

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

—————
Certiorari to Bamberg County

Honorable Kristi F. Curtis, Circuit Court Judge
—————

KWAMAINE ROSS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-000412
—————

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI
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ARGUMENT IN REPLY

In the State's Return, it avoids addressing the prejudicial impact of all instances of ineffective assistance of counsel by relying upon the fact the sole issue before the Court is the prejudicial impact of counsel's handling of the coercive *Allen*¹ charge. (State's Return fn. 1). The reliance on the fact that the matters argued were not addressed during the PCR hearing as a basis for relief ignores the point petitioner makes in raising them in the Petition for Certiorari. These other instances of ineffective assistance of counsel are presented in argument that the error before the Court, an additional instance of ineffective assistance of counsel surrounding the coercive *Allen* charge, was prejudicial.

This is the logical import of this Court's view of how to apply the prejudice prong of the Strickland v. Washington, 466 U.S. 668 (1984) standard for granting post-conviction relief. The strength of the state's case against an applicant must be weighed against the impact of counsel's specific deficiency (in this case the handling of the coercive *Allen* charge) and *other relevant factors*. Those other relevant factors entail *other instances* of ineffective assistance of counsel, such as presented here by appellate counsel's failure to address the trial judge drawing the jury's attention (over trial counsel's objection) to the physical restraints petitioner was forced to wear while testifying before the jury. As outlined by this Court in Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018), other instances of ineffective representation have a role in the prejudice analysis even if not argued as an independent basis for relief under *Strickland*. This is not a novel concept.

Simmons and *Smith* illustrate the proper consideration of the strength of the State's case in the PCR court's analysis of prejudice: it is one significant factor the court must consider—along with the specific impact of counsel's error *and other relevant*

¹ Allen v. United States, 164 U.S. 492 (1896).

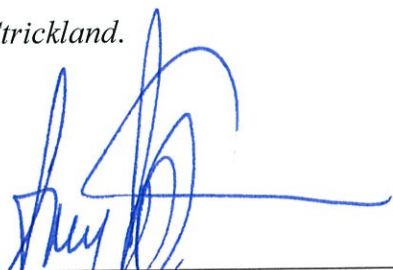
considerations—in determining whether the applicant has met his burden of proving prejudice. In this case, however, neither the PCR court nor the court of appeals appears to have considered the specific impact of counsel's error. Rather, both courts used what they considered “overwhelming evidence of guilt” as a categorical bar that precluded a finding of prejudice, without the necessity of separately considering the impact of counsel's error.

Smalls, 422 S.C. at 190, 810 S.E.2d at 844 (emphasis added).

As this Court stated in *Smalls*, the prejudice analysis involves considering the strength of the case along with the specific impact of counsel's error *and other relevant considerations* in determining whether petitioner can demonstrate prejudice in this matter. As the state has simply ignored the impact of the other relevant considerations on the admitted lack of reliance upon them as an independent basis for granting relief under *Strickland*, this Petition provides this Court the opportunity to specifically address the scope of the prejudice prong that insures the prejudice prong focuses on whether the error of counsel and other relevant factors “undermine confidence in the outcome” of the trial. Strickland, 466 U.S. at 694.

CONCLUSION

The determination of prejudice in the PCR setting can be viewed on a sliding scale. As “overwhelming evidence of guilt” tilts that scale against a finding of prejudice, it must be balanced with the nature of the alleged error of counsel to push the scale towards finding the nature of the error undermines confidence in the outcome of the trial. As the evidence of guilt weakens, the nature of the alleged error of counsel does not need to rise to the same level to accomplish the same goal: the confidence in the outcome of the trial is simply on weaker standing. In both settings, the courts should look at the nature of the trial and evidence against the accused, including other instances of potential ineffective assistance of counsel in determining whether, if trial counsel was ineffective, petitioner has met the burden to undermine the confidence in the outcome of the trial so as to grant relief. The state’s argument that this Court should ignore other aspects of counsel’s performance in the prejudice analysis is without merit but does provide this Court the opportunity to clarify the impact of *other relevant considerations* in the prejudice analysis required by *Strickland*.



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This 23rd day of March, 2026.