



OPINIONS
OF
THE SUPREME COURT
AND
COURT OF APPEALS
OF
SOUTH CAROLINA

ADVANCE SHEET NO. 44
November 12, 2020
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

28001 – The State v. Fabian Lamichael Green 8

UNPUBLISHED OPINIONS

2020-MO-013 – Shireen Nicole Simmons v. The State
(Orangeburg County, Judge Edgar W. Dickson)

PETITIONS FOR REHEARING

27993 – William Crenshaw v. Erskine College Pending

27994 – SC Coastal Conservation League v.
Dominion Energy Pending

27995 – Grays Hill Baptist Church v. Beaufort County Pending

27998 – In the Matter of Richard G. Wern Pending

28000 – Dr. Thomasena Adams v. Governor Henry McMaster Pending

PETITIONS - UNITED STATES SUPREME COURT

27945 – The State v. Eric Terrell Spears Pending

The South Carolina Court of Appeals

PUBLISHED OPINIONS

None

UNPUBLISHED OPINIONS

2020-UP-302-SCDSS v. Peggy Davis
(Filed November 4, 2020)

2020-UP-303-SCDSS v. Russell Davis, Jr.
(Filed November 5, 2020)

2020-UP-304-SCDSS v. David Allison
(Filed November 6, 2020)

2020-UP-305-SCDSS v. Natalia Coj and Fernando Hernandez
(Filed November 6, 2020)

2020-UP-306-David Harwell v. Deborah Harwell

2020-UP-307-State v. Craig C. Busse

PETITIONS FOR REHEARING

5726-Chisolm Frampton v. S.C. Dep't of Natural Resources Pending

5738-The Kitchen Planners v. Samuel E. Friedman Pending

5754-Lindsay Sellers v. Douglas Nicholls Pending

5755-Stephany A. Connelly v. The Main Street America Group Pending

5758-State v. Deshanndon M. Franks Pending

5764-State Farm v. Myra Windham Pending

5769-Fairfield Waverly v. Dorchester Cty. Assessor	Pending
2020-UP-103-Deborah Harwell v. Robert Harwell	Pending
2020-UP-225-Assistive Technology Medical v. Phillip DeClemente	Pending
2020-UP-236-State v. Shawn R. Bisnauth	Pending
2020-UP-247-Ex parte: Teresa L. Ferry	Pending
2020-UP-257-Melanie Maddox v. Richard Carroll	Pending
2020-UP-260-Viresh Sinha v. Neelu Choudhry (2)	Pending
2020-UP-262-Neelu Choudhry v. Viresh Sinha	Pending
2020-UP-263-Phillip DeClemente v. Assistive technology Medical	Pending
2020-UP-264-SCDSS v. Antonio Bolden	Pending
2020-UP-266-Johnnie Bias v. SCANA	Pending
2020-UP-268-State v. Willie Young	Pending
2020-UP-269-State v. John McCarty	Pending
2020-UP-271-State v. Stewart Jerome Middleton	Pending
2020-UP-272-State v. Heyward L. Martin, III	Pending
2020-UP-275-Randall Seels v. Joe Smalls	Pending
2020-UP-284-Deonte Brown v. State	Pending
2020-UP-290-State v. Phillip Wesley Walker	Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

5588-Brad Walbeck v. The I'On Company	Pending
5641-Robert Palmer v. State et al.	Pending

5696-The Callawassie Island v. Ronnie Dennis	Pending
5697-State Farm v. Beverly Goyeneche	Pending
5699-PCS Nitrogen, Inc. v. Continental Casualty Co.	Pending
5705-Chris Katina McCord v. Laurens County Health Care System	Pending
5707-Pickens County v. SCDHEC	Pending
5714-Martha Fountain v. Fred's Inc.	Pending
5717-State v. Justin Jamal Warner	Pending
5722-State v. Herbie V. Singleton, Jr.	Pending
5723-Shon Turner v. MUSC	Pending
5729-State v. Dwayne C. Tallent	Pending
5736-Polly Thompson v. Cathy Swicegood	Pending
5741-Martha Lusk v. Jami Verderosa	Pending
5749-State v. Steven L. Barnes	Pending
5750-Progressive Direct v. Shanna Groves	Pending
5760-State v. Jaron L. Gibbs	Pending
5767-State v. Justin Ryan Hillerby	Pending
5768-State v. Antwuan L. Nelson	Pending
5773-State v. Mack Seal Washington	Pending
2019-UP-331-Rajinder Parmar v. Balbir S. Minhas	Pending
2019-UP-383-Lukas Stasi v. Mallory Sweigart	Pending
2019-UP-393-The Callawassie Island v. Gregory Martin	Pending
2019-UP-396-Zachary Woodall v. Nicole Anastasia Gray	Pending

2019-UP-416-Taliah Shabazz v. Bertha Rodriguez	Pending
2020-UP-014-Ralph Williams v. Patricia Johnson	Pending
2020-UP-018-State v. Kelvin Jones	Pending
2020-UP-020-State v. Timiya R. Massey	Pending
2020-UP-026-State v. Tommy McGee	Pending
2020-UP-030-Sunset Cay v. SCDHEC	Pending
2020-UP-031-State v. Alqi Dhimo	Pending
2020-UP-038-State v. Vance Ross	Pending
2020-UP-072-State v. Brenda L. Roberts	Pending
2020-UP-095-Janice Pitts v. Gerald Pitts	Pending
2020-UP-101-Erick Hernandez v. State	Pending
2020-UP-108-Shamsy Madani v. Rickey Phelps	Pending
2020-UP-129-State v. Montrell Deshawn Troutman	Pending
2020-UP-132-Federal National Mortgage Assoc. v. D. Randolph Whitt	Pending
2020-UP-133-Veronica Rodriguez v. Peggy Evers	Pending
2020-UP-144-Hubert Brown v. State	Pending
2020-UP-145-Kenneth Kurowski v. Daniel D. Hawk	Pending
2020-UP-148-State v. Ronald Hakeem Mack	Pending
2020-UP-150-Molly Morpew v. Stephen Dudek	Pending
2020-UP-151-Stephen Dudek v. Thomas Ferro (Morpew)(2)	Pending
2020-UP-196-State v. Arthur J. Bowers	Pending

2020-UP-197-Cheryl DiMarco v. Brian DiMarco (3)	Pending
2020-UP-198-State v. Sidney Moorner	Pending
2020-UP-199-State v. Joseph Campbell Williams, II	Pending
2020-UP-215-State v. Kenneth Taylor	Pending
2020-UP-219-State v. Johnathan Green	Pending
2020-UP-237-State v. Tiffany Ann Sanders	Pending
2020-UP-238-Barry Clarke v. Fine Housing, Inc.	Pending

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

The State, Respondent,

v.

Fabian Lamichael Green, Petitioner.

Appellate Case No. 2019-001435

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Laurens County
Donald B. Hocker, Circuit Court

Opinion No. 28001
Heard September 16, 2020 – Filed November 12, 2020

AFFIRMED AS MODIFIED

Appellant Defender Susan B. Hackett, of Columbia, for
Petitioner.

Attorney General Alan Wilson, Chief Deputy Attorney
General W. Jeffrey Young, Deputy Attorney General
Donald J. Zelenka, Senior Assistant Deputy Attorney
General Melody J. Brown, all of Columbia; and Eighth
Circuit Solicitor David M. Stumbo, of Greenwood, all for
Respondent.

JUSTICE KITTREDGE: We granted a writ of certiorari to review the court of appeals' decision in *State v. Green*, 427 S.C. 223, 830 S.E.2d 711 (Ct. App. 2019). We affirm as modified. We refer to the excellent court of appeals' opinion for the facts and legal issues. Petitioner Fabian Green was convicted of murder and desecration of human remains. Two issues were presented on direct appeal—a challenge to (1) the trial court's Rule 901(b)(4), SCRE, authentication determination concerning social media posts, and (2) the trial court's denial of Petitioner's motion for a mistrial based on an alleged improper communication between a bailiff and a member of the jury. Finding no abuse of discretion by the trial court on either issue, the court of appeals affirmed.

We have carefully reviewed Petitioner's challenges in light of the record and applicable law. For the reasons set forth by the court of appeals, we affirm the trial court's authentication determination and admission of the social media posts without further comment.

We do wish, however, to clarify the court of appeals' analysis concerning the bailiff misconduct issue. Like the court of appeals, we recognize a criminal defendant's right to a fair and impartial jury. U.S. Const. amend. VI; S.C. Const. art. I, § 14. In the Sixth Amendment context, the Supreme Court of the United States has held that "any private communication, contact, or tampering . . . with a juror during a trial about the matter pending before the jury is . . . deemed presumptively prejudicial." *Remmer v. United States*, 347 U.S. 227, 229 (1954). The Court in *Remmer* concluded: "The presumption is not conclusive, but the burden rests heavily upon the Government to establish . . . that such contact with the juror was harmless to the defendant." *Id.* Our court of appeals found the "comments [by the bailiff] here triggered *Remmer*." *Green*, 427 S.C. at 236, 830 S.E.2d at 717. We are not persuaded that the *Remmer* presumption of prejudice applied here.

We readily agree with the court of appeals that the State "overthrew" any presumption of prejudice, if it applied. In this regard, we join the court of appeals in commending the trial court for its "deft handling of this issue." The trial court questioned each juror and the bailiff, which proved "there was no reasonable possibility the [bailiff's] comments influenced the verdict." *Id.* 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]." 347 U.S. at 228. The federal district court, without holding a hearing, denied the defendant's motion for a new trial. *Id.* at 229. 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]." *Id.* at 229–30.

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. Here, the jury deliberated approximately four hours before reaching a verdict. The jury never indicated it was at an impasse. At some point in the deliberations, a juror asked the bailiff what would happen if the jury were not able to reach a verdict. The response by the bailiff, while inappropriate, did not rise to level of a violation of Petitioner's Sixth Amendment right to a fair and impartial jury.

We recognize that bailiffs serve an important role in the conduct of jury trials. We further recognize that bailiffs must communicate with jurors. But those communications should be limited to procedure and logistics concerning jury service. Where a juror asks a bailiff a question that is of a substantive nature related in any manner to the case or the deliberative process, the bailiff should not comment except to request that the question be placed in writing so it can be delivered to the judge. While we decline to adopt the *Remmer* presumption of prejudice in every instance of an inappropriate bailiff communication to a juror, the occasion of this case presents an opportunity for our clerks of court and circuit judges to ensure that all bailiffs are properly trained.

The decision of the court of appeals is

AFFIRMED AS MODIFIED.

BEATTY, C.J., HEARN, FEW and JAMES, JJ., concur.