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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

COLLETON COUNTY
Court of General Sessions
The Honorable Jean Hoefer Toal, Chief Justice (Ret.)

Appellate Case No. 2024-000576

Richard Alexander Murdaugh.....Appellant,

v.

The State of South Carolina.....Respondent.

APPELLANT RICHARD ALEXANDER MURDAUGH'S
MOTION FOR CERTIFICATION UNDER RULE 204(b), SCACR

Pursuant to Rule 204(b) of the South Carolina Appellate Court Rules, Petitioner Richard Alexander Murdaugh, through undersigned counsel, respectfully moves the Court to certify this case for review before it is determined by the Court of Appeals. This case concerns an issue of significant public interest and a legal principle of major importance warranting certification under Rule 204(b). The issue of significant public interest is whether the verdict returned after Mr. Murdaugh's internationally televised murder trial should be overturned due to unprecedented jury tampering by a state official, the former Colleton County Clerk of Court. The legal principle of major importance is whether it is presumptively prejudicial for a state official to secretly advocate for a guilty verdict through *ex parte* contacts with jurors during trial, or whether a defendant,

having proven the contacts occurred, must also somehow prove the verdict would have been different at a hypothetical trial in which the surreptitious advocacy did not occur.

I. Factual and Procedural Background

Mr. Murdaugh, once a prominent member of the South Carolina Bar, admittedly stole money from clients, his law firm and others to support a severe opioid addiction. His law firm confronted him about his thievery on September 3, 2021. He resigned from the firm and, after a failed suicide attempt assisted by his drug dealer, entered drug rehabilitation. He was arrested immediately upon leaving a rehabilitation facility and has been incarcerated ever since.

Three months earlier, on June 7, 2021, Mr. Murdaugh's wife, Maggie Murdaugh, and younger son, Paul Murdaugh, were brutally murdered at approximately 9 p.m. at the dog kennels on their rural family property in Colleton County. Mr. Murdaugh was indicted for the murders on July 14, 2022, and the trial commenced on January 23, 2023. The Honorable Clifton B. Newman presided. The State claimed Mr. Murdaugh was confronted at his law firm earlier that day about missing attorney's fees, and that he came home and killed his wife and son to distract a bookkeeper investigating those fees and to reduce his financial exposure in a negligent entrustment suit filed over two years earlier regarding a boat which Paul allegedly operated while intoxicated, resulting in the horrible death of a young woman. Mr. Murdaugh admits all allegations of theft against him, but vehemently denies murdering his family. There is no direct evidence of Mr. Murdaugh's guilt. There were no witnesses to the crime, no videos or photos of the crime occurring, no recovered murder weapons, no blood or DNA evidence establishing guilt. As Judge Newman stated during trial, "[t]his is a circumstantial case." Trial Tr. 2191:4–5.

After six weeks of trial, the case was submitted to the jury at about 3:45 pm on March 2, 2023. The verdict was returned early that evening. Jurors' television interviews indicate the actual

deliberations took less than one hour. Mr. Murdaugh timely appealed the verdict. That appeal is separate from the instant appeal. *State v. Murdaugh*, Appellate Case No. 2023-000392.

On August 1, 2023, the then-Colleton County Clerk of Court, Rebecca Hill, published a book, *Behind the Doors of Justice*, about Mr. Murdaugh's trial. She had been planning to write a book about the trial even before it began. Evid. H'rg Tr. 181:11–183:19 (**Exhibit A**). She repeatedly said that a guilty verdict would sell more books, and that she needed to sell books because "she needed a lake house." *Id.* 181:20–183:1. The book caused some jurors to come forward to describe Ms. Hill's efforts to obtain her desired guilty verdict through jury tampering during trial. Jurors stated that after the State rested and the defense began it case, Ms. Hill entered the jury rooms often, telling jurors not to let the defense "throw you all off," or "distract you or mislead you," and telling them "not to be fooled" by Mr. Murdaugh's testimony in his own defense. *Id.* 52:7–18, 203:18–25, 209:25–210:18; Mot. New Trial Ex. A (Juror 630 Aff., Aug. 14, 2023) & Ex. H (Juror 785 Aff., Aug. 13, 2023) (**Exhibit B**); Juror 741 Aff., Jan. 29, 2024 (**Exhibit C**).

On September 5, 2023, Mr. Murdaugh filed a motion to suspend his appeal and for leave to file a motion for a new trial based on the evidence of Ms. Hill's jury tampering. The Court of Appeals granted the motion and Mr. Murdaugh filed his motion for a new trial on October 27. On November 1, he petitioned the Court for a writ of prohibition to prohibit Judge Newman from adjudicating the new trial motion, based on public statements Judge Newman made after the jury returned guilty verdicts. On November 15, the Court denied the petition as moot because Judge Newman recused himself from hearing the new trial motion. On December 18, the Chief Justice appointed retired Chief Justice Jean H. Toal to serve as the circuit judge hearing Mr. Murdaugh's motion for a new trial.

The circuit court ordered an evidentiary hearing and the parties submitted extensive briefing in advance of the hearing. Appellant's Br. (**Exhibit D**); Resp't's Br. (**Exhibit E**); Appellant's 2d Br. (**Exhibit F**); Resp't's 2d Br. (**Exhibit G**); Appellant's Reply Br. **Exhibit H**). The circuit court held a "prehearing procedure" on January 16, 2024, to determine, *inter alia*, "[w]ho has the burden of proof in this matter, and what must be shown to meet that burden of proof, and what must then be shown to contest what has been shown and proved?" Prehearing Hr'g Tr. 3:1–2, 5:22–25 (**Exhibit I**). At the prehearing hearing, the circuit court ruled that Mr. Murdaugh bears the burden to prove actual prejudice in the verdict rendered. *Id.* 21:9–20. It further ruled Mr. Murdaugh would not be permitted to call any witnesses, including eyewitnesses to Ms. Hill's jury tampering, or to examine any jurors called by the court. *Id.* 51:9–54:2. Instead, the circuit court would call and itself examine each juror; the only other witness would be Ms. Hill and any cross-examination of her would be strictly limited. *Id.* 41:22–42:2, 43:3–45:14, 46:25–51:7, 49:22–23.

On January 24, 2024, the circuit court communicated its proposed questions to jurors to the parties. Mr. Murdaugh's counsel objected to the questions and to the rulings made at the prehearing hearing by letter dated January 25, 2024 (**Exhibit J**). The circuit court reconsidered its prior rulings and allowed Mr. Murdaugh to call the alternate juror and Barnwell County Clerk Rhonda McElveen and allowed the parties an opportunity for cross-examination of witnesses who were not deliberating jurors.

The evidentiary hearing was held on January 29, 2024. A single juror testified one business day earlier, on January 26, to accommodate a scheduling conflict. The jurors (identified by anonymous letters) testified as follows:

Jurors C, F, L, E, O, Y, W, Q, and K testified that they did not hear Ms. Hill comment on the merits of the case before the verdict.

Juror P testified that he heard Ms. Hill tell jurors, regarding Mr. Murdaugh's decision to testify in his own defense, to "watch his body language." Evid. Hr'g Tr. 77:22–78:7 (Ex. A). Juror P testified the comment did not affect his verdict.

Juror X testified that she heard Ms. Hill comment, regarding Mr. Murdaugh's decision to testify in his own defense, that it was rare for a defendant to testify in a criminal case and that "this is an epic day." *Id.* 23:9–24:3. Juror X testified the comments did not affect her verdict.

Juror Z testified that she heard Ms. Hill comment, regarding Mr. Murdaugh's decision to testify in his own defense, to watch Mr. Murdaugh's actions and to watch him closely. Juror Z testified that the comments did affect her verdict:

> Q. All right. Was your verdict influenced in any way by the communications of the clerk of court in this case[?]
>
> A. Yes, ma'am.
>
> Q. And how was it influenced?
>
> A. To me, it felt like she made it seem like he was already guilty.
>
> Q. All right, and I understand that, that that's the tenor of the remarks she made. Did that affect your finding of guilty in this case?
>
> A. Yes, ma'am.

Id. 46:6–15. The circuit court then examined Juror Z regarding her affidavit attached to Mr. Murdaugh's motion for a new trial, and she affirmed each paragraph therein. The circuit court then asked,

> Juror Z, I asked you previously was your verdict on March 2, 2023, influenced in any way by communications from Becky Hill, the clerk of court. You answered that question yes. In light of what you said in the affidavit, which is:

I had questions about Mr. Murdaugh's guilt but voted guilty because I felt pressured by the other jurors.

Is that answer that I just read a more accurate statement of how you felt?

MR. HARPOOTLIAN: Object to the form, Your Honor.

THE COURT: Overruled.

A. Yes, ma'am.

Q. All right. So, you do stand by the affidavit?

A. Yes, ma'am.

Q. Very good.

After Juror Z left the courtroom, Mr. Murdaugh's counsel objected:

MR. HARPOOTLIAN: Your Honor, we objected to the questioning because this juror gave two statements under oath, one in an affidavit and one here to you today. The one here to you today was Becky Hill influenced her verdict.

THE COURT: Yes.

MR. HARPOOTLIAN: The one she gave in an affidavit six months ago was based on jurors. It could be both. Your Honor picked out the one in the affidavit from six months ago and said is that a more accurate statement. That presupposes and suggests to her what she should say. And we believe that this, this juror's testimony -- and, Your Honor, I'm afraid what you're going to say is, well, she said the affidavit was more accurate than what she testified under oath here today and, therefore, I'm not going to consider her testimony, and I think that's where we're heading here.

I'd ask you to bring her back in, explain to her there's nothing wrong with it both being true.

THE COURT: I decline to do that and overrule the objection.

Later during the hearing, Juror Z, through her own counsel, provided an affidavit averring,

1. I would like to clarify my testimony today.

2. As I testified, I felt influenced to find Mr. Murdaugh guilty by reason of Ms. Hill's remarks, before I entered the jury room.

3. Once deliberations began as I stated in paragraph 10 of my earlier affidavit, I felt further, additional pressure to reach the guilty verdict.

Juror Z Aff., January 28, 2024 (**Exhibit K**). Although the circuit court introduced Juror Z's prehearing affidavit into evidence on its own motion, it refused to allow Juror Z's affidavit of that day into evidence or to allow any further testimony from Juror Z.

Ms. Hill testified after the jurors. She denied engaging in any jury tampering. She also denied stating that she wanted a guilty verdict to promote book sales. She admitted she plagiarized portions of her book and that her profits from its sale in the six months before it was withdrawn from publication because of her plagiarism were approximately $100,000. Evid. Hr'g Tr. 133:8–12 (Ex. A). She admitted the book contained unfounded statements included for "poetic license" or "literary ease." *Id.* 125:18–20, 137:17–19. Examination by the circuit court revealed that Ms. Hill's denial, during direct examination, of questioning a juror during the murder trial was not truthful, and that she did want a guilty verdict. *Id.* 146:18–159:3.

Barnwell County Clerk of Court Rhonda McElveen testified next to rebut Ms. Hill's denial that she wanted a guilty verdict to promote book sales. Ms. McElveen was assisting in the courtroom during the murder trial. She testified,

> Q. And did she discuss with you -- what, if anything, did she discuss with you about how she felt the verdict should turn out to be in the Murdaugh trial vis a vis in reference to the book, what would help the book?
>
> A. A guilty verdict.
>
> Q. Tell the judge and, and me what exactly she said to you that you remember. This is prior to the trial.
>
> A. Okay. Well, first of all, she said we might want to write a book because she needed a lake house and I needed to retire, and from then, further conversation was that a guilty verdict would sell more books, and we left it at that. This was before even in December.

> Q. And, and when, when -- did she ever say that again to you during this -- the, the weeks you spent there?
>
> A. Several times. It could be said -- it was, you know, amongst friends in her office or we might be having dinner, that kind of stuff, but that's about it.
>
> Q. That she needed a guilty verdict to sell more books?
>
> A. That would be the best way to sell books, yes, sir.
>
> Q. The best way to sell books.
>
> Now, during this -- during this process, did she ever express to you an opinion on whether or not, in fact, was Mr. Murdaugh guilty of the murders of his son and his, his wife?
>
> A. Yes, sir.
>
> Q. Tell me. Tell me what she said and if you remember when.
>
> A. I don't exactly remember when. I know it's over half of the trial had already happened, but the evidence was coming forth that it looked like he might be guilty. She made a comment that guilty verdict would be better for the sale of books.

Id. 181:20–183:1. She also testified that Ms. Hill made comments to her, like "'[d]on't be fooled by the evidence presented by Mr. Murdaugh's attorneys," identical to statements reported by some jurors. *Id.* 184:25–185:18. And she testified that Ms. Hill insisted on allowing a book writer (who wrote the forward to Ms. Hill's book) to sit in the well of the court during trial, where she could see sealed exhibits, under the subterfuge of being a Sunday school teacher. *Id.* 186:12–190:10.

The final witness was the alternate juror, Juror 741. She testified that Ms. Hill told jurors "the defense is about to do their side" and "[t]hey're going to say things that will try to confuse you" but "[d]on't let them confuse you or convince you or throw you off." *Id.* 203:18–204:3.

At the conclusion of the hearing, the circuit court ruled from the bench:

> Did Clerk of Court Hill make comments to any juror which expressed her opinion what the verdict would be? Ms. Hill denies [doing so] and so the question becomes was her denial credible.

> I find that the clerk of court is not completely credible as a witness. Ms. Hill was attracted by the siren call of celebrity. She wanted to write a book about the trial and expressed that as early as November 2022, long before the trial began. She denies that this is so, but I find that she stated to the clerk of court Rhonda McElveen and others her desire for a guilty verdict because it would sell books. She made comments about Murdaugh's demeanor as he testified, and she made some of those comments before he testified to at least one and maybe more jurors.
>
> . . .
>
> The clerk of court allowed public attention of the moment to overcome her duty.

Id. 251:13–252:1, 23–24.

The circuit court nevertheless denied the motion for a new trial, reasoning that there is no presumption of prejudice from tampering with jurors during a trial about the matter pending before the jury and Mr. Murdaugh failed to prove that Ms. Hill's comments actually changed the jury's verdict. The circuit court discounted the testimony Juror Z, who said Ms. Hill's comments did affect her verdict, because she "was ambivalent in her testimony." *Id.* 252:13. In a State-drafted written order entered 66 days after the ruling from the bench, the circuit court further ruled in passing that "this Court also find[s] that any possible presumption of prejudice was overcome," without any reference to any evidence presented at the evidentiary hearing. Order 24, Apr. 4, 2024 (**Exhibit L**). Mr. Murdaugh timely appealed the order on April 11.

On March 25, 2024, Ms. Hill resigned from office. In May 2024 it was reported that the State Ethics Commission had referred ethics complaints against her for criminal prosecution.

II. <u>Legal Standard</u>

Rule 204(b) of the South Carolina Appellate Court Rules provides,

> (b) Certification by Supreme Court. In any case which is pending before the Court of Appeals, the Supreme Court may, in its discretion, on motion of any party to the case, on request by the Court of Appeals, or on its own motion, certify the case for review by the Supreme Court before it has been determined by the Court of Appeals. Certification is normally appropriate where the case involves an issue of significant public interest or a legal principle of major importance. The effect of

> such certification shall be to transfer jurisdiction over the case to the Supreme Court for all purposes.

III. Argument

The circuit court erred when denying Mr. Murdaugh's motion for a new trial by ruling that South Carolina courts should disregard binding precedent of the U.S. Supreme Court. In *Remmer v. United States*, the U.S. Supreme Court held (unanimously) that in a criminal case, any "tampering . . . with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial" and "the burden rests heavily upon the Government to establish . . . that such contact with the juror was harmless." 347 U.S. 227, 229 (1954). The Fourth Circuit holds *Remmer* is "clearly established federal law." *Barnes v. Joyner*, 751 F.3d 229, 243 (4th Cir. 2014). The circuit court however ruled that *State v. Green*, 432 S.C. 97, 851 S.E.2d 440 (2020), directs South Carolina courts to ignore *Remmer*:

> THE COURT: [The] South Carolina Supreme Court said very clearly we do not go by the guidance of the 1950s case of *US v. Remmer*.
>
> MR. HARPOOTLIAN: That's -- we do not believe that's what Justice Kittredge has said in [*State v. Green*] ---
>
> THE COURT: He said it straight out as clear as a bell can be, but I've ruled on that.

Evid. Hr'g Tr. 100:19–25 (Ex. A).

The Court however has not split with the Fourth Circuit to instruct South Carolina courts to disregard *Remmer*. In *Green* the Court merely "decline[d] to adopt the *Remmer* presumption of prejudice in every instance of an inappropriate bailiff communication to a juror" because "not every inappropriate comment by a bailiff to a juror rises to the level of constitutional error," including the inappropriate comments at issue in *Green*, which "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." 432 S.C. at 100–01, 851 S.E.2d at 44. *Green* accords perfectly with recent

Fourth Circuit authority: Under *Remmer* "any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is deemed presumptively prejudicial," but "[t]o trigger this presumption, a defendant must introduce 'competent evidence of extrajudicial juror contacts' that are 'more than innocuous interventions.'" *United States v. Elbaz*, 52 F.4th 593, 606 (4th Cir. 2022) (internal quotation marks omitted), *cert. denied*, 144 S. Ct. 278 (2023).

If the *Remmer* presumption of prejudice ever applies, it must apply where, as here, an elected state official advocates for a guilty verdict in the jury room during trial so that she can personally profit from selling books about the trial. That is not an "innocuous intervention." At the evidentiary hearing, the State failed to meet its heavy burden to overcome the presumption that Ms. Hill's conduct was prejudicial to Mr. Murdaugh's right to a fair trial before an impartial jury that considers only the evidence and argument presented in open court. It did not even try to argue any presumption was overcome. *See, e.g.*, Evid. Hr'g Tr. 230:18–239:19 (closing argument of S. Creighton Waters for the State).

The circuit court nonetheless held that Ms. Hill's jury tampering could not "in any way undermine the fairness and impartiality of [the] six-week trial with its extensive evidentiary presentations, arguments from counsel, and instructions from the trial court" and "any possible presumption of prejudice was overcome by these facts." Order 24 (Ex. L). That holding is both unsound and revealing. It is unsound in that it considers only the evidence against Mr. Murdaugh presented to the jury at trial but not any evidence presented to the court about Ms. Hill's tampering with the jury. It is revealing in that it shows the circuit court misapprehended the issue before it. The prejudice at issue, whether it is presumed or must be proven, is not an incorrect verdict. Jury tampering is prejudicial if it denies the accused a fair trial. The strength of the State's evidence

against the accused cannot cure the denial of his right to a fair trial. *See, e.g., Parker v. Gladden*, 385 U.S. 363, 363–65 (1966) (reversing the Supreme Court of Oregon, where a bailiff told a juror in a murder trial "that wicked fellow, he is guilty," and the state supreme court had held the statement did not require a new trial because it was not shown its prejudiced the outcome of the trial, 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" which "are among the fundamental requirements of a constitutionally fair trial"); *see also, e.g., 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))

But the present motion does argue the errors of the circuit court's decision. This motion merely argues that it decided a matter of major public interest and a legal principle of major importance, justifying immediate review by this Court. On this point, Appellant and Chief Justice Toal may agree: "these matters are best disposed of by the trial judge in a very timely manner so that you may then go to the authorities that really count more than I do. That is the appellate authorities who will decide what the standard in this particular matter is." Evid. H'rg Tr. 254:24–255:4 (Ex. A).

A. Whether Mr. Murdaugh should be retried due to deliberate jury tampering by an elected state official, acting for personal financial gain, is a matter of significant public interest.

Public interest in the Murdaugh case has been extraordinary. Mr. Murdaugh's trial likely was the most high-profile trial in the history of South Carolina. While there have been trials in

this state for arguably worse crimes (*e.g.*, Dylann Roof, Timothy Jones, Susan Smith, Donald "Pee Wee" Gaskins), those persons confessed to their crimes and were never prominent members of the community, and interest in their cases was more focused on the details of their horrific crimes than the operation of the resulting judicial proceedings. Mr. Murdaugh's case, however, has created intense interest in our state's judicial proceedings. Mr. Murdaugh is a fourth-generation son of what for over a century was one of the state's most prominent legal families, and he himself was once president of the South Carolina Trial Lawyers Association. "For many South Carolinians, the interest comes from a strong desire to see justice served to a well-connected man who has only recently acknowledged lies and abuses of power that long went unchecked." James Pollard, *What the Alex Murdaugh murder trial says about the human psyche*, L.A. Times, Mar. 2, 2023. Additionally, the unusual, mysterious, sometimes bizarre and continually evolving facts of this case have created unique interest in Mr. Murdaugh's court proceedings:

> South Carolina state Rep. Tommy Pope, who was the lead prosecutor in the Smith case, said he thinks people are drawn to the Murdaugh saga because of its "truth is stranger than fiction" aspects.
>
> "It's like a soap opera, but it's really happening with real people," said Pope, adding, "This is not entertainment. It is a tragedy and lives were lost."
>
> Pope said the Murdaugh case offered an opportunity to educate the public about the justice system. As an analyst on Court TV during the trial, Pope said the gavel-to-gavel coverage probably helped viewers reach their own conclusions and understand the legal system's "positives" as well as its "warts."

Id.

Of course, Ms. Hill's participation in the trial turned out to be the biggest "wart" of all. It appears nothing like her misconduct has ever happened before. The cases cited in the circuit court's order involving external influences on jurors during trial dealt with minor things like a pamphlet left in the jury room, or an alternate juror mistakenly and briefly being left with the jury

after deliberations began, or one-off inappropriate comments by bailiffs to jurors that did not directly relate to the merits of the case before them. *E.g.*, *Green*, 432 S.C. 97, 851 S.E.2d 440; *State v. Grovenstein*, 335 S.C. 347, 517 S.E.2d 216 (1999); *State v. Kelly*, 331 S.C. 132, 502 S.E.2d 99 (1998); *Blake by Adams v. Spartanburg Gen. Hosp.*, 307 S.C. 14, 413 S.E.2d 816 (1992).[1] None of those hiccups comes close to the elected state official in charge of managing juries engaging in deliberate jury tampering in a murder trial to secure a guilty verdict so she can make money selling books about it.

Ms. Hill's conduct was the subject of a hearing presided over by a former Chief Justice on live television. At that hearing, it was found that Ms. Hill planned to publish a book from the beginning, that she wanted a guilty verdict to boost book sales, that she did engage in jury tampering advocating a guilty verdict, and she did subsequently publish the book for a profit of over $100,000. Ms. Hill has since been publicly accused of many crimes, some relating to the trial and others involving separate misconduct in office, and she has resigned in disgrace. But, as the circuit court stated at the conclusion of the hearing, the question of greatest public interest, whether Ms. Hill's unprecedented misconduct taints the verdict rendered in the highest-profile trial in South Carolina history, has yet to be decided by "the authorities that really count . . . [t]hat is the appellate authorities who will decide what the standard in this particular matter is." Evid. Hr'g Tr. 255:2–4 (Ex. A). And as Mr. Pope said, this case is teaching the public how South Carolina's legal system deals with its "warts." Does it cut them away, however painful it might be, to cure them, or does

[1] One case cited, *State v. Rowell*, 75 S.C. 494, 56 S.E. 23 (1906), dealt with a constable who made a comment on the merits overheard by a juror at a hotel where the jury was being held. But that case predates by several decades both *Remmer* and *Parker v. Gladden*'s incorporation of the Sixth Amendment right to an impartial jury to the states through the Fourteenth Amendment.

it apply makeup to conceal them and learn to live with them? That is a matter of "significant public interest" for this Court to decide. *See* Rule 204(b), SCACR.

B. Whether it presumptively prejudicial for a state official to secretly advocate for a guilty verdict through *ex parte* contacts with jurors during trial, or whether the Court has adopted the minority position in a federal circuit split in opposition to the Fourth Circuit to hold the defendant must also prove the verdict would have been different had the contacts not occurred, is a legal principle of major importance.

Additionally, the Court should certify this appeal because it presents a legal principle of major importance independent of public interest in the facts of the case. Under *Remmer*, any "tampering . . . with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial" and "the burden rests heavily upon the Government to establish . . . that such contact with the juror was harmless." 347 U.S. at 229. But the circuit court held that when there is tampering with a juror during a trial about the matter pending before the jury, prejudice is never presumed but instead always must be proven by the defendant. Prehearing Hr'g Tr. 20:25–21:20 (Ex. I); Order 4–5 (Ex. L). On that issue there is a three-way federal circuit split. The First, Second, Third, Fourth, Seventh, Ninth, Eleventh, and D.C. Circuits and at least 28 states presume prejudice under *Remmer*, although many, like the Fourth Circuit (and as this Court appeared to do in *Green*) decline to apply it categorically to "innocuous" contacts with jurors. *E.g.*, *United States v. Pagán-Romero*, 894 F.3d 441, 447 (1st Cir. 2018) ("It is now well established that less serious instances of potential taint should be addressed using the abuse-of-discretion standard, with the presumption of prejudice being reserved for more serious instances."); *United States v. Greer*, 285 F.3d 158, 173 (2d Cir. 2002) ("It is well-settled that any extra-record information of which a juror becomes aware is presumed prejudicial."); *United States v. Claxton*, 766 F.3d 280, 299 (3d Cir. 2014) ("[A]ny private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is . . . deemed presumptively prejudicial."); *Barnes*, 751 F.3d at 245 (4th Cir. 2014); *United States v.*

Turner, 836 F.3d 849, 867 (7th Cir. 2016) ("[I]n a criminal case, any private communication . . . with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial."); *Godoy v. Spearman*, 861 F.3d 956, 968 (9th Cir. 2017) ("Once a defendant shows a possibly prejudicial contact, the presumption of prejudice attaches, and the burden shifts to the state to prove the contact was harmless."); *Ward v. Hall*, 592 F.3d 1144, 1180 (11th Cir. 2010) ("[E]xposure [to extraneous information] is presumptively prejudicial."); *United States v. Gartmon*, 146 F.3d 1015, 1028 (D.C. Cir. 1998) ("But notwithstanding the view of the Sixth Circuit that *Remmer* is no longer controlling . . . many of our cases have continued to recognize the presumption of prejudice and to place the burden of disproving it on the government."). The Fifth, Sixth, and Tenth Circuits and at least fourteen states decline to apply *Remmer* and instead require defendants to prove prejudice, as the circuit court held. *E.g.*, *United States v. Sylvester*, 143 F.3d 923, 934 (5th Cir. 1998) ("[W]e reject the *Remmer* presumption . . . .")[2]; *United States v. Lanier*, 988 F.3d 284, 295 & n.13 (6th Cir. 2021) (noting the Sixth Circuit "places on the defendant the burden of proving bias at the *Remmer* hearing"); *United States v. Barrett*, 496 F.3d 1079, 1102 (10th Cir. 2007) ("[T]he defendant must . . . demonstrate that an unauthorized contact created actual juror bias; courts should not presume that a contact was prejudicial." (internal quotation marks omitted)). The Eighth Circuit and at least seven states leave the question to judicial discretion. *E.g.*, *United States v. Hall*, 877 F.3d 800, 806 (8th Cir. 2017)

[2] The Fifth Circuit may have since moved back to the majority position. *See United States v. Jordan*, 958 F.3d 331, 335 (5th Cir. 2020) ("To be entitled to a new trial based on an extrinsic influence on the jury, a defendant must first show that the extrinsic influence likely caused prejudice" and "[t]he government then bears the burden of proving the lack of prejudice.")

("We give the district court broad discretion to grant or deny a motion for mistrial because it is in a far better position to weigh the effect of any possible prejudice.").[3]

The question driving the split is whether *Remmer* was narrowed or overruled by later U.S. Supreme Court cases, *Smith v. Phillips*, 455 U.S. 209 (1982) and *United States v. Olano*, 507 U.S. 725 (1993). *See, e.g.*, *Sylvester*, 143 F.3d at 934 ("We agree that the Remmer presumption of prejudice cannot survive *Phillips* and *Olano*."); *United States v. Pennell*, 737 F.2d 521, 532 (6th Cir. 1984) ("We conclude that *Phillips* has indeed altered the law concerning unauthorized communications with jurors."). In *Phillips*, a juror applied for employment with the district attorney's office during trial, but the prosecution did not disclose the fact until after the trial. 455 U.S. at 213–14. In *Olano*, the trial court permitted alternate jurors to attend but not participate in jury deliberations. 507 U.S. at 728–29. In each case the Supreme Court held that a new trial was not required. But neither case involved an external influence on the jury from anyone other than alternate jurors. Both cases cited *Remmer* with approval. *Olano*, 507 U.S. at 738; *Phillips*, 455 U.S. at 215. *Olano* even stated "[t]here may be cases where an intrusion should be presumed prejudicial," citing *Turner v. Louisiana*, 379 U.S. 466 (1965), as an example of such a case. 507 U.S. at 739. In *Turner*, prejudice was presumed where the jury was in the charge of sheriff's deputies who were also prosecution witnesses, a fact pattern with a close similarity to the present case.[4] 379 U.S. at 474.

The State nevertheless argued *Remmer* was abrogated by *Smith* and *Olano*. Resp't's 2d Br. 6 ("*Smith* . . . abrogates *Remmer* to the extent which it may be relied upon for the proposition that

[3] The number of states listed in this three-way split sum to 49. The missing state is South Carolina; where it falls in the split is the question Appellant asks the Court to answer.

[4] Like the deputies in *Turner*, Ms. Hill had the jury in her charge. She was not a prosecution witness, but like a prosecution witness she made statements to the jury advocating a guilty verdict.

prejudice must be presumed where external influences are brought upon the jury . . . .") & 7 (quoting the Fifth Circuit's *Sylvester* decision holding *Olano* abrogated *Remmer*). The circuit court agreed, ruling from the bench:

> I am not conducting a *Remmer* hearing. *Remmer* is a 1954 decision of the United States Supreme Court that deals with question of influence of the jury and a motion for a new trial on the basis of after-discovered evidence of that influence. I rely on the South Carolina decision of our Supreme Court authored by Justice Kittredge, *State v. Green*, and the *Green* decision specifically says that *Remmer* is not the guidance that South Carolina trial judges should look to in conducting hearings on after-discovered evidence.

Prehearing Hr'g Tr. 11:1–10 (Ex. I); *see also* Evid. Hr'g Tr. 100:19–21 (Ex. A) ("[The] South Carolina Supreme Court said very clearly we do not go by the guidance of the 1950s case of *US v. Remmer*."). Its State-drafted order entered months after the evidentiary hearing, however, hides its reasoning, stating only that "Murdaugh argues . . . prejudice must be presumed under *Remmer*" while the State "argues that the overwhelming weight of South Carolina case law is clear that . . . the burden is on the defendant to show not only that the improper influence occurred but also resulting prejudice." Order 4–5 (Ex. L). The order then proceeds to review South Carolina cases, some of which are arguably irrelevant (*e.g.*, cases dealing with external influences not touching on the merits of the case before the jury or alternate jurors participating in deliberations) and some of which are inarguably irrelevant (*e.g.*, cases dealing with internal jury influences),[5] without attempting to explain why a U.S. Supreme Court decision on a question of federal constitutional law directly on point on the facts of the case is not good law. *Id.* 5–8.

But the Fourth Circuit's contrary position could not be clearer:

> Some courts have suggested that post-*Remmer* developments—*Smith v. Phillips*, 455 U.S. 209, 215 (1982), *United States v. Olano*, 507 U.S. 725, 738–39 (1993), and Federal Rule of Evidence 606(b)—narrowed or overturned *Remmer*'s

[5] The *Remmer* presumption does not apply to internal influences on the jury. *Barnes*, 751 F.3d at 245–46.

> presumption of prejudice. *See, e.g.*, *United States v. Sylvester*, 143 F.3d 923, 934 (5th Cir. 1998) ("[T]he *Remmer* presumption of prejudice cannot survive *Phillips* and *Olano*."). But the Fourth Circuit continues to adhere to a *Remmer* presumption when the contact goes beyond the innocuous. *United States v. Cheek*, 94 F.3d 136, 141 (4th Cir. 1996).

United States v. Elbaz, 52 F.4th 593, 606 n.9 (4th Cir. 2022), *cert. denied*, 144 S. Ct. 278, 217 L. Ed. 2d 126 (2023) (parallel citations omitted). *See also United States v. Johnson*, 954 F.3d 174, 179–80 (4th Cir. 2020) (holding that where "an unauthorized contact was made" with jurors "of such a character as to reasonably draw into question the integrity" of the trial proceedings, the defendant "is entitled under *Remmer*: (1) to a rebuttable presumption that the external influence prejudiced the jury's ability to remain impartial" (internal quotation marks omitted)); *Barnes*, 751 F.3d at 243 (holding *Remmer* is "clearly established federal law"); *United States v. Lawson*, 677 F.3d 629, 642 (4th Cir. 2012) ("At issue in this debate are the Supreme Court's decisions in *Smith v. Phillips* and *United States v. Olano* . . . . This Court's decisions addressing such external influences on a jury's deliberations reflect that the *Remmer* rebuttable presumption remains [a]live and well in the Fourth Circuit." (citations omitted)). "To determine whether a contact with a juror is innocuous or triggers the *Remmer* presumption we look to whether there was (1) any private communication; (2) any private contact; (3) any tampering; (4) directly or indirectly with a juror during trial; (5) about the matter before the jury." *Elbaz*, 52 F.4th at 607 (internal quotation marks omitted).

Two years before the Fourth Circuit's *Elbaz* decision (the most recent published decision affirming *Remmer*), the Court in *Green* considered a case in which a juror asked a bailiff what would happen if the jury deadlocked, and the bailiff responded that the judge probably would give an *Allen* charge and ask them to stay later. The Court held,

> The trial court questioned each juror and the bailiff, which proved "there was no reasonable possibility the [bailiff's] comments influenced the verdict." 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. In *Remmer*, a juror was approached by a "person unnamed" and told "that [the juror] could profit by bringing in a verdict favorable to the [defendant]." The federal district court, without holding a hearing, denied the defendant's motion for a new trial. Ultimately, the Supreme Court recognized the presumption of prejudice from the highly improper juror contact and remanded to the federal district court "to hold a hearing to determine whether the incident complained of was harmful to the [defendant]."
>
> 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. 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.

432 S.C. at 100, 851 S.E.2d at 441 (2020) (citations omitted). The circuit court read that language to hold that South Carolina courts never apply the Remmer presumption of prejudice in any circumstances. Prehearing Hr'g Tr. 11:1–10 (Ex. I); Evid. Hr'g Tr. 100:19–21 (Ex. A). *Green* is the only reported South Carolina appellate decision discussing *Remmer*.[6] The question in the instant appeal is whether the Court's *Green* decision indeed split from the Fourth Circuit and determined *Remmer* has been abrogated or overruled by subsequent cases. This is of major legal importance for at least two reasons.

First, the circuit court's reading of the Court's recent *Green* decision is plainly erroneous. "While we decline to adopt the *Remmer* presumption of prejudice in every instance of an inappropriate bailiff communication to a juror" does not mean "we decline to adopt the *Remmer* presumption of prejudice in *any* instance of inappropriate communication to a juror," nor does "[o]ur 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" mean "no inappropriate comment to a juror ever rises to the level of constitutional error."

[6] The only other South Carolina appellate case citing *Remmer* is *State v. Bryant*, 354 S.C. 390, 395, 581 S.E.2d 157, 160 (2003), which cites *Remmer* once in a string cite without any discussion.

Green, 432 S.C. at 100–01, 851 S.E.2d at 441. A more reasonable reading is that the Court's opinion is identical to the Fourth Circuit's opinion expressed in *Elbaz* two years later: prejudice is presumed unless the contact is "innocuous" or does not "touch the merits." *Compare* 52 F.4th at 606 *with Green*, 432 S.C. at 100, 851 S.E.2d at 441. That is also consistent with the earlier Court of Appeals decision in *State v. Cameron*, which held,

> In this case, 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.

311 S.C. 204, 208, 428 S.E.2d 10, 12 (Ct. App. 1993).[7] The circuit court refused to consider *Cameron* because it was a Court of Appeals decision, Prehearing Hr'g Tr. 21:25–22:3 (Ex. I) ("I do not regard *State v. Cameron* as the guidance that needs to be used by me in making a determination about this case. It's a Court of Appeals case."), and because, in its view, the later *Green* decision held *Remmer* is no longer good law, *id.* 22:3–10. But no matter how erroneous and unpersuasive Chief Justice Toal's reading of *Green* may be, her stature as a jurist and the intense publicity surrounding her decision means her reading of *Green* is a uniquely precedential circuit court opinion that will guide South Carolina courts unless this Court corrects it.

Second, a state splitting from its home federal circuit on a question of federal law is an issue of major legal significance, and doing so on a question of criminal law is especially

[7] Similarly, in *Bryant*, the only South Carolina case other than *Green* to cite *Remmer*, the Court held the defendant must prove "actual juror bias," which he did by proving "the questioning of jurors' family members by Horry County Police detectives in a case in which the victim was a Horry County Police Department Officer was, at minimum, an attempt to influence the jury" that "could have been perceived as an attempt to intimidate jurors." 354 S.C. at 395, 581 S.E.2d at 160–1 (2003). That jury intimidation was the actual prejudice the defendant had the burden to prove. There was no suggestion that having proven law enforcement officers engaged in jury intimidation, the defendant then needed to prove what the verdict would have been but for the intimidation.

important. It is so important it should only be done by the state's highest court after careful consideration. "[T]his Court often defers to Fourth Circuit decisions interpreting federal law" but "it is not obligated to do so" where there is "lack of uniformity amongst the federal circuits." *Limehouse v. Hulsey*, 404 S.C. 93, 108–09, 744 S.E.2d 566, 575 (2013). As noted above, there is a federal circuit split on the continued viability of *Remmer*. This Court is not obligated to follow the Fourth Circuit in that circuit split, but there are strong legal and prudential reasons to do so.

Certainly, South Carolina courts are not required to follow the reasoning of the Fourth Circuit when it is an outlier, like children following the pied piper of Hamelin. But the Fourth Circuit's position accords with the majority of federal circuits and the majority of states. At least 35 federal appellate courts and state appellate courts of last resort agree with the Fourth Circuit that the *Remmer* presumption still applies to external communications with the jury during trial about the merits of the case before them. This Court should join them. Although South Carolina's courts are not subject to the mandate of the U.S. Court of Appeals for the Fourth Circuit, the South Carolina's executive officers having custody of prisoners in this state are subject to the writs of the courts of the Fourth Circuit. South Carolina courts must follow what the Fourth Circuit says is "clearly established" federal law regarding the rights of criminal defendants or federal courts in the Fourth Circuit will grant writs of habeas corpus. *See* 28 U.S.C. § 2254(d)(1) (providing for a habeas writ where state court proceedings "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States").

In other words, South Carolina courts are powerless to enforce their own opinions on questions of federal constitutional law in criminal cases where those opinions differ from the Fourth Circuit, and splitting from the Fourth Circuit in such cases essentially is an act of advocacy.

If South Carolina believes the Fourth Circuit is incorrect on a question of criminal defendants' federal constitutional rights, it is better for South Carolina's Attorney General to convince the U.S. Supreme Court of that than to place South Carolina judges in the position of advocating against the reasoning of federal judges on questions of federal constitutional law.

Possibly, the Attorney General would succeed, and this case would be the vehicle for overturning *Remmer*. Or perhaps the Supreme Court would decide Ms. Hill's egregious jury tampering does not present an attractive vehicle for changing the legal standard for a mistrial, because common sense says that when an elected state official goes into the jury room during a murder trial to advocate for a guilty verdict because she wants to make money selling books about the guilty verdict, the result should be a mistrial. Regardless, the Supreme Court is the proper court to decide whether most federal circuit courts have misunderstood Supreme Court precedent. South Carolina courts should follow what federal courts having jurisdiction over South Carolina have held is "clearly established" federal law and leave advocacy for changing that law to the Attorney General and his able deputy. The circuit court's refusal to do so presents a legal issue of major significance necessitating review of this appeal by this Court before it is determined by the Court of Appeals.

IV. Conclusion

For the foregoing reasons, Appellant respectfully requests the Court certify this case for review before it is determined by the Court of Appeals.

Respectfully submitted,

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