| STATE OF SOUTH CAROLINA<br>COUNTY OF COLLETON | COURT OF GENERAL SESSIONS<br>FOURTEENTH JUDICIAL CIRCUIT |
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| State of South Carolina,<br><br>v.<br><br>Richard Alexander Murdaugh,<br><br>Defendant. | Indictment Nos. 2022-GS-15-00592, -593, -594, and -595<br><br>**DEFENDANT'S PRE-HEARING BRIEF RE: MOTION FOR A NEW TRIAL** |

Defendant Richard Alexander Murdaugh, through undersigned counsel, pursuant to Rule 29(b) of the South Carolina Rules of Criminal Procedure, hereby re-submits this pre-hearing brief as the Court directed on January 4, 2024.

## I. Introduction

Mr. Murdaugh was indicted for the murder of his wife Maggie and son Paul on July 14, 2022. His murder trial began January 23, 2023. The presiding judge was the Honorable Clifton Newman. The trial ran for six weeks, ending with convictions on the evening of March 2, 2023, and sentencing on March 3, 2023.

On October 27, 2023, Mr. Murdaugh filed a motion for a new trial based on after-discovered evidence, having obtained leave from the Court of Appeals to suspend his appeal of his convictions to file the motion. His motion alleges that Rebecca Hill, the elected Clerk of Court for Colleton County, had extensive private communications with members of the jury during trial. This allegation was supported by sworn affidavits of jurors and a witness to juror interviews, testimony at *in camera* proceedings, and other evidence including Ms. Hill's own book. The subject matter of Ms. Hill's alleged communications was the evidence being presented at trial. Mr. Murdaugh alleges that an elected state official deliberately violated his constitutional right to a fair trial before an impartial jury. If that allegation is proven, the law requires a new trial.

On December 21, 2023, the Court instructed the parties to submit pre-hearing briefs by January 3, 2024. On January 4, 2024, the Court instructed the parties to resubmit their briefs answering the following questions directly:

1. List all potential witnesses you plan to call during the evidentiary hearing.

    a. List any objections or challenges you plan to make to opposing party's witnesses. I understand you may not have an exact list but you can predict the opposing side's intentions as far as witnesses.

2. List all exhibits you plan to introduce during the evidentiary hearing.

    a. Again, list any objection or challenges to opposing party's exhibits.

3. Clarify your argument as to whether the Defendant is entitled to new trial or not.

a. Specifically, clarify the argument you will make during the evidentiary hearing. I've already decided an evidentiary hearing will occur. The mere fact that I have set the matter to include an evidentiary hearing does not mean I have decided any issue in the case at the present.

4. Any procedural issues which you feel may affect the evidentiary hearing:

    a. Issues regarding the subpoena of specific witnesses.

    b. Your position regarding how the court should receive testimony. Whether any witness testimony should be in conducted in camera rather than in open court.

5. Any other issues regarding the conduct for the hearing of the merits of the motion.

Mr. Murdaugh submits this revised brief organized under the issues the Court identified. After his response to point number five, Mr. Murdaugh provides, for issue preservation purposes, responses to arguments the State asserted in its filed memoranda which the Court appears to have rejected or deemed moot.

## II. List all potential witnesses you plan to call during the evidentiary hearing.

In a criminal proceeding, the State must produce evidence proving guilt beyond a reasonable doubt. The State has powerful investigative tools to marshal evidence against the accused. At trial, it is decided whether its evidence meets that demanding standard. Thus, the defendant typically does not need discovery beyond production by the State of the evidence against him. Similarly, in a civil proceeding, a party asserting a claim has the burden of production to produce evidence supporting its claim and the burden of persuasion to show it has met the legal standard for the relief it seeks. Thus, in civil litigation the adjudicative proceeding is preceded by a period of discovery, in which compulsory process is available to the parties to marshal the evidence they will present to the factfinder.

This is a criminal case, but the instant motion places Mr. Murdaugh in the position of a plaintiff in a civil proceeding. Mr. Murdaugh needs discovery because he has an affirmative case to prove. As the movant, Mr. Murdaugh has the burden of proving his claim for relief. Although no South Carolina case states the standard of proof applicable in this situation, the general rule for new trial motions based on unauthorized communications with jurors is that the standard of proof is a preponderance of the evidence. Mr. Murdaugh must make "'two showings, by a preponderance of the evidence: [1] [extrajudicial] contact or communications between jurors and unauthorized persons occurred, and [2] the contact or communications pertained to the matter before the jury.'" *E.g.*, *State v. Berrios*, 129 A.3d 696, 713 (Conn. 2016) (quoting *Ramirez v. State*, 7 N.E.3d 933, 939 (Ind. 2014)).

Yet it is the State, and not Mr. Murdaugh, which has had the opportunity to conduct discovery for the past several months regarding Mr. Murdaugh's claim using the tools available to law enforcement. It is well prepared to bolster its witnesses and to impeach witnesses favorable to the defense. Mr. Murdaugh has been unable to conduct any discovery whatsoever. All he has

had are voluntary statements made by jurors and other witnesses willing to talk to his lawyers and information published by journalists. He received discovery from the State less than a week ago. At present it is impossible for him to state with certainty which witnesses he will call and which documents he will introduce as exhibits during the testimony of those witnesses.

With that important caveat, at present, Mr. Murdaugh plans to call the following witnesses in his case-in-chief during the evidentiary hearing:

- Juror 254
- Juror 630
- Juror 741
- Juror 785
- Rhonda McElveen, Barnwell County Clerk of Court

The State must call Ms. Hill to deny the allegations that she tampered with the jury. Depending on Ms. Hill's testimony, Mr. Murdaugh might call some of the following witnesses as rebuttal witnesses:

- Laura Hayes, former deputy Clerk of Court in Colleton County
- Jeffrey Hill, former IT Director for the Colleton County Courthouse
- The Honorable Clifton Newman, retired Circuit Court Judge
- Tim Stone, ex-husband of Juror 785
- Timothy Stone, original poster of the FB message presented to Judge Newman during trial and included in the Court's Exhibit 4
- Lori Weiss, employee of the Clerk of Court in Colleton County

**A. List any objections or challenges you plan to make to opposing party's witnesses. I understand you may not have an exact list but you can predict the opposing side's intentions as far as witnesses.**

Mr. Murdaugh believes the State will call jurors, bailiffs, and court staff who were never or almost never in the jury room in which Ms. Hill made her jury-tampering statements, to present a cascade of witnesses saying they never heard Ms. Hill make inappropriate statements in the jury room, to imply by false logic that she therefore did not make such statements.

When the jurors retired from the courtroom during trial, they spread across two different rooms. Jurors 254, 572, 578, 589, 630, 741, and 785 were in the actual courthouse jury room. Jurors 193, 326, 530, 544, 729, 826, and 864 were in Judge Perry Buckner's office. Ms. Hill made her jury-tampering statements to jurors in the jury room. Mr. Murdaugh has no objection to the State calling other jurors who were in that room to testify that they never heard Ms. Hill make inappropriate statements. But Mr. Murdaugh objects to calling jurors who were in a different room to testify that they never heard Ms. Hill make inappropriate statements. There are millions of people in South Carolina who did not hear Ms. Hill say what certain jurors heard her say, because they were not in the room with them. Their testimony is not probative of whether Ms. Hill in fact said what several jurors have said she said when they were together in the same room at the same time and is therefore inadmissible. *See* Rule 401, SCRE (providing that evidence is relevant if it is probative of a material fact) & Rule 402, SCRE ("Evidence which is not relevant is not admissible."). Calling jurors who were in a separate office, or bailiffs or court staff who were stationed in different parts of the courthouse, is hardly more probative than calling jurors or court staff from other courthouses in South Carolina. Therefore, if the Court is inclined to allow the State to call jurors 193, 326, 530, 544, 729, 826, or 864, before allowing the State to ask any questions about what Ms. Hill may have said in the jury room it should require the State to lay a foundation that the juror was actually or at least usually in the jury room. *See* Rule 602, SCRE

("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.").

Further, Mr. Murdaugh will object to any questions posed to jurors that seek to invade the province of their deliberations in violation of Rule 606(b) of the South Carolina Rules of Evidence. Specifically, he would object to questions such as, "Would your decision have been the same if you had not been exposed to improper communications from the Clerk of Court, or any third party?"

Mr. Murdaugh also plans to call Rhonda McElveen, the Barnwell County Clerk of Court who assisted at the trial. The State presumably would object to her for the same reason Mr. Murdaugh objects to calling persons who were not in the jury room to say they never heard something allegedly said in the jury room—she was not in the jury room. Mr. Murdaugh however believes, based on her SLED interview, that she will corroborate expected juror testimony about Ms. Hill's statements because she will testify that Ms. Hill made substantively identical statements to her during trial, and because she received several complaints from court staff about Ms. Hill having inappropriate and excessive contacts with jurors. She therefore may have personal knowledge of facts probative of whether Ms. Hill made the statements jurors say she made. If the State objects to her testimony, Mr. Murdaugh would ask the Court to review her videorecorded interview with SLED and decide for itself whether her testimony would assist the Court as factfinder. If the Court does so, however, it is important to review the video recording of her entire interview and not the SLED memorandum summarizing it. As explained in the discussion of the mode of witness examination, *infra*, the State's memoranda summarizing witness interviews are sometimes grossly inaccurate, and when they are it is always in a manner that favors the State.

## III. List all exhibits you plan to introduce during the evidentiary hearing.

The caveat about not having discovery applies even more forcefully regarding exhibits since exhibits are, typically, obtained through discovery. With that important caveat, at present, Mr. Murdaugh plans to introduce the following exhibits in his case-in-chief during the evidentiary hearing:

- Affidavits of jurors 630 and 785.
- Recorded interviews with SLED of jurors 254 and 741, and Rhonda McElveen

It is impossible to specifically list all exhibits to be used in the cross-examination of Ms. Hill without knowing her testimony, but the categories of exhibits will be her emails, text messages, telephone records, her book, recordings of her public statements and media interviews, her affidavit in this matter, SLED's memorandum for her interview (her counsel would not permit SLED to record the interview), and Court's exhibit number 4 from trial regarding the Facebook post issue.

### A. Again, list any objection or challenges to opposing party's exhibits.

Reserving all objections to calling particular witnesses or asking particular questions, Mr. Murdaugh does not object to the use of witnesses' affidavits, written statements, or interview recordings as exhibits when examining the witness who gave the affidavit, statement, or interview. Mr. Murdaugh does not know what other documents the State may seek to introduce as exhibits.

The State may object that exhibits used to impeach Ms. Hill are inadmissible under Rule 608(b) of the South Carolina Rules of Evidence, which allows inquiry on cross-examination into specific instances of conduct probative of truthfulness or untruthfulness but prohibits proof of such instances by extrinsic evidence. But that rule does not apply to the witness's prior statements, which if denied may be proven by extrinsic evidence. Rule 613(b), SCRE; *see State v. Fossick*, 333 S.C. 66, 69–70, 508 S.E.2d 32, 33 (1998) ("The trial judge ruled the evidence inadmissible

for impeachment under Rule 608(b). . . . Since [the witness] denied the statement, the proffered extrinsic evidence was admissible under Rule 613(b). We conclude the trial judge erred . . . .”). Ms. Hill’s emails, text messages, book, media interviews, etc., are her own statements and so if she denies them are provable by extrinsic evidence. SLED’s interview memorandum similarly is a record of her prior statement, evidence of which is not hearsay because the State is a party-opponent, Ms. Hill is an elected state official, and her statement to SLED concerns a matter within the scope of her employment as a state official and was made during the existence of that employment. *See* Rule 801(d)(2)(D), SCRE.

## IV. Clarify your argument as to whether the Defendant is entitled to new trial or not.

### A. Mr. Murdaugh does not need to show actual bias on the part of any juror to obtain a new trial.

If Mr. Murdaugh proves his allegation that Ms. Hill communicated with the jury about the evidence presented during his murder trial, the standard for deciding whether to grant a new trial is ***not*** whether the Court believes the outcome of the trial would have been the same had Ms. Hill’s jury tampering not occurred. “A defendant in a criminal prosecution is constitutionally guaranteed a fair trial by an impartial jury, and in order to fully safeguard this protection, it is required that the jury render its verdict free from outside influence.” *State v. Johnson*, 302 S.C. 243, 250, 395 S.E.2d 167, 170 (1990) (internal quotation marks omitted). Where “‘[t]here was the private communication of the court official to members of the jury, an occurrence which cannot be tolerated if the sanctity of the jury system is to be maintained . . . a new trial ***must*** be granted unless it clearly appears that the ***subject matter*** of the communication was harmless and could not have affected the verdict.’” *State v. Cameron*, 311 S.C. 204, 207–08, 428 S.E.2d 10, 12 (Ct. App. 1993) (quoting *Holmes v. United States*, 284 F.2d 716, 718 (4th Cir. 1960)) (emphasis added). The law requires the “subject matter” of the communication to be harmless— “clearly” harmless. *Id.*

Otherwise, a new trial must be granted. Asking the jury what it wants for lunch is clearly harmless. Telling it not to believe the defendant when he testifies is not.

The issue before the Court is a structural issue in Mr. Murdaugh's trial, not a failure to impanel unbiased jurors. Where a new trial is sought based on biases or partiality jurors brought with them into the trial, required standard is to show actual bias, whether those biases were facts jurors concealed during voir dire (*e.g.*, *State v. Woods*, 345 S.C. 583, 550 S.E.2d 282 (2001)), were biases created by state action during voir dire (*e.g.*, *State v. Bryant*, 354 S.C. 390, 581 S.E.2d 157 (2003)), were biases resulting from jurors reading newspapers or other unauthorized materials during trial (*e.g.*, *State v. Stone*, 290 S.C. 380, 350 S.E.2d 517 (1986)) or initiating inappropriate communications during trial (*e.g.*, *Smith v. Phillips*, 45 U.S. 209 (1982)), or the like.

**The present case is different because a state official instructed jurors how to view the defense case outside the presence of the court, the Defendant, and his counsel**, and in other ways deliberately and surreptitiously used her official authority to direct the verdict to her preferred outcome. This is, fortunately, a vanishingly rate event, but it is one that requires a new trial.

The *Cameron* court's distinction between the communication being harmless and the subject matter of the communication being harmless and its requirement that a new trial be granted unless the latter is established recognizes that deliberate jury tampering by a court official cannot be cured or excused by the strength of the evidence presented at trial or jurors offering their own subjective opinions regarding their own biases. Even if every juror were to testify that he or she would have reached the same verdict regardless of Ms. Hill's tampering, a new trial is required if it is proven that Ms. Hill communicated with jurors about the merits of the evidence presented. Sustaining a conviction based on the Court's opinion the strength of the evidence against the accused regardless of improper external influences on the jury from court officials about the merits

of the case would effectively be a directed verdict for the prosecution—a statement that whatever happened at trial simply does not matter because the evidence can admit only one result regardless. That would constitute structural error. *Cf. Neder v. United States*, 527 U.S. 1, 34 (1999) (Scalia, J., concurring in part) (noting that even if "the judge certainly reached the 'right' result," "a directed verdict against the defendant . . . would be *per se* reversible *no matter how overwhelming the unfavorable evidence*," because "[t]he very premise of structural-error review is that even convictions reflecting the 'right' result are reversed for the sake of protecting a basic right" (emphasis in original)).

For example, in *Parker v. Gladden*, a bailiff told a juror in a murder trial "that wicked fellow, he is guilty." 385 U.S. 363, 363 (1966) (per curiam). The Supreme Court of Oregon held the statement did not require a new trial because it was not shown the statement prejudiced the outcome of the trial. The U.S. Supreme Court reversed, holding "[t]he evidence developed against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel," and "[w]e have followed the undeviating rule, that the rights of confrontation and cross-examination are among the fundamental requirements of a constitutionally fair trial." *Id.* at 364–65 (internal quotation marks and citations omitted).

In *Parker,* the state also argued that the bailiff's statement was harmless because ten members of the jury never heard his statement and Oregon law at that time allowed a guilty verdict by ten affirmative votes of the twelve jurors. The Supreme Court rejected that reasoning, and, after questioning whether the factual record supported that argument, stated that in "any event, petitioner was entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors." *Id.* at 366. That reasoning accords with the reasoning in *Cameron* 27 years later—the right being

protected is not the right to a "correct" verdict but the constitutional right to trial before a fair and impartial jury free from state officials' improper influences. What matters is what was in fact said to the jurors by the state official, not a counterfactual analysis of what probably would have happened had that not in fact been said.

Our Supreme Court more recently touched on this point in *State v. Green*, 432 S.C. 97, 851 S.E.2d 440 (2020). In *Green*, during jury deliberations a juror asked a bailiff "what would happen in the event of a deadlock, and he responded the judge would likely give them an *Allen* charge and ask if they could stay later." *State v. Green*, 427 S.C. 223, 229, 830 S.E.2d 711, 713 (Ct. App. 2019), *aff'd as modified*, 432 S.C. 97, 851 S.E.2d 440 (2020) (citation omitted). The Court of Appeals held the bailiff's comments were presumptively prejudicial because of his official position, but that the State rebutted that presumption by showing for various reasons that the remark did not in fact influence the outcome of the jury's deliberations. *Id.* at 236, 830 S.E.2d at 717. The Supreme Court affirmed but modified the decision to correct the Court of Appeals' reasoning. The communication was not prejudicial not because it did not in fact change the verdict, instead, it was not prejudicial because the subject matter of the communication was harmless: "The bailiff's actions here—though improper—did not touch the merits, but dealt only with the procedural question of how the judge might handle a jury impasse that apparently never materialized." *Green*, 432 S.C. at 100, 851 S.E.2d at 441. In other words, a bailiff presuming to tell the jury that if it is deadlocked, the judge will instruct them to keep deliberating is improper but likely harmless because the subject matter is procedural or logistical, rather than to the merits of the case.

Of course, the allegations in the instant motion—that a state official told the jury not to believe the defendant's defense or his testimony when he testified in his own defense—

indisputably regard the merits of the case. The extensive, deliberate, and self-interested jury tampering in which Ms. Hill allegedly engaged far exceeds the simple bailiff mistakes that forced a retrial in *Cameron*, where "a bailiff's misleading response to a juror's question about sentencing options compromised the jury's impartiality because it left the impression that their verdict could not affect the trial court's sentencing discretion," or in *Blake by Adams v. Spartanburg General Hospital*, where a bailiff told a juror "that the trial judge 'did not like a hung jury, and that a hung jury places an extra burden on taxpayers.'" *See State v. Green*, 427 S.C. at 237, 830 S.E.2d at 717–18 (citing 311 S.C. at 208, 428 S.E.2d at 12 and quoting 307 S.C. 14, 16, 413 S.E.2d 816, 817 (1992)).

**B. The State misstates the controlling legal standard and provides no authority supporting its mistaken position.**

In response to Mr. Murdaugh's motion for a new trial, the State incorrectly asserts that Murdaugh "must show both that the alleged improper communications occurred and that jurors were actually biased as a result." Resp. Opp'n Mot. New Trial 3 n. 2. The State can cite no authority supporting that proposition. The State's response includes citations to several cases purportedly supporting its position, but not one cited case actually supports it.

*State v. Kelly*, 331 S.C. 132, 502 S.E.2d 99 (1998): The State provides no parenthetical explanation of how *Kelly* supports its position because the case has nothing to do with the present motion. In *Kelly*, a juror was accused of misconduct, not a court official. During the guilt phase of a capital trial, a juror provided a pamphlet purportedly expressing God's views on capital punishment to other jurors in the jury room. The trial judge dismissed the offending juror but determined that a mistrial was not warranted because it was not relevant to the issues in the guilt phase of the trial and because "no other juror had been exposed to the contents of this pamphlet." *Id.* at 141, 502 S.E.2d at 104. The Supreme Court affirmed. Chief Justice Finney and Justice Toal

dissented, arguing "the inappropriate possession and use of the extraneous pamphlet by jury members so tainted the jury that its contents affected the ability of the jury to be fair and impartial at both the guilt and penalty phases of appellant's bifurcated trial." *Id.* at 150, 502 S.E.2d at 109. Regardless, as in the *Holmes* case that provides the controlling legal standard quoted in *Cameron*,

> ***Here there is more than jury misconduct in reading forbidden matter***. There was the private communication of the court official to members of the jury, an occurrence which cannot be tolerated if the sanctity of the jury system is to be maintained. When there has been such a communication, a new trial must be granted unless it clearly appears that the subject matter of the communication was harmless and could not have affected the verdict.

*Holmes*, 284 F.2d at 718 (emphasis added).

*Smith v. Phillips*, 45 U.S. 209 (1982): This case says nothing about the standard for granting a new trial when a state official tampers with the jury. In *Smith*, the prosecution failed to disclose that a juror had, during trial, applied for employment as an investigator in the prosecutor's office. The U.S. Supreme Court held "[t]his Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias," and agreed with the state courts and federal district court that no actual bias was proven at the hearing. *Id.* 455 U.S. at 214–15. It reversed the U.S. Court of Appeals for the Second Circuit on the issue of whether the prosecution's failure to disclose the letter was misconduct necessitating a new trial. But the issue in the instant motion is not whether a particular juror had an undisclosed bias or whether the prosecution concealed any pertinent information.

*State v. Green*, 432 S.C. 97, 851 S.E.2d 440 (2020): As explained above, in *Green* the Court held that an improper procedural comment by a bailiff to a jury was harmless because it did not bear on the merits. There is no suggestion in *Green* that a comment by a state official that did bear on the merits of the case could also be harmless. Any such assertion would be precluded by the U.S. Supreme Court's holding *Parker v. Gladden*, discussed above but notably not mentioned at

in the State's response despite also being discussed in Mr. Murdaugh's initial motion. The *Green* court did reasonably decline to extend the presumption in *Remmer v. United States* that "'any private communication, contact, or tampering . . . with a juror during a trial about the matter pending before the jury is . . . deemed presumptively prejudicial'" to situations where the communications at issue "did not touch the merits" of the case on trial. *Id.* at 99–100, 851 S.E.2d at 441 (quoting 347 U.S. 227 (1954)). Instead, it reversed the Court of Appeals application of *Remmer* prejudice and instead followed the reasoning of *Cameron*: the inquiry should focus on the subject matter of the improper communication rather than presuming all improper communications are prejudicial and then requiring the State to rebut the presumption even where the communications did not bear on the merits of the case. *Id.* at 99–101, 851 S.E.2d at 441. This has no relevance here because Ms. Hill's alleged statements to jurors indisputably bore on the merits.

*State v. Cameron*, 311 S.C. 204, 428 S.E.2d 10 (Ct. App. 1993): The State cites *Cameron* for the unremarkable proposition "[n]ot every inappropriate comment by a member of court staff to a juror rises to the level of constitutional error," Resp. Opp'n Mot. New Trial 3, but in a footnote claims Mr. Murdaugh's citations to *Cameron* for the controlling legal standard cite to a "portion of the opinion which does not state the legal standard, but rather quotes a portion of a 4th Circuit Court of Appeals opinion inconsistent with the standard acknowledged by *Cameron* and more subsequently clarified in *Smith* and most recently in *Green*," *id.* at 3 n.2. That assertion only makes sense if the State did not expect the Court to read the *Cameron* opinion. The entire portion of the *Cameron* opinion that follows its factual recitation is quoted below:

> The trial judge ruled that the jury properly decided that the length of sentence he might impose was not their concern. He further ruled that the short colloquy between the bailiff and the forelady could not have in any way influenced the jury to refuse to recommend mercy.

> A defendant in a criminal prosecution is constitutionally guaranteed a fair trial by an impartial jury, and in order to fully safeguard this protection, it is required that the jury render its verdict free from outside influences of whatever kind and nature. *State v. Johnson*, 302 S.C. 243, 250, 395 S.E.2d 167, 170 (1990); *State v. Wasson*, 299 S.C. 508, 511, 386 S.E.2d 255, 256 (1989); *State v. Salters*, 273 S.C. 501, 504, 257 S.E.2d 502, 504 (1979). The mere fact, however, that some conversation occurred between a juror and a court official would not necessarily prejudice a defendant. *State v. Goodwin*, 250 S.C. 403, 405, 158 S.E.2d 195, 197 (1967).
>
> In this case, "[t]here was the private communication of the court official to members of the jury, an occurrence which cannot be tolerated if the sanctity of the jury system is to be maintained. When there has been such a communication, a new trial must be granted unless it clearly appears that the subject matter of the communication was harmless and could not have affected the verdict." *Holmes v. United States*, 284 F.2d 716, 718 (4th Cir. 1960); *see Blake v. Spartanburg General Hospital*, 307 S.C. 14, 413 S.E.2d 816 (1992).
>
> While the trial court adequately instructed the jury on the verdicts of guilty with and without mercy, the jury was obviously confused as to the length of the respective sentences. In this case, the right to fix punishment or make a recommendation that would place punishment in the discretion of the court rested exclusively with the jury. *State v. Brooks*, 271 S.C. 355, 359, 247 S.E.2d 436, 438 (1978); *State v. McGee*, 268 S.C. 618, 620, 235 S.E.2d 715, 716 (1977). The bailiff's response to the forelady, that they should not worry if they were deadlocked because the judge was fair, was misleading. It tended to lessen the jury's sense of responsibility by implying that if they rendered a verdict of guilty without mercy, the judge had some discretion in sentencing. "Jurors are simply not to consider the opinions of neighbors, officials or even other juries." *State v. Thomas*, 287 S.C. 411, 413, 339 S.E.2d 129, 129 (1986) (quoting *State v. Smart*, 278 S.C. 515, 526, 299 S.E.2d 686, 693 (1982), *cert. denied*, 460 U.S. 1088, 103 S. Ct. 1784, 76 L. Ed.2d 353 (1983)).
>
> The appellant's conviction is reversed and the case is remanded for a new trial.
>
> REVERSED AND REMANDED.

311 S.C. at 205–08, 428 S.E.2d at 11–12. There is no standard "acknowledged" or otherwise stated in the above opinion other than "a new trial must be granted unless it clearly appears that the subject matter of the communication was harmless and could not have affected the verdict." Mr. Murdaugh has no idea what "*Smith*" case the State believes "more subsequently clarified" the legal standard. The only "*Smith*" case cited in the State's response is *Smith v. Phillips*, the irrelevant 1982 U.S. Supreme Court case discussed above that predated *Cameron* by eleven years. And as

discussed above, *Green* reversed a Court of Appeals decision to correct its reasoning to bring it in line with *Cameron*.

**C. South Carolina case law provides the controlling legal standard.**

As discussed above, the burden-shifting described in *Remmer* is not relevant to this case because the alleged communications were by a court official, to at least one deliberating juror, and inarguably pertained to the merits of the case being tried. This is because South Carolina case law—*Cameron*—provides the legal standard, not *Remmer*. If Mr. Murdaugh proves that the Clerk of Court engaged in surreptitious advocacy on the merits during trial, there is nothing for the State to rebut. A new trial is required. *See Cameron*, 311 S.C. at 207–08, 428 S.E.2d at 12.

U.S. Supreme Court decisions—in particular, *Parker v. Gladden*—control the decision here only insofar as they establish a "floor" below which the protections of South Carolina constitutional and decisional law cannot fall. As the Supreme Court of Utah recently stated in a case alleging improper jury contact by a bailiff: "Still, the Sixth Amendment right to an impartial jury was incorporated against the states through the Fourteenth Amendment in *Parker v. Gladden*, 385 U.S. 363, 364, (1966) (per curiam). As such, the Sixth Amendment forms the 'floor' below which the Utah Constitution's protections cannot fall." *Utah v. Soto*, 2022 UT 26, ¶ 21, 513 P.3d 684, 690 (parallel citations omitted).

Moreover, were *Remmer* controlling in this case, it would create a strong presumption of prejudice that the State must rebut. "In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties." *Remmer*, 347 U.S. at 229. This rule has not been abrogated by *Smith v. Phillips* or rejected by our Supreme Court in *Green*, as the State claims in its original prehearing

brief. "The scope and currency of the *Remmer* presumption has split the federal circuits, but it 'remains [a]live and well in the Fourth Circuit,' *United States v. Lawson*, 677 F.3d 629, 642 (4th Cir. 2012), and therefore controls our approach to the Sixth Amendment issue Green raises." *Green*, 427 S.C. at 235, 830 S.E.2d at 711 (Court of Appeals decision affirmed as modified in 432 S.C. 97, 851 S.E.2d 440). The Fourth Circuit explains that "[w]ith respect to the presumption of prejudice, we have recently observed, there is a split among the circuits regarding whether the *Remmer* presumption has survived intact following the Supreme Court's decisions in *Smith v. Phillips*, 455 U.S. 209 (1982), and *United States v. Olano*, 507 U.S. 725 (1993)." *Barnes v. Joyner*, 751 F.3d 229, 242 (4th Cir. 2014) (internal quotation marks and parallel citations omitted). "[W]e have held that the *Remmer* presumption is clearly established federal law . . . even after the Supreme Court's decisions in *Phillips* and *Olano*. *Id.* at 243.

In the referenced circuit split, the Second, Fourth, Seventh, Ninth, Tenth, and Eleventh Circuits continue to apply the *Remmer* presumption in cases involving external influences on jurors, while the Fifth, Sixth, Eighth, and District of Columbia Circuits have departed from the presumption. *United States v. Lawson*, 677 F.3d 629, 643 (4th Cir. 2012). However, a majority of circuits "hold that the *Remmer* presumption is still good law ***with respect to egregious external interference*** with the jury's deliberative process via private communication, contact, or tampering with jurors about the matter." *Connecticut v. Berrios*, 129 A.3d 696, 709 (Conn. 2016). In such cases, the First and Eighth Circuits join the majority position in applying the *Remmer* presumption. *Id.* at 710 (collecting cases). State courts generally do the same. *Id.* at 710–11 (collecting cases from Arizona, Illinois, Indiana, Maryland, Nevada, Oregon, and the District of Columbia).

South Carolina likewise "accord[s] with the approaches of the Second and Fourth Circuits with respect to serious, or not 'innocuous' claims of external influence, such as jury tampering."

*Id.* at 710. As explained above, that is exactly what our Supreme Court held in *Green*. "Our unwillingness to categorically apply the *Remmer* presumption of prejudice stems from our view that not every inappropriate comment by a bailiff to a juror rises to the level of constitutional error." *Green*, 432 S.C. at 100, 851 S.E.2d at 441. "The attempted bribery of a juror in *Remmer*—conduct which goes to the heart of the merits of the case on trial—is a far cry from the circumstances presented in this case," in which a bailiff's improper comment "dealt only with the procedural question of how the judge might handle a jury impasse that apparently never materialized." *Id.* And, again, *Parker* provides a floor regarding what the State can rebut under *Remmer*—while the State could in other circumstances perhaps show, for example, that a communication was harmless because it was only heard by a non-deliberating juror, where a state official's exhortations on the evidence presented at trial it was communicated to at least one deliberating juror the Court cannot overlook the offense by speculating that the outcome would have been the same regardless. See Parker, 385 U.S. at 363.

**D. In addition to juror bias issues, a state official's surreptitious advocacy to the jury outside the courtroom creates a structural error in the conduct of the trial.**

It has long been held to be a structural error for a state actor to engage in *ex parte* advocacy to the jury during trial. "The requirement that a jury's verdict must be based upon the evidence developed at the trial goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." *Turner v. Louisiana*, 379 U.S. 466, 472 (1965) (internal quotation marks omitted). "The evidence developed against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel . . . ." *Parker*, 385 U.S. at 364. In *Simmons v. South Carolina*, the U.S. Supreme Court similarly holds it is unconstitutional for the defendant to receive the death

penalty "on the basis of information which he had no opportunity to deny or explain." 512 U.S. 154, 161 (1994) (internal quotation marks omitted).

The principle is ancient and foundational to our jury system:

> In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as 'indifferent as he stands unsworne.' His verdict must be based upon the evidence developed at the trial. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall in 1 Burr's Trial 416(1807).

*Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (citations omitted). Indeed, what is now called the "*Remmer*" presumption is far older than the 1954 *Remmer* decision. "Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear." *Mattox v. United States*, 146 U.S. 140, 150 (1892).[1] Likewise,

> It is well settled, that it is not necessary to show that the minds of the jury, or of any member of it, were influenced. It is sufficient to show that intermeddling did take place, to set aside the verdict. Too much strictness cannot be exercised in guarding trials by jury from improper influence. It has been said that, "this strictness is necessary to give confidence to parties in the results of their causes; and every one ought to know that, for any, even the least, intermeddling with jurors, a verdict will always be set aside."- *Knight v. Freeport*, 13 Mass. 220.
>
> This is the language of the Supreme Court of Massachusetts in a civil cause. How much more important is it, to guard the purity of jury trials, against improper influence, when the matter at stake is the life or liberty of a prisoner.
>
> The authorities upon this point all agree; and, as they are very numerous . . . .

[1] *Maddox* has a "red flag" in Westlaw because it was superseded in 1975 by Rule 606(b) of the Federal Rules of Evidence on a separate issue regarding the admissibility of juror testimony to impeach the verdict. But it is still currently cited by federal appellate courts for the principle that when state officials communicate *ex parte* with the jury about the merits of the case during trial, a new is required. *E.g.*, *Tarango v. McDaniel*, 837 F.3d 936, 947 (9th Cir. 2016) ("*Mattox* and its progeny further establish that undue contact with a juror by a government officer almost categorically risks influencing the verdict.").

*Pope v. Mississippi*, 36 Miss. 121, 124 (Miss. Err. & App. 1858). For an even older example,

> An officer is sworn to keep the jury, without permitting them to separate, or any one to converse with them; for no man knows what may happen; although the law requires that honest men should be returned upon juries, and, without a known objection, they are presumed to be *probi et legales homines*, yet they are weak men, and perhaps may be wrought upon by undue applications. The evil to be guarded against, is improper influence; and when an exposure to such an influence is shown, and it is not shown that if failed of effect, then the presumption is against the purity of the verdict.

*Lord Delamere's Case*, 4 Harg. St. T. 232 (Eng. 1685) (In *Lord Delamere's Case* Henry, Baron Delamere was tried for high treason before the Court of the Lord High Steward on January 14, 1685. A text of the decision is available at text of the decision available at https://quod.lib.umich.edu/e/eebo/A63176.0001.001/1:3?rgn=div1;view=fulltext.).

Contrary to the State's position, our State Supreme Court has not abrogated or abandoned this foundational principle that when the State's officials engage in *ex parte* communications with the jury during trial about the merits of the case, a new trial is required. Nor has the U.S. Supreme Court opened a door that could allow states to abandon that principle. All that has happened is a sensible restriction of the principle to exclude improper communications that do not bear on the merits of the issue before the jurors. *See Green*, 432 S.C. at 100, 851 S.E.2d at 441.

**E. Mr. Murdaugh will argue that a preponderance of the evidence shows Ms. Hill made statements to at least one deliberating juror about the merits of the evidence presented at trial.**

If they testify consistently with their affidavits and witness interviews, Juror 630 will testify Ms. Hill said they should not be fooled by the defense and that they should watch Mr. Murdaugh's body language with suspicion when he testified in his own defense, Juror 785 will testify that Ms. Hill told them not to be fooled by the defense, Juror 741 will testify that Ms. Hill told them not to let the defense confuse or convince them, and Juror 254 will testify that Ms. Hill told them to watch Mr. Murdaugh's body language when he testified in his own defense. Ms. McElveen will

testify that some of those statements are substantively identical to statements Ms. Hill made directly to her during trial, and that staff were complaining to her about Ms. Hill's excessive contact with the jury. Any other jurors called to testify will only be able to state that they never heard those comments by Ms. Hill. The only witness to directly contradict the testimony of these jurors will be Ms. Hill, but even she admits she met with the jury foreperson "a few times" to discuss "jurors who were having a hard time with anxiety during the trial" and the foreperson's "ability to keep the peace within the jury room due to many large personalities."

Ms. Hill's denials should not be credited because her many acts of fraud and dishonesty, which will be explored and detailed during cross-examination, demonstrate that she has a character for untruthfulness. *Cf.* Rule 606(b), SCRE. With Ms. Hill's denials uncredited, the juror testimony will be uncontroverted. Moreover, Jurors 254, 630, 741, and 785 have not appeared on television or otherwise given interviews or sought any publicity for themselves. They have not sought any payment for their story. They did not seek to be placed on this jury, they have maintained their anonymity ever since, and they have nothing to gain from false testimony. Their testimony therefore should be credited over the testimony of a Clerk of Court who has been repeatedly caught seeking wrongful money and publicity from this case, even going so far as to writing a book about the case that was removed from publication for her plagiarism.

**V. <u>Any procedural issues which you feel may affect the evidentiary hearing:</u>**

**A. Issues regarding the subpoena of specific witnesses**

Mr. Murdaugh requests that the Court issue a subpoena for each of the jurors and witnesses identified in response to question number 1. He also requests that the Cout issue a forthwith order compelling the immediate production of documents subpoenaed by any party, so that the documents may be reviewed in advance of the hearing. Further, he requests that each party be

compelled to produce all documents received in response to a subpoena to the other party immediately upon receipt.

**B. Your position regarding how the court should receive testimony. Whether any witness testimony should be conducted in camera rather than in open court.**

Mr. Murdaugh believes good cause exists for the Court to conduct the examination of jurors *in camera*, with a redacted transcript provided to the public. In addition to shielding jurors from appearing on television involuntarily, *in camera* examination is necessary because it will be difficult for a juror to testify without revealing personally identifying information like his or her name or the names of other jurors. By testifying *in camera*, jurors may speak freely with any personal information in their testimony redacted from the publicly available transcript.

Mr. Murdaugh previously took the position that jurors should be examined by the Court rather than by counsel, with the Court accepting suggested questions from the parties, in advance of the examination and during the examination, which the Court in its discretion may or may not ask. Mr. Murdaugh's reasoning was that jurors may be unsettled by being interrogated by the same lawyers they watched interrogate witnesses for six weeks.

However, after receiving the SLED's video recordings and summary memoranda of juror interviews, Mr. Murdaugh's counsel are concerned that the Court may not have sufficient information to examine the jurors effectively. The interview memoranda are sometimes grossly inaccurate. For example, Ms. McElveen told investigators that court staff asked her to speak to Ms. Hill about her excessive contacts with jurors, including at Walmart, and that Ms. Hill was working on a book deal during trial and gave an author a seat with court staff in the well of the courtroom from where she could see sealed exhibits, overruling objections by stating "well they'll

just have to do what I want, today."[2] For some reason, none of that made it into the interview memorandum. Thus, to examine jurors effectively, the Court would at least need to watch the entire SLED interview for each testifying juror, and to the extent the jurors speak about other jurors or staff, the interviews for those other jurors or staff as well. With only 19 days before the evidentiary hearing, counsel is best equipped to review this information in preparation for questioning, rather than the Court.

The State originally argued jurors should be examined by the Court, and has argued the Court should question them "with a mind to at least (1) whether the communication actually occurred and, if so, its context and substance; (2) the number of jurors exposed to the improper communication; (3) the weight of the evidence properly before the jury; and (4) the likelihood that curative measures were effective in reducing the prejudice." Resp. Opp'n Mot. New Trial 6. Only the first topic is appropriate. The only relevant subject for juror examinations is whether Ms. Hill made improper communications on the merits of the case, including anything serving to corroborate or refute testimony on that subject. The number of jurors exposed to the communications is irrelevant so long as it is at least one deliberating juror. *See Parker*, 385 U.S. at 366. The "weight of the evidence properly before the jury" and "the likelihood that curative measures were effective in reducing the prejudice" are entirely irrelevant under the controlling legal standard, *see Cameron*, 311 S.C. at 207–08, 428 S.E.2d at 12, and appear to solicit testimony inadmissible under Rule 606(b) of the South Carolina Rules of Evidence.

In its original prehearing brief, the State moved away from its position in its response to the motion for a new trial, to argue that the Court should only ask jurors (1) if they voted guilty,

[2] Ms. McElveen was not a juror, of course, but is used as an example in this brief to preserve juror privacy. The point is the same for any SLED interview.

and (2) whether their verdict was "based solely on the testimony, evidence, law, and arguments of counsel presented at trial." Prehearing Br. 4. The State's position appears to be a repackaging of its argument that there should not be an evidentiary hearing at all, which the Court has rejected. Obviously, an evidentiary hearing has no point if no one is going to ask any juror whether Ms. Hill made the statements Mr. Murdaugh alleges she made. The State appears to agree that if jurors indeed will be asked substantive questions, it may be necessary for them to be examined by counsel. *Id.* at 5 (noting that "additional inquiry" would be "with questions from the Court, questions suggested to the Court by counsel, and questioning by counsel").

If testimony is needed from Judge Newman, Mr. Murdaugh believes it should also be conducted by the Court *in camera*, to preserve the dignity of his judicial office.

The default method of examining witnesses at an adversarial proceeding is through questioning by counsel for the parties. *See* Rule 614(b), SCRE ("***When required by the interests of justice only***, the court may interrogate witnesses." (emphasis added)). All witnesses should be so examined unless there is good cause to reserve examination to the Court. *Id.* Mr. Murdaugh does not believe good cause exists to reserve the examination of any witness to the Court, other than Judge Newman and possibly the jurors. Ms. Hill especially is an elected public official accused of malfeasance in office, whom Mr. Murdaugh has accused of violating his constitutional rights in a criminal proceeding, and who has voluntarily provided an affidavit directly contradicting Mr. Murdaugh's claims. She does not need to be shielded from scrutiny in the same manner as anonymous jurors involuntarily summoned to serve. She is a witness against Mr.

Murdaugh in a criminal case whom Mr. Murdaugh has a right to challenge in open court. *See* Rules 611(b) & 614(b), SCRE.[3]

## VI. Any other issues regarding the conduct for the hearing of the merits of the motion.

### A. Mr. Murdaugh needs wide latitude in impeaching Ms. Hill.

Ms. Hill has provided an affidavit that contradicts the sworn and unsworn statements of many jurors. As a result, Ms. Hill's credibility will be a central issue in this evidentiary hearing. For this reason, counsel requests wide latitude in examining Ms. Hill, if she is called as a witness by the State.

Mr. Murdaugh anticipates the only person who can directly contradict jurors who witnessed Ms. Hill's jury tampering is Ms. Hill.

Mr. Murdaugh therefore must present evidence corroborating Juror 630's testimony, including testimony from the alternate juror and Juror 785, who was dismissed on the last day of trial, and possibly testimony from court staff. He must also present evidence impeaching Ms. Hill.

Evidence impeaching Ms. Hill includes her emails, text messages, and telephone records, testimony from court staff, testimony and documentary evidence from persons involved in the production of her book, complaints against Ms. Hill and the results of investigations into Ms. Hill's wrongdoing. It includes evidence related to her involvement in the removal of Juror 785—not

[3] Additionally, although the Sixth Amendment Confrontation Clause does not apply to a motion for a new trial, *see, e.g.*, *United States v. Boyd*, 131 F.3d 951, 954 (11th Cir. 1997), Article I, § 14 of the South Carolina Constitution provides that "any person charged with an offense shall enjoy the right . . . to be fully heard in his defense by himself or by his counsel." This right would be violated if the Court were to credit Ms. Hill's testimony against Mr. Murdaugh without allowing his counsel the opportunity to challenge her testimony through cross-examination. *Cf. State v. Hester*, 137 S.C. 145, 134 S.E. 885, 899 (1926) (observing the "right to cross-examine is one which must remain inviolate," "[t]he power of cross-examination . . . certainly is one of the most efficacious, tests which the law has devised for the discovery of truth," and it is "[o]ne of the most inestimable rights by which a man may maintain his defense" (internal quotation marks omitted)). However, if the Court were to decide Ms. Hill's testimony cannot be credited, her testimony would not be relevant to any issue and Mr. Murdaugh would have no right to examine her.

because the removal itself is grounds for a new trial, but because Juror 785 has averred Ms. Hill was involved with her removal in an improper and dishonest way that, if true, would serve to impeach Ms. Hill's credibility. Both witnesses and documentary evidence regarding the allegedly fabricated Facebook post, which ultimately did not cause Juror 785 to be removed, and witnesses and documentary evidence regarding Juror 785's alleged statements to her tenants during trial, which ultimately did cause Juror 785 to be removed, are relevant to Ms. Hill's credibility. Evidence impeaching Ms. Hill includes evidence demonstrating her personal interest in the outcome of the trial and willingness to engage in obviously inappropriate conduct to further that personal interest. *See* Rule 606(c), SCRE ("Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.") For example, emails released to journalists in response to FOIA requests show that Ms. Hill was sending emails directly to prosecutors and law enforcement witnesses for the State during trial about the merits of testimony from defense witnesses under examination at that moment. Emails from B. Hill to C. Waters, C. Jewell, & C. Ghent (Feb. 21, 2023) (FITSNEWS_FOIA_000624 & _000861. Evidence impeaching Ms. Hill may also include testimony from Judge Newman.

There will be much evidence to present that impeaches Ms. Hill. The State may argue presenting it all would be cumulative or repetitive or otherwise unnecessary. But evidence is cumulative only when it "supports a fact established by the existing evidence." Evidence, Black's Law Dictionary (11th ed. 2019). So long as the Court is prepared to give Ms. Hill's testimony any weight, her lack of credibility is not "established" and evidence impeaching her cannot be

considered cumulative or repetitive.[4] Courts have underscored the noncumulative nature of additional evidence when a trial features a "swearing match" between witnesses on both sides. *See, e.g.*, *English v. Romanowski*, 602 F.3d 714 (6th Cir. 2010) (rejecting state court's conclusion that witness's testimony was cumulative; the state court "failed to recognize that the trial was essentially a swearing match" between witnesses on both sides); *Montgomery v. Petersen*, 846 F.2d 407, 413, 415 (7th Cir. 1988) (holding that, given the "swearing match" between the witnesses, the uncalled witnesses were not cumulative because they would have "directly contradicted the state's chief witness," while providing the defense with a disinterested alibi witness who could have caused the jury to "view[] the otherwise impeachable testimony of the twelve [defense] witnesses in a different light"); *Nealy v. Cabana*, 764 F.2d 1173, 1174 (5th Cir. 1985) (holding that counsel's failure to investigate and call alibi witnesses was prejudicial "[b]ecause the trial boiled down to a swearing match . . . and because the missing testimony might have affected the jury's appraisal of the truthfulness of the state's witness and its evaluation of the relative credibility of the conflicting witnesses").

**B. Counsel for non-parties should not be permitted to participate in these proceedings.**

Attorney Eric Bland has requested to participate in these proceedings as counsel for certain jurors who may be called to testify as witnesses. Mr. Murdaugh objects to Mr. Bland's request. This is a criminal proceeding brought by the State against the Defendant. Mr. Bland seeks a level of non-party participation (e.g., participating in status conferences) beyond even the rights afforded victims under Article I, § 24 of the South Carolina Constitution, and the jurors he represents are

[4] If the Court were to decide pre-hearing that it cannot credit Ms. Hill over the sworn testimony of any juror, it is likely that the hearing would consist only of *in camera* examination of jurors. This would also avoid potential Fifth Amendment issues regarding Ms. Hill. It is unlikely the State would agree to that since it is likely the State can prevail ***only*** if the Court finds Ms. Hill to be credible.

not crime victims. In discussing his request in the media, Mr. Bland stated on his podcast Cup of Justice, episode 61 (Dec. 26, 2023), that Justice Toal, the newly assigned presiding judge in this matter "has friends sometimes to reward and enemies to punish" and "I worry about what procedures are going to be put in place, the fact that there was a status conference and you know I represent four jurors and I wasn't even told of that status conference, and I believe that my jurors have the right to legal representation in any type of proceeding dealing with Alex Murdaugh's verdicts where they're going to have their verdicts questioned." His stated intent is not to protect the personal interests of his clients as witnesses, but to advocate to sustain "their" verdict. To allow a publicity-seeking lawyer for non-victim private parties to intervene in this criminal case and advocate against Mr. Murdaugh as an additional opposing party would violate Mr. Murdaugh's procedural due process rights under Article I, § 3 of the South Carolina Constitution and the Fourteenth Amendment to the United States Constitution.

The jurors are simply witnesses with no more right to participate in this criminal proceeding than witnesses in any other criminal case. Unlike typical witnesses, they do have a right to a degree of anonymity so it could be appropriate to allow them to be heard through counsel if the Court were inclined to strip them of that anonymity. But neither party is asking the Court to do that, and the Court has made clear it is not inclined to do that. Mr. Murdaugh does not seek to subpoena telephone records or other personal records regarding them, and if he decided to do so in the future, their lawyers of course could move to quash the subpoena. Otherwise, they have no cognizable interest in these proceedings, and if there is such an interest the Attorney General would be adequate to assert it.

The reason to hold an evidentiary hearing on Defendant's motion for a new trial is to protect Mr. Murdaugh's constitutional right to a fair judicial proceeding. It would defeat that purpose if

the proceedings were allowed to devolve into a speaker's corner for lawyers who want to appear on television even more than they already do. Mr. Murdaugh therefore asks the Court to limit the participation of any witness-retained lawyer to the extremely limited role traditionally allowed to a lawyer representing an innocent bystander witness in a criminal case. Further, he requests that the Court order the Clerk of Court not to accept any filings in this matter from any non-parties without leave of the Court obtained prior to filing.

## VII. Responsive arguments on decided or moot issues presented for issue preservation

### A. The Court must hold an evidentiary hearing.

The State's response argues Mr. Murdaugh has failed to show that he is entitled to an evidentiary hearing. Resp. Opp'n Mot. New Trial 19–21. The Court has instructed counsel that it has "already decided an evidentiary hearing will occur." Nevertheless, because the State has made the argument in a filed memorandum and no filed order has addressed it directly, Mr. Murdaugh provides the following rebuttal for preservation purposes. As the State correctly argued before the Court of Appeals, the standard to suspend the direct appeal and for leave to file a motion for a new trial is a prima facie showing of an entitlement for relief. Return to Motion to Suspend Appeal and for Leave to File Motion for New Trial, *State v. Murdaugh*, Appellate Case No. 2023-000392 (Sept. 15, 2023) (citing *State v. Butler*, 261 S.C. 355, 358, 200 S.E.2d 70, 71 (1973)). Mr. Murdaugh agreed that is the correct standard. Reply to the State's Return, *Murdaugh*, Appellate Case No. 2023-000392 (Sept. 21, 2023) (quoting *State v. Ford*, 301 S.C. 485, 491, 392 S.E.2d 781, 784 (1990) ("In order to obtain leave from this Court to move for a new trial based on after-discovered evidence, an appellant must make a *prima facie* showing that a new trial is warranted."). The Court of Appeals concluded that standard was satisfied when it granted the motion to suspend the appeal and for leave to file the instant motion. Order, *Murdaugh*, Appellate Case No. 2023-000392 (Oct. 17, 2023). There has been no material change to the law or to the record before the Court

(other than the discovery of yet more examples of Ms. Hill's dishonesty and malfeasance in office) since the Court of Appeals' order. It therefore is the law of the case that a prima facie case has been made. *Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997) ("The doctrine of the law of the case prohibits issues [that] have been decided in a prior appeal from being relitigated in the trial court in the same case."). Where a prima facie case is made, an evidentiary hearing is required. *Barnes v. Joyner*, 751 F.3d 229, 242 (4th Cir. 2014) ("[W]hen the defendant presents a credible allegation of communications or contact between a third party and a juror concerning the matter pending before the jury" the defendant has an "entitlement to an evidentiary hearing." (citing *Remmer*, 347 U.S. 227)). The Court therefore must hold an evidentiary hearing on the merits of the motion for a new trial.

**B. The State's motions to strike should be denied.**

In its response to the motion for a new trial, the State moves to strike (1) affidavits of paralegal Holli Miller, (2) anything statements regarding jury deliberations, and (3) any claims regarding Facebook posts, Ms. Hill's book deal, or "post-trial media interactions." It is unclear what purpose striking anything from the motion for a new trial would accomplish, given that it is the law of the case that a prima facie case has been made, that an evidentiary hearing therefore is required, that an evidentiary hearing has been scheduled, and that the motion will be decided on the evidence presented to the Court at the hearing and not on attorney argument made before the Court receives any evidence whatsoever. Nevertheless, since the State makes the argument, Mr. Murdaugh will briefly rebut it.

*First*, the affidavits of Holli Miller were offered only as evidence as to what certain jurors would say if called to testify at an evidentiary hearing. Of course, they are hearsay. All affidavits from persons who have not (yet) testified in court are hearsay. Rule 801(c), SCRE ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in

evidence to prove the truth of the matter asserted."). Hearsay is just an objection to the admissibility of evidence; it is not a basis to strike a filing. The purpose of Ms. Miller's affidavits was to help obtain an evidentiary hearing, which has been accomplished. Obviously, they cannot prove Mr. Murdaugh's is entitled to a new trial. Witness testimony in a courtroom will do that.

*Second*, there is no basis for the State's motion to strike references to jury deliberations. Juror 630's affidavit was freely given to support a public filing. Other jurors have spoken about the deliberations in national television interviews. Such statements may or may not be admissible as evidence at the merits evidentiary hearing, but Rule 606 of the South Carolina Rules of Evidence in no way supports striking public statements from a motion memorandum.

*Third*, the State correctly notes that the only relevance of the Facebook post Ms. Hill fabricated to remove Juror 785, her book plans, or her other post-trial actions, is to impeach Ms. Hill. The State argues attacking Ms. Hill's character is "an outlandish theory" against "a dedicated public servant" that is "Immaterial, Impertinent, and Scandalous" and so should be struck. That is incorrect. Ms. Hill likely is the only witness the State can offer who can directly contradict Juror 630's averments of jury tampering, and Ms. Hill has offered an affidavit doing exactly that. Resp. Opp'n Mot. New Trial Ex. A. Her credibility is the crux of the matter before the Court. The purpose of the evidentiary hearing is to allow the Court to decide whether it believes the word of Ms. Hill more than it believes the sworn testimony of one or more jurors. Anything that impeaches Ms. Hill is relevant. And the State's rhetoric about Ms. Hill being "a dedicated public servant" unfairly maligned has not aged well in the two months since the State filed its response, to put it mildly. Ms. Hill is alleged to have stolen money, illegally sold access to the courthouse, conspired with her son to conduct illegal wiretaps, and even had her book removed from publication because of her plagiarism.

## VIII. Conclusion

For the foregoing reasons, Mr. Murdaugh respectfully submits that when Ms. Hill's jury tampering is proven at the evidentiary hearing, the Court must grant the motion for a new trial.

Respectfully submitted,

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