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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

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CERTIORARI TO BAMBERG COUNTY
Court of Common Pleas
The Honorable Kristi F. Curtis, Circuit Court Judge

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Appellate Case No. 2025-000412

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KWAMAINE ROSS,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## RESPONDENT'S STATEMENT OF ISSUES PRESENTED

I. The PCR court properly found trial counsel was not ineffective for failing to object to the *Allen* charge because the charge was not unconstitutionally coercive.

## STATEMENT OF THE CASE

Petitioner is presently confined within the South Carolina Department of Corrections. During its February 2017 term, the Bamberg County Grand Jury indicted Petitioner for murder (2017-GS-05-0028) following the shooting death of the decedent during a home invasion in Bamberg County.

Petitioner was originally represented by retained counsel Alex Postic, Esquire, then J. Todd Rutherford, Esquire, but was eventually represented by appointed counsel Ola Johnson, Esquire. Deputy Solicitor David W. Miller and Assistant Solicitor R. Jackson Cooper of the Second Circuit Solicitor's Office prosecuted the case.

On June 19, 2018, the State called the matter to trial before the Honorable Doyet A. Early, III., circuit court judge, and a jury. Following the presentation of evidence and deliberations, the jury convicted Applicant as indicted. Judge Early sentenced Petitioner to imprisonment for thirty years for murder.

Petitioner filed a timely notice of appeal. Chief Appellate Defender Robert M. Dudek of the South Carolina Commission on Indigent Defense-Office of Appellate Defense perfected Applicant's appeal by filing a brief with the Court of Appeals on the following issue:

> The [trial] court erred by allowing Agent David Owen to testify that Lenell Ross allegedly told him that appellant was wearing a yellow shirt on the night of the murder, and that appellant changed his shirt later that night, since this was highly prejudicial hearsay testimony where the state was urging that the evidence shower that the murdered was wearing a yellow shirt.

Following briefing, the South Carolina Court of Appeals affirmed Petitioner's conviction and sentence in an unpublished opinion. *State v. Kwamaine Jarelle Ross.*, Unpub. Op. No. 2021-UP-100 (Ct. App. filed Mar. 31, 2021). The remittitur was issued on April 21, 2021.

Petitioner filed an application for post-conviction relief on March 31, 2022. On February

1, 2024, an evidentiary hearing into the matter was convened before the Honorable Kristi F. Curtis at the Aiken County Courthouse. Petitioner was present and represented by Tommy A. Thomas, Esquire. Assistant Attorney General Travis Cruise Mitchell represented the State. Following the hearing, Judge Curtis issued an order denying and dismissing the application with prejudice on December 30, 2024. This appeal follows.

## STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. *Id.; Smalls v. State*, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

## ARGUMENT

### I. The PCR Court properly found trial counsel was not ineffective for failing to object to the *Allen* charge because the charge was not unconstitutionally coercive.

Petitioner alleges the PCR court erred in finding trial counsel was effective when he failed to object to the coercive *Allen* charge that improperly failed to inform the jury not to set aside their firmly held beliefs. The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to "assistance by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Strickland v. Washington*, 466 U.S. 668 (1984). Where, as in this case, a PCR Petitioner alleges ineffective assistance of counsel as a ground for relief, the Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*: first, the Petitioner must prove that counsel's performance was deficient. *Strickland*, 466 U.S. at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

Second, counsel's deficient performance must have prejudiced Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different." *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625. "A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed." *Strickland*, 466 U.S. at 670. The Petitioner bears the burden of proving the allegations in his application by a preponderance of the evidence. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814; Rule 71.1(e), SCRCP.

At Petitioner's trial, the Court gave the following charge to the jury after they indicated they were deadlocked:

> The Court: Madam forelady, ladies and gentlemen of the jury, I received your latest notes saying that y'all have been unable to reach a - - an unanimous decision.
>
> Obviously trying to get 12 people to unanimously agree on something is not the easiest task no matter what you are trying to do, particularly in a difficult situation such that y'all have been assigned to do what the task is in this case.
>
> So what happens is if you are unable to reach a unanimous verdict the ultimate and the end result is what we call a mistrial, which means simply this: That at another time here in this place we will bring in jurors like we brought you in. We will select 12 more jurors - - juries - - 12 more jurors to form a jury. The case will be presented again.
>
> And obviously the testimony and the evidence is not going to change. It is what it is. And we will be asking another 12 jurors to make a decision in the case. So it doesn't go away. It is simply what is known as a mistrial.
>
> You have been deliberating now about five-and-a-half hours. That is not an excessive long length of time. But I don't judge by how long you have been deliberating. Sometimes I judge on how hard you are working and how many questions you have asked me. And obviously I think y'all are taking your job very very seriously and you are doing the best you can.
>
> So what I am going to ask you to do - - and I am not going to make you stay back there an inordinate amount of time, but I am going to ask you to give it one more good shot.

> And I am going to ask those who are in the majority to listen to those who are in the minority and those who are in the minority to listen to those in the majority and see if you can't accomplish your civic duty of reaching a unanimous verdict.
>
> *If you can't, I understand; and you will certainly not be criticized by me or anybody here.* If you can, you won't be criticized either or praised; you will simply be doing your job.
>
> But I am going to ask you to go back and give it a last effort to try to reach a unanimous decision. And, ma'am, if you can't - - and I am not going to make you stay back a long period of time. If you can't, you can't. If you can, then after having - - maybe you can after giving it another shot. *But if you can't, I understand.*

(App. pp. 332–334) (emphasis added).

At the evidentiary hearing, Counsel testified that he did not see any reason to object to the *Allen* charge. (App. p. 437). "An *Allen* charge is an instruction advising deadlocked jurors to have deference to each other's views, that they should listen, with a disposition to be convinced, to each other's arguments." *State v. Lee-Grigg*, 374 S.C. 388, 418 n.1, 649 S.E.2d 41, 57 n.1 (Ct. App. 2007) (internal quotation marks omitted), *aff'd* 387 S.C. 310, 692 S.E.2d 895 (2010). "Whether an *Allen* charge is unconstitutionally coercive must be judged in its context and under all the circumstances." *Tucker v. Catoe*, 346 S.C. 483, 490, 552 S.E.2d 712, 716 (2001) (quoting *Lowenfield v. Phelps*, 484 U.S. 231 (1988)).

"In South Carolina state courts, an *Allen* charge cannot be directed to the minority voters on the jury panel." *Green v. State*, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002). "Instead, an *Allen* charge should be even-handed, directing both the majority and the minority to consider the other's views." *Id.* "A trial judge has a duty to urge, but not coerce, a jury to reach a verdict." *Id.* In *Tucker*, the Supreme Court of South Carolina adopted the standard established by the United States Supreme Court in *Lowenfield* to determine whether an *Allen* charge is unconstitutionally coercive. Those factors are:

(1) Whether the charge spoke specifically to the minority juror(s);

(2) The language of the charge, including statements such as "You have [] to reach a decision in this case";
(3) Whether the trial judge inquired into the jury's numerical division, a question generally considered coercive; and
(4) Weighing the length of time between the issuance of the Allen charge and the jury's return of a verdict (with verdicts returned "shortly after" the supplemental charge suggesting a possibility of coercion) against trial counsel's failures to object either to the charge itself or an inquiry whether the jurors believed further deliberation would result in a verdict.

*Tucker*, 346 S.C. at 492, 552 S.E.2d at 716 (citing *Lowenfield*, 484 U.S. at 237).

Analyzed under the *Lowenfield* factors, the trial judge's *Allen* charge was not unconstitutionally coercive. The trial judge spoke to both the majority and minority jurors by asking "those who are in the majority listen to those who are in the minority and those who are in the minority to listen those in the majority." Clearly, the judge did not speak specifically to the minority jurors when requesting both the majority and minority jurors to consider each other's views. Petitioner asserts that the trial court was aware the not guilty jurors were in the minority. This is unsupported by the record. Although the foreperson sent notes reflecting the numerical division, the notes did not disclose whether guilty or not guilty was the majority position. (App. p. 358; 360). Importantly, the trial court never inquired into which position constituted the majority. Therefore, the trial court was not aware of which position was in the minority.

Nor does the trial court's reminder of the jurors' civic duty to attempt to reach a unanimous verdict render the charge coercive. A trial judge has not only the authority but the obligation to urge the jurors to reach a verdict. *See Green v. State*, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002) ("A trial judge has a duty to urge, but not coerce, a jury to reach a verdict"). Additionally, the trial court's reference to the jurors' civic duty immediately followed, and was part of the same sentence as, the request that both sides consider one another's views. In this context, the trial

court's reminder of the jurors' civic duty cannot reasonably be characterized as coercive or directed toward the minority position.

Petitioner argues the trial court's comment reminding the jurors to "accomplish their civic duty of reaching a unanimous verdict" is akin to the improper comments made in *State v. Rampey*, 438 S.C. 519, 885 S.E.2d 366 (2022).

The court in *Rampey* gave the following *Allen* charge:

> All right. Ladies and gentlemen, I've received your note and I sympathize with you. I recognize this is a difficult case and it's difficult to come to a resolution. It's hard enough for two people to agree on anything, so it's particularly difficult, oftentimes, for 12 people who have just met each other and have been thrust into a jury room to deliberate to agree on a verdict in the case. So I sympathize with you in that regard. I sympathize with you because I recognize this is a very difficult decision for each of you to make, both collectively and personally.
>
> *But I do want to impress upon you that there have been many resources that's been brought to bear this week to bring this case to trial. The State of South Carolina, the County of Pickens, the parties to this case have expended substantial and significant resources to bring this case to trial.* If you were to fail to come to a verdict in this case, then this case would simply have to be tried again. Twelve other people in the county of Pickens would come to trial and would hear the same witnesses, the same evidence, same arguments and would be tasked with deliberating on the case. Now, there are no 12 other people in the county of Pickens who are more capable, who are more able, who are more competent to reach a decision in this case than you are.
>
> Now, I recognize that it's a very difficult decision to make, *but these parties deserve finality and they deserve a decision.* So I would ask you to return to your jury room and continue deliberations. Those of you who may be in the minority, I would ask you to consider the position of the majority. Those of you who are in the majority, I would ask you as well to consider the position of the minority again and see if you can come to some resolution in this case. I know that's not what you wanted to hear when I brought you back out there, but again, *this is important and a lot of resources have been expended to get to this point in time, And these parties deserve a verdict.* So I ask you to return to your jury room and attempt to come to a verdict. Thank you very much.

*Id.* at 522–24, 885 S.E.2d at 367–68 (emphasis added).

The Supreme Court in *Rampey* found the above charge was unconstitutionally coercive based on the court's repeated comments that the parties deserve a verdict and its emphasis on the substantial resources spent in bringing the case to trial. *Id.* at 527, 885 S.E.2d at 370. No similar remarks were made in this case. In fact, the trial court informed the jury that they would not be criticized if they cannot come to a verdict and ended the *Allen* charge by stating "but if you can't [come to a decision], I understand." This is entirely opposite to the trial court's remarks in *Rampey* where the trial judge reiterated the "point towards the end of its charge, stating 'these parties deserve finality and they deserve a decision." *State v. Rampey*, 438 S.C. 519, 526, 885 S.E.2d 366, 369 (2022).

Furthermore, Petitioner misstates the PCR court's findings. The PCR court did not find, as Petitioner suggests, that the trial judge was unaware of the jury's split; rather, the PCR court found that "there was no inquiry into the jury's numerical division." (App. p. 510). The record plainly supports that finding. At no point did the trial court ask how the jury was divided numerically. Although the jury's notes referenced a numerical division, they did not indicate whether guilty or not guilty constituted the majority. (App. p. 358; 360). Nor, critically, did the trial court ever inquire into how the jury was split. The numerical division was merely volunteered by the jurors in their notes to the court. The trial court did not request that information and did not inquire into the jury's split. Therefore, the record is clear that the trial court played no role in eliciting the numerical split of the jurors. Thus, the PCR court's finding that the trial court did not inquire into the jury's numerical division is wholly supported by the record, despite Petitioner's assertion to the contrary.

Additionally, the timing of the verdict after the *Allen* charge does not indicate coercion. The jury began deliberations on June 20, 2018, at 3:09 p.m. (App. p. 318). The jury finished deliberations for the day at 7:12 p.m. (App. p. 322). The jury resumed deliberations on June 21,

2018, at 10:01 a.m. At 10:16 a.m., only 15 minutes after the jury resumed deliberations, they sent a note to the trial court indicating they were still deadlocked. (App. p. 331). The trial court gave the *Allen* charge at 11:18 a.m. and the jury resumed deliberating at 11:21 a.m. (App. pp. 332–335). Following the *Allen* charge, the jury requested to play back portions of the trial testimony. (App. pp. 336–337; 361). The jury came back with a verdict at 1:10 p.m., one hour, 49 minutes following the *Allen* charge. (App. p. 337). The PCR court did not err by finding this length of time did not indicate coercion. The pre-*Allen* charge deliberations totaled 4 hours, 3 minutes. The jury deliberated an additional 1 hour, 49 minutes following the issuance of the *Allen* charge. This is an entirely reasonable period of time given the total time of the deliberations. During this time, the jury requested to play back certain testimony from trial, which indicates they were in thoughtful deliberations following the *Allen* charge and were not surrendering their firmly held beliefs. Thus, the time between the issuance of the *Allen* charge and the verdict does not indicate coercion.

Because the *Allen* charge given by the trial court was proper, Petitioner has suffered no prejudice from Counsel's alleged failure to object.[1]

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1 Petitioner, in asserting prejudice, raises two issues that he concedes are unpreserved and were never raised, discussed, or ruled upon in the proceedings below. Accordingly, this Court should reject Petitioner's attempt to litigate these issues for the first time on appeal. *See Mangal v. State*, 421 S.C. 85, 805 S.E.2d 568 (2017) (declining to excuse a procedural default where the issue was not presented to the PCR court at the hearing); *Plyler v. State*, 309 S.C. 408, 413, 424 S.E.2d 477, 480 (1992) (holding an issue that was neither raised at the PCR hearing nor ruled on by the PCR court is procedurally barred on appeal), *overruled on other grounds by State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019); *Hyman v. State*, 278 S.C. 501, 502, 299 S.E.2d 330, 331 (1983) (holding an issue that was not raised in the PCR application or at the PCR hearing is not properly before the appellate court).

## CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari, as the post-conviction relief court properly determined Petitioner failed to establish any constitutional ineffectiveness. Should this Court grant certiorari, Respondent requests the opportunity to fully brief the issue raised.

Respectfully Submitted,

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This 9th day of March, 2026.