you?

13 JUDGE MILLER: I would suspect he did. I
14 don't -- I don't have that right in front of me. And I --
15 if I can comment on that, he has a -- had a history of
16 using recusal motions, continuous motions, grievances as a
17 -- as a strategy.

18 And that's borne out in the -- in the
19 plaintiff, that being the receiver's response to the latest
20 motion to recuse, about his history as an attorney before
21 he was disbarred, and also in this case.

22 REPRESENTATIVE SMITH: And that's kind of
23 the point that I see from the submissions that we have in
24 front of the Commission. 'Cause the easy thing is, Judge
25 Miller, as in every judge is -- you know, from my

1 experience, is when asked to recuse yourself, get off the
2 case; you got plenty of other cases you can handle.

3 JUDGE MILLER: Yes, sir.

4 REPRESENTATIVE SMITH: But I was presuming,
5 and that's what I'm trying to understand, is that you took
6 this more as a strategic move by Mr. Field to just keep
7 going down the line till he got a judge to which he thought
8 would be --

9 JUDGE MILLER: Yes, sir.

10 REPRESENTATIVE SMITH: -- thought would be
11 in his corner or more sympathetic to him.

12 JUDGE MILLER: Yes, sir. I did -- and
13 that's -- you know, maybe I should have gotten out a long
14 time ago. But the receiver and their lawyers wanted me to
15 stay in because of the complexity of it, and I understood
16 it. I was not -- I wasn't -- I didn't participate in any
17 of the actions that they pursued to recover assets. I just
18 monitored their conduct.

19 REPRESENTATIVE SMITH: So in cases -- and
20 you mentioned this earlier, Judge Few, now Justice Few, got
21 assigned the case, and it was designated as complex.

22 JUDGE MILLER: Yes, sir.

23 REPRESENTATIVE SMITH: And, obviously, when
24 you have a receiver court -- that's what we call it, right?

25 JUDGE MILLER: Yes.

1 REPRESENTATIVE SMITH: A receiver court,
2 that's that one -- that's the court the judge who is over
3 the receivership, right?

4 JUDGE MILLER: Yes, sir.

5 REPRESENTATIVE SMITH: And so at that point
6 it is your job to make sure that the receiver marshals the
7 assets and distributes them where they should be
8 distributed.

9 JUDGE MILLER: Yes, sir.

10 REPRESENTATIVE SMITH: And they have to --
11 they have -- they have a duty -- a fiduciary duty the to
12 receivership and/or to the -- to the, in this case the
13 victims, to make sure that they aggressively pursue the
14 assets in order for the restitution to occur.

15 JUDGE MILLER: Yes, sir. That's my
16 understanding.

17 REPRESENTATIVE SMITH: And so with that
18 happening in a receivership, it's important that a judge --
19 it's not just rotating around from you happen to be at a
20 hearing, common pleas, non-jury motions in January. And
21 then come March we have, you know Judge Stillwell come up
22 or -- that's not -- receiverships don't operate in that
23 fashion, do they?

24 JUDGE MILLER: Yes, sir. That's correct.

25 VICE CHAIRMAN SMITH: And so, you know, I

1 guess -- you know, and I'll just be forthright with you, in
2 my initial reaction to all this is: Why didn't you just
3 recuse yourself?

4 But then I think what I want to make sure
5 that this record is complete in this, is what we have seen
6 is that there are complaints and evidence that there were
7 issues with Mr. Field's using the ODC system as a weapon in
8 order to have a judge moved on or recused. And that not
9 only happened in these cases, it appears that it's happened
10 in other jurisdictions too. Is that your understanding?

11 JUDGE MILLER: Yes, sir. That's correct.

12 VICE CHAIRMAN SMITH: All right. In regards
13 to your temperament, I presume I'm kind of -- this is,
14 basically, Mr. Bryant's complaint and covering your
15 complaint. I look on here and I -- and it's not old age
16 and it's a -- so I'm not commenting on your age, but you're
17 68 years old.

18 JUDGE MILLER: Correct.

19 VICE CHAIRMAN SMITH: Mandatory retirement
20 is at --

21 JUDGE MILLER: I have to admit that.

22 VICE CHAIRMAN SMITH: Yes. Mandatory
23 retirement is at 72.

24 JUDGE MILLER: Yes, sir.

25 VICE CHAIRMAN SMITH: So this is your last

1 hurrah in front of this commission.

2 JUDGE MILLER: Yes, sir.

3 VICE CHAIRMAN SMITH: And so tell this
4 commission -- you know, you've said, and I appreciate your
5 comments, that -- and first, let me say this: I did not
6 know anything about your wife, and I am so sorry to hear
7 that. And I can only imagine the pain and the difficulty
8 that one endures. And that's certainly -- you know, you
9 want always to strive to be a -- be the best you can be as
10 a judge.

11 JUDGE MILLER: Yes.

12 VICE CHAIRMAN SMITH: But sometimes
13 circumstances deliver you some bad news, and it causes us
14 all to have a bad day from time to time. And I certainly
15 understand that. And it doesn't sound like you're making
16 excuses for it. You're just saying, "Look, it happened."
17 What assurances are you going to give this
18 commission, that at the end of all this, I'm not
19 accountable to anybody except to my profession and to my --
20 and to the judiciary, you don't have to come back here
21 again what that -- with -- that this is not going to be the
22 way that you operate in the future for your last four years
23 on the bench?

24 JUDGE MILLER: Well, I give you my word. I
25 have -- I think if you review most of my career, I think

1 I'm pretty well liked by the Bar. And this case has pushed
2 the limits, pushed the envelope for me.

3 And but I give you my word that -- and I
4 tell you, the -- it has caused me to look at myself and
5 recognize that I need to be more aware and more astute and
6 more conscious of those issues. Because I -- if you give
7 me the opportunity, I would like to finish my career and --
8 with a good reputation, not with a old sourpuss reputation
9 or however you want to describe it.

10 VICE CHAIRMAN SMITH: Well, and I would
11 point out we look at your ballot box comments.

12 JUDGE MILLER: Yes, sir.

13 VICE CHAIRMAN SMITH: And those are -- those
14 are anonymous comments. And sometimes we get accused of
15 letting the secretive process guide some of the questions
16 and/or decisions that this commission makes. And when I
17 look at this and the -- there's a specific one on judicial
18 temperament.

19 And so when I look at this, you have 467
20 people that responded to this said that you have -- you are
21 well qualified. And the people who said you're unqualified
22 is 15. So 1.9 percent. So that would seem to have an
23 indication that the people who appear in front of you --
24 and I've never appeared in front of you, that I'm aware of.

25 But people who appear in front of you are