

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

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Certiorari to Richland County

Honorable Daniel McLeod Coble, Circuit Court Judge
—————

ANDRE T. HEATLEY, JR.

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001526
—————

BRIEF OF PETITIONER
—————

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ISSUES PRESENTED

I. Whether the PCR court erred in finding trial counsel was effective when he failed to object to the trial court's coercive instruction that the jury took an oath to render a true verdict after more than ten hours of deliberation, that was aimed squarely at the lone juror voting in favor of acquittal, resulting in a verdict a mere thirty minutes after the coercive charge?

II. Whether the PCR court erred in finding trial counsel was effective when he failed to request a charge under State v. Logan¹ after building the entire defense around the circumstantial nature of the evidence against Petitioner.

¹ State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013).

STATEMENT OF THE CASE

Petitioner was indicted by a Richland County grand jury for murder and armed robbery on November 7, 2016. App. 1347 – 1352. Petitioner was tried before the Honorable DeAndrea G. Benjamin from January 22 – 30, 2019. Petitioner was represented by E. Deon O’Neil (hereinafter trial counsel) and Khalil Eaddy, with Daniel Goldberg and Lamar Fyall representing the state. App. 1.

On direct appeal, Petitioner’s appellate counsel, Lara Caudy, raised a single issue pursuant to Anders v. California, 386 U.S. 738 (1967) concerning hearsay statements admitted into evidence indicating decedent planned to meet Petitioner on the evening of her death. The Court of Appeals dismissed the appeal by unpublished opinion. State v. Heatley, 2021-UP-265 (filed July 14, 2021).

Petitioner timely filed for PCR alleging ineffective assistance of counsel. App. 1278. An evidentiary hearing was held before the Honorable Daniel McLeod Coble on May 12, 2023. App. 1296. Michael Lifsey represented Petitioner and D. Russell Barlow, II, appeared on behalf of the state. App. 1296. Judge Coble denied relief by order of dismissal dated August 29, 2023. App. 1325.

This Court granted the petition for certiorari to review the decision of the PCR court, and this Brief of Petitioner follows.

STATEMENT OF FACTS

Petitioner and the decedent, Deandra Roach, had an on off-and-on relationship but were not currently dating at the time of her death. App. 565, l. 10 – 567, l. 10. On January 28, 2016, Roach clocked out at of work at Walmart at 10:09 p.m. and was captured on surveillance footage leaving her job at 10:13 p.m. App. 323, ll. 23-25. Her body was found in a field around 5:00 p.m. the following day, January 29, 2016, near her vehicle off a dirt road. App. 324, l. 17 – 325, l. 14; 358, ll. 5-19; 364, ll. 7-19. She had been killed by nine-millimeter bullets fired from two different firearms. App. 944, l. 1 – 949, l. 25. Petitioner denied being involved in the murder. App. 1307, ll. 13 – 16. Trial counsel focused the defense on the circumstantial nature of the state’s evidence and the evidence that placed Petitioner away from the crime scene at the time the state asserted Roach was killed. App. 1311, l. 15 – 1312, l. 5.

This evidence included the presence of an individual identified as “Von” [spelled “Vaughn” in the PCR hearing transcript] who provided Petitioner with the decedent’s credit card on the night of the murder.² App. 808, ll. 1 – 23; 1311, l. 23 – 1312, l. 5. The presence of “Von” corresponded to the presence of third-party DNA found in decedent’s car and on other items found at the crime scene. (Petitioner’s DNA was not present in the vehicle). App. 1015, l. 12 – 1016, l. 17. None of Petitioner’s DNA was found on decedent nor any of decedent’s DNA on Petitioner’s clothing. App. 894, ll. 2 – 13.

In an attempt to place Petitioner at the scene of the murder, the state used cell phone records to map the cell phone location of the decedent and Petitioner. App. 1039, l. 20 – 1049, l. 15. This evidence actually placed Petitioner miles away from the crime scene at the time the state alleged the crime occurred. App. 1066, l. 10 – 1068, l. 12. The fact that “Von” had decedent’s

² During closing argument, the state discounted the existence of “Von” and argued Petitioner made him up. App. 1183, ll. 16 – 25.

debit card in his possession was circumstantial evidence. He also had decedent's cell phone when Petitioner drove "Von" to several ATM machines, allowing Petitioner's phone and decedent's phone to sync locations after the alleged murder. App. 888, l. 17 – 889, l. 23; 1046, l. 21 – 1049, l. 11. While a weapon matching one of the guns used to shoot decedent was found in Petitioner's glove box, the fingerprint on the gun was inconclusive, and "Von" threatened Petitioner with a handgun during the drives to the various ATM machines. App. 886, ll. 9 – 23; 888, l. 17 – 889, l. 25. In addition, the coroner placed the time of death (January 29, 2016, between 4:00 a.m. and 5:00 p.m.) substantially later than the timeline claimed by the state (around 10:34 to 10:37 p.m. on the evening on January 28, 2016, based upon cell phone location data), and at a time Petitioner was at his physical residence and not in the vicinity of the crime scene based upon cell phone location data. App. 525, l. 4 – 526, l. 13; 1046, l. 1 – 1048, l. 25.

Despite the conflicting circumstantial evidence surrounding guilt, trial counsel did not to request the circumstantial evidence charge approved in State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013). App. 1316, ll. 13 - 21. The jury deliberated for more than 10 hours over two days. App. 1239 – 1260. Without objection by trial counsel, the trial court singled out the lone juror who expressed reasonable doubt by recharging the oath the jury swore that they would give a "true verdict." App. 1259, ll. 5 – 14. Less than thirty minutes after this charge, the jury returned a guilty verdict on all charges. App. 1259, l. 16 – 1260, l. 7. Petitioner was sentenced to fifty years for murder and ten years for armed robbery. App. 1353 – 1354.

STANDARD OF REVIEW

The standard for appellate review of in PCR cases “depends on the specific issue” raised to the Court. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). The reviewing court will “defer to a PCR court’s findings of fact and will uphold them if there is evidence in the record to support them.” Id. However, “[q]uestions of law are reviewed *de novo*, and [this Court] will reverse the PCR court's decision when it is controlled by an error of law.” Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016).

Criminal defendants are entitled to the effective assistance of counsel pursuant to the Sixth and Fourteenth Amendments to the United States Constitution. “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686 (1984). “An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense.” Wiggins v. Smith, 539 U.S. 510, 521(2003). “When a convicted defendant complains of the ineffectiveness of counsel’s assistance, the defendant must show that counsel’s representation fell below an objective standard of reasonableness.” Id. at 687-688. “[T]he performance inquiry must be whether counsel’s assistance was reasonable considering all the circumstances.” Strickland, 466 U.S. at 688. Concerning prejudice, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id. at 694.

ARGUMENTS

I.

The PCR court erred in finding trial counsel was effective when he failed to object to the trial court's coercive instruction that the jury took an oath to render a true verdict after more than ten hours of deliberation, that was aimed squarely at the lone juror voting in favor of acquittal, resulting in a verdict a mere thirty-minutes after the coercive charge.

A. How the issue was raised during trial.

During Petitioner's trial, jury deliberations started just before 1:00 p.m. on January 29, 2019. App. 1236, ll. 21 – 22. The jury requested clarification on the murder charge at 3:49 p.m. App. 1239, l. 18 – 1242, l. 16. At 6:32 p.m., the jury provided three different notes to the trial judge. App. 1242, l. 25 – 1243, l. 9. Two of the notes provided reasons jurors needed to leave for the day. App. 1243, ll. 2 – 9. A note from the foreperson (delivered at 6:32 p.m. January 29, 2019) indicated a more significant problem, stating the jury was unable to reach a verdict and was "hung." App. 1244, ll. 3 – 20. However, the trial court informed the foreperson that the court would not accept the note as written, since it indicated the current numerical split on the jury. App. 1244, ll. 3 – 20.

The jury was instructed to break for the evening and resume deliberations at 9:30 a.m. the following morning. App. 1245, l. 6 – 1246, l. 5. The trial court specifically told the foreperson that the note on being hung had to be re-written and could not be accepted as originally presented. App. 1244, ll. 22 – 24. On January 30, 2019, jury deliberations began at approximately 9:30 a.m. App. 1246, ll. 1 – 14. Early that morning, the solicitor appeared expecting an Allen charge to be given. The trial court noted:

THE COURT: They are still deliberating. And he has not sent the note back out.

MR. GOLDBERG: Oh. I think we got some bad information.

THE COURT: Yes, I think it came from my office. Somebody said we were supposed to be doing the Allen Charge. He didn't send the note back out.

App. 1246, l. 20 – 1247, l. 2.

The jury deliberations continued until a new note was provided to the trial court at 2:55 p.m. App. 1246, l. 18 – 1247, l. 19. This note once again informed the trial court that the jury was unable to reach a verdict and singled out a specific juror for no longer participating, being “biased,” and expressing a concern over how police treat “young black men.” App. 1247, ll. 8 – 19. This note from the foreperson was abundantly clear that a single, female juror was “biased” against the “police” and refusing to vote with the majority for a conviction due to a lack of evidence and trust in the police:

We feel that one of our jurors is biased, and she has made statements indicating she is biased. She is not taking evidence into consideration. She is reading her book and ignoring the evidence. She stated, You know how these police do these young black men. And that was in quotations. She has no reasoning why she wants to vote different from everyone else. She ignores us and won't engage in our conversation.

App. 1247, ll. 10 – 18 (emphasis added).

The trial court then actively questioned the foreperson outside the presence of the remaining jurors regarding this lone juror, with the foreperson admitting the juror had “participated” but was not putting in her “opinion” when the jury reviewed the evidence or giving the other jurors “an answer that makes this thing what it is supposed to be.” App. 1248, ll. 2 – 9. The foreperson informed the trial court that this juror had voted against the majority since *she* [the juror] didn’t feel there was enough evidence. App. 1248, ll. 12 – 13. The foreperson admitted the juror was reviewing all the evidence but was now sitting in a corner reading a book

and no longer participating. App. 1248, l. 12 – 1249, l. 16. Importantly, this lone juror related a concern to the court through the foreperson that “she is starting to feel threatened in the room, that somebody says she had blood on her hands and the room was getting hostile.” App. 1249, ll. 19 – 22. The trial court and petitioner’s counsel were therefore on notice that a lone juror did not feel there was enough evidence to agree with the remaining eleven jurors and that same juror felt threatened and in a hostile environment. App. 1248, l. 2 – 1249, l. 22.

At this stage, trial counsel made no motion for a mistrial, nor did he request a proper charge to the jury under Allen v. United States, 164 U.S. 492 (1896). Rather, trial counsel went along with the trial court’s suggestion that the court simply recharge the jury on the oath it had taken at the beginning of the trial. Specially, at 3:20 p.m. the trial court charged the jury as follows:

Ladies and gentlemen of the jury, I have received two notes from you all. I have marked them as Court Exhibit Numbers 10 and 11. I am going to read you, remind you of the oath that you took on last week, Tuesday or Wednesday. And this is an oath that all jurors take in this state in criminal cases. It says: *Do you swear or affirm that you shall well and truly try, and true deliverance make, between the State of South Carolina and the Defendant at bar, whom you shall have in charge, and a true verdict give, according to the law and the evidence, so help you God? I remind you that you all took that oath.* I am going to send you back in the room and continue to deliberate. I ask that you be respectful to each other during your deliberations.

App. 1258, l. 23 – 1259, l. 14 (emphasis added). The jury returned a guilty verdict on all charges within 30 minutes of this charge. App. 1260, ll. 3 – 7.

This charge to the jury made no reference to the right of a juror to stand on their own opinion since it contained no language providing the jury guidance that it “must decide the case for yourself but only after discussion and impartial consideration of the case with your fellow jurors” and to “reexamine your own views and to change your opinion if you are convinced you

are wrong but do not surrender your honest belief as to the weight and effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.” Lowenfield v. Phelps, 484 U.S. 231, 235 (1988).

B. How the issue was raised at the PCR hearing.

At the PCR hearing, trial counsel O’Neil admitted that he did not object to the handling of the issue by the trial court and did not request the protective language surrounding an Allen charge regarding a juror’s individual honest belief regarding the proper verdict:

Q. [T]ell me about the jury deliberation issue. Do you remember when there was some indication? What do you remember about that?

A. I do. This was the first time I've ever had that situation where the note came back from -- two notes come from the jury. One said basically that one juror would not participate at all with the rest of us. Then the other note might have come from that juror but through the foreman, basically complaining about how the rest of the jury was treating her.

Q. Okay. All right. In response to that, what did the judge do?

A. She simply recharged the initial oath to the jury.

Q. Did you at any point object to that charge?

A. I don't think so. I'm going to rely on what the transcript says, but I don't believe so.

Q. Did you ever ask her to recharge or to charge the jury that they should not compromise their firmly held beliefs in order to reach a verdict?

A. No.

App. 1315, l. 23 – 1316, l. 17 (emphasis added).³

³ Any claim that the performance of trial counsel regarding the lone juror was not fully preserved for review is misplaced. The issue was in petitioner’s amended PCR application: “After the jury indicated by note that a juror was refusing to deliberate further, Applicant’s trial counsel failed to object to the judge recharging the jury on their oath as jurors without also requesting that the

In attempt to minimize the impact of trial counsel's failure to properly handle the issue surrounding the jury's deliberation, the state focused on the lack of a technical Allen charge:

Q. Okay, and regarding the juror's refusing to deliberate issue and failure to object on the charging something further than the oath, was this -- was an *Allen* charge given?

A. No.

Q. So, there was no *Allen* charge?

A. They never used the magic term. Like, nobody ever came in and said we're hung or can't come to a decision here. So, they never -- the judge never give an *Allen* charge.

Q. And it was just the judge recharging on the oath?

A. Yes.

Q. Okay, and do you recall moving for a mistrial?

A. I do.

Q. Directly after that?

A. I do.

Q. Based on what happened with the jury?

A. Yes.

App. 1316, l. 22 – 1317, l. 14 (emphasis added).

To the contrary, trial counsel never moved for a mistrial. Instead, having failed to object to the handling of the jury's deliberation before a verdict was rendered, trial counsel moved for a "new trial" in part based upon the problems surrounding the jury's verdict.

court recharge them that they should not compromise their firmly held beliefs in order to reach a verdict." App. 1293-94. Trial counsel was asked by both parties regarding this point during the evidentiary hearing. App. 1315, l. 23 – 1316, l. 17; App. 1316, l. 22 – 1317, l. 14. The matter was also subject to the PCR court's order denying relief. App. 1344.

MR. O'NEIL: Yes, Your Honor. At this time, I would renew all my previous objections, Your Honor. *And I would ask at this point for a new trial for Mr. Heatley on the basis*, specifically – renewing my previous objections, but specifically as it relates to two things, Your Honor. The motion that we made to suppress the handgun that was found in Mr. Heatley's car, and also based off the nature of the jury deliberation and the various notes we received of the deliberations. *At this point here, since we got a verdict shortly after, minutes after we had the previous note from the jury*, and those notes are a part of the Court's record here, based on the totality of all that, Your Honor, *I would ask for a new trial for Mr. Heatley.*

App. 1266, ll. 10 – 25 (emphasis added).

Even if this motion were liberally construed as a motion for a mistrial, the lack of a contemporaneous objection (or any objection) to charging the oath waived any appellate review of this issue. *See S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) (“It is well settled that an issue may not be raised for the first time in a post-trial motion.”); *State v. Avery*, 333 S.C. 284, 296, 509 S.E.2d 476, 483 (1998) (finding an objection to a jury instruction was unpreserved when the defendant “did not object to the trial [court's] initial or supplemental instructions”); *State v. Hicks*, 330 S.C. 207, 499 S.E.2d 209 (1998) (to preserve an issue for appellate review, the objection must be timely made, which usually requires it be made at the earliest possible opportunity); *State v. Kelly*, 331 S.C. 132, 502 S.E.2d 99 (1998) (a new trial motion may not be used to raise an evidentiary issue for the first time); *McGee v. Bruce Hosp. Syst.*, 321 S.C. 340, 468 S.E.2d 633 (1996) (an issue may not be raised for the first time in a motion for a new trial); *State v. Penland*, 275 S.C. 537, 538, 273 S.E.2d 765, 767 (1981) (finding appellant waived the issue where he did not make a motion for a mistrial until after the verdict).

C. How the PCR court ruled.

Focusing on the technical fact that an Allen charge was not required due to a lack of a deadlock, the PCR court ruled:

In Applicant's case, the record reflects that the jury was not deadlocked, but that one juror decided not to further participate in deliberations. The foreman reported that the juror participated in part, but refused to consider evidence, engage in conversations, and refused to voice her opinion when asked. The foreman further stated to the trial judge that the juror was, at that point, sitting in a corner reading a book and completely refusing to participate. (Trial Tr. 124 7-1250). Also, the record reflects that the trial court, Trial Counsel, and Solicitor exhaustively discussed exactly what the trial court was going to do with regard to the jurors, and that was to charge them with their oath and to continue to deliberate. (Trial Tr. pp. 1 250 - 1257). Further, this Court finds that there was no objectionable basis for Trial Counsel to object as the trial court did not give an Allen charge.

App. 1344 (emphasis added).

D. The PCR court erred in finding trial counsel's performance was not ineffective in allowing the trial court to single out the lone juror voting for not guilty in a coercive and improper manner.

The PCR court erred in focusing on the trial court's decision to alter the appropriate Allen charge and instead re-charge the jury's oath as a basis for denying relief. In effect, the PCR court placed the label of the re-charge (the oath) over its substance (its impact on the holdout juror). This lone juror was singled out for no longer participating and being "biased" and expressing a concern over how police treat "young black men." App. 1247, ll. 8 – 19. Without objection by trial counsel, the trial court then questioned the foreperson regarding this lone juror, with the foreperson admitting the juror had "participated" but was not putting in her "opinion" when the jury reviewed the evidence or giving the other jurors "an answer that makes this thing what it is supposed to be." App. 1248, ll. 2 – 9. The foreperson informed the trial court that this

juror had voted not guilty since she [the juror] didn't feel there was enough evidence. App. 1248, ll. 12 – 13. The foreperson admitted the juror was reviewing all the evidence but was now sitting in a corner reading a book and no longer participating. App. 1248, l. 12 – 1249, l. 16. Importantly, this lone juror related a concern to the court that “she is starting to feel threatened in the room, that somebody says she had blood on her hands and the room was getting hostile.” App. 1249, ll. 19 – 22.

Trial counsel's explanation for his failure to object to the trial court's decision to charge the oath was that they jury “never used the magic term. Like, nobody ever came in and said we're hung or can't come to a decision here. So, they never -- the judge never give an Allen charge.” App. 1317, ll. 3 – 6. In addition, trial counsel wrongly claimed he had made a motion for a mistrial on the basis of the treatment of the minority juror. App. 137, ll. 9 – 14. Trial counsel was ineffective in allowing the singling out of the lone juror, who was feeling threatened by the other jurors, with a coercive instruction that “you swear or affirm that you shall well and truly try, and true deliverance make, between the State of South Carolina and the Defendant at bar, whom you shall have in charge, and a true verdict give, according to the law and the evidence, so help you God? I remind you that you all took that oath.” App. 1258, l. 23 – 1259, l. 14.

Trial counsel offered no valid strategic reason in refusing to request the protection of the minority juror's status as the lone juror standing between petitioner and conviction with the precautions in place in this state for more than two decades to avoid this very situation:

The trial judge has the duty to urge, but not coerce, a jury to reach a verdict. An Allen charge cannot be directed to the minority voters on the jury panel, but must instead be even-handed, directing both the majority and the minority to consider the other's views.

Dawson v. State, 352 S.C. 15, 20, 572 S.E.2d 445, 447 (2002); *see also* State v. Taylor, 427 S.C. 208, 214, 829 S.E.2d 723, 727 (Ct. App. 2019) (holding a trial judge may “urge jurors to reach a verdict but must do so in a way that does not coerce them, eroding their independence and impartiality.”).

In evaluating the coercive nature of any instruction to the jury in this setting, the Lowenfield⁴ factors are appropriately considered:

(1) whether the charge speaks “specifically to minority jurors”; (2) whether the charge includes “you must return a verdict” type language; (3) whether there was an “inquiry into the jury’s numerical division,” which is generally coercive; and (4) whether the time between when the charge was given and when the jury returned a verdict demonstrates coercion.

Taylor, 427 S.C. at 214–15, 829 S.E.2d at 727; *see also* Tucker v. Catoe, 346 S.C. 483, 552 S.E.2d 712 (2001); Dawson v. State, 352 S.C. 15, 20, 572 S.E.2d 445, 447 (2002) (noting the contested language could be perceived as being directed toward the minority juror and that the trial judge knew of the numerical division when providing the instruction).

Our Supreme Court has recently reviewed the impact an erroneous and coercive charge can have on the jury.

However, an Allen charge, due to its potential for coercion, must be viewed with a more heightened scrutiny than a general jury charge. *See* State v. Taylor, 427 S.C. 208, 214, 829 S.E.2d 723, 727 (Ct. App. 2019) (“A trial judge has a duty to urge jurors to reach a verdict, but must do so in a way that does not coerce them, eroding their independence and impartiality.”). In United States v. Bailey, 468 F.2d 652, 666 (5th Cir. 1972), the federal court labeled it a “dynamite” charge because of its proven ability to “blast a verdict out of a jury otherwise unable to agree.” And our court of appeals, citing to Bailey, has noted that “[l]ike dynamite, the charge must be handled with extreme care.” Taylor, 427 S.C. at 214, 829 S.E.2d at 727. We thus scrutinize this charge with

⁴Lowenfield v. Phelps, 484 U.S. 231 (1988).

increased care and concern compared to our analysis of a general charge.

State v. Rampey, 438 S.C. 519, 524–25, 885 S.E.2d 366, 369 (2022). An incorrect charge in this setting is “unconstitutional and warrants a new trial” and “the post-verdict polling of the jurors by the trial court” does not cure this error. Rampey, 438 S.C. at 531, 885 S.E.2d at 372.

As noted below, the “oath” charge given was substantially more coercive than an Allen charge. The PCR court erred in its determination that, since the oath was not technically an Allen charge, it should not be examined for its coercive impact on the minority juror in the same manner as an Allen charge. In effect, the PCR court ruled that since the oath charge was used in place of an Allen charge, there was no basis for trial counsel to object despite the charge violating the Lowenfield factors.

In the PCR setting, failure of trial counsel to object to a coercive instruction that singles out a lone juror falls below the reasonable expectation of representation:

Given the trial judge confirmed the existence of one minority juror immediately before the Allen charge, we conclude the underlined language was clearly directed to the “holdout” and, under these circumstances, was coercive. *Accordingly, trial counsel's failure to object to the charge was unreasonable.* But for counsel's failure to object, there is a reasonable probability the outcome of trial would have been different.

Dawson, 352 S.C. at 21, 572 S.E.2d at 447–48 (emphasis added). As in Dawson, if the oath as charged in this setting was coercive as discussed below, then trial counsel was ineffective in failing to object.

i. Recharging the oath in this setting spoke “specifically to minority jurors.”

Since the jury was split 11-1, any instruction regarding the need to reach a verdict that did not include language protecting a minority juror’s firmly held opinions would create a problem. Rather than use a properly measured Allen charge, the trial judge told the jury:

Ladies and gentlemen of the jury, I have received two notes from you all. I have marked them as Court Exhibit Numbers 10 and 11. *I am going to read you, remind you of the oath that you took on last week, Tuesday or Wednesday.* And this is an oath that all jurors take in this state in criminal cases. It says: *Do you swear or affirm that you shall well and truly try, and true deliverance make, between the State of South Carolina and the Defendant at bar, whom you shall have in charge, and a true verdict give, according to the law and the evidence, so help you God?* I remind you that you all took that oath. I am going to send you back in the room and continue to deliberate. *I ask that you be respectful to each other during your deliberations.*

App. 1258, l. 23 – 1259, l. 14 (emphasis added).

Here, the trial judge and the entire courtroom knew there was a single juror who would be impacted by whatever instruction the trial court provided. The instruction provided was aimed directly at the single female juror who already felt threatened by the other jurors. Telling the jurors they had taken an “oath” to reach “a true verdict” “according to the law and the evidence, so help you God” was language implying the jury “must” return a verdict.

This language, taken in the context of the foreperson singling out one juror for the court as the source of problems, implied the minority juror was violating their oath and had an obligation to render a “true verdict” in the case. The jury had deliberated for over five hours on the first day of deliberations and for more than five hours on the second day of deliberations. The court was informed by the foreperson of the lone minority juror who stood by her belief that the state had failed to produce enough evidence. This lone juror also informed the trial court, through the foreperson, of being threatened by the other jurors. App. 1249, ll. 19 – 22. The trial court’s language that the jurors had all sworn an oath to render a “true verdict” before sending the jury back to deliberate was targeting the single minority juror. The facts here mirror those found troubling in Dawson, where the jury initially volunteered the numeric division, but the trial court ultimately specifically inquired and acted upon the knowledge of a lone juror. “An Allen

charge cannot be directed to the minority voters on the jury panel, but must instead be even-handed, directing both the majority and the minority to consider the other's views.” Dawson, 352 S.C. at 20, 572 S.E.2d at 447. Here, a charge on the oath, since it lacks any of the safeguards found in a traditional Allen charge, is focused clearly on the lone juror who already feels threatened and is overly coercive.

ii. The charge, since it was incomplete, told the jury they had taken an oath to return a “true verdict.”

The trial judge told the jury it expected them to render a “true verdict” and that they had taken an “oath” to that effect. App. 1258, l. 23 – 1259, l. 14. This language conveyed the impression that the jury was expected to reach a verdict in the case. *See State v. Williams*, 386 S.C. 503, 516 n.7, 690 S.E.2d 62, 68 n.7 (2010) (“[W]e take this opportunity to caution trial judges against using the following language: ‘with the hope you can arrive at a verdict.’ Because jurors are not required to reach a verdict after expressing that they are deadlocked, we believe this language could potentially be construed as being coercive.”); *State v. Taylor*, 427 S.C. 208, 216, 829 S.E.2d 723, 728 (Ct. App. 2019) (“Even an otherwise benign remark, such as ‘you should come to a decision,’ could be interpreted by a rational juror that the trial judge believes the result is obvious, or at least capable of unanimous agreement.”). The charge also lacked any of the safeguards of a modern Allen charge that informed the jury not to “surrender their conscientiously-held beliefs for the sake of a verdict” as this “language is one of the hallmarks of a typical Allen charge.” *State v. Rampey*, 438 S.C. 519, 530, 885 S.E.2d 366, 371 (2022).

The reliance on a footnote in State v. Durant, 430 S.C. 98, 844 S.E.2d 49 (2020) regarding adding the oath language to an Allen charge as an acceptable practice is misplaced.⁵ Petitioner would note that in Durant, the trial court gave a more extensive Allen charge than simply the language of the oath used here. Greater guidance can be found in contrasting the improper charge that required reversal in State v. Rampey with the procedure petitioner’s trial counsel allowed in the present case. As our Supreme Court noted in Rampey, “despite the fact that this charge may be less coercive than the charge in Taylor, it nevertheless fails since the trial court overemphasized the resources expended in bringing the matter to trial and did not instruct the jury that no juror should surrender his or her conscientiously held beliefs simply for the sake of reaching a verdict.” Rampey, 438 S.C. at 530–31, 885 S.E.2d at 372; *see also* Dawson v. State, 352 S.C. 15, 572 S.E.2d 445 (2002) (noting that in the context of the circumstances, language that could be perceived as being directed toward the minority juror was unduly coercive).

iii. There was an “inquiry into the jury's numerical division” and the trial court questioned the foreperson regarding the behavior and deliberations of the single minority juror.

The foreperson relayed the numerical split within the jury on January 29, 2019. App. 1244, ll. 3 – 20. On January 30, 2019, the foreperson once again informed the trial court that the jury was unable to reach a verdict but also singled out a specific juror for no longer participating and being “biased” and expressing a concern over how police treat “young black men.” App.

⁵ According to the Record on Appeal filed in State v. Durant, 430 S.C. 98, 844 S.E.2d 49 (2020), the trial court gave a more complete Allen charge and that the minority view of the jury was not a lone juror (although a lone juror was refusing to actually vote, the jury would still have been deadlocked regardless of the manner the juror voted). *See* Record on Appeal, 760, l. 1 – 765, l. 13. <https://ctrack.sccourts.org/public/caseView.do?csIID=62404>.

1247, ll. 8 – 19. Complicating matters, the trial court then questioned the foreperson regarding this lone juror, with the foreperson admitting the juror had “participated” but was not putting in her “opinion” when the jury reviewed the evidence or giving the other jurors “an answer that makes this thing what it is supposed to be.” App. 1248, ll. 2 – 9. The foreperson informed the trial court that this juror had voted for not guilty since she [the juror] didn’t feel there was enough evidence. App. 1248, ll. 12 – 13. The foreperson admitted the juror was reviewing all the evidence but was now sitting in a corner reading a book and no longer participating. App. 1248, l. 12 – 1249, l. 16.

iv. The time between when the charge occurred and when the jury returned a verdict demonstrates coercion.

The jury returned a guilty verdict on all charges within 30 minutes of the charge on their oath. App. 1260, ll. 3 – 7. The speed of the verdict after the charge on the oath forcefully demonstrates its coercive nature. *See State v. Rampey*, 438 S.C. 519, 527–28, 885 S.E.2d 366, 370 (2022) (noting “our case law suggests the one hour and seventeen minutes of deliberation following the Allen charge weighs in favor” of finding coercion); *State v. Taylor*, 427 S.C. 208, 217, 829 S.E.2d 723, 728 (concluding the two-and-a-half hours of deliberations following the Allen charge “[did] not dispel the likelihood of coercion” where the jury deliberated for roughly ten hours overall); *Workman v. State*, 412 S.C. 128, 771 S.E.2d 636 (2015) (finding prejudice after verdict was returned two hours after receiving improper Allen charge). *Rampey* and *Taylor* are not “new” concepts and reflect the law of South Carolina for more than two decades. *See Tucker v. Catoe*, 346 S.C. 483, 552 S.E.2d 712 (2001) (noting that Lowenfield sets the standard by which coercive jury instructions are to be judged); *Dawson v. State*, 352 S.C. 15, 572 S.E.2d

445 (2002) (finding counsel was ineffective in failing to object to singling out a lone juror for a coercive charge).

E. Petitioner was prejudiced by trial counsel's failure to protect the minority juror during deliberations.

The PCR court did not address prejudice in this portion of its ruling since it found there was no basis for Petitioner's counsel to object to the improper pressure applied by to the minority juror by re-charging the oath. Petitioner denied being involved in the murder. App. 1307, ll. 13 – 16. Trial counsel focused the defense on the circumstantial nature of the evidence, a third party who was the source of the decedent's credit card, and the evidence that placed Petitioner away from the crime scene at the time the state asserted Roach was killed. App. 1311, l. 15 – 1312, l. 5.

This evidence included the presence of an individual identified as "Von" [spelled "Vaughn" in the PCR hearing transcript] who provided Petitioner with the decedent's credit card on the night of the murder. App. 808, ll. 1 – 23; 1311, l. 23 – 1312, l. 5. The presence of "Von" corresponded to the presence of third-party DNA found in decedent's car and on other items found at the crime scene. (Petitioner's DNA was not present in the vehicle). App. 1015, l. 12 – 1016, l. 17. None of Petitioner's DNA was found on decedent nor any of decedent's DNA on Petitioner's clothing. App. 894, ll. 2 – 13.

To place Petitioner at the scene of the murder, the state used cell phone records to map the cell phone location of the decedent and Petitioner. App. 1039, l. 20 – 1049, l. 15. This evidence actually placed Petitioner miles away from the crime scene at the time the State alleged the crime occurred. App. 1066, l. 10 – 1068, l. 12. At 10:33 p.m. and 10:35 p.m., Petitioner is moving along Killian Road. App. 1066, l. 20 – 1067, l. 3. During those times, the decedent's

phone is located near Wilson Boulevard, well above the location of Petitioner's phone during the time the state asserts the shooting occurred. App. 1067, ll. 2 – 25. Petitioner asserted that "Von" had decedent's debit card in his possession and had decedent's cell phone when Petitioner drove "Von" to several ATM machines, thus allowing Petitioner's phone and decedent's phone to synch locations after the alleged murder. App. 888, l. 17 – 889, l. 23; 1046, l. 21 – 1049, l. 11. While a 9 mm handgun matching one of the weapons used to shoot decedent was found in the glove box of Petitioner's car, the fingerprint on the gun was inconclusive, and "Von" had threatened Petitioner with a handgun during the drives to the various ATM machines with decedent's debit card. App. 886, ll. 9 – 23; 888, l. 17 – 889, l. 25. In addition, the coroner placed the time of death substantially later than the timeline created by the state, and at a time Petitioner was at his physical residence and not in the vicinity of the crime scene based upon cell phone location data. App. 526, ll. 4 – 13.

"As we have explained, the strength of the evidence must be considered along with the specific impact of counsel's errors." Smalls v. State, 422 S.C. 174, 194, 810 S.E.2d 836, 846 (2018). As there was enough reasonable doubt for the lone juror to refuse to convict over the course of two days of deliberation, there is a "reasonable probability that but for counsel's deficient performance" the result of Petitioner's trial would have been different. Franklin v. Catoe, 346 S.C. 563, 575, 552 S.E.2d 718, 725 (2001).

II.

The PCR court erred in finding trial counsel was effective when counsel failed to request a charge under *State v. Logan*⁶ after building the entire defense around the circumstantial nature of the evidence against Petitioner.

A. How the issue was raised during trial.

At trial, counsel failed to request a charge under *State v. Logan*, 405 S.C. 83, 747 S.E.2d 444 (2013). App. 1147, ll. 15 – 25. Instead, the trial court charged the jury as follows:

Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. It is evidence which immediately establishes collateral facts from which the main fact may be inferred. Circumstantial evidence is based on inference and not on personal knowledge or observation.

The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence, nor is a greater degree of certainty required of circumstantial evidence than of direct evidence.

App. 1221, ll. 5 – 11. Trial counsel made no objection to the charge other than on the trial court's refusal to charge accessory after the fact. App. 1237, ll. 2 – 7.

B. How the issue was raised at PCR.

At the PCR hearing, trial counsel admitted the *Logan* charge was both more favorable in light of his trial strategy and not requested.

Q. All right. When it came time -- are you aware of the case of *State v. Logan*?

A. *I am now.*

MR. LIFSEY: Okay, and I just want to put on the record just so it's clear what I'm arguing, Judge. I'm arguing *State v. Logan*, 405, SC 83 747 SC 2d 444 (2013) case.

⁶ 405 S.C. 83, 747 S.E.2d 444 (2013).

Q. All right. So, you, you are aware now that the Logan case gives a potential charge on circumstantial evidence that is different from the one that Judge Benjamin charged in this case?

A. I am.

Q. Would you agree with me that it is a more-favorable-to-defendant's charge than the one she gave?

A. *I would.*

Q. You did not request that charge?

A. I did not.

App. 1314, ll. 6 – 22 (emphasis added).

C. How the PCR court ruled.

The PCR court ruled that the charge given by the trial court was a correct statement of law, therefore trial counsel could not be deficient in accepting the charge.

This Court finds that Trial Counsel's failure to request a *Logan* charge does not amount to deficient performance, nor can this Court discern any prejudice that would result if it did. First, as a matter of law, the Court cannot reconcile Applicant's proposition that failure to seek a *Logan* charge constitutes deficient performance with the Supreme Court's preservation of the *Grippon* charge as valid—if satisfaction with and reliance upon the *Grippon* charge by Trial Counsel were a deficiency, then *Grippon* would, as a practical matter, no longer constitute a valid charge.

App. 1342.

Alternatively, the PCR court found a lack of prejudice due to the weight of evidence in favor of the guilty verdict. App. 1342 – 1343.

D. The PCR court erred in finding trial counsel’s performance was not ineffective in failing to request a *Logan* charge when counsel’s entire theory for the defense focused on the circumstantial nature of the evidence against Petitioner.

Based upon the ruling of the PCR court, trial counsel can never be deemed ineffective in failing to request a Logan charge if the traditional circumstantial evidence charge used during trial is an accurate statement of law. This finding was an error of law.

“When requested, the Logan charge must be given in cases based in whole or part on circumstantial evidence.” State v. Herndon, 430 S.C. 367, 371, 845 S.E.2d 499, 501 (2020). This has been the law of South Carolina since Logan was published in 2013. See State v. Jenkins, 408 S.C. 560, 572, 759 S.E.2d 759, 765 (Ct. App. 2014) (noting the law required the “application of *Logan* to cases pending on appeal at the time the *Logan* opinion was published”).

Trial counsel offered no strategic reasons for his failure to request the preferred charge that was settled law at the time of trial. In fact, trial counsel implied that he was aware of the preferred Logan charge “now” but admitted he made no effort to include it in Petitioner’s trial. App. 1314, ll. 6 – 22. The PCR court’s reliance on State v. Cherry, 361 S.C. 588, 606 S.E.2d 475 (2004), for the continued validity of the charge used in the present case as an accurate statement of the law ignores the fact that the Logan language has become the standard in circumstantial evidence cases and ignores the fact that the trial court is required to charge the Logan language when requested by the defendant. Here, trial counsel failed to request the appropriate charge and was ineffective.

E. The PCR court erred in finding no prejudice by focusing solely on the circumstantial evidence supporting guilt and ignoring the contrary evidence in the record.

In finding a lack of prejudice, the PCR court focused solely on those facts which supported a finding of guilt.

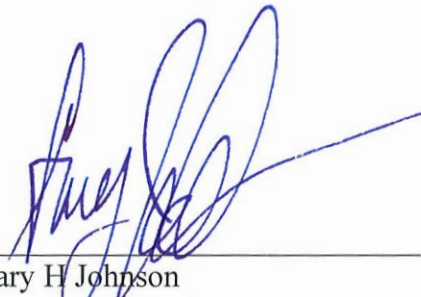
Applicant was found with Victim's debit card on his person, the bank video of him using Victim's debit card to withdraw cash from Victim's accounts at three separate ATM's on the night of the murder, the text messages from Applicant to his girlfriend, and the gun that Applicant admitted was his property linking him to the murder through the ballistics analysis showing the bullets that killed Victim were shot from Applicant's gun. Simply put, all of the circumstances were consistent with each other and pointed conclusively to Applicant's guilt beyond a reasonable doubt.

App. 1342.

As discussed in Argument I, Section E, *supra*, regarding prejudice, “the strength of the evidence must be considered along with the specific impact of counsel's errors.” Smalls v. State, 422 S.C. 174, 194, 810 S.E.2d 836, 846 (2018). As there was enough reasonable doubt for the lone juror to refuse to convict over the course of two days of deliberation, there is a “reasonable probability that but for counsel's deficient performance” the result of Petitioner’s trial would have been different. Franklin v. Catoe, 346 S.C. 563, 575, 552 S.E.2d 718, 725 (2001). For the reasons set forth in connection with Argument 1 concerning prejudice, Petitioner was prejudiced by trial counsel’s failure to request the Logan on circumstantial evidence. State v. Herndon, 430 S.C. 367, 371, 845 S.E.2d 499, 501 (2020).

CONCLUSION

To establish ineffective assistance of counsel, the petitioner must satisfy the two-prong test set forth in Strickland v. Washington, 466 U.S. 668 (1984). In light of the significant errors of trial counsel in failing to request a Logan charge and failing to object to the coercive “oath” charge aimed at the minority juror who favored a not-guilty verdict, this Court should “find the errors significantly ‘undermine confidence in the outcome of the trial’ and leave ‘a reasonable probability that, but for counsel's errors, the result of the trial would have been different.’” Smalls v. State, 422 S.C. 174, 195, 810 S.E.2d 836, 847 (2018). Petitioner respectfully requests that this Court reverse the decision of the PCR court and remand this matter to the Richland County court of general sessions for a new trial.



Gary H Johnson
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of March, 2025.