RECEIVED
Jan 28 2026
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Florence County
Honorable D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TIRIK JAQUAN JOHNSON-EPPS,

APPELLANT

APPELLATE CASE NO. 2025-001215

BRIEF OF RESPONDENT

JESSICA M. SAXON
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

South Carolina Cases

United States Cases

Other Jurisdictions

Other Authorities

Constitutional Provisions

COUNTER STATEMENT OF THE ISSUE

Whether the Court of Appeals properly reversed Respondent's convictions where the trial court denied Respondent's timely request to individually poll the jurors, since a poll must be taken if a request for polling is made pursuant to this Court's holding in *State v. Wright*, 439 S.C. 101, 886 S.E.2d 206 (2023)?

STATEMENT OF THE CASE

Respondent was indicted at the May 6, 2021 term of the Florence County grand jury for the offenses of murder and possession of a weapon during the commission of a violent crime. R. 418 – 421. Respondent's case and that of co-defendant, Quinterris Carmichael, were called to trial on January 23, 2023, before the Honorable D. Craig Brown and a jury. Respondent was represented by Gregory Ammons. William "Josh" Edgeworth, III, represented co-defendant Carmichael. J. Ryan White was the assistant solicitor. R. 1. After a five-day trial, the jury found Respondent and Carmichael guilty as indicted. R. 400, ll. 6-22. Both were sentenced to life imprisonment for the murder. No sentence was imposed on the weapons charge. R. 416, ll. 5-12.

Respondent filed his notice of appeal on February 6, 2023. On April 23, 2025, the Court of Appeals reversed Respondent's convictions, holding the trial court committed reversible error by denying Respondent's request to individually poll the jurors. *State v. Johnson-Epps*, 2025-UP-135 (S.C. Ct. App. filed April 23, 2025). The state filed a petition for rehearing on May 8, 2025, which was denied on May 22, 2025. On July 8, 2025, the state filed a petition for writ of certiorari to the Court of Appeals. A return to the petition was filed on August 7, 2025. This Court granted certiorari on October 21, 2025. The state filed the brief of petitioner on November 25, 2025. This brief of respondent follows.

STANDARD OF REVIEW

The appellate courts of South Carolina review questions of law *de novo*, with no deference to trial courts. *Smalls v. State,* 422 S.C. 174,181, 810 S.E.2d 836, 840 (2018). If the request [for individual polling] is made, a poll must be taken." *State v. Linder*, 276 S.C. 304, 309, 278 S.E.2d 335, 338 (1981). The refusal to individually poll the jury upon request is reversible error *per se*. *State v. Wright*, 432 S.C. 365, 373, 852 S.E.2d 468, 471-72 (Ct. App. 2020) *aff'd* State v. Wright, 439 S.C. 101, 886 S.E.2d 206 (2023).

ARGUMENT

The Court of Appeals properly reversed Respondent's convictions where the trial court denied Respondent's timely request to individually poll the jurors, since a poll must be taken if a request for polling is made pursuant to this Court's holding in *State v. Wright*, 439 S.C. 101, 886 S.E.2d 206 (2023).

Relevant facts

At approximately 3:30 in the morning on September 12, 2019, Tydrecus Williams (Decedent) was shot and killed outside of the Tiger Mart gas station and convenience store in Florence, South Carolina. The incident was captured on motion-triggered surveillance cameras from several different angles. The state alleged the surveillance video showed Respondent and co-defendant Carmichael at the Tiger Mart when Decedent and his friend, Kareem Jones, arrived. Carmichael approached Jones and verbally accosted Jones before striking him. Carmichael, Respondent, Decedent, and Jones then moved around the side of the building out of the camera view. The camera next captures the Decedent running towards the road and being shot at multiple times before falling into the roadway. The surveillance camera cut out and when it resumed recording Decedent was no longer in view. The state alleged that Respondent fired the initial shots at Decedent as he ran into the road, and Carmichael fired the other shots, including the fatal shot, off camera. R. 40, l. 16 – 42, l. 10; See State's Exhibit 3 on file with this Court.

After closing arguments and the charge on the law, the jury began deliberating at 12:24 p.m. R. 399, l. 18 – 400, l. 8. The jury reached a verdict and came back into open court at 2:30 p.m. R. 401, ll. 1-2. The jury verdicts of guilty of murder and possession of a weapon during the commission of a violent crime were then announced in open court. R. 401, ll. 5-22. After the

verdict was announced, the judge addressed the jury stating: "Madam forelady, ladies and gentlemen of the jury, if this was and still is your verdict, please indicate by raising your right hand." R. 401, ll. 23-25. All twelve jurors raised their hands in response to the question. Counsel Edgeworth moved to have the jurors individually polled, and Counsel Ammons joined the motion. The judge conducted a bench conference with the parties before ruling,

> All right, defense counsel has asked that *each individual juror be polled.* I have previously asked this jury whether or not this is their verdict and whether or not it is still their verdict, as I indicated on the record, each of those 12 jurors have *raised their hands.* I believe that that is sufficient under the circumstances and therefore I'm not going to individually poll each juror. I've given an opportunity for them to respond pursuant to my question, and they've responded and I think that's appropriate under the circumstances.

R. 402, ll. 14-23 (emphasis added)

Respondent's trial did not proceed in the ordinary fashion. Prior to the jury being sworn, two jurors stated they did not feel comfortable sitting on the jury. One of those jurors was visibly shaking and crying during questioning by the court. Although she stated no one had tried to contact her, she was released, and the first alternate (Juror 133) was sat. R. 412, l. 30 – 413, l. 9. Following the dismissal of that juror, the judge held a bench conference wherein he expressed concern about the number of individuals in the courtroom. The parties agreed they were "a little bit" concerned about the number of spectators. R. 36, l. 5-8. The solicitor informed the court that the case was not gang related, but "there is some bad blood here." R. 36, ll. 9-12. Counsel Edgeworth stated the "victim's family obviously holds a lot of grudges." R. 36, ll. 13-14. The solicitor also informed the court that witnesses for the state had been getting repeated phone calls from blocked numbers where they would answer, be told: "do not go," and then be hung up on.

R. 36, ll. 15-19. The judge then admonished the gallery about maintaining order before starting the trial. R. 36, ll. 20-24.

The judge recessed for lunch after the testimony of the first witness. When the parties reconvened, Juror 133 informed the judge that during lunch he had received a message on Facebook from someone he did not know. The message read: "Eric, both them boys killed Mrs. Betty's grandson, bug son. Shot him 11 times and one in the head. I had to leave and go to work. Please give them the justice they deserve." Juror 133 was released from the jury, and the second alternate was sat. R. 88, l. 1 – 90, l. 21.

At the start of the third day of trial, the judge restricted access to the courtroom to family members of the parties, meaning parents, siblings, and grandparents of the Decedent or defendants, due to the numerous irregularities that had occurred up to that point in the trial. R. 101, ll. 1-10. Additionally, the solicitor informed the judge that jail phone calls from Carmichael had been intercepted where it appeared that he was discussing a juror. The solicitor had been told that Carmichael was telling the other person on the call "not to worry about looking for Dee's girlfriend anymore" because she was excused from the jury. R. 101, ll. 15-24. The judge was "vitally concerned and tremendously disturbed about what may be going on here." R. 102, ll. 5-6.

Prior to announcing the sentences, the judge recited into the record the irregularities of the trial, things that he had never witnessed in thirteen years as a judge. He stated, "there is no evidence – right now there's no evidence that either one of these defendants had anything to do with things that happened this week." R. 412, ll. 7-10. He further informed the courtroom that after the case was submitted to the jury, four rounds of live ammunition were found in the men's bathroom. Law enforcement had to clear the building and rescreen everyone through security for

safety. Additionally, the courtroom was searched by dogs from both the local sheriff's department and the U.S. Marshals Service. R. 415, ll. 3-10. The judge made it "abundantly clear, there's no indication that either one of these defendants or anybody on their behalf had anything to do with that." R. 415, ll. 13-17. It is unclear from the record if the jury was required to evacuate the courthouse during deliberations while the security sweeps were performed.

The Court of Appeals, relying on *State v. Wright*, 432 S.C 365, 852 S.E.2d 468 (Ct. App. 2020) *aff'd*, 439 S.C. 101, 886 S.E.2d 206 (2023), held "the trial court erred by denying Johnson-Epps's request to individually poll the jurors because the denial of his right to an individual poll of each juror is reversible per se." *State v. Johnson-Epps*, Op. No. 2025-UP-135 (S.C. Ct. App. Filed April 23, 2025). Because it reversed on the jury polling error, the Court of Appeals declined to address Respondent's remaining argument.[1] *Id.*

Discussion

Petitioner admits the trial court failed to honor defense counsels timely request for individual polling of the jury but argues the error in this case is procedural error subject to harmless error review and that there can be no harm because 1) the jury was collectively polled, 2) there is no evidence tending to suggest that the defendant received a nonunanimous verdict, and 3) the "extraordinary circumstances" of the case demonstrate that a "rare exception" to the polling requirements is needed. In effect, Petitioner has asked this Court to walk back the bright line rule establish in *State v. Linder*, 276 S.C. 304, 278 S.E.2d 335 (1981), and *State v. Wright*, 432 S.C 365, 852 S.E.2d 468 (Ct. App. 2020) *aff'd*, 439 S.C. 101, 886 S.E.2d 206 (2023), to

---

[1] Respondent also alleged the trial court erred by allowing state's exhibit #2, the interview of co-defendant Carmichael, into evidence where law enforcement improperly told Carmichael he was only entitled to the assistance of "retained" counsel since this violated the commands of *Miranda v. Arizona*, 384 U.S. 436 (1966), and the failure to honor Carmichael's initial invocation of his right to counsel allowed Respondent to be implicated in the crime based on Carmichael's involuntary and unintelligently tendered statement.

allow a trial judge to have discretion to determine whether individually polling is proper based on the circumstances of each case. Such a subjective standard is not supported by our jurisprudence, nor by the majority of jurisdictions who have addressed similar factual situations. This Court should affirm its holdings in *Linder* and *Wright*.

Respondent had a substantial right to individual polling

In *State v. Linder*, this Court ended the trial court's discretion regarding jury polling. "Whether a poll of the jury will be conducted is discretionary with the trial judge *unless* a polling is requested. If the *request* is made, a poll *must* be taken. *Id.* at 309, 278 S.E.2d at 338 (emphasis added). From 1981 forward, if a party requested the jury be polled, the trial court was required to *individually* poll the jurors. The purpose of the rule was "to dispel any doubt *a party* might entertain as to the propriety of a jury verdict as rendered." *Id.* at 309, 278 S.E.2d at 338 (emphasis added). While *Linder* required the trial court to poll the jurors individually upon a party's request, it did not set forth a particular method to achieve that end.

Nearly forty years later[2] the Court of Appeals held as a matter of first impression that a defendant has a *substantial right to an individual poll of each juror in open court*, and the failure to conduct a poll upon request is *per se* reversible error. *State v. Wright* at 373, 852 S.E.2d at 472. On certiorari, this Court affirmed the "well-reasoned opinion" of the Court of Appeals writing, "our holding in *Linder* is not an empty one, and we agree with the court of appeals that the denial of a defendant's request for individual polling is reversible per se." *State v. Wright*, 439 S.C. 101, 103, 886 S.E.2d 206, 207 (2023).

The *Linder* court defined polling as "a practice whereby the court determines from the jurors *individually* whether they assented and still assent to the verdict." *Linder* at 307, 278

---

[2] In that nearly forty-year span, Respondent could find no other cases dealing with this narrow issue. Presumably, because this Court's rule in *Linder* has been largely followed.

S.E.2d at 338. In *Wright*, the collective questioning of the jury as to its verdict was categorically held *not* to be a sufficient poll of the jurors because it did not require them to be individually questioned and speak for themselves. The Court of Appeals clarified that "individual polling means each juror must be *separately asked* to *confirm verbally* on the record that the verdict announced is still his or her verdict." *Wright* at 370, 852 S.E.2d at 471 (Ct. App. 2020).

As recognized in *Wright*, individual polling supports several interests of justice. Most critically, individual jury polling is a corollary to the defendant's constitutional right to a unanimous verdict. *Ramos v. Louisiana*, 590 U.S. 83 (2020) (Under the Sixth Amendment to the United States Constitution, as incorporated against the States by the Fourteenth Amendment, jury verdicts in felony criminal trials must be unanimous). Polling also protects the right to a public trial and the public's interest in ensuring the outcome of the criminal trial process is reliable. Further, "[i]ndividual polling promotes finality and accountability of the verdict stage and enhances the integrity of the deliberative process by ensuring no juror was coerced in the jury room." *Wright* at 369, 852 S.E.2d at 470.

The Federal Rules of Criminal Procedure were amended in 1998 to *require* individual polling, rather than collective polling, as collective polling "saves little time and does not always adequately ensure that an individual juror who has been forced to join the majority during deliberations will voice dissent from a collective response." *Id. citing* Fed. R. Crim. P. 31 Advisory Committee Notes. Even prior to the amendment, several federal circuits had held that collective questioning of the jury was not the best method for accomplishing the purpose of the jury poll. *Id. citing United States v. Miller*, 59 F.3d 417, 421 (3d Cir. 1995); *United States v. Carter*, 772 F.2d 66, 68 (4th Cir. 1985). Similarly, numerous other states have held collective

polling is not adequate. As the Connecticut Supreme Court observed when addressing a similar matter:

> These cases reflect the understanding, based on common human experience, that members of a group may react differently when addressed as a group, and when addressed individually. They also reflect the notion that *the concept of jury unanimity is sufficiently significant so as to require that, upon request, each juror be required to state his or her verdict in open court—individually—to face the defendant and the state, and confirm, on his or her own, that the collectively reported verdict is truly his or hers.*

State v. Pare, 755 A.2d 180, 193 (2000) (emphasis added).

Petitioner argues a poll was conducted in this case because the jurors all raised their hands when questioned by the court. However, a "[f]or the poll to serve its intended goal, it must be conducted in a manner that affords jurors a forum in which they can 'dissent from a verdict to which they have previously assented in the jury room.'" *State v. Milton*, 178 N.J. 421, 433 840 A.2d 835, 841-42 (2004) *citing Virgin Islands v. Hercules,* 875 *F.*2d 414, 418 (3d Cir.1989). Indeed, a poll that "produces "a mere chorusing of what has already been announced, will not adequately safeguard a defendant's right to a unanimous verdict." *Id. citing State v. Holloway,* 106 N.M. 161, 740 P.2d 711, 715 (Ct. App.) cert. denied, 106 N.M. 405, 744 P.2d 180 (1987).

A jury poll was not conducted in Respondent's case, as he was denied the substantial right to *individually* poll the jurors despite the timely request by defense counsel. At no point were the jurors required to verbally or individually assent to their verdict in this matter. The collective poll did not ensured that no juror was coerced into assenting to the verdict because the collective poll did not separately test the conscience of each juror while giving them the opportunity to dissent. *See Miles v. Commonwealth*, 256 S.W.3d 46, 46 (Ky. Ct. App. 2008) ("The right is one to have the conscience of each individual juror tested by an individualized

question directed at him or her, not a question directed at any group of jurors in which individuals may find some degree of anonymity."); *Humphries v. District of Columbia*, 174 U.S. 190, 194 (1899) (observing object of poll "is to ascertain for a certainty that each of the jurors approves of the verdict as returned; that no one has been coerced or induced to sign a verdict to which he does not fully assent"); *State v. Tennant*, 319 S.E.2d 395, 399 (W. Va. 1984)("Courts have recognized that the chief purpose behind an individual poll of jurors is to enable a juror to express any reservation he may have about the verdict free from the pressure of his fellow jurors.")

Petitioner asserts the collective poll in this case was warranted to ensure the wellbeing, safety, and feelings of the jurors because of the extraordinary circumstances that occurred during trial. However, Petitioner offers no authority for the premise that the feelings or privacy of the jurors would override a criminal defendant's substantial right to have the jury individually polled. In fact, the United States Supreme Court has recognized that the right of a defendant to a fair trial is "the most fundamental of all freedoms—[which] must be maintained at all costs." *Estes v. State of Texas,* 381 U.S. 532, 540 (1965). The Court noted that "no right ranks higher than the right of an accused to a fair trial." *Press–Enterprise Co. v. Superior Court of California,* 464 U.S. 501, 508 (1984). It logically follows that Respondent's substantial right to poll the jury to confirm unanimity of the verdict and to confirm there was no coercion of any juror, corollary rights to the right to a fair trial, would trump concern for a juror's wellbeing, safety, and feelings.

The argument that the trial judge refused individual polling to protect the jurors is based purely on an assumption, as the conversation that took place at the bench after polling was requested was not transcribed. While one can guess that the trial court did not poll the jury based on the various odd occurrences throughout the case, it is *not* a known fact. Nevertheless, even *if*

the trial judge had explicitly stated its reasons for declining to poll the jury, that discretion was not allowed based on this Court's holding in *Linder*, *supra.*

Lastly, the numerous odd occurrences during Respondent's trial weighed in favor individual polling, not against it. When there are any anomalies in a trial, the sanctity of the verdict becomes questionable. When there are eight occurrences of juror interference, alleged witness tampering or courthouse safety the specter of impropriety looms large and the need to ensure the jury reached a truly unanimous verdict is heightened. *Cf. People v. Hoffman*, 24 N.Y.2d 59, 61 (N.Y. Sup Ct. 1940) (where jury deliberated on election even through election day until shortly before they would need to return a verdict in time to be released and reach their polling places in order to vote, "[t]he right to poll the jury in any case is a substantial one, but it was particularly so under the facts in this case.")

This Court made clear in *Linder* that individual juror polling was mandatory upon a request from either party. A collective poll does not suffice to protect a defendant's right to a unanimous verdict. Petitioner has offered no compelling reason to depart from the precedent. Respondent timely requested the jurors be individually polled, and that request was denied. This was error requiring reversable.

An Error Not Amenable to Harmless Error Analysis

As the Court of Appeals recognized, "the structural/trial error distinction is not pivotal to Wright's appeal for a polling error is not a pure constitutional error and resembles both an error affecting the framework within which the trial proceeds (structural error) and an error in the trial process itself (trial error)." *Wright* at 371, 852 S.E.2d at 471. A review of all fifty states revealed that the majority of jurisdictions that have addressed the failure to poll the jury following a request poll, like this Court, that the error in failing to poll the jury regarding its

verdict to be reversible *per se*, and they often do so without classifying the error as structural or trial error. *See Wingfield v. State*, 95 Ark. 71, 128 S.W. 562 (1910) (If the statute is mandatory, it follows that the refusal to poll the jury was a prejudicial error, for it deprived the defendant of a substantial right to ascertain to a certainty from the individual expression of each juror whether or not the verdict reported by the foreman was concurred in by all.); *State v. Pare*, 253 Conn. 611, 755 A.2d 180 (2000) (We conclude that, pursuant to § 42–31, a trial court's obligation to poll the jury upon a timely request from either party is mandatory ....in light of the weighty interest protected by a jury poll, and the impracticality of gauging the results of a poll not taken, we conclude that a violation of a party's timely polling request requires automatic reversal of the judgment.); *Sowell v. State*, 458 So. 2d 375 (Fla. Dist. Ct. App. 1984) (Finding the polling language is mandatory and the trial judge should have strictly adhered to the procedure embodied in the rule upon appellant's timely request. Further holding that the failure to afford a defendant the right to a jury poll is not harmless.); *Rinker v. State*, 228 Ga.App. 767, 492 S.E.2d 746 (1997) ("The right to a poll of the jury is a material right derived from the common law.... In criminal cases the right to poll the jury is not discretionary, and [the] denial of that right when timely requested is reversible error.... A request for poll is timely when made after the verdict is read."); *People v. Wheat*, 383 Ill. App. 3d 234, 242, 889 N.E.2d 1195, 1203 (2008) (The motion was therefore timely, and the trial court abused its discretion by ruling otherwise. As mentioned, if the jury is not polled in spite of a defendant's timely request to do so, reversible error occurs.); *State v. Callahan*, 55 Iowa 364, 7 N.W. 603, 603 (1880) (It is evident the defendants were deprived of the right given by statute to poll the jury. We cannot say such right was not material or the defendants were not prejudiced by being deprived of such statutory right. It seems to us it was a substantial right, of which a defendant in a criminal action cannot be deprived without his

consent. The court erred in receiving and recording the verdict, and in rendering judgment thereon.); *Johnson v. Commonwealth*, 694 S.W.3d 232, 252 (Ky. 2023) (The Defendant has a right not only to see and know that the whole jury is present assenting to the verdict, but by polling to demand face to face of each juror whether the verdict is his verdict, and to object to it unless each member of the jury shall answer for himself that the verdict is his. Thus, the failure to poll the jury when requested and preserved is reversible error.); *Stewart v. People*, 23 Mich. 63 (1871) (He demanded the right to poll the jury, and, when the court denied it, he strenuously insisted and protested against the verdict being recorded without such polling. For the error in denying to the prisoner the right to have the jury polled, the judgment must be reversed and a new trial ordered.); *McLarty v. State*, 842 So. 2d 590, 592 (Miss. Ct. App. 2003) (The right to poll the jury is explicit in Rule 3.10 of the Uniform Rules of Circuit and County Court. Although defendant's counsel was tardy in his request for a jury poll, the jury was still in the courtroom. The trial court's failure to poll the jury is reversible error.); *State v. Reppetto*, 66 Mo. App. 251, 253 (1896) (The court also erred in refusing to grant defendant's request for a poll of the jury upon the rendition of their verdict. This is a right secured to litigants by law to enable them to determine that the verdict rendered was that of each member of the jury.); *State v. Boger*, 202 N.C. 702, 163 S.E. 877 (1932) (We think a defendant on trial in a criminal case (and of course the Solicitor for the State) has the right to have the jury polled, whether it be an oral or a sealed verdict. The defendant was denied his right to have the jurors polled by the judge or under his direction. For error in denial of this right in the instant case, the defendant is entitled to a new trial.); *City of Dayton v. Allen*, 27 O.O.2d 179, 200 N.E.2d 356, 365 (Ohio Com. Pl. 1959) (Holding that the defendant-appellant was deprived of a fundamental right when the court denied his counsel's request that the jury be polled. Such request made individual polling of the jury

mandatory.); *State v. Pockert*, 49 Wash. App. 859, 746 P.2d 839 (1987) (Trial court's failure to poll the jury upon defendant's request was reversible error.); *State v. Wojtalewicz*, 127 Wis. 2d 344, 345–46, 379 N.W.2d 338, 339 (Ct. App. 1985) (Where timely asserted, a defendant in a criminal case has the right to have the jurors polled individually as to their verdict. The trial court's refusal to do so is reversible error.)

These cases repeatedly hold that the right to individually, verbally poll the jury is absolute upon a timely request and that a poll of the jury is more than a mere procedural or technical matter, but a substantial right. The majority of jurisdiction recognize that "[t]he action of the court [in denying a timely request to poll the jury] worked a denial of a right of the accused so fundamental as to require a retrial even though, as clearly appears from the record, the trial was otherwise markedly free from error and the jury's verdict was fully warranted by the evidence." *Commonwealth v. Martin,* 379 Pa. 587, 109 A.2d 325, 328 (1954).

In *Wright* the Court of Appeals wrote "the structural/trial error dichotomy does not cover all trial mistakes; some, like the polling error here, elude neat classification." *State v. Wright*, 432 at 371, 852 S.E.2d at 471. It continued that the United States Supreme Court in *Weaver v. Massachusetts*, 582 U.S. 286 (2017), had provided a way out of the classification dilemma by noting three broad categories of errors that are structural. The *Weaver* Court had noted that an error is structural if 1) the right at issues is designed to protect an interest other than the defendant's interest in being wrongly convicted; 2) the effects of the error are "simply too hard to measure"; or 3) the error always results in fundamental unfairness. *Id.* at 296. Taking each point in turn, the Court of Appeals held that the denial of a timely request to individually poll the jury bore on all three traits. *State v. Wright*, 432 S.C. at 371–72, 852 S.E.2d at 472. First, "the polling right protects not only the defendant from being wrongfully convicted, but also the

public's interest in ensuring the outcome of the criminal trial process is reliable." *Id.* Second, "[d]enial of the polling right also defies harmless error analysis... as we cannot say the lack of a valid poll contributed to the verdict, as the error occurred after a verdict was announced." *Id.* The Court of Appeals recognized "[i]t would be an odd end to the matter to deem it harmless, for in effect we would be presuming the unanimity of the verdict while simultaneously denying the defendant the only real right he has to check behind the presumption." *Id.* Third, "the denial of the polling right caused fundamental unfairness by undermining ... the systemic requirements of a fair and open judicial process." *Id.*

Petitioner asserts that the *Wright* opinion failed to properly review the three categories and argues, without citing authority, that the conclusions reached in the opinion are wrong. As to category one, Petitioner argues the different right identified by the Court of Appeals was a difference without distinction because "the demand of a unanimous guilty verdict can only be considered a right protecting against an erroneous conviction." That is simply not true as countless individuals who were convicted in criminal courts by unanimous juries have been later found to be erroneously convicted and set free by programs such as The Innocence Project and The Exoneration Project. The right to poll the jury does not necessarily prevent an erroneous conviction but protects a defendant's right to a *unanimous* conviction, even if it was erroneous. It "also safeguards the right to a public trial. If the poll reveals the jury's announced verdict is not in fact unanimous, the verdict cannot stand, and the trial court may, as circumstances warrant, direct further deliberation or declare a mistrial." *Wright* at 369, 852 S.E.2d at 470 *citing State v. Kelly*, 372 S.C. 167, 170-71, 641 S.E.2d 468, 470 (Ct. App. 2007). The right at issue protects against more than just a defendant's wrongful conviction.

As to category two, Petitioner asserts there are no effects to measure because the verdict was given before any basis for the error arose, thus the verdict itself was proper and could only be bolstered by jury polling. This argument presumes the unanimity of the verdict while simultaneously arguing that the defendant cannot be harmed by being denied the right to be checked behind that presumption. As the Court of Appeals stated in *Wright* the error here is not what was done, but what was *not done*. There is no way for an appellate court to gauge the impact of something that did not occur. Additionally, a verdict does not become final until a sentence is imposed, *See State v. Robinson*, 287 S.C. 173, 337 S.E.2d 204 (1985) (judgment in a criminal case is not final until sentence is imposed), and "if it is made known to the court when it is time to render the verdict that any juror does not assent to it, the verdict cannot be received and the jury should retire to their room until they have agreed." *State v. Singleton,* 319 S.C. 312, 316, 460 S.E.2d 573, 576 (1995). The verdict was not final until the court imposed a sentence and could have been changed upon any dissent found during polling. However, because no poll was taken, it was impossible to discern any potential dissent, and the effect of the error cannot be measured.

As to category three, Petitioner asserts that Respondent was not denied the right to a unanimous verdict and thus the trial was not rendered fundamentally unfair by the denial of his request to individually poll the jurors. However, again this argument presumes the unanimity of the verdict while simultaneously alleging that the defendant cannot be harmed when his request to check behind that presumption is denied. "For these purposes, however, one point is critical: An error can count as structural even if the error does not lead to fundamental unfairness in every case." *Weaver v. Massachusetts*, 582 U.S. 286, 296, (2017). Thus, even if there was some credence to Petitioner's argument that the failure to poll the jury did not lead to fundamental

unfairness in this case, that alone does not remove the error out of the structural class of errors requiring reversal.

The New York Court of Appeals discussion, in a civil case no less, on the inability to apply harmless error analysis to the denial of the right to individually poll the jury is instructive. The court there wrote,

> A verdict in a jury trial is emphatically not a judicial construct. Indeed, it is hard to know upon what empirical basis a verdict untested in open court by direct inquiry of the individual jurors might be judicially deemed to be the final expression of the jury's true intention. Here, it is important to understand that the relevant question is not whether the trial evidence was sufficiently persuasive to impel a hypothetical reasonable juror to vote in favor of the announced verdict, but rather whether each juror chosen by the parties to hear the case would, upon reflection, publicly affirm that the verdict agreed to in the jury room was the one he or she actually intended. The exercise of individual conscience involved is one whose outcome defies prediction.
>
> ...
>
> No court, however, may claim to know each juror's conscience so as to retrospectively offer assurance that the verdict was in its initial iteration what its authors had actually intended. Only timely inquiry of jurors will disclose whether their announced verdict truly expresses their will, and it is for this reason, and not out of unreasoned devotion to antique forms, that the common-law insistence upon jury polling has persisted. Harmless error analysis in this context would amount to no more than a speculative exercise, impermissibly substituting the judgments of judges for those that would have been made and disclosed by jurors had their verdict been properly pronounced in open court.

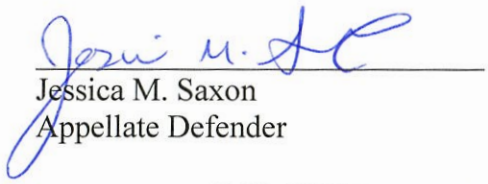
Duffy v. Vogel, 12 N.Y.3d 169, 177, 905 N.E.2d 1175 (2009)

While the right to polling itself is not constitutional, it is a corollary to the Sixth Amendment right to have a unanimous verdict. Indeed "[t]he right to have each juror individually state his or her verdict in his presence is essential to a criminal defendant's constitutional right to a unanimous verdict." *State v. Pockert*, 49 Wash. App. 859, 746 P.2d 839 (1987) The denial of such a substantial, fundamental right, where there is no other opportunity

for a party questioning the propriety of the verdict to test it in open court, warrants reversal. Even when the trial is otherwise largely free from error that the denial of the right to individually poll the jury is off significant magnitude that "it is better that the case be tried again than that a precedent impairing a defendant's right to a poll of the jury be engrafted on our criminal procedure." *Commonwealth v. Martin,* 379 Pa. 587, 109 A.2d 325, 327 (1954); *See Also Sowell v. State,* 458 So.2d 375, 376 (Fla. Dist. Ct. App. 1984) (We find that precedent also should not be established in this state impairing a defendant's right to a poll of the jury upon his or her timely request.) The weight of authority is in accord with this Court's decision in *Linder* and *Wright.* The holding in *Linder* is not an empty one but pertains to a substantial right of a criminal defendant and the harm from the denial of such a poll cannot be known, only speculated to. This Court should affirm its decisions in *Linder* and *Wright.*

CONCLUSION

Based on the foregoing arguments, Respondent's convictions should be reversed and this case remanded to the Florence County Court of General Sessions for a new trial.



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR RESPONDENT

This 16th day of January, 2026.