

STATE OF SOUTH CAROLINA
COUNTY OF COLLETON

) IN THE COURT OF GENERAL SESSIONS
) FOR THE FOURTEENTH JUDICIAL CIRCUIT
)

State of South Carolina,

) Case Nos: 2022-GS-15-00592
) 2022-GS-15-00593
) 2022-GS-15-00594
) 2022-GS-15-00595

v.

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Jan 03 2024

S.C. SUPREME COURT

Richard Alexander Murdaugh,
Defendant.

) **STATE'S PRE-HEARING BRIEF IN**
) **OPPOSITION TO DEFENSE MOTION FOR A**
) **NEW TRIAL**
)

Many of the legal and factual issues in contention have been addressed at considerable length by the State in its Response to Defendant's Motion for a New Trial and Motions to Strike filed November 7, 2023 (hereafter "State's Response to Motion"). The following is a summary of the various issues the State contends need to be litigated for the motion for a new trial.

I. BURDEN OF PROOF: Murdaugh Must Carry the Burden of Proving Both that an Improper Contact Occurred with the Jury and that He was Actually Prejudiced Thereby.

First is the appropriate burden and standard to apply to a motion for a new trial based on allegations of improper contact with the jury by clerk of court or court official. Case law and general respect for the burdens of public service on a jury – particularly in a case as lengthy and complicated as this one – preclude jurors from being subjected to an invasive and burdensome inquiry as if they were themselves charged and on trial.

The burden rests with the movant, in this case Murdaugh, to prove that an improper contact occurred between at least one juror who deliberated and a non-juror, and further that he was actually prejudiced by that improper contact. Murdaugh must make a *prima facie* showing that he can meet that burden before an evidentiary hearing

may be granted, and as part of that showing must establish that he was not contemporaneously aware of the issue alleged and failed to raise it. **{See State's Response to Motion at 2-4}**. See also Rule 29, SCRCrimP ("Except for motions for new trials based on after-discovered evidence, post-trial motions shall be made within ten (10) days after the imposition of the sentence").

Murdaugh argues that because he alleges improper contacts by a court official, prejudice must be presumed under *Remmer v. United States*, 347 U.S. 227 (1954), and that the burden of proof thus shifts to the State to prove lack of any prejudice. However, *Remmer's* "presumption of prejudice" standard was abrogated by the standard set in *Smith v. Phillips*, 455 U.S. 209, 215-16 (1982) (the remedy is the opportunity to prove actual bias); and in any event has been also recently rejected by the Supreme Court of South Carolina in *State v. Green*, 432 S.C. 97, 100, 851 S.E.2d 440, 441 (2020). Accordingly, Murdaugh bears the burden to show prejudice. **{See State's Response to Motion at 2-4}**.

II. EVIDENTIARY HEARING IS UNNECESSARY: Because Murdaugh Has Failed to Make a *Prima Facie* Showing of Prejudice, No Evidentiary Hearing is Necessary.

Indeed, the State's next argument is that no further evidentiary inquiry is necessary as Defendant failed to make a *prima facie* showing required to necessitate an evidentiary hearing. Not a single juror who actually deliberated on the case indicates that their deliberations or verdict was in any way affected by the improper contacts alleged. The jurors were polled individually and affirmed their verdicts on the record. **{See State's Response to Motion at 21-22}**.

Murdaugh offers with his motion an affidavit from only one juror who deliberated: Juror 630. In the affidavit, Juror 630 attributes statements to Clerk Hill which resemble

arguments made by the State, but she does not claim she was influenced by Clerk Hill, but rather merely felt pressure from other jurors. Due process is not implicated by pressure upon one juror by other jurors. See, generally *State v. Franklin*, 341 S.C. 555, 534 S.E.2d 716 (Ct. App. 2000) (due process not implicated where other jurors verbally abused a holdout for at least four hours). Thus, Juror 630's affidavit is affirmatively inconsistent with a *prima facie* showing necessary for an evidentiary hearing. **{See State's Response to Motion at 19-20}**.

Juror 785 – the so-called “egg juror” and landlord to Juror 630 – did not participate in deliberations and was removed for her own violations of the court's instructions not to discuss the case with third-parties, and lack of forthcoming candor regarding those discussions. Further, when asked by Judge Newman at trial if Clerk Hill discussed anything about the case with anybody on the jury, Juror 785 replied “**not that I'm aware of.**” **{See State's Response to Motion at 10-16; 20; 23}** **{Trial Tr. 5553, II. 22-25}**. The affidavits in the defense motion on their own do not support a new trial and the motion should be denied on the pleadings.

Moreover, none of the other jurors who deliberated who spoke to SLED after Murdaugh filed his motion indicated their verdict was in any way based on anything but a fair consideration of the evidence, further supporting that the motion should be rejected on the pleadings. **{See State's Response to Motion at 21-22}**.

Nonetheless, Murdaugh argues that a hearing is necessary, seemingly in order to impeach Clerk Hill. That a potential witnesses may be impeachable is inconsequential to whether Defendant has made a *prima facie* showing. The jurors found Murdaugh guilty, affirmed their verdict when polled, and none have alleged Clerk

Hill influenced them. **{See State’s Response to Motion at 24}**. Thus, no evidentiary hearing is necessary and the motion should be denied.

III. JUDICIALLY CONDUCTED, LIMITED QUESTIONING: Should the Court Deem an Evidentiary Hearing Necessary, the Procedure should be Judicially Guided, and the Scope of Relevant Evidence is Limited

In the event the Court deems an evidentiary hearing necessary to resolve the motion, any inquiry to jurors should be limited and judicially conducted to minimize intrusion into the lives of those who performed such public service in this case.

Assuming the Court rules as argued above that Murdaugh must show prejudice, the following questions to deliberating jurors, based in what the record on appeal reflects the trial court used in *State v. Green*, 432 S.C. 97, 851 S.E.2d 440 (2020), should be sufficient, with additional inquiry to be conducted only if necessary:

1. On March 2, 2023, did you answer when polled that your verdict was guilty on each of the charges?
2. As you were instructed to do by Judge Newman, was your verdict on March 2, 2023 based solely on the testimony, evidence, law, and arguments of counsel as presented at the trial?

This is sufficient to determine whether there was any improper effect on the verdict and minimizes intrusion on the jury, while preserving the focus of the proceedings upon the allegation actually raised by Murdaugh’s motion. **{See State’s Response to Motion at 5-6}**.

Rule 606(b), SCRE, also makes this principle clear:

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. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

In the event any juror's answer to the above questions raises the need for additional inquiry, then additional inquiry would be warranted with questions from the Court, questions suggested to the Court by counsel, and questioning by counsel, as well as evidence from additional relevant witnesses.

Defendant wishes to make central his focus on the credibility of Clerk Hill as a potential witness, specifically in the context of a Facebook post supposedly involving Juror 785's ex-spouse. However, Juror 785's improper contact with third parties was the catalyst of the inquiry into the juror, and the trial judge specifically stated on the record that nothing to do with the Facebook post had anything to do with excluding the juror. **{Trial Tr. 5740-43}**. Every portion of Murdaugh's motion relating to Facebook posts is a red herring, and the State has moved to strike every part of the motion related thereto. **{See State's Response to Motion at 18-19}**.

Murdaugh attempt to challenge his own valid conviction cannot be a vehicle to issue witness subpoenas to those with no testimony relevant to the underlying question of whether improper contacts occurred and whether prejudice flowed therefrom. The relevant questions are for the jurors, and their questioning must be judicially directed if it must occur at all.

IV. POTENTIAL EXHIBITS SHOULD BE LIMITED

The State proposes few exhibits are relevant in any potential evidentiary hearing. The State asks the Court consider as exhibits or otherwise part of the record the transcript of the trial, which in particular includes Judge Newman's repeated instructions

to the jury to base their decision solely on the evidence, the *in camera* hearings regarding the removal of Juror 785, and the jury's verdict and affirmation upon polling.

Depending on the Court's ruling as to the nature of the inquiry to be conducted and only if the results of any limited questioning of the jurors requires it, additional examination may be necessary from jurors and other witnesses. Exhibits could also include recorded interviews, written statements, and memoranda of interview with the jurors, as well as interviews and testimony from clerk staff, and others conducted by SLED following Murdaugh's motion for a new trial.

Finally, as the State noted during the conference call, it is prepared to share the post-trial interviews with Murdaugh's attorneys, but must request a protective order as discussed during the conference call and provided concurrently with this filing. The State also concurrently files a Motion for Reciprocal Discovery to be provided similar information gathered by the defense during the preparation of and subsequent to the filing of their motion for a new trial.

CONCLUSION

WHEREFORE, the State respectfully requests that this Court summarily deny Murdaugh's motion for a new trial or, barring that, convene an evidentiary hearing consistent with that conducted in *State v. Green* and, upon hearing the testimony of the jurors and witnesses presented, find Murdaugh's allegations to be not credible and deny his motion for a new trial.

Should the Court desire more thorough briefing on any of the issues raised herein, or in the State's Response to Motion, the State will of course oblige.

Respectfully submitted,

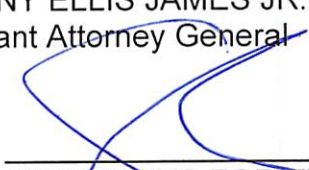
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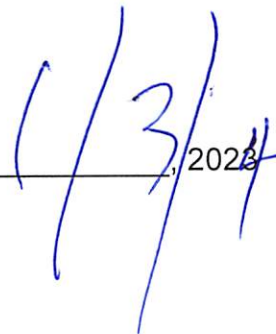
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