THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM COLLETON COUNTY
Court of General Sessions

The Honorable Clifton B. Newman, Circuit Judge
The Honorable Jean Hoefer Toal, Chief Justice (Ret.)

Appellate Case Nos. 2023-000392

THE STATE OF SOUTH CAROLINA, ...RESPONDENT,

V.

RICHARD ALEXANDER MURDAUGH, ...APPELLANT.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Is prejudice to the defendant's right to a fair trial presumed when a state official[1] secretly advocates a guilty verdict in the jury room during a criminal trial?

2. Is prejudice to a defendant's right to a fair trial proven when it is found that a state official tampered with the jury and a juror testifies the jury tampering influenced her verdict?

3. Did the trial court err by allowing cumulative and unfairly prejudicial evidence of financial crimes to be presented for over a week, purportedly as evidence of motive?

4. Did the trial court err in concluding that the Defendant "opened the door" to evidence of financial crimes by questioning a witness about the Defendant's relationship with his wife and son?

5. Did the Defendant waive his right to object to the introduction of evidence of financial crimes by testifying?

[1] In trial court proceedings, the State objected to referring to former Colleton County Clerk of Court Rebecca Hill as a "state official." Mr. Murdaugh does not mean that her improper motives or conduct should be imputed to the prosecution or law enforcement in this case. But it is inarguable that Ms. Hill acted in this case as an official of the State of South Carolina: She held an elected office created by Section 24 of Article V of the South Carolina Constitution, her duties included summoning, impaneling, and managing the jury (*see* S.C. Code tit. 14 ch. 7), and she was able to interact with the jurors in Mr. Murdaugh's murder trial only by virtue of her office.

6. Did the trial court err by allowing the State to impeach the Defendant with his post-*Miranda* silence?

7. Did the trial court err by allowing a witness qualified as an expert in extracting data from cell phones to testify about an experiment he conducted during trial in which he sat alone in his office over a weekend throwing a phone on the floor to see if the screen would come on, when he collected no data regarding the results of the experiment, admitted he had no expertise regarding that aspect of the phone's operation, and admitted the results he reported from memory were not statistically significant?

8. Did the trial court err by allowing the State to distract from its failure to recover a murder weapon by allowing a State firearms examiner to offer an expert opinion based on a discredited toolmark methodology and by allowing the admission of multiple firearms into evidence that were not connected to the murders as well as a raincoat coated with gunshot residue that was not connected to the defendant?

9. Did the trial court's cumulative evidentiary errors prejudice the Defendant's right to a fair trial?

STATEMENT OF THE CASE

On June 7, 2021, Appellant Richard Alexander Murdaugh's wife, Maggie Murdaugh, and his younger son, Paul Murdaugh, were brutally murdered at the dog kennels on their rural family property in Colleton County. Murdaugh was indicted

for the murders and for related firearms offenses on July 14, 2022, by a Colleton County Grand Jury and his jury trial commenced on January 23, 2023. (Indictments.) The Honorable Clifton B. Newman presided.

On March 2, 2023, Murdaugh was convicted of two counts of murder and two related firearms charges and sentenced to life without parole. (Judgment.) He timely filed notice of appeal from those convictions on March 9, 2023 (Notice of Appeal), and that appeal was docketed as Appellate Case No. 2023-000392 (the "Direct Appeal"). On September 5, 2023, Murdaugh filed a motion to suspend the Direct Appeal and for leave to file a motion for a new trial based on after-discovered evidence of jury tampering by Rebecca Hill, the Colleton County Clerk of Court. (Motion to Suspend Appeal.) The Court of Appeals entered an order granting the motion on October 17, 2023. (Order.) Murdaugh thereafter filed a motion for a new trial in Colleton County, on October 27, 2023. (Mot. New Trial.)

A one-day evidentiary hearing concluded on January 29, 2024, and the trial court entered an order denying the motion for a new trial on April 4, 2024. (Order Denying Mot. New Trial.) Mr. Murdaugh filed a notice of appeal of the order denying a new trial on April 11, 2024 (Notice of Appeal), and that appeal was docketed as Appellate Case No. 2024-000576 (the "Jury Tampering Appeal"). On July 10, 2024, Murdaugh filed a motion to certify the Jury Tampering Appeal to the Supreme Court. (Mot. To Certify.) On August 13, 2024, the Court granted

Murdaugh's motion to certify the Jury Tampering Appeal. (Order.) The Supreme Court also certified the Direct Appeal on its own motion under Rule 204(b), SCACR. By order dated September 13, 2024, the two appeals were consolidated. (Order.)

STATEMENT OF FACTS

I. THE MURDER INVESTIGATION

On June 7, 2021, at 10:07 pm, Appellant Richard Alexander Murdaugh ("Alex" or "Murdaugh") called 911 and reported that he discovered his wife Maggie and son Paul had been "shot badly" and were lying on the ground outside the dog kennels at his residence off Moselle Road in Colleton County, South Carolina. State's Exs. 9, 11. During the 911 call, Alex explained that he had "been up to it now" and "it's bad." (*Id.*) Alex further stated that he had just returned home from visiting his mother. Alex then informed the 911 operator that he was returning to his residence, some 1100 feet away, to get a gun because he feared for his safety. Alex then drove his 2021 Chevrolet Suburban to his residence, retrieved a 12-gauge shotgun which he loaded with one 12-gauge shell and one 16-gauge shell. Alex returned to the kennels and waited for the first responders to arrive. Trial Tr. 470, 506:21–25, 507–08; State's Exs. 9, 11.

Deputies with the Colleton County Sheriff's Department arrived first, followed by Colleton County fire and rescue and later Colleton County EMS. Colleton County Sheriff Buddy Hill requested that SLED take the lead in the

investigation, and later in the night, SLED agents arrived on the scene. The first deputy on the scene secured the shotgun that Murdaugh had retrieved and briefly questioned Alex. Another Colleton County Deputy swabbed Murdaugh's hands for gunshot residue. A third Colleton County Deputy obtained a search warrant for the entire Moselle property, which consisted of approximately 1700 acres of land, a main residence, the kennels and a few out-buildings adjacent to the kennels. Trial Tr. 460–567, 578–744.

SLED Agents then arrived on the scene and conducted a recorded interview of Alex in a SLED vehicle. Alex again explained that he had gone to visit his mother, who lived at Almeda, approximately 13 miles away, because his father had just been admitted to the hospital. When Alex returned home, he expected to find Maggie and Paul inside the residence. When they were not there, he drove down to the kennels because that is where they had gone after dinner. Alex informed the officers that he had gone up to the bodies to check for signs of life, that he attempted to roll Paul over and when he did, Paul's phone popped out of his pocket. Alex put the phone on Paul's backside. Trial Tr. 680–743; State's Ex. 153.

Alex also explained that earlier in the evening, he and his son Paul rode the property, did some target shooting with a .22 caliber pistol, and then met Maggie for supper at the residence. (Maggie had been at a doctor's appointment in Charleston earlier in the day and returned home to be with Murdaugh and Paul, rather than going

to their Edisto beach house.) Alex also told the investigators that after dinner, Maggie went down to the kennels to let the dogs out, which she liked to do, and that Paul presumably went to the shop next to the kennels. Murdaugh stated he laid down on the sofa, nodded off for a short nap, and when he woke, they had not returned to the residence. Alex tried to call Maggie to let her know he was going to check on his mother, but she did not answer. So, he texted her instead. *Id.*

En route to his mother's house, Alex called his son Buster to check in on him, tried calling his father, and called friend and fellow attorney Chris Wilson. Buster and Chris Wilson would later testify that there was nothing unusual in their conversations with Alex. Alex visited with his mother for about 15 to 20 minutes and then returned to Moselle. Alex's mother's caregiver Shelley Smith was present during Alex's visit, and later testified that Alex sat on the bed next to his mother, that he was not acting out of the ordinary, that he was his normal fidgety self, and that he did not have any blood on his clothing or shoes. Trial Tr. 2771–82, 2129–32.

Following the recorded interview, Murdaugh was directed to the residence, where his family and law partners were located. SLED agents followed Murdaugh into the residence and took possession of the clothes and shoes he was wearing. An agent also conducted a brief walk-through of the residence the following day, checked the drains in the bathtubs and sinks for signs of blood, and there were none. Trial Tr. 708, 1699–1700, 1704–06.

The agents concluded that Maggie was shot and killed with an AR-type weapon known as a 300 Blackout, and that Paul was shot and killed with a 12-gauge shotgun. Accordingly, SLED agents seized every 12-gauge shotgun and the only 300 Blackout located in the residence. Trial Tr. 1005–09.

Also, the next morning, June 8, 2021, SLED and the Colleton County Sheriff's Department issued a joint press release stating that the public did not have any reason to be concerned for their safety. Trial Tr. 4121-27. Alex was immediately identified as the one and only suspect in this brutal double homicide. SLED's chief investigator, and multiple other agents, testified that they conduct homicide investigations concentrically, drawing a theoretical circle around the crime scene and then try to eliminate the individuals within the circle. From the moment the investigation began, Alex was the one and only person within this investigative circle and the agents did not eliminate him. Trial Tr. 1022–24, 3663–64.

Alex was not eliminated from the investigative circle and no one else was ever included within it, because SLED and the Colleton County Sheriff's investigators botched the investigation. Trial Tr. 3662–3709. The first responders from the Colleton County Sheriff's Department walked through the crime scene and into the feed room where Paul was shot, trampling bloody footprints at the scene (possibly the perpetrators') with their own footprints. There were noticeable tire tracks in the

wet grass that did not match any of the Murdaugh vehicles that were not followed or investigated. Trial Tr. 486, 500, 510–12, 843–44, 866.

SLED crime scene forensic agents did not even attempt to lift fingerprints from the feed room doors, doorknobs, or entrance area where Paul was murdered. Trial Tr. 1866–69. The SLED DNA lab identified DNA from an unknown male under Maggie's fingertips. However, SLED never submitted this DNA to the national DNA database, CODIS, for a potential match. Trial Tr. 3286–89.

Although Alex was at the center of the investigation, SLED did not search his mother's residence and property at Almeda for the murder weapons or any other evidence. SLED agents only conducted a cursory search at Moselle, which did not reveal any evidence linking Alex to the murders. Trial Tr. 1024, 1699, 1703–06, 3663–84.

Most significantly, SLED allowed the location data from Maggie's cell phone to be overwritten after SLED recovered the phone. Maggie's phone was found approximately one-half mile from the Moselle property about fifteen feet off the shoulder of the road in a wooded area. Whoever tossed the phone to this location was evidently present when Maggie was murdered and took the phone from her dead body. Alex repeatedly asked SLED to check the location data on Maggie's phone against his own phone, which would show that the two phones were not traveling together. Trial Tr. 1361–64, 4754–56.

When Maggie's phone was located using Alex's other son Buster's shared location service with Maggie's phone, SLED agents unlocked Maggie's phone with the password provided by Alex. After unlocking the phone, SLED agents put the phone in airplane mode and transported it to Columbia. Although the phone was in airplane mode, it was still recording GPS location information. When SLED finally extracted data from Maggie's phone, eight days after it was recovered, the location data from the night of the murders had been overwritten and erased because it only went back six days. This would have been avoided if SLED had put Maggie's phone in a Faraday bag, a basic cell phone forensic protocol that blocks GPS signals, or failing that, simply turned it off. Trial Tr. 748–55, 1361–65, 4613–15, 4755.

II. THE INDICTMENT AND TRIAL

On July 14, 2022, the State obtained an indictment from a Colleton County Grand Jury for two counts of murder, and two counts of using a firearm during the commission of a violent crime. The lead case agent made at least two material statements to the grand jury when presenting the indictments that were proven to be false at trial.[2] First, the agent incorrectly testified that SLED located multiple shotguns loaded with a combination of buckshot followed by birdshot at Murdaugh's residence. Trial Tr. 3694–95. This is the same combination that was used to murder

[2] Although the grand jury testimony was not transcribed, the notes that the agent used for his testimony were produced in discovery. Trial Tr. 3684.

Paul, who was shot first with buckshot through the chest and then with steel birdshot into his head. *Id.* At trial, the agent was confronted with this misrepresentation that he made to Alex during an interview, and the agent simply explained he is allowed to use "trickery" while interrogating a suspect. When asked if he was using "trickery" when he made the same false statement to the grand jury, the agent then claimed that he was mistaken in his testimony. *Id.*

Second, the agent incorrectly testified before the grand jury that the clothes Alex was wearing when law enforcement arrived on the scene, which were later collected by SLED, had high velocity blood spatter which placed Alex very close to Paul when he was shot and killed. Trial Tr. 3684–85. SLED had sent photos of Alex's clothes to a so-called "blood spatter expert" in Oklahoma for analysis. This "expert" issued an initial report stating that there was no evidence of blood spatter on Alex's clothes. Not satisfied, SLED agents flew to Oklahoma for an in-person meeting with this "expert" who immediately issued a revised report concluding that Alex's shirt did in fact have high-velocity blood spatter stains. (Mot. to Exclude.)

During pretrial discovery, SLED produced its lab notes and other reports in response to a subpoena, which had not previously been provided to the defense from the Attorney General's production. This SLED production contained a report which definitively determined that there was in fact no human blood on the shirt Alex was wearing the night of the murders. As a result, Murdaugh moved to exclude this

"expert" from testifying as to his blood spatter opinions, alleging the State had fabricated the blood spatter evidence. *Id.* The State never responded to the motion or denied fabricating the evidence; instead, it abandoned the "expert" at trial and instead argued that Murdaugh changed his clothes after the murders. *E.g.*, Trial Tr. 5817–51.

The State's forensic evidence presented at trial failed to link Alex to Maggie and Paul's murder. All experts agreed that Paul was initially shot through his chest while he was standing inside the small feed room, and the second kill shot was to his head. This shot blew open Paul's skull, causing his brain to first hit the ceiling of the feed room and then land just outside the door, next to Paul's lifeless body. Trial Tr. 5176–5200. The person who killed Paul would have been covered in blood and brain matter. *Id*. Maggie, on the other hand, appeared to be shot from further away and the murderer would not have received much, if any, of her blood on or about his or her body. Trial Tr. 5209–14.

The DNA evidence from Alex's clothes did not reveal any significant amount of Paul's DNA. As stated above, there was no blood on Murdaugh's shirt, and just trace amounts on his shorts, which was consistent with Murdaugh touching the bodies upon his arrival on the scene. Trial Tr. 3686–88. Similarly, there were only two particles of gunshot residue on Murdaugh's hands, three particles were found on his shirt, three particles on his shorts, no particles on his shoes, and a single particle

on the seat buckle in the Chevrolet Suburban that Murdaugh was driving. These minimal findings are consistent with Alex retrieving the shotgun for personal protection, after approaching the bodies, that he had when first responders arrived. Trial Tr. 2448:13–25, 2466:1–12, 2487.[3] Also, trace amounts of Maggie's blood were on the steering wheel of the Suburban and the shotgun that Murdaugh retrieved, which is consistent with Alex touching her body to check for signs of life. *Id.*

The State introduced ballistic expert opinion testimony over objection and after a *Council* hearing. The SLED forensic ballistics witness did not offer an opinion as to whether any of the shotguns or the 300 Blackout seized from the Moselle property were used to murder Maggie or Paul. Instead, the ballistics witness testified that the same shotgun fired both shells that killed Paul. The witness also testified that because the 300 Blackout shell casings found near Maggie's body had sufficiently similar extraction marks to 300 Blackout shell casings found near the Murdaugh residence and at the shooting range on the Murdaugh property, the same weapon must have extracted all three sets of casings. To reach this conclusion, the

[3] The State also introduced, over objection, evidence that gunshot residue was found inside a blue rain jacket located in a search of Mrs. Murdaugh's Almeda residence in September 2021, months after the murder. Trial Tr. 2466:12–2480:12. There was no evidence whatsoever linking Murdaugh to this rain jacket. Instead, Murdaugh's mother's caregiver testified that she observed Murdaugh bring a blue tarp into the residence and leave it spread open in a sitting room early one morning, a few days following Murdaugh's father's funeral. Trial Tr. 2142:6–43:6.

expert necessarily had to presume, without any supporting tests, studies or data, that every 300 Blackout manufactured in the world makes singularly unique extraction marks. Trial Tr. 313–71, 1884–1996, State's Ex. 400.

SLED's cell phone forensic examiner testified regarding the data captured on Maggie, Paul and Alex's phones. Significantly, Maggie's phone registered an orientation change between 9:06:12 and 9:06:20 pm, meaning that the phone was physically rotated during that period. This orientation change occurred while Alex was calling Maggie's phone. Trial Tr. 1238–39, 1324–27. Furthermore, while this orientation change was occurring, Maggie's phone was not recording footsteps, yet Alex's phone was. Def.'s Ex. 156. The SLED cell phone forensic witness conceded that he would expect to find recorded steps on Maggie's phone if the same person possessed both Maggie's and Alex's phones when the orientation change occurred at 9:06 pm. Trial Tr. 1329–30, 1356–57. According to the defense cell phone forensic witness, this orientation change occurred when the cell phone was tossed to the side of Moselle Road, about one-half mile from the entry to the kennels. Trial Tr. 1652:7–55:10, State's Ex. 227.

Furthermore, On-Star data for Murdaugh's Suburban indicates that he passed the location where Maggie's phone was tossed at 9:08:36 pm, approximately two minutes after the orientation change and 96 seconds after the screen on Maggie's phone went dark and remained dark until after Murdaugh arrived at his mother's

home. Trial Tr. 1349, 1351, 4049, 4051–53, 4058, 4307–08, 4621, 4623–32; Def.'s Ex. 158. The defense cell phone expert testified that iPhones have a "Raise to Wake" feature, which was active on Maggie's phone, and which causes the screen to illuminate in response to the slight movement of being picked up from a table or seat. Trial Tr. 4620–32. A phone that illuminates whenever it is picked up certainly would illuminate when thrown from a vehicle moving 42 miles per hour. *See id.* Alex therefore could not have had Maggie's phone when it was thrown on the roadside.

After the defense cell phone expert testified, a deputy with the Charleston County Sheriff's Department spent the weekend in his office tossing an iPhone onto the floor of his office to test whether the phone would illuminate. Based upon this unscientific experiment, he concluded that the cell phone will illuminate if it is gently moved but not if it violently moved. The State was allowed to present the deputy's testimony about this experiment and the Deputy's conclusions, over objection, in its rebuttal case. Trial Tr. 5395–5415.

The State also entered Paul's cell phone and its extracted data into evidence. SLED's cell phone forensics witness located a video on Paul's phone taken on the night of the murders from 8:44:49 p.m. to 8:45:47 p.m. Trial Tr. 1318:20–21:20. The video is of Cash, a dog owned by family friend Rogan Gibson. Paul contacted Rogan expressing concern about Cash's tail. Rogan requested Paul send him a video

of the tail. In this video, Paul, Maggie, and a third person can be heard speaking in the background. Rogan and numerous other witnesses identified this third person's voice as Alex's. The video portrayed a family going about their normal routine, without any sign of trouble or hostility. However, the video contradicted Alex's statements made to law enforcement and others that he stayed inside the residence following supper, briefly napped on the couch, then went to visit his mother, and never went down to the kennels. Trial Tr. 1318:20–21:20; State's Ex. 297.

In the middle of the trial, SLED was notified by General Motors that it had the On-Star data for the night of the murders for Murdaugh's Suburban. This data was introduced into evidence and corroborated Alex's statements that he went directly to and from his mother's residence at Almeda without stopping or taking any detours. Trial Tr. 3452–59.

Additionally, the State presented over objection ten witnesses who testified over a span of six days about financial crimes Murdaugh committed, which involved more than nineteen victims, as evidence of Alex's alleged motive for killing Maggie and Paul. Trial Tr. 2242–2433, 2502–87, 2656–2799, 2812–2956, 3497–3520, 3877–3903, 3905–37. Specifically, Jeannie Seckinger, the chief financial officer of the Murdaugh law firm where Alex was a partner, testified that on the afternoon of June 7, 2021, she spoke with Alex about a fee that the firm should have received from a trucking accident lawsuit in which Alex was co-counsel with Chris Wilson, an

attorney from another firm. Trial Tr. 2286–88. The law firm received an expense check from the Wilson firm, but not a fee check. Alex's paralegal contacted Wilson's paralegal to ask about the fee and was informed that Alex had already received the fee. Alex was first asked about the missing fee a month or so earlier. Trial Tr. 2278–81.

Seckinger testified that when she asked Alex again about the missing fee on June 7, he was hostile at first but then went into his office with her to discuss the situation. Alex was insistent that Wilson still had the fee in his trust account. During this conversation, Alex received a phone call saying that his father was being admitted back to the hospital with a poor prognosis. When Alex received this call, Seckinger testified that she stopped her inquiry and offered Alex sympathy as a friend. Trial Tr. 2286–88.

The State's theory at trial was that this confrontation, combined with the pressure of an upcoming motion to compel hearing scheduled later in the week in a boating accident lawsuit in which Alex was a defendant and extensive financial information was being sought from Alex, prompted Alex to murder Maggie and Paul to distract from the inquiry about the missing funds.

The trial court also allowed the State, over objection, to introduce evidence involving three different and more extensive financial fraud schemes that had not even been suspected at the time of the murders. Seckinger testified that in September

2021, three months after the murders, she was running a report of Alex's cases and discovered that Alex had been depositing client settlement funds made payable to Forge, a well-known structure settlement firm, into a fake Forge account that Alex opened at Bank of America. The State also presented evidence that Russell Lafitte of Palmetto State Bank diverted settlement proceeds deposited into estate and conservatorship accounts to Alex. Lastly, the State presented evidence that Alex diverted more than $4 million paid on his behalf to the Estate of Gloria Satterfield, the Murdaugh housekeeper, to settle an insurance claim brought against Alex for Satterfield's accidental death on the Murdaugh property. Overall, the jury received evidence in this murder trial over a six-day period that Murdaugh defrauded at least nineteen clients of more than $9 million. State's Exs. 314, 329, 352.

When Alex was confronted by his law partners about the fake Forge account scheme in September 2021, he admitted his misconduct, confessed to stealing the money to support a severe opioid addiction, and resigned from the firm. Trial Tr. 2414–15. A few days later, Alex's drug supplier, Curtis Eddie Smith, shot Murdaugh in the head, penetrating and fracturing his skull, in an assisted suicide attempt. Alex survived the gun shot, was admitted to the hospital in Savannah, and later entered a drug treatment facility in Atlanta. Trial Tr. 3877–3922.

Alex testified at trial in his own defense and denied killing Maggie and Paul. Alex admitted that he was at the kennels with them and had lied to law enforcement

and others regarding his whereabouts after dinner. Alex explained that he lied because of drug-induced paranoia, and after having lied that he continued to lie because of paranoia, distrust for SLED, and concern that he was the center of focus in the investigation. Alex testified that he and Paul rode around the property and when Maggie arrived home, they all met at the residence for supper. Alex took a shower and changed clothes and ate dinner with them. Maggie asked him to go to the kennels after dinner and he initially declined. A short time later, he drove down to the kennels in a golf cart because he felt bad that he rejected her request. When Alex arrived at the kennels, things were somewhat chaotic. Bubba, their yellow labrador retriever, chased and caught a chicken. Bubba brought the chicken to Alex, and he took it from the dog's mouth, placed the chicken on top of an animal cage, then immediately drove back to the house in the golf cart. After a few minutes, Alex decided to drive to his mother's home in Almeda to check on her. Alex left the Moselle residence going out the main entrance, and did not ride by the kennels. Alex never heard gunshots at any time.[4] Trial Tr. 4964–80.

Alex also admitted to the financial crimes about which the State had presented evidence in its case. Alex testified that he stole money from the law firm and clients

[4] The defense presented the results of an acoustics test which established, without contradiction, that a person inside the residence with the television on could not hear gunshots from a 12-gauge shotgun or 300 Blackout rifle being fired at the kennels. Trial Tr. 4284–97; Def.'s Ex. 140.

to support his severe opioid addiction. Alex had been struggling with opioid addiction for over 20 years, which started when he was prescribed opioids for pain relief after knee surgery. *Id.*

Alex also testified that he was not concerned about Seckinger's questioning of him regarding the attorneys' fee and that the upcoming hearing on the motion to compel was not worrisome either. *Id.* Alex's attorney in the boating lawsuit, Dawes Cooke, also testified that the upcoming hearing was a routine matter and not especially concerning. Tr. 4499–4504. In addition, Mark Tinsley, the plaintiff's counsel in the boating accident case, conceded that nothing explosive was expected to occur at the motion hearing scheduled for June 10, three days after the murders. Trial Tr. 2053–54, 2951–52.

During closing arguments, the defense argued that the State's theory that Murdaugh would murder his wife and son to distract from the financial inquiry was a total fabrication and unbelievable. In response, the prosecutor argued that the jury could disregard their motive theory and find Murdaugh guilty because the State is not required to prove motive, only malice. Trial Tr. 5823–25.

III. THE TAMPERED JURY VERDICT

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. Murdaugh was sentenced to life in prison without the possibility of parole.

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. Hr'g Tr. 181:11–183:19. She repeatedly said during the trial 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 its 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); Juror Z Aff., Jan. 29, 2024.

IV. MURDAUGH'S MOTION FOR NEW TRIAL

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 granted the motion and Mr. Murdaugh filed his motion for a new trial on October 27. On November 1, he petitioned the Supreme 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 Supreme 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 trial court ordered an evidentiary hearing, and the parties submitted extensive briefing in advance of the hearing. The trial 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. At this initial hearing, the trial court ruled that Mr. Murdaugh bears the burden of proving 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 trial 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 trial 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 hearing by letter dated January 25, 2024. Ltr. from R. Harpootlian to Ret. Chief Justice Toal, Jan. 25, 2024. The trial 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 Murdaugh's decision to testify in his own defense, to "watch his body language." Evid. Hr'g Tr. 77:22–78:7. Juror P testified the comment did not affect his verdict.

Juror X testified that she heard Ms. Hill comment, regarding 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 Murdaugh's decision to testify in his own defense, to watch 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 trial court then examined Juror Z regarding her affidavit attached to Murdaugh's motion for a new trial, and she affirmed each paragraph therein, including averments that during trial Ms. Hill "told the jury 'not to be fooled' by the evidence presented by Murdaugh 's attorneys, which I understood to mean that Mr. Murdaugh would lie when he testified," and that Ms. Hill "instructed the jury to 'watch him [Murdaugh] closely' immediately before he testified, including 'look at his actions' and 'look at his movements,' which I understood to mean that he was guilty." Mot. New Trial Ex. A ¶¶ 2–3.

The trial court then asked,

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

Evid. Hr'g Tr. 55:1–56:7. After Juror Z left the courtroom, 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.

Id. 58:2–22. 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 29, 2024. Although the trial 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. She admitted the book contained unfounded statements included for "poetic license" or "literary ease." *Id.* 125:18–20, 137:17–19. Examination by the trial 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 trial 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 trial 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 Murdaugh failed to prove that Ms. Hill's comments changed the jury's verdict. The trial court discounted the testimony of

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 trial 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 Denying Mot. New Trial 24, Apr. 4, 2024.) Murdaugh timely appealed the order on April 11, 2024.

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.

STANDARD OF REVIEW

"The decision whether to grant a new trial rests within the sound discretion of the trial court" and is reviewed for an abuse of discretion. *State v. Mercer*, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009). "An abuse of discretion arises in cases in which the judge issuing the order was controlled by some error of law or where the order, based upon factual, as distinguished from legal, conclusions, is without evidentiary support." *Stewart v. Floyd*, 274 S.C. 437, 440, 265 S.E.2d 254, 255 (1980).

When it is asserted the trial court's order was controlled by an error of law, "a question of law is presented" and the "standard of review is plenary" and "without

deference to the trial court." *State v. Cochran*, 369 S.C. 308, 312–13, 631 S.E.2d 294, 297 (Ct. App. 2006) (Kittredge, J.) (citing S.C. Const. art. V, § 5 & 9; S.C. Code §§ 14-3-320, 14-3-330, & 14-8-200); *Crossmann Communities of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 47, 717 S.E.2d 589, 592 (2011).

When reviewing the trial court's decision, the appellate court may not make its own findings of fact if the trial court's findings are "reasonably supported by the evidence." *Cochran*, 369 S.C. at 312–13, 631 S.E.2d at 297. "The appellate court does not re-evaluate the facts based on its own view of the evidence but simply determines whether the trial judge's ruling is supported by any evidence." *State v. Kirton*, 381 S.C. 7, 23, 671 S.E.2d 107, 114 (Ct. App. 2008). But "[i]n reviewing mixed questions of law and fact, where the evidence supports but one reasonable inference, the question becomes a matter of law for the court." *State v. Moore*, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000).

Similarly, a trial court's ruling on the admission or exclusion of evidence—when the ruling is based on the South Carolina Rules of Evidence—is reviewed under an abuse of discretion standard. A trial court acts outside of its discretion when the ruling is not supported by the evidence or is controlled by an error of law. *State v. Wallace*, 440 S.C. 537, 541–43, 892 S.E.2d 310, 312–13 (2023); *State v. Jones*, 423 S.C. 631, 636, 817 S.E.2d 268, 270 (2018) ("A trial court's ruling on the admissibility of expert testimony constitutes an abuse of discretion where the ruling

is unsupported by the evidence or controlled by an error of law."). A trial court's failure to exercise its discretion as to the admissibility of evidence is itself an abuse of discretion. *Wallace*, 440 S.C. at 541–43, *State v. King*, 422 S.C. 47, 68–69, 810 S.E.2d 18, 29 (2017) (holding the trial court's refusal to listen to the disputed phone call recording left the court unable to carry out the required balancing under Rule 403, SCRE). The trial court—when ruling on the admission or exclusion of evidence—must think through the objection that has been made, the arguments of the attorneys, and the law—particularly the applicable evidentiary rules—and must thoughtfully apply the correct law to the information and evidence before it. *Wallace*, 440 S.C. 541–43; *Morris v. BB&T Corp.*, 438 S.C. 582, 587, 885 S.E.2d 394, 397 (2023).

ARGUMENT

I. MURDAUGH WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY FREE FROM OUTSIDE INFLUENCES.

The trial court found Ms. Hill tampered with the jury during Murdaugh's murder trial. Evid. Hr'g Tr. 251:13–252:1, 23–24. The only evidence the State presented contradicting sworn testimony describing the tampering was Ms. Hill's own denial, which the trial court found not credible. *Id.* The trial court found she was motivated by a desire to sell books. *Id.* The trial court found she was "attracted by the siren call of celebrity" and she "allowed public attention of the moment to

overcome her duty." *Id.* And one juror testified that Ms. Hill's tampering did influence her verdict. *Id.* 46:6–15.

But the trial court nonetheless denied the motion for a new trial, by committing legal error and by abusing its discretion. The trial court erred when it refused to presume that jury tampering during trial by a state official advocating a guilty verdict is prejudicial to the right of the accused to a fair trial, and when it held that deliberate jury tampering by a state official seeking a guilty verdict was harmless because, in its opinion, the correct verdict was rendered regardless. The trial court abused its discretion when finding that Ms. Hill's tampering did not affect the jury's verdict despite a juror's uncontradicted testimony that her verdict was affected. The Court therefore should reverse the trial court's order denying Murdaugh's motion for a new trial, vacate Murdaugh's murder and firearms convictions, and remand for a new trial.

A. <u>There is an irrebuttable presumption of prejudice when a state official secretly advocates a guilty verdict in the jury room during a criminal trial.</u>

The trial court identified the wrong legal standard to decide Murdaugh's motion for a new trial. When a state official communicates with jurors about a criminal case during trial, the law presumes the tampering was prejudicial to the defendant's right to a fair trial. The burden shifts to the state to show the communication was harmless. The State can meet that burden by, for example,

showing the communication did not concern the merits of the case, that it was favorable to the defendant, or that it never reached a deliberating juror. But where it is proven there was an improper communication by a court official to jurors about the merits of the case before them—*ex parte* advocacy by a state official—the presumption is irrebuttable. *State v. Cameron*, 311 S.C. 204, 207–08, 428 S.E.2d 10, 12 (Ct. App. 1993) (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.'" (quoting *Holmes v. United States*, 284 F.2d 716, 718 (4th Cir. 1960)) (emphasis added)).

The trial court, however, rejected the correct legal standard and applied an erroneous standard of its own invention: that Murdaugh, in addition to proving that Ms. Hill did tamper with the jury about the merits of his case during trial, must also prove what the verdict would have been but for that tampering. The Court should hold that in so doing, the trial court abused its discretion. Identification of the correct legal standard is a question of law subject to the Court's plenary review and Justice Toal's legal error is entitled to no deference.

1. <u>The U.S. Supreme Court holds that in a criminal case jury tampering is presumptively prejudicial.</u>

The trial court erred by ruling that South Carolina courts should disregard binding precedent of the U.S. Supreme Court that requires it to presume jury tampering is prejudicial to the defendant. In *Remmer v. United States*, the U.S. Supreme Court held, unanimously,

> 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. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

347 U.S. 227, 229 (1954). The Fourth Circuit holds *Remmer* is still "clearly established federal law." *Barnes v. Joyner*, 751 F.3d 229, 243 (4th Cir. 2014). The trial court, however, instead 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.

This 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) (Richardson, J.) (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 a guilty verdict. That is not an "innocuous intervention."

But the trial court nevertheless 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; Order Denying Mot. New Trial 4–5. In doing so, the trial court adopted the State's argument that *Remmer* was abrogated by *Smith v. Phillips*, 455 U.S. 209 (1982), and *United States v. Olano*, 507 U.S. 725 (1993). Resp't's 2d Br. 6–7.

The trial 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; *see also* Evid. Hr'g Tr. 100:19–21 ("[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 Denying Mot. New Trial 4–5. The trial court's 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 *Remmer* is not good law. *Id.* 5–8.

To be sure, the continued viability of *Remmer* is not universally agreed. There is a three-way federal circuit split on the issue. The majority position, adopted by the First, Second, Third, Fourth, Seventh, Ninth, Eleventh, and D.C. Circuits and at least 28 states, presumes prejudice under *Remmer*, although many courts, like the Fourth Circuit (and this Court 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); *United States v. Greer*, 285 F.3d 158, 173 (2d Cir. 2002); *United States v. Claxton*, 766 F.3d 280, 299 (3d Cir. 2014); *Barnes*, 751 F.3d at 245; *United States v. Turner*, 836 F.3d 849, 867 (7th Cir. 2016); *Godoy v. Spearman*, 861 F.3d 956, 968 (9th Cir. 2017); *Ward v. Hall*, 592 F.3d 1144, 1180 (11th Cir. 2010); *United States v. Gartmon*, 146 F.3d 1015, 1028 (D.C. Cir. 1998). The Fifth,[6] Sixth,

[5] The *Remmer* presumption does not apply to internal influences on the jury, *Barnes*, 751 F.3d at 245–46, and Mr. Murdaugh has not sought any relief based on any alleged improper internal influence on the jury.

[6] 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.").

and Tenth Circuits and at least fourteen states decline to apply *Remmer* and instead require defendants to prove prejudice, as the trial court held. The Eighth Circuit and at least seven states leave the question entirely to judicial discretion.

As the State argued, the question driving the split is whether *Remmer* was narrowed or overruled by *Smith v. Phillips* and *United States v. Olano*. *See, e.g.*, *United States v. Sylvester*, 143 F.3d 923, 934 (5th Cir. 1998) ("We agree that the *Remmer* presumption of prejudice cannot survive *Phillips* and *Olano*."). The Court should decline the State's invitation to join the minority position on that question for three reasons.

First, the argument that *Olano* or *Phillips* abrogated *Remmer* is unpersuasive—which may explain why that argument remains the minority position 30 and 40 years after those decisions, respectively. 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 to 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.[7] 379 U.S. at 474.

Second, only the U.S. Supreme Court can decide whether it has overruled its decision in *Remmer*: "'[I]t is this Court's prerogative alone to overrule one of its precedents.'" *Bosse v. Oklahoma*, 580 U.S. 1, 3 (2016) (quoting *United States v. Hatter*, 532 U.S. 557, 567 (2001)). This Court cannot decide that the U.S. Supreme Court has overruled a precedential decision by implication from later decisions that appear to use inconsistent reasoning: "'Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality.'" *Id.* (quoting *Hohn v. United States*, 524 U.S. 236, 252–53 (1998)).

Third, the Court should defer to the Fourth Circuit's interpretation of a question of federal constitutional law, especially when it adopts the majority

[7] 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.

position, *see Limehouse v. Hulsey*, 404 S.C. 93, 108–09, 744 S.E.2d 566, 575 (2013),[8] and the Fourth Circuit's position is clear:

> 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 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.

Elbaz, 52 F.4th at 606 n.9; *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

[8] Moreover, while South Carolina's courts are not subject to the mandate of the Fourth Circuit, they must follow what the Fourth Circuit says is "clearly established" federal law regarding the rights of criminal defendants in this State or writs of habeas corpus may be granted. *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").

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 (its most recent published decision affirming *Remmer*), this 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 trial 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; Evid. Hr'g Tr. 100:19–21.

Green is the only reported South Carolina appellate decision discussing *Remmer*,[9] and the trial court's reading of it 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." *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

[9] 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 citation without any discussion.

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 opinion of the Court of Appeals in *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. at 208, 428 S.E.2d at 12. The trial court refused even to consider *Cameron* because it is a Court of Appeals decision, Prehearing Hr'g Tr. 21:25–22:3 ("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.

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 160–01 (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.

2. <u>The presumption of prejudice is irrebuttable when a state official tampers with the jury during a criminal trial about the merits of the case.</u>

Having proven that Ms. Hill communicated with at least one deliberating juror about the evidence presented during his murder trial, Murdaugh has established that he is entitled to a new trial. "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." *Cameron*, 311 S.C. at 207–08, 428 S.E.2d at 12 (internal quotation marks omitted). *Cameron* requires the "subject matter" of the communication between an official and a juror to be harmless—clearly harmless. *Id.* Otherwise, a new trial must be granted.

When, as here, it is proven that a state official has told jurors not to believe the defendant when he testifies, the State cannot rebut the presumption of prejudice by arguing what the outcome would have been without that tampering. Ms. Hill was

a state official who used her official authority to obtain private access to jurors so she could argue the merits of the evidence outside of the presence of the court, the Defendant, and his counsel. This is, fortunately, a rare event, but it is one that requires a new trial. The Court of Appeals' distinction in *Cameron* between the communication itself 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.

The U.S. Supreme Court addressed this exact issue almost sixty years ago when it held the Sixth Amendment right to a trial before an impartial jury is incorporated to the states via the Fourteenth Amendment. 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 changed 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 State of Oregon argued, as the State does here, that the jury tampering did not require a new trial because the defendant did not show the verdict would have been different but for the improper communication. In *Parker*, that was almost mathematically certain—ten jurors never heard the communication at issue and the vote of ten jurors was at that time enough to convict. *Id.* at 365.

Yet 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.

The Court of Appeals more recently touched on this point in *Green*, holding a 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. *State v.*

Green, 427 S.C. 223, 236, 830 S.E.2d 711, 717 (Ct. App. 2019), *aff'd as modified*, 432 S.C. 97, 851 S.E.2d 440 (2020) (citation omitted). This 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. 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. Here, by contrast, the extensive, deliberate, and self-interested jury tampering which it has been proven Ms. Hill committed 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 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)).

Finally, state and federal courts have "found the authority of the speaker to be relevant to Sixth Amendment analyses" of improper external communications with jurors during trial. *Utah v. Soto*, 513 P.3d 684, 695 (2022). In *Parker*, the U.S. Supreme Court noted that the state's argument that no harm could have resulted from a bailiff's comments on the merits "overlooks the fact that the official character of the bailiff—as an officer of the court as well as the State—beyond question carries great weight with a jury which he had been shepherding for eight days and nights." 385 U.S. at 365. For that reason, "undue contact with a juror by a government officer almost categorically risks influencing the verdict." *Tarango v. McDaniel*, 837 F.3d 936, 947 (9th Cir. 2016). Here, the improper communications about the merits of the case did not come from a bailiff acting as a security guard or as a message courier. They came from an *elected official*—someone whose name nearly every one of the jurors presumably had seen on the same ballot that they used to vote for the President of the United States[10]—holding an office established by the state Constitution. It was the very person who summoned the jurors to serve, who impaneled them and administered their oath, who administered the oath to the witnesses presented to

[10] Ms. Hill was elected in 2020; the voter turnout in the 2020 general election in Colleton County was over 73% of all registered voters. *2020 Statewide General Election Results*, S.C. Election Comm'n, https://www.enr-scvotes.org/SC/Colleton/106517/Web02.264677/#/.

them for their consideration, who told when and where to report for each day of their service, and who read their verdict in the courtroom.

a. ***The State cannot rebut the presumption of prejudice by arguing Ms. Hill's jury tampering was harmless because secret advocacy for a guilty verdict in the jury room during a criminal trial by a state official is a structural error in the trial that cannot be harmless.***

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 is effectively 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 be 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)).

When the jury returned guilty verdicts in this case, the trial court congratulated the jury that "certainly the verdict that you have reached is supported by the evidence, circumstantial evidence, direct evidence, all of the evidence pointed to only one conclusion, that's the conclusion you all have reached. So, I applaud you all for . . . coming to a proper conclusion." Trial Tr. 5877:17–23. Even before Ms.

Hill's misconduct was known, the trial court foreshadowed the outcome of the "harmless error" analysis it applied to Murdaugh's new trial motion: The trial court 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 Denying Mot. New Trial 24.

But 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*, 385 U.S. at 363–65. Thus, the rule for deciding whether to grant Murdaugh a new trial is not whether the trial court believes the outcome of the trial would have been the same had Ms. Hill's jury tampering not occurred. If that were the case, the trial court should deny a motion for a new trial even if she paid the jury to vote guilty because, in the trial court's opinion, "all of the evidence pointed to only one conclusion"—the guilt of the accused.

The Fourth Circuit very recently made a similar point when overturning a Murdaugh-related criminal conviction because of a violation of the defendant's Sixth Amendment right to trial by an impartial jury. In *United States v. Laffitte*, the Fourth Circuit held that the trial court's removal of a juror during deliberations violated the

defendant's right to an impartial jury because there was a reasonable possibility that the removal was related to the juror's views on the merits of the case. 121 F.4th 472, 489–90 (4th Cir. 2024). The government argued the violation was harmless. The Fourth Circuit held that it need not reach the issue of whether the Sixth Amendment violation was structural error, because "even under the harmless error standard . . . [f]or constitutional errors, the government bears the heavy duty of proving 'beyond a reasonable doubt that the error complained of did not contribute to the [result] obtained.'" *Id.* at 491 (quoting *United States v. Legins*, 34 F.4th 304, 319 (4th Cir. 2022)). The Fourth Circuit rejected the government's argument "that the strength of the evidence submitted during its case-in-chief was sufficient to render any error harmless" under that standard because the defendant "presented defenses, and whether the jury credited his testimony was at the heart of those defenses . . . [a]nd the jury—not this Court—is tasked with evaluating that evidence and deciding whether the Government has met its burden." *Id.* at 492. Likewise, in this case the State cannot cure the absence of an impartial jury at trial by asking a trial judge or an appellate court to evaluate the evidence it presented at trial in lieu of the missing impartial jury.

This case, however, is distinct from *Laffitte* in that Ms. Hill's jury tampering is so far beyond the pale that the Court should have no reason to be reluctant to conclude that her conduct constitutes structural error in the trial. The issue here is

not whether a judge erred in dealing with a jury issue during trial, nor whether a juror engaged in misconduct, nor whether some member of the public engaged in misconduct, nor whether a defendant engaged in misconduct, nor even whether a bailiff made an improper statement. The issue is whether an elected state official using the power of her office to enter the jury room during trial to advocate against the defendant to promote her own financial interests is a structural error in the conduct under the trial, under the principle that all evidence and argument presented to the jury must be presented in the courtroom. *See Turner*, 379 U.S. at 472–73 ("In a constitutional sense, trial by jury in a criminal case necessarily implies at the very least that 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.").

The undisputed evidence and findings from the evidentiary hearing are that Ms. Hill did engage in jury tampering. Three jurors and the alternate juror testified that Ms. Hill made comments to them regarding the merits of Murdaugh's testimony in his own defense. Evid. Hr'g Tr. 23–24, 46–56, 77–78, 203–04. One juror and the alternate testified that she told them not to be "fooled by" the defense. *Id.* at 46–56, 203–04. The only witness to contradict any of that testimony was Ms. Hill, whom the trial court found to be not credible. *Id.* at 251:13–252:1, 23–24. One juror even testified that Ms. Hill's conduct did influence her decision to vote guilty. *Id.* at 46–

56. Ms. Hill's conduct would necessarily bias a jury against the defendant. It was an abuse of discretion for the trial court instead to reason that it does not matter whether that happened because any jury, biased or unbiased, would reach the same verdict in this case. The right at issue is the constitutional right to trial before an unbiased jury, not a right to a correct verdict.

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*, 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 held 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 system of trial by jury:

> 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 unsworn.' 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). 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).[11] 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,

[11] *Maddox* 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*, 837 F.3d at 947 ("*Mattox* and its progeny further establish that undue contact with a juror by a government officer almost categorically risks influencing the verdict.").

> 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 . . . .

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).

Contrary to the State's position before the trial court, the 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.

In the trial court, the State complained that this sort of tampering happens so commonly that it "cannot overstate the impossibility" of considering it a structural

error. Resp't's 2d Br. 12. That exactly reverses the issue. Nothing like Ms. Hill's conduct has ever happened before this case. Most likely it will never happen again. The impossibility is found in excusing Ms. Hill's conduct with *post hoc* reasoning that her tampering probably did not change the outcome of the trial (even though one juror said it did). If Ms. Hill's misconduct is excused, then truly anything goes.

The trial court committed legal error by not presuming Murdaugh's right to a fair trial was prejudiced by Ms. Hill's jury tampering. Applying the correct legal standard, the evidence—that an elected state official deliberately advocated for a guilty verdict in the jury room during trial so she could personally profit from it—supports only one reasonable inference—the presumption of prejudice to Murdaugh's right to a fair trial is irrebuttable and constitutes a structural error in his trial. The Court therefore should reverse the trial court and vacate Murdaugh's convictions.

3. <u>The trial court's "finding" that Ms. Hill's comments to jurors that were "not overt as to opinion" is unsupported by and contrary to the evidence in the record.</u>

At the evidentiary hearing the trial court examined Juror Z about her affidavit describing Ms. Hill's jury tampering, and she testified,

> [The Court] Q. Very good. The second -- the first paragraph, of course, is the statement that you were in the case. Second paragraph says:
>
> Toward the end of the trial, after the Presidents' Day break but before Mr. Murdaugh testified, the clerk of court, Rebecca Hill, told the jury, quote, not to be fooled, unquote, by the evidence presented by Mr.

> Murdaugh's attorneys, which I understood to mean that Mr. Murdaugh would lie when he testifies.
>
> Is that what your recollection is of that statement?
>
> [Juror Z] A. Yes, ma'am.
>
> Q. Is there anything in the statement that on reflection you think is not correct?
>
> A. No, ma'am.
>
> Evid. Hr'g Tr. 5:4–18.
>
> When ruling from the bench that same day, the trial court ruled:
>
> Did Clerk of Court Hill make comments to any juror which expressed her opinion what the verdict would be? Ms. Hill denies, A, and so the question becomes was her denial credible.
>
> I find that the clerk of court is not completely credible as a witness. . . . 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.

Id. 251:13–252:1.

That seems clear enough. But the State-drafted order the trial court entered months later slips in the statement "This Court further finds that the improper comments made by Clerk Hill as expressed by Jurors Z and P were limited in subject and not overt as to opinion . . . ." Order Denying Mot. New Trial 22. That offhand finding is unsupported by and, indeed, contradicted by, the evidence in the record and it contradicts the ruling the trial court from the bench the same day it received the juror's testimony. Juror Z testified that Ms. Hill said "not to be fooled" by

evidence presented in Murdaugh's defense. Evid. Hr'g Tr. 5:4–18. The alternate juror 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. No reasonable person can say those statements are "not overt as to opinion." Certainly, that is not what Justice Toal said when ruling on the motion for a new trial later that same day.[12]

Allowing the State to insert a "finding" contradicted by all evidence in the record and by the trial court's own ruling from the bench, simply to shore up its position on appeal, was an abuse of discretion by the trial court. The Court therefore should disregard the finding that Ms. Hill's statements were not "overt as to opinion." *See State v. Simmons*, 279 S.C. 165, 167, 303 S.E.2d 857, 859 (1983) (holding the trial court abused its discretion when denying a motion for a new trial where its decision was based on a factual finding but "the record is in all respects void of evidence to support [that] finding"). Ms. Hill's statements as set forth in sworn testimony, uncontroverted by anyone except Ms. Hill (whom the trial court found not credible), speak for themselves. To the extent it is necessary to characterize those statements in a legal analysis, that is a mixed question of law and

[12] Mr. Murdaugh concedes the statements were "limited in subject"—the subject of his testimony in his own defense at trial. The trial court does not identify any other subject to which the statements purportedly were "limited." *See* Circuit Court Order, Apr. 4, 2022.

fact and "[i]n reviewing mixed questions of law and fact, where the evidence supports but one reasonable inference, the question becomes a matter of law for the court." *Moore*, 343 S.C. at 288, 540 S.E.2d at 448. The only reasonable inference here is that Ms. Hill's statements to jurors overtly expressed her opinion that Murdaugh should be found guilty.

4. <u>Even if the presumption of prejudice were rebuttable, the State did not rebut—or even attempt to rebut—any presumption of prejudice in this case.</u>

At the evidentiary hearing, the State failed to meet its burden to overcome the presumption that Ms. Hill's conduct was prejudicial to Murdaugh's right to a fair trial before an impartial jury that considers only the evidence and argument presented in open court. It was impossible to do so, so 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).

Nevertheless, the trial court 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 that "any possible presumption of prejudice was overcome by these facts." Order Denying Mot. New Trial 24. That finding is unsupported by any evidence in the record. The trial court does not cite or refer to any evidence

presented at the evidentiary hearing to support that finding—for which the State did not even argue.

The evidence presented at the hearing was that nine jurors testified that they did not hear Ms. Hill comment on the merits of the case before the verdict, three jurors (P, X, and Z) and the alternate juror testified that Ms. Hill commented to the jury about Murdaugh's testimony in his own defense, one deliberating juror and the alternate juror testified that Ms. Hill told jurors not to believe or be fooled by the defense—and that deliberating juror testified that Ms. Hill's comments influenced her decision on the verdict, and the Barnwell County Clerk of Court who participated in the trial nearly every day testified that Ms. Hill made similar comments to her and that Ms. Hill repeatedly stated that a guilty verdict would help her book sales. Evid. Hr'g Tr. 181–183. Further, the trial court did not examine Juror 785, who was impaneled from the start of the murder trial until the very last day, even though she was at the courthouse and available to testify. Evid. Hr'g Tr. 173:11–19. Juror 785 has also given a sworn statement that she too heard Ms. Hill say that jurors should not be "fooled by" the defense. Mot. New Trial Ex. H ¶ 2.

That record provides no support whatsoever for a finding that the State overcame any presumption of prejudice. Based on the trial court's commentary in same paragraph of the order in which it presents this finding about the "six-week trial with its extensive evidentiary presentations" (Order Denying Mot. New Trial

24) and its unusual action to summon the gallery back to the courtroom after the adjournment of the evidentiary hearing to proclaim, "I agree that the evidence was overwhelming and the jury verdict not surprising" (Evid. Hr'g Tr. 254:3–16, 255:19–20), it appears that its finding that "any possible presumption of prejudice was overcome" is based solely on its own opinion that the correct verdict was rendered at trial. That was an abuse of discretion. Because no evidence supports the trial court's finding that "any possible presumption was overcome," this Court should disregard it.

Finally, the throwaway line in the State-drafted order that "any comments [from Ms. Hill to jurors] that occurred were cured by the trial court's extensive instructions," Order Denying Mot. New Trial 22, has no merit. During trial, Judge Newman was unaware of Ms. Hill's jury tampering so of course he gave no curative instructions regarding her tampering. He only gave the usual jury instructions given in every trial—do not discuss the case with anyone, do not seek outside information or watch news reports about the case, and consider only the evidence presented in the courtroom when deliberating. Order Denying Mot. New Trial 22–23. Jury instructions given to every jury, from a trial judge unaware that any jury tampering is taking place, cannot "cure" jury tampering by a state official going into the jury room to advocate for a guilty verdict so she can sell books about it. *See Remmer*, 347 U.S. at 229 (jury tampering in a criminal case is presumptively prejudicial);

Cameron, 311 S.C. at 207-08, 428 S.E.2d at 12 (holding "the private communication of the court official to members of the jury" means "a new trial must be granted unless it clearly appears that the subject matter of the communication was harmless"). The trial court's citation to *State v. Grovenstein*, 335 S.C. 347, 517 S.E.2d 216 (1999) in support of its conclusion that the standard jury instruction not to consider external influences cures all jury tampering, known or unknown, is completely off-point. *Grovenstein* involved a curative instruction specific to the external influence at issue given by the trial judge to the jury after he learned of the external influence—which was nothing more than the alternate juror remaining with the jury for 20 or 30 minutes after the case was submitted. 335 S.C. at 353, 517 S.E.2d at 219.

Because the undisputed evidence admits only one reasonable inference, that no presumption was (or could have been) overcome, this Court should hold the presumption of prejudice to Murdaugh's right to a fair trial was not rebutted, vacate his convictions, and remand for a new trial.

B. <u>Prejudice was proven at the evidentiary hearing.</u>

As discussed above, in *Parker* the U.S. Supreme Court held that the Supreme Court of Oregon erred in holding a bailiff's statement to a juror that the defendant "is guilty" did not require a new trial because the defendant did not prove the comment affected the verdict. 385 U.S. at 366. The Supreme Court ruled "'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.'" *Id.* at 364 (quoting *Turner*, 379 U.S. at 472–473). It further ruled the state's argument that the defendant did not show the comment prejudiced him ignored the "official character of the bailiff—as an officer of the court as well as the State." *Id.* at 365. Here, Murdaugh's motion for a new trial asserted a much higher-ranking official made equally direct comments (and more of them) to jurors during a criminal trial. *Parker* therefore controls if the comments were made. The State's prehearing brief implicitly admitted this point:

> Finally, Murdaugh cites to *Parker v. Gladden*, 385 U.S. 363 (1966), and argues it represents that the statement of "that wicked fellow, he is guilty" cannot be harmless. However, *Parker* is factually distinguishable because he was able to do what Murdaugh cannot: 'one of the jurors testified that she was prejudiced by the statements[.]' . . . In this case, Murdaugh has presented an affidavit from a single juror who deliberated, and that juror prescribed her verdict to pressure from other jurors—not anything Clerk Hill allegedly said.

Resp't's 2d Prehearing Br. 10.

That fell flat at the evidentiary hearing.[13] Not only did Murdaugh prove the comments were made, but a juror also testified they influenced the verdict. In

[13] That was not the only instance in which the State's return to the motion was overtaken by events. In its return, the State also claimed Mr. Murdaugh's allegations that Ms. Hill committed wrongdoing were not "even remotely plausible" and that he was merely "projecting his own calculating, manipulative psyche onto a dedicated public servant"—ironically referring to Ms. Hill. State's Return to Mot. New Trial

Parker, the juror only testified, regarding the bailiff's statement, that "all in all it must have influenced me. I didn't realize it at the time." *Parker*, 385 U.S. at 366 n.3. At the evidentiary hearing, Juror Z gave much more definitive testimony:

> 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.

Evid. Hr'g Tr. 46:6–15. In *Parker*, the juror testified "it must have influenced me," but in this case the juror testified "it *did* influence me."

Parker therefore controls this case. If a bailiff stating, "that wicked fellow, he is guilty," to a juror who later testifies that statement "must have influenced me," requires a new trial, then a much more senior court official telling a juror not to be "fooled by" evidence presented by the defense and not to believe the defendant when he testifies to a juror who later testifies those statements "did influence me," must require a new trial. The prejudice is proven. And there is no question about the

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18. After that filing, Ms. Hill's ethics commissions complaints were referred for criminal prosecution, her book was withdrawn for publication due to plagiarism, and she resigned from office in disgrace.

continued viability of *Parker*—it is a landmark case that incorporated the Sixth Amendment right to an impartial jury to the states. 385 U.S. at 364.

Although Murdaugh's counsel argued *Parker* in, *inter alia*, his pretrial brief, his second pretrial brief, his reply pretrial brief, and his written objections to the trial court's proposed questions to the jurors, the trial court studiously avoided it entirely. Instead, the trial court erroneously required that Murdaugh, in addition to proving that Ms. Hill did tamper with the jury about the merits of his case during trial, must also prove that tampering affected the deliberating jurors' subjective decision to vote for a guilty verdict.

Questioning jurors about what motivated them to vote in a certain way when rendering their verdict is improper, and the defense objected. *E.g.*, Ltr. from R. Harpootlian to Ret. Chief Justice Toal, Jan. 25, 2024, at 1–2; Evid. Hr'g Tr. 49:9–51:3. Rule 606(b) of the South Carolina Rules of Evidence provides,

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

"Thus, juror testimony or affidavits are admissible to prove an allegation of extraneous information or influence," *State v. Zeigler*, 364 S.C. 94, 110, 610 S.E.2d

859, 867 (Ct. App. 2005), but not to prove the "effect" of that information "upon that or any other juror's mind or emotions as influence the juror to assent to or dissent to the verdict," Rule 606(b), SCRE. "[I]nquiry into the motives of individual jurors and conduct during deliberations is *never* permissible; any investigation must focus solely on whether the jury was exposed to external influences and, *from an objective perspective*, whether such influence was likely to have affected the jury's verdict." *Mahoney v. Vondergritt*, 938 F.2d 1490, 1492 (1st Cir. 1991) (emphasis added) (construing substantively identical federal Rule 606(b)); *see also Minnesota v. Cox*, 322 N.W.2d 555, 559 (Minn. 1982) ("Therefore, the proper procedure for reviewing a jury verdict is to determine from juror testimony what outside influences were improperly brought to bear upon the jury and then estimate their probable effect on a hypothetical average jury." (citing *United States ex rel. Owen v. McMann*, 435 F.2d 813, 820 (2d Cir. 1970) & *Massachusetts v. Fidler*, 385 N.E.2d 513, 519 (Mass. 1979)); *Manley v. AmBase Corp.*, 337 F.3d 237, 252 (2d Cir. 2003) ("[C]ourts must apply an 'objective test,' . . . focusing on two factors: (1) 'the nature' of the information or contact at issue, and (2) 'its probable effect on a hypothetical average jury.'"); *United States v. Lloyd*, 269 F.3d 228, 238 (3d Cir. 2001) ("[W]e must conduct 'an objective analysis by considering the probable effect of the allegedly prejudicial information on a hypothetical average juror.'"); *Haugh v. Jones & Laughlin Steel Corp.*, 949 F.2d 914, 917 (7th Cir. 1991) ("The proper procedure

therefore is for the judge to limit the questions asked the jurors to whether the communication was made and what it contained, and then, having determined that the communication took place and what exactly it said, to determine—without asking the jurors anything further and emphatically without asking them what role the communication played in their thoughts or discussion—whether there is a reasonable possibility that the communication altered their verdict.").

There is no doubt that the "probable effect on a hypothetical average jury" of being told not to believe the defendant when he testifies in his own defense, by the elected official who administered the oath to them when they were impaneled, is to be prejudiced against the defendant. So, the State requested the trial court instead ask jurors whether Ms. Hill's comments affected their decision to vote guilty in this case. The State requested this because it thought it knew what the answer would be, made evident by the statement in its prehearing brief that "*Parker* is factually distinguishable because he was able to do what Murdaugh cannot: 'one of the jurors testified that she was prejudiced by the statements[.]'" Resp't's 2d Prehearing Br. 10.

But when Juror Z unexpectedly testified that she was prejudiced by Ms. Hill's statements, the State was cornered. Even under the incorrect legal standard adopted by the trial court, Murdaugh prevailed. He proved the verdict was influenced by Ms. Hill's jury tampering. One deliberating juror did testify that her verdict was

influenced by Ms. Hill's jury tampering. And no evidence was presented to controvert Juror Z's testimony or to show any bias or motive for falsehood.

The only way out was for the trial court to decide that Juror Z's uncontroverted testimony in open court about her own state of mind and her own mental processes was not credible:

> 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.

Evid. Hr'g Tr. 55:1–56:7. After Juror Z left the courtroom, Murdaugh's counsel objected that there was no inconsistency with being influenced both by Ms. Hill's comments during the presentation of evidence at trial and by other jurors during deliberations. *Id.* 58:2–22. Juror Z attempted to make this point herself, but the trial

court would not permit any further testimony or examination of her. So, through her own counsel, she provided an affidavit that day 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 29, 2024. The trial court nevertheless held "this Court does not find credible Juror Z's ambivalent and self-contradicted statements to the contrary that her verdict was in any way affected by any comments from Clerk Hill." Order Denying Mot. New Trial 21.

Because the trial court elected to disregard Rule 606(b), we do not have an objective inquiry into whether Ms. Hill's comments likely would have affected *a* jury, but instead have a credibility determination about whether those comments affected *this* jury. That determination is based on a court-conducted, inquisitorial inquiry into a juror's own internal mental processes, a subject the trial court was forbidden by law to inquire into, and based on the strange reasoning that if a juror testifies she was influenced by external tampering, she has violated her oath to follow the judge's instructions not to base her verdict on anything but the evidence presented in court, and therefore her testimony that she was influenced is not credible and should be disregarded. *See* Order Denying Mot. New Trial at 20–21. Or that if

she testifies that she was influenced by other deliberating jurors during deliberations, any testimony that she also was influenced by events that happened during trial before deliberations should be disregarded. *Id.*

This is a bizarre and legally untenable result. Juror Z, who has direct knowledge of her own mental processes, said those mental processes were influenced by Ms. Hill's comments that she should not be fooled by the defense. The trial judge—who knows nothing of Juror Z's mental processes other than how Juror Z describes them—presumed to tell Juror Z that she was mistaken, and that Ms. Hill did not influence her. It is extraordinary that the trial judge believed she knew Juror Z's mental processes better than Juror Z.

Juror Z did not ask to be placed in this situation. She sat in a courtroom, isolated from her normal life and work, for six weeks because someone she did not know was accused of committing a crime that had nothing to do with her. That is a tremendous public service for which she has not been compensated in any meaningful way. She maintained her anonymity until well after the evidentiary hearing. She did not "cash-in" with media appearances after the verdict. She is not, as the State has scurrilously argued, an ally or advocate for Murdaugh. *See* Resp't's 2d Prehearing Br. 18 (accusing Juror Z's lawyer of being "an agent of Murdaugh"). She voted to convict him of murder. She has no reason to lie. She has simply been

honest about what Ms. Hill did during the trial and the effect it had on her own deliberations.

It was an abuse of discretion for the trial court to disregard Juror Z's testimony about her own mental processes simply because her testimony met a legal standard the State thought that Murdaugh could not possibly satisfy. The trial judge's characterization of her testimony as "ambivalent" is unsupported by any evidence in the record. When asked, "Was your verdict influenced in any way by the communications of the clerk of court in this case[?]" she answered, "Yes, ma'am." Evid. Hr'g Tr. 46:6–14. When asked, "And how was it influenced?" she answered, "To me, it felt like she made it seem like he was already guilty." *Id.* When asked, "Did that affect your finding of guilty in this case?" she answered "Yes, ma'am." *Id.* No reasonable person can say that is "ambivalent" testimony.

The only reasonable inference from the record is that Ms. Hill's jury tampering did influence at least one juror's decision to vote for a guilty verdict. The Court therefore should reverse the trial court and vacate the murder and firearms convictions.

* * *

The public rightly sees Murdaugh's downfall as an exposé of privilege and corruption in South Carolina's legal system and the citizens of South Carolina need more from this case than confirmation of their own social-media-fed ideas about the

details of a crime they did not witness. They need to see that their legal system actually works. Satisfying public desire to see a hated man punished is not why we have a legal system. If Murdaugh is to be convicted of murder, the citizens of South Carolina need to see him convicted by a process they would agree is fair if they were the defendants. No reasonable man would agree, if he were on trial for his life, that having the clerk of court secretly advocate against him in the jury room so she can sell books about his conviction would be a fair trial. Providing Murdaugh with the fair trial that every citizen of South Carolina would expect for himself is necessary to assure all that no one—powerful or humble, innocent or guilty, hated or beloved—is proscribed from due process and the equal protection of the law.

II. THE TRIAL COURT ALLOWED THE STATE TO INTRODUCE IMPROPER CHARACTER EVIDENCE AND OTHER IRRELEVANT AND UNFAIRLY PREJUDICIAL EVIDENCE THAT "SO INFECTED THE TRIAL WITH UNFAIRNESS AS TO MAKE THE RESULTING CONVICTION A DENIAL OF DUE PROCESS."

The trial court committed numerous evidentiary errors, repeatedly admitting over objection evidence that was irrelevant, unfairly prejudicial, or otherwise prohibited by the South Carolina Rules of Evidence. These errors were, standing alone, reversible errors. Additionally, they combined to create a due process violation because they rendered Murdaugh's criminal trial fundamentally unfair. *See Chambers v. Mississippi*, 410 U.S. 284, 298 (1973) (holding the combined effect of individual errors "denied [Chambers] a trial in accord with traditional and

fundamental standards of due process" and "deprived Chambers of a fair trial"). Cumulative evidentiary errors are a constitutional violation where the errors have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *See Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). Such "infection" occurs where the combined effect of the errors had a "substantial and injurious effect or influence on the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (internal quotations omitted). The inquiry to determine whether the combined effect of trial errors violated a defendant's due process rights is whether the errors rendered his defense "far less persuasive than it might [otherwise] have been." *See Chambers*, 410 U.S. at 294.

As explained below, the evidence that the trial court erroneously admitted without exception served to materially undermine Murdaugh's defense, and to bolster and to plaster over holes in State's case. The State was allowed to present day after day of character evidence against Murdaugh under the thin guise that his thereby demonstrated bad character provided a motive for the murders. The State was allowed to impeach Murdaugh's exculpatory testimony with his exercise of his post-*Miranda* right to remain silent. Improper scientific testimony was admitted in the State's rebuttal case to plaster over the fact that only someone other than Alex could have thrown Maggie's phone into the roadside brush from where it was recovered by law enforcement. Improper expert testimony about firearms was

allowed, firearms unconnected to the murders were sent into the jury room during deliberations, and gunshot residue on a raincoat unconnected to Murdaugh was admitted into evidence to plaster over the State's failure to recover any murder weapons. These evidentiary errors were, standing alone, reversible errors because they were substantial errors affecting the result of the trial. *See State v. Plumer*, 433 S.C. 300, 313, 857 S.E.2d 796, 802 (Ct. App. 2021), *aff'd as modified*, 439 S.C. 346, 887 S.E.2d 134 (2023) (holding evidentiary errors that result in prejudice to the defendant reversible errors). Collectively they violated Murdaugh's right to due process of law because they rendered his defense "far less persuasive than it might [otherwise] have been" had the trial court consistently enforced the South Carolian Rules of Evidence. *See Chambers*, 410 U.S. at 294

A. Evidence of financial crimes should have been excluded under Rules 404(b) and 403 of the South Carolina Rules of Evidence.

"In order to admit evidence of bad acts not resulting in conviction, the trial court must, '[a]s a threshold matter, … determine whether the proffered evidence is relevant.'" *See State v. Scott*, 405 S.C. 489, 497–98, 748 S.E.2d 236, 241 (Ct. App. 2013) (quoting *State v. Clasby*, 365 S.C. 148, 154, 682 S.E.2d 892, 895 (2009)); *see also* Rule 402, SCRE ("Evidence which is not relevant is not admissible."). "If the trial judge finds the evidence to be relevant, the judge must then determine whether the bad act evidence [is admissible under the terms] of Rule 404(b)." *Scott*, 405 S.C. at 497–98, 748 S.E.2d at 241 (alteration in original and internal quotation marks

omitted). While evidence of prior bad acts generally "is not admissible to prove the character of a person in order to show action in conformity therewith," a court may admit "such evidence to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b), SCRE. Importantly, admissibility of such evidence requires it "logically relate to the crime with which the defendant has been charged," and that it be clear and convincing. *State v. King*, 424 S.C. 188, 200, 818 S.E.2d 204, 210 (2018) (quoting *State v. Fletcher*, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008)).

In the seminal case *State v. Lyle*, the Court explained that the trial court must rigidly scrutinize whether evidence of other distinct crimes falls within one of the exceptions, providing the defendant with the benefit of the doubt, and exclude all such evidence unless its logical relevance is clearly established. 125 S.C. 406, 118 S.E. 803 (1923). The Court explained:

> Whether evidence of other distinct crimes properly falls within any of the recognized exceptions noted is often a difficult matter to determine. The acid test is its logical relevancy to the particular excepted purpose or purposes for which it is sought to be introduced. If it is logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime**.** *But the dangerous tendency and misleading probative force of this class of evidence require that its admission should be subjected by the courts to rigid scrutiny.* Whether the requisite degree of relevancy exists is a judicial question to be resolved in the light of the consideration that the inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors. *Hence, if the court does not clearly perceive the connection between the extraneous criminal transaction and the crime*

> *charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected.*

Id. at 125 S.C. 406, 118 S.E. at 807 (emphasis added).

In addition, the logical relevancy between the prior criminal conduct and the crime charged must be supported by the evidence in the record. Argument of counsel, without more, is insufficient to satisfy the rigid scrutiny this Court must apply when assessing evidence of prior criminal acts and other misconduct. *See State v. Smith*, 309 S.C. 442, 446, 424 S.E.2d 496, 498 (1992) (evidence of drug use is incompetent to establish motive for a crime or the state of mind of the defendant where the record does not support any relationship between the crime and the drug use); *State v. Peake*, 302 S.C. 378, 381, 396 S.E.2d 362, 364 (1990) ("The record before us evinces no connection between appellant's prior offer to sell marijuana to the victim and the circumstances of her death."); *State v. Coleman*, 301 S.C. 57, 60, 389 S.E.2d 659, 660 (1990) ("While there was testimony that appellant appeared 'wired' on the morning of the murder, there was no evidence to suggest appellant's condition was the result of cocaine use. Further, there was nothing in the record to support the inference that the victim and appellant were involved in a drug transaction.").

1. <u>The State's theory that Murdaugh murdered his wife and son in cold blood to distract his law firm from investigating alleged financial improprieties is illogical, implausible, and unsupported by the evidence.</u>

The State argued that on the day of the murders, June 7, 2021, Murdaugh's financial schemes were about to come to light because of two reasons. First, Jeannie Seckinger was questioning Murdaugh about the whereabouts of the attorneys' fee from the *Farris* trucking accident case he worked on with co-counsel Wilson. Second, the State asserted that the hearing on the motion to compel financial information from Murdaugh in the *Beach* case would have exposed Murdaugh's financial schemes. Therefore, Murdaugh murdered his wife and son to distract from these two matters, and to garner sympathy from the community.

There was no evidence introduced to support the State's motive theory. Without any evidentiary support, this theory is pure, illogical speculation. Furthermore, the State's evidence contradicted its theory that June 7 was a tipping point. Seckinger testified that she stopped questioning Murdaugh once she learned his father was being admitted to the hospital again, and she offered her support to him as a friend. Murdaugh's father in fact died three days later. Seckinger also testified that she and the firm did not suspect that Murdaugh was stealing money. Rather, the concern was Murdaugh was concealing money to avoid disclosing it in response to discovery requests in the boating accident lawsuit. In addition, Mark

Tinsley, plaintiff's counsel in the boating accident lawsuit, conceded that nothing explosive was expected to occur at the June 10 hearing.

The State must provide more than just a prosecutor's best effort at a motive theory. *Cf. Smith*, 309 S.C. at 446, 424 S.E.2d at 498**;** *Peake*, 302 S.C. at 381, 396 S.E.2d at 364 (1990); *Coleman*, 301 S.C. at 60, 389 S.E.2d at 660. The trial court was required to subject the State's claim of motive to rigid scrutiny and reject evidence of prior criminal conduct unless the court clearly perceived the connection between the extraneous criminal transaction and the crime charged**,** after giving the defendant the benefit of the doubt. *See Lyle*, 125 S.C. 406, 118 S.E. at 807. Here, the State offered nothing more than a fabricated motive theory, without any supporting evidence. The evidence, therefore, does not meet the requirements of *Lyle* and Rule 404(b) and should have been excluded.

Furthermore, the case law relied upon by the State does not support the admission of Murdaugh's alleged prior bad acts under the State's theory of motive. *See* Def's Mem. In Opp'n to Mot. in Limine re: Evid. of Other Crimes & Bad Acts at 6-7 (distinguishing cases cited in State's Return in Opp'n to Def's Mot. For Bill of Particulars & State's Mot. to Admit Evid. of Motive at 10-11). The cases the State relies upon involve situations where the murder victim presented a threat of exposing the defendant's financial crimes, *United States v. Seigel*, 536 F.3d 306, 317 (4th Cir. 2008) (concerning defendant charged with violating 18 U.S.C. §1512(a) which

required that the government prove that the defendant killed the victim for the purpose of preventing him or anyone else from providing law enforcement with information about the federal crimes she committed); *Pennsylvania v. Rizzuto*, 777 A.2d 1069, 1080 (Pa. 2001) ("Appellant engaged in a premeditated course of conduct to forge checks and cover up his forgeries. A logical inference can be drawn that Appellant murdered Mrs. Laurenzi to cover up his theft of her funds."), or the defendant would obtain financial gain from the murder, *California v. Thompson*, 384 P.3d 693, 747 (Cal. 2016) (holding trial court did not abuse its discretion in concluding that evidence of defendant's prior financial misdeeds was relevant to show her motive for killing, and conspiring to kill, her husband in order to collect on his life insurance); *Felder v. Nevada*, 810 P.2d 755, 757 (Nev. 1991) (holding evidence that defendant obtained credit cards by forgery could indicate desperation and therefore properly admitted to prove motive where defendant was charged with murdering victim as part of a ransom scheme).

Here, there is absolutely no evidence that Maggie or Paul posed a threat of exposing Alex's financial crimes. In *West Virginia v. McGinnis*, the West Virginia Supreme Court rejected a similar attempt to introduce evidence of prior financial crimes under a theory that the defendant committed murder so that he would receive sympathy and avoid scrutiny from his financial misdeeds. 455 S.E.2d 516, 528–33 (W. Va. 1994). There, the defendant was charged with murdering his wife. *Id.* At

the time of her death, the defendant was under investigation for arson, tax evasion, and mail fraud. *Id.* At trial, the prosecution spent a substantial part of the opening statement and approximately three days of trial presenting evidence of the defendant's financial crimes. *Id.* The prosecution successfully argued to the trial court that this evidence fit within the motive exception to Rule 404(b) because of the defendant's pattern of portraying himself in a sympathetic role. *Id.* The West Virginia Supreme Court ruled that the prosecution's theory was implausible. *Id.* The court overturned the defendant's conviction concluding "the collateral evidence added impermissible substance to the prosecution's otherwise weak case and created the likelihood that the jury would convict the defendant solely because of his prior criminal conduct." *Id.* at 531.

In *State v. King*, the Court reversed a murder conviction where the State was permitted to introduce evidence that the defendant previously stole from his ex-wife. 334 S.C. 504, 514 S.E.2d 578 (1999). The trial court concluded that the evidence was relevant to establish the defendant's need for money, which supported the State's motive theory that the defendant murdered the victim for money. *Id.* at 511, 514 S.E.2d at 581–82. The Court characterized two types of thefts—remote thefts that occurred years before the murder, and a theft that occurred the night before the murder. The Court concluded that evidence of remote thefts was not admissible under any theory. *Id.* at 513, 514 S.E.2d at 582–83. The Court also concluded that

"while the remote thefts may have been minimally relevant to show motive under *Lyle*, the prejudicial effect of this evidence far outweighed this slight probative value." *Id.* at 513 n.5, 514 S.E.2d at 583 n.5. The Court also concluded that the thefts occurring the night before the murder were too attenuated for admissibility under the *res gestae*[14] theory or under *Lyle*. *Id.* at 513, 514 S.E.2d at 583.

Starting with *Lyle*, and continuing to the present, this Court has steadfastly ensured that in a criminal case the jury is only presented with evidence relevant to the charged crime and the Court has not hesitated to vacate a conviction where evidence of bad conduct is improperly admitted. For example, in *State v. McElveen*, the Court reversed a murder conviction where the State introduced evidence of the defendant's infidelity to his wife. 280 S.C. 325, 313 S.E.2d 298 (1984). In *State v. Cooley*, the Court vacated a murder conviction because the defendant's son was permitted to testify about prior instances of spousal abuse by the defendant against the victim. 342 S.C. 63, 536 S.E.2d 666 (2000); *see also Smith*, 309 S.C. at 446, 424 S.E.2d at 498 (evidence of drug use); *Peake*, 302 S.C. at 381, 396 S.E.2d at 364 (prior offer to sell marijuana to the victim); *Coleman*, 301 S.C. at 60, 389 S.E.2d at 660 (evidence of drug use).

[14] The *res gestae* theory recognizes evidence of other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred. *King*, 334 S.C. at 512, 514 S.E.2d at 582–83.

Here, the State was improperly permitted to introduce evidence of Murdaugh's alleged financial crimes solely to impugn his character to bolster its otherwise weak case. This fact was revealed during the State's closing argument where the prosecutor essentially abandoned this motive theory and told the jury its theory could be disregarded because the State is only required to prove malice. Trial Tr. 5823-25.

2. <u>Any probative value of the evidence concerning the alleged prior bad acts was substantially outweighed by the unfair prejudice that resulted to Defendant; therefore, it should have been precluded.</u>

Evidence of prior bad acts deemed relevant and proffered for a permissible purpose may nevertheless be excluded upon a determination by the trial court that "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE; *see also King*, 424 S.C. at 200, 818 S.E.2d at 210; *Scott*, 405 at 497–98, 748 S.E.2d at 241. "'[T]he determination of prejudice must be based on the entire record, and the result will generally turn on the facts of each case.'" *King*, 424 S.C. at 200, 818 S.E.2d at 210 (quoting *State v. Stokes*, 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2009)).

Should this Court deem the evidence relevant for a permissible purpose, evidence of the alleged prior bad acts should have nevertheless been excluded

because any probative value it offered was substantially outweighed by the unfair prejudice and undue delay that resulted from its introduction. *See State v. Gilchrist*, 329 S.C. 621, 627, 496 S.E.2d 424, 427 (Ct. App. 1998) ("Unfair prejudice means an undue tendency to suggest [a] decision on an improper basis.").

Here, the State presented ten witnesses over six days who testified about Murdaugh's financial misdeeds, dating back to at least 2015.[15] Trial Tr. 2242–33, 2502–87, 2656–3520, 3497–3517. The firm's chief financial officer Jeannie Seckinger testified about the diversion of fees in the *Farris* trucking accident case that she questioned Murdaugh about on June 7. She described the diversion of fees in the *Farris* case as a "one off" from Murdaugh's other schemes that she discovered in September 2021, months after the murder. Trial Tr. 2381–82:3.

Seckinger meticulously detailed Murdaugh's theft of client funds using the fake Forge account. Trial Tr. 2263:25–2335:14. A summary spreadsheet of the fake Forge account transactions totaling $2,841,512. State's Ex. 314. involving fourteen separate clients that she prepared was entered into evidence. The State then introduced disbursement sheets for each of the clients' settlements, with Seckinger explaining how Murdaugh deceived the firm and clients with each transaction.

[15] This testimony came after the Court conducted an *in camera* hearing spanning three days. Trial Tr. 1536–1640, 1708–1848, 2032–79.

State's Exs. 317–328, 429. Seckinger also explained how the law firm repaid each of these clients because Murdaugh stole their money.

The State also introduced a second spreadsheet that Seckinger prepared summarizing what she described as a scheme to defraud at least four clients using Palmetto State Bank. Trial Tr. 2335, State's Ex. 329. According to Seckinger, Alex used her brother-in-law as a Personal Representative on significant death cases and had him write checks from the settlement proceeds to cover Alex's personal expenses. The spreadsheet identified a total loss of $2,079,826. As with the fake Forge account transactions, Seckinger meticulously explained the disbursement forms for each of the four client victims. Trial Tr. 2335–54. Seckinger also testified about an incident when the firm mistakenly wrote Murdaugh a loan repayment check that was meant for his brother, and Murdaugh cashed it, later claimed the check was lost, got a replacement check, and cashed that one too. Trial Tr. 2258:4–60:23. Seckinger concluded her direct exam by responding to a question of whether she "really knew" Murdaugh, to which she replied, "I don't think I ever knew him; I don't think anybody knows him." Trial Tr. 2354:25–55:2.

The State presented evidence from Ronnie Crosby, one of Murdaugh's law partners, to corroborate Seckinger's findings. In addition, Crosby testified that Murdaugh admitted to the client thefts and said that he knew he was going to get caught at some point in time. Trial Tr. 2413:14–17:19. The State called Murdaugh's

former paralegal who testified about questioning Murdaugh about the *Farris* fee and later discovering a cancelled check from the Wilson law firm that proved Murdaugh had lied to her. Trial Tr. 2502–63. Michael Gunn, a principal with Forge Consulting, testified that his firm did not have a Bank of America account and that the fake Forge account was in fact fake. Trial Tr. 2563–83. Chris Wilson testified about conversations he had with Murdaugh regarding the *Farris* fee, and that Murdaugh lied to him as well. Trial Tr. 2656–2793. Jan Malinowski, the President of Palmetto State Bank, testified about Murdaugh's receipt of money from the various Estate accounts held at the bank and under the control of Russell Lafitte. Trial Tr. 2814–95.

Perhaps the most blatant unfairly prejudicial testimony came from a young victim, Tony Satterfield. Trial Tr. 2812–40. Alex used the fake Forge account to steal a $4,305,000 settlement against him brought by the Estate of Gloria Satterfield, Tony's mother and Alex's former housekeeper, which was intended to have gone to Tony and his disabled brother. State's Ex 352. Although Alex stole these funds in 2019, Alex was not under investigation or even under suspicion of stealing the Satterfield proceeds at any time leading to the murders. In fact, Tony Satterfield first spoke with Alex to inquire about the progress of the case after the murders when he became aware of media reports of a settlement involving his mother's estate. Satterfield's phone records identify a call on June 22, 2021, almost three weeks after

the murders. Trial Tr. 2828:6–29:8; State's Ex. 454. Before this call, Murdaugh communicated with Satterfield on April 12, 2021, when he sent Satterfield a text stating that he had "been working on case that made me think of you. Hope all is good. Call me any time I can help." Trial Tr. 2826:3–19, State's Ex. 453.

Because of the extremely sympathetic nature of this victim, the fact that Murdaugh stole from him and his vulnerable adult brother, and that his mother was Murdaugh's family's housekeeper, Murdaugh offered to stipulate to the admission of records involving this theft, in lieu of calling Tony to the stand in the presence of the jury. Trial Tr. 2807. The State refused to consent to sterilizing this evidence in any manner, and the trial court denied Murdaugh's specific Rule 403 objection to this sympathetic victim witness. Trial Tr. 2807–08.

3. Murdaugh did not waive his objections to the financial crime evidence by testifying.

Alex took the stand in his own defense and admitted that he had committed the financial crimes that the jury heard evidence about over a span of six days and explained that he did so primarily to support a severe opioid addiction. Alex also rebutted the State's motive theory that he murdered Maggie and Paul to distract from the impending financial investigation. By doing so, Alex did not waive his right to challenge the lower court's erroneous decision to admit this evidence. *See Rogers v. State*, 853 S.W.2d 29, 35 (Tex. Crim. App. 1993) (error is not waived when the evidence is brought in later in an effort to meet, rebut, destroy, deny or explain the

improperly admitted evidence); *State v. Logan*, 394 Md. 378, 390, 906 A.2d 374, 381 (2006), *abrogated by Kazadi v. State*, 467 Md. 1, 223 A.3d 554 (2020) ("The defendant does not waive an error by attempting to minimize or explain improperly admitted evidence. It would be unfair to permit the State to introduce evidence, *albeit* later found to be inadmissible, but not to permit the defendant, upon pain of waiver, to attempt to meet it, explain it, rebut it or deny it." (citation omitted)); 1 McCormick On Evid. § 55 (8th ed.) ("However, when her objection is made and overruled, she is entitled to treat this ruling as the 'law of the trial' and to negatively rebut or explain, if she can, the evidence admitted over her protest.").

4. The trial court erred by concluding Murdaugh "Opened the Door" to the financial crime evidence by questioning a witness about Murdaugh's relationship with Maggie and Paul.

Will Loving, a friend of Paul's, was called as a witness by the State in its case-in-chief. On cross-examination, Loving described Paul's relationship with his father as "awesome," that "it just kind of seemed like Paul was the apple of [Alex's] eye. Trial Tr. 1503:18-23. Loving also described Alex's relationship with Maggie as "awesome" as well. "[T]hey were always laughing and everybody got along . . . nothing was out of the ordinary at all." Trial Tr. 1503:24–25; 1504:1–4. On redirect, the State asked Loving whether he knew anything about Murdaugh's finances, his law practice, where he was spending his money, anything about his bank account, or what kind of debt Murdaugh was carrying. Trial Tr. 1511:4–25. Then the State

asked, "Do you know anything about him being confronted on the morning of June 7, 2021, about $792,000 of missing fees from his law firm." Loving had no knowledge about any of the issues raised. The trial court allowed this questioning over objection concluding that the defense opened the door by eliciting testimony about Murdaugh's relationship with Maggie and Paul, which the trial court reasoned was essentially character evidence.

The trial court abused its discretion by permitting this line of questioning. While a party may introduce otherwise inadmissible evidence in rebuttal when an opponent introduces evidence as to a particular fact or transaction, the trial court is required to be "wary of a thinly-veiled attempt to show propensity by way of the open-door doctrine." *State v. Young*, 378 S.C. 101, 106, 661 S.E.2d 387, 390 (2008). Furthermore, testimony in response must be "proportional and confined to the topics to which counsel had opened the door." *Bowman v. State*, 422 S.C. 19, 42, 809 S.E.2d 232, 244 (2018).

Testimony about a defendant's loving relationship with his spouse is not character evidence. Furthermore, even if it could be construed as character evidence, Loving's testimony did not open the door for the introduction of financial crimes evidence. Rule 404(a) prohibits evidence of a person's character or a trait of character for the purpose of proving action in conformity therewith, excepting evidence of a pertinent character trait offered by an accused, or by the prosecution

to rebut the same. At most, testimony about Alex's loving relationship with Maggie and Paul could possibly be construed as pertaining to Alex's character trait of peacefulness, and non-violence toward his family. If so, then the State would be permitted to offer evidence to rebut this character trait, such as prior incidents of domestic violence if there were any. But there was not any such evidence. The trial court abused its discretion by allowing this line of questioning because evidence that Alex stole money from his law firm does not in any way rebut Loving's and other witnesses' testimony that Alex had a loving relationship with Maggie and Paul.

B. The State violated Murdaugh's due process rights by using his post-*Miranda* silence to impeach him.

The trial court allowed the State to use Alex's post-*Miranda* silence after being arrested on the murder charges to impeach the exculpatory trial testimony that Alex offered about being at the kennels in violation of Alex's due process rights, as recognized in *Doyle v. Ohio*, 426 U.S. 610 (1976). During cross-examination, Alex was questioned about Maggie finding pills in his vehicle in May 2021. Murdaugh denied that Maggie insisted he go back to detox after this discovery. Alex testified that Paul convinced Maggie that Alex had gotten the pills in anticipation of dental surgery, and that Alex had not relapsed. Alex further explained that he previously admitted to Paul that Alex was back on the pills, but struck an agreement with Paul that he would go back to detox as soon as Pauls' criminal charges arising from the boating accident were resolved.

The prosecutor then sought to impeach Alex by questioning whether this was the first time the State had heard his explanation. Alex responded,

> A. Well, you asked me this. Mr. Waters, you keep making the issue about the first time I—you hearing these things. When, when I got arrested and I went to jail, we began reaching out to you to talk to you about all of these things, to try to tell you everything that I had done, to give you all these details, to help y'all go through the financial things. And up until the time y'all charged me with murdering my wife and child, you would never give Jim Griffin a response to our invitation to sit down and meet with you.

Trial Tr. 4923:20–24:3. The prosecutor then switched the line of questioning to impeach Alex about remaining silent after his arrest for the murders of Maggie and Paul.

> Q. Are you saying that you ever before yesterday reached out to anyone through yourself or through your attorneys and reached out to anyone in law enforcement or the prosecution and told them the story about the kennels? Are you telling me that?
>
> A. I'm---what I'm telling you Mr. Waters---
>
> Q. Would you answer my question first. Did you ever reach out to anyone in law enforcement or the prosecution and tell that story you told this jury yesterday about the kennels before yesterday?

Trial Tr. 4924:8–18.

Counsel for Murdaugh objected to this questioning citing Alex's Fifth Amendment right to remain silent and *Doyle v. Ohio*, 426 U.S. 610 (1976). Trial Tr. 4924:23–25:5, 5015:16–16:19. The State conceded that it would have been precluded from this line of questioning if Murdaugh "had claimed his right to silence from the beginning and had kept silent throughout," Trial Tr. 5017:7–10, but argued

that Alex waived any *Doyle* violation by giving statements on multiple occasions. The State, however, did not identify any statements Murdaugh gave after his arrest. Trial Tr. 5017:21–18:15.

The trial court overruled the *Doyle* objection, stating:

> *Doyle* primarily addresses the issue of post-arrest silence. If an accused is silent following an arrest, then it's improper to comment on a post-arrest silence. It does not allow a person, an accused or a person who's suspected to give contradictory information or to voluntarily give a statement or to voluntarily give a misstate, as has been acknowledged here. I do not find any *Doyle* violation.

Trial Tr. 5017:16–23.

The trial court was factually and legally incorrect. In *Doyle*, the Supreme Court held that a defendant's due process rights are violated when a prosecutor seeks to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving *Miranda* warnings at the time of his arrest. In *State v. Green*, 440 S.C. 292, 304, 890 S.E.2d 761, 768 (2023), this Court held that when a defendant objects to the State's use of post-arrest silence for impeachment purposes and asserts that *Miranda* warnings were given, the burden is on the State to prove by a preponderance of the evidence that the defendant did not receive *Miranda* warnings prior to his silence.

Murdaugh's counsel objected to the State's attempt to impeach Murdaugh with his post-arrest and post-*Miranda* silence on the murder charges. Trial Tr. 5016. There was not any question raised as to whether Alex received *Miranda* warnings

after his arrest. Furthermore, there was no evidence that Alex made any statements to law enforcement after being interviewed in August 2021, one month prior to his assisted suicide attempt and subsequent arrest for financial crimes, and almost one year before his arrest on murder charges. The State sought to impeach Murdaugh, initially on the fact that he had never offered an explanation to the State about Maggie's discovery of his pills, until his trial testimony. Alex acknowledged this but offered an explanation that he had been trying to arrange a meeting with the prosecutor through counsel to discuss his pending charges, "up until the time y'all charged me with murder of my wife and child." Trial Tr. 4924:1–3.

The State then directly questioned Murdaugh about the fact that he never told anyone with the prosecution or law enforcement about being at the kennels after supper until his trial testimony. This is precisely the line of questioning that *Doyle* prohibits. Yet, the State argued to the trial court that Murdaugh "made numerous statements on multiple occasions, and that operates as a *Doyle* waiver." Trial Tr. 5016:21–23. The trial court erroneously adopted this flawed reasoning in overruling the defense's *Doyle* objection.

Doyle prevents the State from commenting on a defendant's post-arrest and post-*Miranda* silence, irrespective of whether a defendant made pre-arrest and pre-*Miranda* misstatements. The decision in *Doyle* is rooted in the fundamental unfairness of advising a defendant he has a right to remain silent, then using that

silence for impeachment purposes. *See Fletcher v. Weir*, 455 U.S. 603, 605–07 (1982) (declining to broaden *Doyle* and holding, "[i]n the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to post[-]arrest silence when a defendant chooses to take the stand"). The State did not seek to impeach Murdaugh based on contradictory statements he made after he received *Miranda* warnings. Instead, the State sought to impeach Murdaugh's testimony by establishing that he had not given his exculpatory explanation until he testified at trial, thereby using Alex's post-*Miranda* silence against him. This tactic exemplifies the fundamental unfairness that *Doyle* prohibits. The trial court once again abused its discretion by allowing this line of questioning despite the strenuous objection lodged by the defense.

C. The trial court committed reversible error by allowing the State to introduce evidence of an unscientific experiment performed by an unqualified Charleston County Deputy in its rebuttal case.

The trial court committed reversible error when it allowed the State in its rebuttal case to introduce inadmissible scientific testimony from an unqualified witness, Charleston County Sheriff's Office Sergeant Paul McManigal, over the defense's repeated objections. As explained below, the State could not have convicted Murdaugh without Sgt. McManigal's improper testimony that it is possible to throw an iPhone from a car moving over 40 miles per hour without the

phone screen illuminating in response to the motion of being picked up, thrown, and bouncing on the ground. Substantial context is first needed to understand why Sgt. McManigal testified in the State's rebuttal case, what his testimony was about, and why it mattered. With that context, it is easy to see why his testimony was inadmissible and why it was highly prejudicial to allow it.

The State's case-in-chief at first relied on witnesses from the Federal Bureau of Investigation (FBI) to present evidence on Murdaugh's vehicular movements in his 2021 Chevrolet Suburban on the night of the murders. Agent Matthew Wild testified that he and other personnel spent two days driving three cars "everywhere all around Moselle" to map cell tower signals, then spent considerable time using that data and records from cell service providers and data extracted from Murdaugh's phone to create a very rough map of his movements that night. Trial Tr. 3077:6–3122:15. FBI electronics engineer Dwight Falkofske testified that the FBI had a team spend a full year hacking the electronics in Murdaugh's Suburban to extract data like when Murdaugh's phone connected to the vehicle via Bluetooth or when the engine started or stopped. Trial Tr. 2605:12–2606:2. The extracted data was somewhat accurate but contained unclear information and required a lot of interpretive inferences. Trial Tr. 26510:25–2651:9. No location data was recovered for the day of the murders. Trial Tr. 2655:9–12. The FBI's year-long hacking effort was required because the systems are encrypted by the manufacturer, General

Motors, and Mr. Falkofske testified no one asked General Motors for assistance because "it's difficult for us to get the manufacturers to work with us on data." Trial Tr. 2644:23–2645:8.

All that work was a useless waste of time.

Someone at General Motors was watching when Mr. Falkofske testified that it is "difficult" to get General Motors to cooperate with a murder investigation. Six days after Mr. Falkofske testified, General Motors senior technical expert Devin Newell appeared as a witness to present extremely detailed data General Motors had collected from Murdaugh's Suburban as it was operated and stored on its own servers. Trial Tr. 3452–3459; State's Ex. 515. The data was disclosed to the State only two days after Mr. Falkofske testified. *Id.* General Motors had recorded Murdaugh's precise position every three seconds and nearly every imaginable event regarding the vehicle, such as when his phone connected to the car and when calls were made through that connection, how fast his car was driving, when it turned on and off, etc. *Id.* There was never any need for the FBI to attempt to roughly triangulate his position from rural cell towers or to hack into the Suburban's electronics.

The General Motors data was offered into evidence by the State and the defense readily conceded its accuracy—the accuracy of this unexpected information received late in the State's case-in-chief was a major problem for the State. Maggie

Murdaugh's iPhone was found in roadside brush about fifteen feet off Moselle Road about a half mile from the driveway entrance. Trial Tr. 1654–1657. The State and the defense agree it was thrown from a vehicle leaving the scene after she was murdered. *See, e.g.*, Trial Tr. 5845. Her phone contained a database that recorded the exact time every time the screen turned on or off. Trial Tr. 1226, 1323, 4622. It also had the "Raise to Wake" feature common to all iPhones, meaning the screen would turn itself on in response to slight movements corresponding to being picked up—rotating the top of the phone up 45 degrees or more from a horizontal plane or 90 degrees on a vertical plane. Trial Tr. 4620. The last time Maggie Murdaugh's phone screen turned on the night of the murders was at 9:05:44 pm; at 9:06:12 pm it recorded its last orientation change, which occurred simultaneously with an unanswered incoming call from Murdaugh; and it turned off at 9:07:00, immediately after another missed call from Murdaugh, and remained off until 9:31:44, at which time Murdaugh was known to be at his mother's home. Trial Tr. 4623–4631; Def.'s Ex. 158; State's Ex. 519. The new General Motors data showed Murdaugh did not drive past the location where her phone was thrown into the roadside brush until 9:08:36 pm. Trial Tr. 3958:8–16. It also showed he was driving at 42 m.p.h. when he passed it. *Id.* He did not stop, slow down, or do anything usual as he drove past it. Trial Tr. 4051:24–4052:25.

The General Motors data put the State in an unexpected bind late in the trial. Murdaugh could have thrown Maggie's phone from his vehicle to where it was recovered on the roadside only if it is possible to throw an iPhone from a car going 42 m.p.h. into the woods off a rural road, without the phone moving sufficiently to turn on the screen, even though the screen always comes on in response even to the slight movement of being picked up off a table or car seat or taken out of a pocket. If that is not possible, then someone else was at the scene and involved in the murders. The State cannot admit that possibility because it would be forced to answer questions like "who was involved?", "what did they do?", and "why did they do it?" The State's answers to those questions would be "we have no idea," which would create so much reasonable doubt that the case might not make it to a jury at all.

For that purpose, the State presented Sgt. McManigal as an expert witness in its rebuttal case. Sgt. McManigal had previously testified in the State's case-in-chief. He took an electronic extraction from Murdaugh's cell phone created by Dylan Hightower, an investigator with the Fourteenth Circuit Solicitor's Office, on June 10, 2021, and redacted potentially privileged contents and reduced it to a timeframe relevant to the murder investigation pursuant to instructions from an attorney with the Ninth Circuit Solicitor's Office. Trial Tr. 1110. He then gave the redacted extraction back to Mr. Hightower, performing no other analysis of the data.

Id. He also received Paul Murdaugh's phone from SLED and attempted, unsuccessfully, to unlock it, and testified as to chain-of-custody forms for it. *Id.* He was just a chain-of-custody witness.

Murdaugh's defense therefore was surprised when the State again called him in its reply as an expert in "cell phone forensics," defined in voir dire as using various software tools to recover evidence from cell phones. Trial Tr. 5396–97. The defense did not object to his qualification as an expert in that area, and he is in fact qualified to extract data from cell phones. *Id.* But his testimony had nothing to do with extracting data from a cell phone. Instead, he was asked about an experiment he conducted while sitting alone in his office during the previous weekend. He obtained an iPhone comparable to Maggie Murdaugh's phone, and he sat alone in his office over the weekend shaking it and throwing it around his office. He testified that when he did so, "[s]ometimes the screen would turn on" but "a lot of times I would throw it and the screen would not turn on." Trial Tr. 5401. He testified "if the IPhone registers a slight amount of motion, it thinks it's being picked up, so it will turn on the screen . . . [b]ut if it's being picked up more aggressively it won't" turn on the screen. So, a violent motion like being thrown from a car would not turn on the screen, even though much lesser movements like being picked up do turn on the screen. He testified that in his "expert" opinion, the screen usually would not come on if the phone were thrown "like a frisbee." Trial Tr. 5401–02.

Sgt. McManigal admitted he had no basis for that opinion other than this "experiment" during trial. Trial Tr. 5406–07. He testified that he never thought to record these experiments or any data from these experiments:

> Q. When you performed these experiments, did you record them in any way?
>
> A. I did not.
>
> Q. You didn't? Did you record doing any of this?
>
> A. I did not.
>
> Q. Did you consider video recording any of these experiments?
>
> A. Actually it never crossed my mind.
>
> Q. You just did the experiments and then just sort of orally relayed when you could have had a video to show us?
>
> A. That is correct.
>
> . . .
>
> Q. According to the experiments that you conducted since -- when did you do these experiments?
>
> A. I started it Friday afternoon and into Saturday.
>
> Q. So, you did these experiments this week -- this last weekend?
>
> A. Correct.
>
> Q. Did not record any data.
>
> A. I did not.
>
> Q. You just played with the phone and are coming here to express your observations.
>
> A. That is correct.

. . .

Q. You just threw the phone around in your office?

A. Absolutely.

Q. So, you didn't record what you were doing, and you did not measure any data --

A. I did not.

. . .

Q. Do you normally do experiments and don't record any data or video or record anything?

A. It never crossed my mind to record video.

Q. Do you believe that you would have to disclose that data if you had recorded it?

. . .

A. I believe so, yes, sir.

Trial Tr. 5402–05. It is not credible that in a televised six-week murder trial with the Attorney General and Deputy Attorney General sitting at the prosecution table, the State asked Sgt. McManigal to conduct this experiment during trial for the purpose of presenting it to the jury and him as an expert witness, but everyone involved simply forgot to record any data whatsoever. If the State sincerely wanted to know whether the screen of an iPhone would come on if the phone is thrown from a moving car, the State could have asked someone knowledgeable at Apple. Or the State could have thrown a phone from a car, then extracted the data to see if the screen came on (something Sgt. McManigal was qualified to do). The State could

have at least filmed Sgt. McManigal throwing his phone around his office, so everyone could see what he saw. Or at least had someone with Sgt. McManigal while he threw the phone around to corroborate his observations. It is obvious why the State did none of those things—if the result was not what the State wanted, the prosecution would have been sunk.

Further, Sgt. McManigal admitted that he was not an expert in this area at all:

> Q. You're trained in extracting data from a cell phone.
>
> A. That's correct.
>
> Q. And when it comes to tossing it around and seeing how it moves, you don't know anything more than anyone else, do you?
>
> A. No, sir.
>
> . . .
>
> Q. You this weekend sat around your office by yourself recording nothing, tossing the phone around here, and are now reporting those results as an expert in what?
>
> A. In cell phone forensics. I understand how cell phones operate more than most people.
>
> Q. Do you understand electrical engineering? Do you have any background?
>
> A. I am not an engineer, no, sir.
>
> Q. Do you know how accelerometers in the iPhone work?
>
> A. Not exactly, no, sir. But I know that they exist and I know that that's how the iPhone determines [motion].
>
> Q. So, there is an unknown device within the phone that detects motion in a way that you don't understand, and some amount of motion that

> you don't know how much because you didn't measure it does something that only you saw in your office this weekend.
>
> A. Well, no. I know what that is. It's the accelerometer, and the accelerometer is what detects the motion, and that's what causes the iPhone to Raise to Wake.
>
> Q. How d[oes] an accelerometer detect motion?
>
> A. I'm not an engineer. I don't know how it detects motion. I just know that it does.[16]
>
> Q. But, sir, you really haven't said anything you couldn't quickly find out on Google. Isn't that correct?
>
> A. Probably, yes, sir.

Trial Tr. 5408, 5410–11. Sgt. McManigal even admitted that his experiment was not statistically reliable. Trial Tr. 5414–15.

It was reversible error to admit Sgt. McManigal's testimony over the defense's objections. Rule 702 of the South Carolina Rules of Evidence provides, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." "To admit expert testimony under Rule 702, the proponent—in this case the State—must demonstrate, and the trial court must find, the existence of three elements: 'the evidence will assist the trier of fact, the

[16] An accelerometer in a phone detects motion by detecting the movement of an internal "proof mass" relative to fixed electrodes, which changes the capacitance between them.

expert witness is qualified, and the underlying science is reliable.'" *State v. Wallace*, 440 S.C. 537, 543–44, 892 S.E.2d 310, 313 (2023) (quoting *State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999)). "When admitting scientific evidence under Rule 702 . . . [t]he trial judge should apply the *Jones* factors to determine reliability." *Council*, 335 S.C. at 20, 515 S.E.2d at 518. These are "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." *Id.* at 19, 515 S.E.2d at 517.

The defense moved to strike his testimony immediately when Sgt. McManigal admitted that he was not an expert. Trial Tr. 5408–09. The trial court overruled the objection. At the first break in proceedings after his testimony, outside of the presence of the jury, the defense renewed the objection to his testimony in the form of a motion to exclude his opinion under *Council*. Trial Tr. 5434–5436. The trial court denied that motion as well, without any cogent reasoning. *Id.* In doing so, the trial court erred for two reasons.

First, the trial court erred in overruling the objection to Sgt. McManigal's expert opinion after he admitted he was not an expert. He was admitted as an expert without objection in the field of downloading information from a cell phone. Trial Tr. 5396–97. His testimony had nothing to do with that. In response to that

argument, the trial court merely ruled that he had been admitted as an expert without objection, ignoring the argument that his testimony had nothing to do with the area in which he was admitted as an expert. Trial Tr. 5408–09. And later, when the objection was renewed as a *Council* motion:

> THE COURT: Your motion is late. You stipulated, you agreed that he was an expert. I gave you an opportunity to voir dire him, question him in any way.
>
> MR. BARBER: Your Honor, we had no notice that he was going to offer this experiment. We -- he was offered as a cell phone forensics expert, which he is, and there was no notice that he had done this engineering analysis, throwing his phone around.
>
> THE COURT: He did not do an engineering analysis; he said he didn't do an engineering analysis. And what was scientific about his testimony?

Trial Tr. 5435:4–21. It was an abuse of discretion for the trial court to simply state that Sgt. McManigal was admitted as an expert without objection while repeatedly refusing to address the argument that his testimony was not within the scope of that expertise and that he that he himself *testified* that he lacked expertise in the subject matter of his opinion. *See Wallace*, 440 S.C. at 543, 892 S.E.2d at 313 (holding "the trial court—when ruling on the admission or exclusion of evidence—must think through the objection that has been made, the arguments of the attorneys, and the law—particularly the applicable evidentiary rules—and must thoughtfully apply the correct law to the information and evidence before it").

Second, the trial court erred in admitting testimony about Sgt. McManigal's experiment regardless of his qualifications. Scientific evidence can only be admitted if reliable, and the *Jones* factors determine reliability. *Council*, 335 S.C. at 20, 515 S.E.2d at 518. Sgt. McManigal's experiment satisfied none of the *Jones* factors. There are no publications or peer review of the "technique" of him sitting alone in his office on a weekend throwing a phone around while recording no data. The State did not suggest that there has been any "prior application" of his "method" of throwing his phone around his office. There are no "quality control procedures used to ensure reliability" in sitting alone in an office throwing a phone on the floor without recording any data about it. And Sgt. McManigal admitted his "method" was not consistent with recognized scientific procedures when he admitted it was not statistically reliable. Trial Tr. 5414–15.

Instead of applying the *Jones* factors, the trial court incredibly ruled that his experiment was admissible because his testimony was not "scientific testimony." Trial Tr. 5435:4–21. There is no colorable basis for the ruling that testimony reporting the result of an experiment purporting to determine whether a specific amount of motion causes a specific proof mass move between electrodes so as to change the capacitance between them within a range that causes a given connected computing device to illuminate an attached video screen is not at least as scientific in character as, for example, accident reconstruction. *Cf. Hamrick v. State*, 426 S.C.

638, 649, 828 S.E.2d 596, 602 (2019) ("Accident reconstruction is a highly technical and specialized field in which experts employ principles of engineering, physics, and other knowledge to formulate opinions as to the movements and interactions of vehicles and people, under circumstances lay people—even trained officers—simply cannot understand."). The trial court simply refused to conduct the required analysis, which is an abuse of discretion. *State v. Phillips*, 430 S.C. 319, 340-41, 844 S.E.2d 651, 662 (2020) (reversing a trial court's ruling to admit expert testimony when the trial court did not "meaningfully exercise that discretion" and "we are actually conducting the analysis for the first time"); *Hamrick*, 426 S.C. at 648-49, 828 S.E.2d at 601 (holding the trial court erred because it "failed to make the necessary findings that the State established the foundation required by Rule 702").

Sgt. McManigal's testimony was extremely prejudicial, and its erroneous admission was therefore reversible error. *Cf. State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) ("Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result."). The General Motors data obtained near the end of the State's case-in-chief meant it was now known exactly—to the second—when Murdaugh drove past Maggie Murdaugh's phone, and her phone's extracted data showed its screen was dark from more than 90 seconds before he drove past until after his arrival at his mother's home in a different town. So, the State unexpectedly and late in the trial had to find evidence that he could have thrown

the phone without the screen turning on. To do so, it had a chain-of-custody witness from the case-in-chief, Sgt. McManigal, sit alone in his office over a weekend and then emerge saying what the State needed him to say as an expert while studiously making sure not to record any data that would allow anyone to validate his experiment. Without his inadmissible testimony, the State would have been forced to admit that someone other than Murdaugh was present at the scene of the murders when they occurred, had taken Maggie Murdaugh's phone from her dead body, and had left the Moselle dog kennels with it and threw it onto the side of the main road leaving Moselle while Murdaugh was still at home. The State could not have convicted Murdaugh with that admission and therefore could not have convicted Murdaugh without Sgt. McManigal's inadmissible testimony.

D. The Trial Court erred by admitting irrelevant and unreliable firearms evidence.

1. The trial court erred by allowing SLED's firearms examiner to provide irrelevant, unreliable, and confusing opinion testimony.[17]

At the crime scene, the ballistic evidence around Paul's body included one shot cup and one shot wad (collectively Item 1), two 12-gauge shotshells (Items 9-10), as well as bullet jacket fragments (collectively Item 11), a fired bullet (Item 12), a buckshot pellet (Item 13) and birdshot pellets (collectively Item 14). Trial Tr. 344–

[17] Murdaugh filed a pre-trial motion seeking to preclude or limit firearm ballistic opinion testimony, Mot. In Limine to Preclude or Limit Firearm Ballistic Testimony. After a *Council* hearing, the trial court allowed the opinion testimony.

347; Court's Ex. 1. The Colleton County Sherriff's Office identified six 300 Blackout caliber cartridges around Maggie's body (Items 2–7) and one bullet (Item 8). *Id.* Law enforcement also seized fired 300 Blackout caliber cartridge cases (Items 35–39) from the ground at the side entrance of the house on the Moselle property—approximately 300 yards from the crime scene. Additional 300 Blackout cartridge cases (Items 108–124, 126–128), as well as 12-gauge shotshells (Items 125, 129–135) were found in an area by a pond near Moselle Road in a field which was frequented by the Murdaugh family and guests for target practice. *Id.*

The above evidence, as well as four 12-gauge shotguns (Items 22, 30, 31, and 32) and one 300 Blackout caliber rifle (Item 33) collected from the Moselle property were submitted to the Firearms Department at SLED for forensic examination. *Id.* The laboratory then fired laboratory-supplied ammunition through each shotgun and rifle to create test specimens. The SLED examiner compared the various items of firearms ballistic evidence submitted from the crime scene with the test specimens created by the lab using the naked eye and a microscope. Based on the observable, physical characteristics of the items submitted to the lab, he concluded that some of the 300 Blackout cartridges retrieved from the firing range and near the residence were fired or loaded into, extracted, and ejected by the 300 Blackout rifle taken from the property. Court's Ex 1 at 7. While he was unable to reach any conclusions as to whether the 300 Blackout cartridges found beside Maggie's body were fired by the

300 Blackout retrieved from the residence, he reported that "[m]atching individual identifying characteristics were found in the mechanism marks of Items 2-7, [spent shell cartridges found at the crime scene], and Items 35-37, 39, 108, 113, 116-117, and 122, [cartridges found at the shooting range and near the residence], to conclude that these Items were loaded into, extracted, and ejected from the same firearm at some previous time." Trial Tr. 1944–45.

However, the SLED examiner was unable to conclude that the breech markings on the firing pins of the spent casings found at the murder scene near Maggie's body matched the breach markings on the firing pins of the spent casings located near the residence or the shooting range. Trial Tr. 1963:15–66:25. And the SLED examiner was unable to identify the weapon that fired the bullets that killed Maggie. Trial Tr. 1966.

To reach this conclusion about extractor and ejector markings, the SLED firearms examiner necessarily had to presume that every 300 Blackout manufactured in the world makes unique extraction and ejection markings. Trial Tr. 1967:22–69:9. But the examiner did not rely upon any studies, literature or scientific data to support this hypothesis. Trial Tr. 349:10–15, 363:17–64:12. The examiner simply concluded that because the ejection and extraction marks looked similar to him, only one 300 Blackout manufactured could have made the marks. The examiner admitted

that the "identification portion" of his analysis is "subjective in nature." Trial Tr. 363:13-16.

Indeed, the field of tool mark analysis is inherently subjective and not scientifically valid. Because the conclusions drawn by the firearms examiner are not based on methods that are scientifically valid or reliable, such evidence should have been excluded under Rule 702 of the South Carolina Rules of Evidence. Additionally, given the unreliable nature of such evidence and the import a jury attributes to expert testimony, such evidence should have also been excluded because any probative value it might offer is substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury. *See* Rule 403, SCRE.

"When admitting scientific evidence under Rule 702, SCRE, the trial judge must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable." *Council*, 335 S.C. at 20, 515 S.E.2d at 518. In determining whether evidence is admissible pursuant to Rule 702, SCRE, the Court "must assess not only (1) whether the expert's method is reliable (i.e., valid), but also (2) whether the substance of the expert's testimony is reliable." *State v. Warner*, 430 S.C. 76, 86, 842 S.E.2d 361, 265 (Ct. App. 2020) (internal citations omitted). The Court's determination of reliability requires consideration of "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to

ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." *Council*, 335 S.C. at 1, 515 S.E.2d at 517 (citing *State v. Ford*, 301 S.C. 485, 392 S.E.2d 781 (1990)). The proponent of scientific evidence has the burden of providing the Court with the factual and scientific information needed for the Court to carry out its gatekeeping function. *See Phillips*, 430 S.C. at 334, 844 S.E.2d at 659. If the Rule 702 evidence is deemed relevant and reliable, the Court must then consider whether the probative value of the evidence is substantially outweighed by its potential for unfair prejudice, confusion of the issues, or misleading the jury. *Council*, 335 S.C. at 1, 515 S.E.2d at 517.

The lower court erred in concluding that the opinion testimony regarding the 300 Blackout shell casings met the *Council* criteria. The examiner's opinions were confusing, unreliable and were more likely to confuse the jury than assist them. The State failed to establish the "assist the trier of fact" element, and the probative value of the DNA evidence is substantially outweighed by danger the evidence would confuse the issues and mislead the jury. The examiner admitted that his opinions are subjective and that there are no objective criteria for determining whether tool markings are sufficiently similar to constitute a match. Trial Tr. 363:13–16; 1979–1983.

Firearms analysis is a "feature-comparison" method that attempts to determine "whether a questioned sample is likely to have come from a known source

based on shared features." President's Council of Advisors on Sci. and Tech., Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods (2016), https://www.justice.gov/d9/2023-07/07.13.23.%20-%20PCAST%20-%20Interim.pdf. It is an inherently subjective forensic field given the methodology depends largely, if not exclusively, on examiner judgment. *Id*. For this reason, authoritative scientific bodies conducting objective reviews of firearms analysis have concluded it is neither scientifically valid nor reliable. In 2009, the National Research Council of the National Academy of Sciences, issued a report (the "NAS Report"), identifying the following issues which plague the reliability of firearms analysis:

- "[E]ven with more training and experience using newer techniques, the decision of the toolmark examiner remains a subjective decision based on unarticulated standards and no statistical foundation for estimation of error rates." *Id.* at 153–154.

- "Sufficient studies have not been done to understand the reliability and repeatability of the methods." *Id.* at 154.

- The Association of Firearm and Tool Mark Examiners' (AFTE) theory of identification does not address "questions regarding variability, reliability, repeatability, or the number of correlations needed to achieve a given degree of confidence." *Id.* at 155.

See Nat'l Res. Council, Strengthening Forensic Science in the United States: A Path Forward (2009), *available at* https://www.ojp.gov/pdffiles1/nij/grants/228091.pdf.

A second objective critique of this discipline was presented in a report issued by the President's Council of Advisors on Science and Technology in 2016 ("PCAST

Report"). Like the NAS Report, it concluded that firearms analysis as a field "still falls short of the scientific criteria for foundational validity." Specifically, the PCAST Report raised the following concerns:

- The AFTE's "theory of identification" that "two toolmarks have a 'common origin' when their features are in 'sufficient agreement'" is circular. *Id*. at 60 ("[AFTE] declares that an examiner may state that two toolmarks have a "common origin" when their features are in "sufficient agreement." It then defines "sufficient agreement" as occurring when the examiner considers it a "practical impossibility" that the toolmarks have different origins.")

- Relying on "training and experience" and "uniqueness" in lieu of empirical demonstration of accuracy. *Id*. at 60-61. (Practitioners' "honest belief that they are able to make accurate judgments about identification based on their training and experience" is a "fallacy''; "'[e]experience is an inadequate foundation for drawing judgments about whether two sets of features could have been produced by (or found on) different sources" and "'training' is an even weaker foundation."

- Firearms analysis has never been satisfactorily validated. *Id*. at 64 ("There is no known study assessing "the overall firearm and toolmark discipline's ability to correctly/consistently categorize evidence by class characteristics, identify subclass marks, and eliminate items using individual characteristics.")

President's Council of Advisors on Sci. and Tech., *supra*.

In short, two independent, non-partisan groups comprised of accomplished experts have each issued reports—which rely on countless other scientific reports—reflecting a consensus in the scientific community that the firearms examiner's opinions that the State introduced have not been validated and are unreliable.

Furthermore, the firearms examiner was unable to express his opinions with a reasonable degree of certainty, as required of expert opinions in South Carolina.

Trial Tr. 347:22–49:9, 942:11–17; *see also, e.g.*, *Clark v. Greenville County*, 313 S.C. 205, 208, 437 S.E.2d 117, 119 (1993) (holding expert testimony must state that the result "most probably" came from the cause alleged). Moreover, trial courts have begun to place limitations on firearms examiners' testimony in view of the recent criticisms of the field, and the Department of Justice guidelines for such testimony, and specifically prohibit firearms examiners to express opinions with any level of certainty. *See United States v. Richardson*, No. 19-20076-JAR, 2024 WL 961228, at *11 (D. Kan. Mar. 6, 2024) (holding that a firearms examiner may not "assert that two toolmarks originated from the same source to the exclusion of all other sources" because such an assertion "is ultimately an examiner's decision and is not based on a statistically-derived or verified measurement or comparison to all other firearms or toolmarks").

The trial court therefore abused its discretion by allowing this confusing and unreliable opinion testimony to be introduced at trial.

2. <u>The trial court erred by allowing the State to introduce multiple guns seized from Murdaugh's residence when no evidence linked the guns to the murders.</u>

SLED seized three 12-gauge shotguns and one 300 Blackout rifle from the gunroom at Murdaugh's residence. Trial Tr. 935–946; State's Exs. 88–91. These firearms were examined and tested by SLED's firearm examiner who concluded that none of these shotguns was used to fire the shotshells located in the feed room next

to Paul's body.[18] The SLED forensic examiner could not reach any conclusion regarding the 300 Blackout. Trial Tr. 1934, 1938:15–25, 1951:9-52:3, 1952:10–17, 1959:1–11, 959:12–61:5. Therefore, there was no forensic evidence or any other evidence whatsoever linking these firearms to the murders. Trial Tr. 1008:5–09:14. Yet the State was permitted to introduce the firearms into evidence, over objection, arguing that the weapons are proof that SLED did a thorough job of investigating the murders. Trial Tr. 935–46:1-3, 960:14–61:1.

These firearms were not relevant to any issue in the trial and should not have been admitted into evidence. Rule 402, SCRE (providing that evidence which is not relevant is not admissible). "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rule 401, SCRE. A "thorough" investigation produces evidence probative of the guilt of the accused; the "thoroughness" of SLED's investigation otherwise has no bearing on whether Murdaugh committed the crimes with which he was charged. Further, the number of guns located in the Murdaugh gun room was

[18] Appellant did not object to the admission of State's Exhibit 4, which was the shotgun Mr. Murdaugh had brought to the scene of the crime. Trial Tr. 472. The SLED examiner was unable to determine whether this firearm was used to fire the shells located at the scene. Trial Tr. 1951.

not unexpected, considering it was a very large hunting plantation. Trial Tr. 1014:15–15:5.

The Court has had occasion to consider the propriety of admitting weapons into evidence that have no connection to the crime charged. In *State v. McConnell*, the Court reviewed the trial court's decision to admit into evidence a pistol that "uncontradicted testimony showed . . . was not in appellant's possession at the time of the shooting incident." 290 S.C. 278, 280, 350 S.E.2d 179, 180 (1986). The Court concluded that the pistol "should not have been admitted" because it was "not properly connected with the incident, irrelevant, incompetent, and raised spurious inferences of prior bad acts." *Id.* at 280, 350 S.E.2d at 180. Further, because "[t]here was insufficient connection between the evidence and the crime with which appellant was charged, . . . the cumulative prejudicial effect of the enumerated evidence far outweighed its probative value." *Id.* Based on these findings, the Court reversed the trial court and ordered a new trial. *Id.*

Likewise, in *Holman v. State*, the Court considered a petition to review an order denying post-conviction relief for ineffective assistance of counsel where the petitioner's trial attorney failed to object to the introduction of a handgun seized from the petitioner's residence that "was in no manner connected to the shooting incident" for which the petitioner was charged. 381 S.C. 491, 674 S.E.2d 171 (2009). The Court reversed the trial court and granted a new trial upon finding that

"the failure to object to this clearly inadmissible evidence was ineffective assistance of counsel." *Id.* at 493, 674 S.E.2d at 172. Citing *McConnell*, the Court observed that counsel's failure to object to the admission of the unrelated firearm resulted in "[s]ubstantial, and easily avoidable, prejudice," and further chided the State for introducing the weapon in the first place. *Id.* ("We are troubled by the State's effort to admit the unrelated firearm in evidence.").

These cases demonstrate that it is manifest error to admit into evidence firearms unconnected to the crime charged. Owing to the prejudicial effect of such evidence and this Court's prior rulings on this issue, reversal is warranted on this basis alone. And in this case introduction of these irrelevant weapons into evidence was especially prejudicial because it served to confuse and mislead the jury into believing one of the weapons about which the SLED firearms examiner could not reach a conclusion was likely the murder weapon that the State in fact never recovered.

3. <u>The trial court erred by allowing the State to introduce gunshot residue results of a raincoat into evidence when no evidence linked the raincoat to Murdaugh.</u>

Mushelle "Shelley" Smith, who was present when Alex visited his mother on the night of the murders, testified that three days after Alex's father's funeral, Alex came to his mother's Almeda home early in the morning, changed vehicles, moved a four-wheeler, and then came into the residence with a blue tarp. Trial Tr. 2106–

17, 2122, 2125, 2138, 2151–54; Def.'s Exs. 86, 87. When Smith left the residence, the blue tarp was spread out over a chair, and she never saw it again. Trial Tr. 2124:6–13.

In September 2021, SLED executed a search warrant at the Almeda property and located a blue tarp in an upstairs closet with dishes wrapped in it. Trial Tr. 2155–2162. The agents concluded that it did not have any evidentiary value and did not conduct any analysis of it. Trial Tr. 2163. The agents then located and seized a blue raincoat also in the same upstairs closet and delivered it to the SLED lab for testing. There was gunshot residue on the interior portion of the blue raincoat. Trial Tr. 1934; 1938, 1951–52, 1959.

The State offered the blue raincoat and gunshot residue testing results as evidence at trial. Murdaugh objected because Smith testified that she did not see Murdaugh with the blue raincoat, that she had never seen the blue raincoat, and that she was sure that Murdaugh was carrying a tarp, of the type one would place on a car. Trial Tr. 2142:6–43:6. Nevertheless, the trial court overruled Murdaugh's objection and admitted both the blue raincoat and gunshot residue test results into evidence. Trial Tr. 2187:5–91:6, 2229:3–40:8; 2466:13–80:12. The trial court abused its discretion in doing so.

Despite Smith's unequivocal testimony that the item she observed Murdaugh carrying was not a blue rain jacket, but instead a blue tarp, the trial judge ruled that

it was for the jury to decide whether she saw a tarp or a raincoat. The trial judge explained that the witness equivocated as to whether she observed Murdaugh with a raincoat or tarp. Trial Tr. 2236–40.

But Smith was not equivocal: She was crystal clear that Murdaugh was carrying a tarp. On direct examination, she testified that Murdaugh had "a blue tarp, a blue something in his hand, something blue . . . like a tarp that they put on a car to keep your car covered up." Trial Tr. 2109:3–21. Further, the State never showed Smith the blue raincoat, not even during trial. Trial Tr. 2122:16–24. Instead, Smith was shown a photograph of the blue raincoat balled up in the bottom of the closet, where no one could readily see that it was a raincoat. Trial Tr. 2112:2–17; State's Ex. 411. In fact, Smith had never looked in any upstairs closets, did not even know where the picture was taken, and had only been upstairs twice in three years working at Mrs. Murdaugh's home. Trial Tr. 2124:14–25:7.

On cross examination, Smith was shown an actual tarp, the type that would cover a car, Trial Tr. 2123:1–8, Def.'s Ex. 86, and testified as follows:

> Q. Is this the type of tarp that Mr. Murdaugh came into the Almeda house on the day that we're talking about?
>
> A. Yes.
>
> Q. A tarp like this that would maybe cover up a car, Is that right?
>
> A. Yes.
>
> Q. Any way to confuse this with a rain jacket?

A. No.

Trial Tr. 2123:6–15.

The trial court's finding that a jury could infer that Smith saw a raincoat, rather than a tarp is clearly erroneous. There is no mistaking that Smith testified she observed Murdaugh with a tarp, not a raincoat. The trial court exacerbated this error by permitting the State to introduce evidence that a significant amount of gunshot residue was present on the raincoat.[19]

The State then argued in closing that Murdaugh disposed of the murder weapons by wrapping them in the blue raincoat. Trial Tr. 5827:18–31:3 ("Gunshot residue inside, inside the rain jacket, that blue type garment that Shelley said I saw him carrying something like that. And he got rid of the guns and he's hiding it there for some reason. Thank goodness he did, and thank goodness for Shelley for bringing that in. That's what he disposed of the guns with."). Trial Tr. 5830:23–31:3. The jury never should have seen the blue raincoat or heard testimony about gunshot residue located on it because there was no evidence that Murdaugh ever possessed the raincoat. The trial court abused its discretion by admitting this extremely harmful and prejudicial evidence without any testimony whatsoever linking Murdaugh to the raincoat.

[19] Gunshot residue is inorganic, not biodegradable, and therefore there is no way to determine when gunshot residue was transferred to the raincoat—the transfer could have occurred many years ago. Trial Tr. 2489–90.

CONCLUSION

Any person accused of a crime—even Alex Murdaugh—has a constitutional right to a fair trial. When a fair trial is denied, he is entitled to a new, fair trial—he is not required to earn it by proving he would have been acquitted had he been given a fair trial the first time. Judges' opinions regarding the strength of the State's evidence against the accused are not a substitute for the presentation of that evidence at a fair trial. The Court should therefore reverse the trial court's denial of Murdaugh's motion for a new trial and vacate his murder and firearms convictions. Additionally, the Court should vacate Murdaugh's convictions because the improperly admitted evidence deprived Murdaugh of a fair trial and its consideration by the jury was not harmless beyond a reasonable doubt.

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