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

Defendant Richard Alexander Murdaugh, through undersigned counsel hereby submits this pre-hearing brief as the Court requested at the December 21, 2023, telephonic status conference.

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 by the defense 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.

II. Argument

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 by the defense during his murder trial, South Carolina and federal law require that Mr. Murdaugh receive a new trial, irrespective of 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 jurors brought with them into the trial, the 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 created by state action during voir dire (*e.g.*, *State v. Bryant*, 354 S.C. 390, 581 S.E.2d 157 (2003)),

resulted 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 from initiating inappropriate communications during trial (*e.g.*, *Smith v. Phillips*, 45 U.S. 209 (1982)), or the like. The present case is different. Here, a state official argued the merits of the evidence presented to jurors during trial outside of 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 rare 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 of 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). 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).
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> 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).
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> 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. The applicable standard of proof is a preponderance of the evidence.

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)). 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. 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.

D. 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 appears to have rejected that argument already because it has set dates for the evidentiary hearing. Nevertheless, because the State made the argument, Mr. Murdaugh will briefly rebut it. 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.

E. 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) any 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.

F. To prevail, Mr. Murdaugh must prove by a preponderance of the evidence that Ms. Hill made statements to at least one deliberating juror about the merits of the evidence presented at trial.

The issue presented to the Court is not what happened during jury deliberations. It is what happened during the presentation of evidence at trial. Mr. Murdaugh anticipates at least one deliberating juror will testify that Ms. Hill advocated against Mr. Murdaugh in improper communications to jurors during trial, and that at least two other persons who were part of the jury at the time will corroborate that testimony. Such communications include telling jurors not to be "misled" by evidence presented in Mr. Murdaugh's defense and not to be "fooled by" Mr. Murdaugh's testimony in his own defense. Based on the chart of juror interviews provided in the State's response to the motion for a new trial (at pages 21–22), at least five jurors (including the dismissed juror and alternate) will testify that Ms. Hill told jurors to watch Mr. Murdaugh's body language when he testified. Mr. Murdaugh also anticipates juror testimony that Ms. Hill asked jurors for their opinions about Mr. Murdaugh's guilt or innocence, that she pressured jurors to reach a quick verdict, telling them from the outset of their deliberations that it "shouldn't take them long," and that she had frequent private conversations with the jury foreperson. It is likely several jurors will testify that they never heard any such jury tampering and that they do not believe it occurred. But that is not a direct contradiction of the testimony of jurors who say they saw and heard it. 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 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. 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) (attached as **Exhibit A**). Evidence impeaching Ms. Hill likely also includes testimony from Judge Newman.

It is possible that Ms. Hill will respond to one or more questions at the evidentiary hearing by asserting rights under the Fifth Amendment. She should not be permitted to do so. She waived the right to assert the Fifth Amendment in this proceeding when she submitted an affidavit specifically denying each allegation against her. *See Brown v. United States*, 356 U.S. 148, 154–55 (1958) (holding that if a witness offers testimony voluntarily "his credibility may be impeached

and his testimony assailed like that of any other witness, and the breadth of his waiver is determined by the scope of relevant cross-examination"). If she asserts the Fifth Amendment in response to any question, she should be instructed to answer the question, and if she refuses, her testimony should be struck in its entirety.

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.[1] 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

[1] 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 Court-conducted *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.

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").

Currently, defense counsel anticipates identifying the trial transcript and exhibits from trial for use at the evidentiary hearing. However, until such time as the State provides Mr. Murdaugh with its discovery in this matter, his counsel is unable to provide the Court with a complete list of exhibits and witnesses, or a list of subpoenas he needs. Once the State produces its discovery, defense counsel will supplement this response immediately to provide a complete list, including a list of subpoenas he needs, if any are needed. It is likely much of the information he would otherwise seek by subpoena has already been compiled by the State. To the extent more subpoenas are needed, it would expedite the process if the Court were to authorize Mr. Murdaugh's counsel to issue subpoenas duces tecum returnable before the evidentiary hearing or, depending on the recipient, to issue the requested subpoenas itself. Mr. Murdaugh at present does not anticipate requesting a subpoena for documentary discovery regarding any deliberating juror but cannot be certain before receiving discovery from the State.

The State has had months in which to use the tools available to law enforcement to conduct discovery regarding this motion as well as to investigate the numerous independent complaints of wrongdoing against Ms. Hill. It will be 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 are voluntary statements made by jurors and other witnesses willing to talk to his lawyers and information published by journalists. To be prepared to go forward on the January 29 date set for the evidentiary hearing, he urgently needs the State to produce its discovery and to receive authorization to issue his own subpoenas as soon as possible.

G. Jurors (and Judge Newman, if necessary) should be examined *in camera* by the Court, but other witnesses should be examined by counsel in open court.

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 believes good cause exists for the Court to conduct the examination of jurors, including the dismissed juror and alternate juror, itself, *in camera*, with a redacted transcript provided to the public. In addition to asking its own questions, the Court could accept 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. 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. Further, jurors may be unsettled by being interrogated by the same lawyers they watched interrogate witnesses for six weeks. Examination by the Court avoids that issue.

The State agrees 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.

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.

Mr. Murdaugh does not believe good cause exists to examine any other witness, including Ms. Hill, in any fashion other than the traditional means of attorney questioning in open court. 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.[2]

[2] 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.

H. 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 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.

III. 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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