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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Bamberg County

Honorable Kristi F. Curtis, Circuit Court Judge

KWAMAIN ROSS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-000412

BRIEF OF PETITIONER

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ISSUE PRESENTED

Whether the PCR court erred in finding trial counsel was effective when he failed to object to the coercive *Allen*¹ charge that improperly failed to inform the jury not to set aside their firmly held beliefs?

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

STATEMENT

On October 24, 2015, an assailant broke into the home of Travis “Bird” Anderson and shot and killed him. Decedent’s wife, Octavia Bannister, testified that she felt something was wrong when she returned home since the sliding door was open and all the lights were on inside the home. App. 236, l. 16 – 237, l. 25. Upon entering the kitchen, she saw signs of a struggle and heard a gunshot from upstairs. App. 238, ll. 5 – 21. As Bannister ran into the living area and out the door, she claimed to see petitioner inside the home. App. 293, ll. 2 – 19. She then claimed to get a second look at petitioner as he stood in the sliding doorway holding a gun. App. 239, l. 21 – 240, l. 3. After being presented three different lineups, Bannister picked petitioner out as the man she saw in the doorway holding a gun. App. 243, ll. 10 – 23.

Bannister’s identification was challenged on cross-examination. Bannister acknowledged only seeing a single individual inside her home wearing a green shirt.² App. 245, ll. 18 – 25. She denied saying this individual had a gold tooth. App. 246, ll. 6 – 11. She admitted altering her story about seeing the perpetrator twice as opposed to the one time as she fled the doorway. App. 246, l. 25 - 247, l. 12. She acknowledged that photograph #2 on the second lineup also “looked like” the perpetrator but that she wasn’t sure and did not select that suspect. App. 248, ll. 1 – 16.

Witness Andrea Rahn was working at the Dollar Tree in Bamberg on October 24, 2015. The Dollar Tree was close to decedent’s house. App. 87, l. 17 – 88, l. 11. Bannister ran to the Dollar Tree for help. App. 88, ll. 10-23. Rahn observed a tall, slender man with dreadlocks wearing a white t-shirt leaving the decedent’s house via the sliding door. App. 89, ll. 8-20.

² The state’s theory was there were multiple perpetrators based upon the contradictory descriptions of the person at this sliding glass door and various colors associated with the shirt worn by the suspect. App. 170, ll. 10-21. Bannister bought into this explanation for the discrepancy between her physical description of the suspect and that of witness Andrea Rahn. App. 247, ll. 14 – 22.

Jeffrey Porter remembered seeing “two guys walking down the road mighty close, so we made a comment about that that it was gay” close to decedent’s home sometime before shots were fired App. 114, l. 17 – 115, l. 23. Porter’s only other description of these two “gay” guys was: one had on a light-colored shirt and the other a dark colored. App. 120, l. 10 – 121, l. 8. After hearing gunshots, Porter helped Bannister remove the children from the home before police arrived. App. 118, l. 12 – 119, l. 6.

The state also relied upon inferences that petitioner had the opportunity to commit the crime due to visiting a relative who lived near the murder scene. Alonza “Duck” Ross is petitioner’s uncle. App. 91, l. 11 – 92, l. 15. He also knew the decedent as “Bird.” App. 95, ll. 4-15. Duck said he had “no idea” who lived with Bird, but he knew “Bird” lived within walking distance of his house. App. 95, l. 21 – 96, l. 21. Duck remembered that petitioner came by his house with two other men on the day of the crime, and one of them was called “Peace.” App. 97, l. 24 – 98, l. 17. Duck testified while the men were visiting, they drank beer. Petitioner and the two other men apparently left for about five minutes at one point and came back with “some Heineken Beer.” App. 99, l. 16 – 100, l. 25. Duck acknowledged that at some point, “Kwamaine and the other two boys left.” App. 101, ll. 4-6. Duck learned from a phone call that there had been a shooting or a homicide in the area. App. 101, l. 11 – 103, l. 8. Upon petitioner returning, Duck mentioned the color of the suspect’s shirt and claimed petitioner then changed shirts. App. 107, l. 19 – 108, l. 6. On cross-examination, Duck admitted telling the defense investigator that petitioner only left one time to go to the store and left later in the evening to head home and did not return: “They went to the store and got beer. And then he left and came back no more then.” App. 111, ll. 14-22.

Special Agent David Owen confirmed that another man, Lenell Ross, was also a suspect in the shooting. App. 153, ll. 5-10. Owen also admitted that at the time of trial, Jamal Green was still a person of interest in the shooting. App. 170, l. 21. Owen explained the police thought more than one person could be involved in the shooting based on the contradictory witness statement (including from Bannister) “of what the individual looked like, his size, the color of shirt he had on and then Ms. Rahn’s statement of the size of the person that she saw run out and the color shirt that he had on.” App. 170, ll. 10-21. At another point, Owen speculated that there could be “the third person involved. There were three at Uncle Duck’s house.” App. 161, l. 18 – 162, l. 4. Owen fluctuated as to the number of assailants from two to four men being involved in the murder but notably refused to acknowledge the possibility of only one perpetrator. App. 164, ll. 10-23.

Two of the three photographic lineups were shown to Bannister on October 28, 2015. Bannister did not recognize anyone from the first and hesitated to identify Ronald Ross³ as one of the men involved from the second because she said: “I’m not 100 percent positive, but it looks like him.” App. 155, ll. 12-18; 362 - 365. Owen showed Bannister another six-man lineup on October 29, 2015, in the back seat of his police car. Owen said Bannister identified petitioner “as being the person who I saw at the back door on Sunday night as I was running.” App. 165, ll. 10-22; 366-67. Owen maintained that Bannister was “physically shaking, crying, and became distraught” when she identified petitioner’s photograph in this lineup. App. 137, 16-25. As to the identifying shirt information, Owen testified that “[o]ne of them had on a light green or yellow shirt and the other had on a white shirt.” App. 158, l. 22 – 159, l. 8.

³ Ronald Ross was related to petitioner but was not called as a witness during trial. App. 459, ll. 20 – 25.

Lenell Ross was petitioner's first cousin and testified that he remembered the night of October 24, 2015. App. 173, l. 19 – 175, l. 22. Lenell denied that he ever told Agent Owen that petitioner was wearing a yellow shirt on the night of the murder. App. 177, ll. 7-24. Lenell denied that he had changed his "story" with the authorities. App. 182, l. 19 – 183, l. 1. The solicitor recalled Agent Owen as a witness to impeach Lenell. App. 221, ll. 3-8. Owen claimed that Lenell told him in November of 2015 that petitioner was wearing a yellow shirt on the night of the murder and that he changed that shirt. App. 223, l. 9 – 224, l. 1. Owen said Lenell never told him that petitioner only "attempted to" change his shirt but was unable to do so. App. 224, ll. 3-5.

Owen also testified that Duck said petitioner left the house with two other men and that petitioner later returned to the house by himself and that "the two boys later returned -- the two boys, or the two gentlemen that arrived with Kwamaine previously, later returned, stayed for a few moments or a few minutes and then left with Kwamaine in the black SUV." App. 224, l. 15 – 225, l. 6. Owen also offered that Duck told him when he returned to his house after going to the store for beer, "he noticed a lot of police activity and a helicopter flying above, near his house." App. 224, ll. 14 – 17.

The state also produced two prison informants to testify against petitioner. Keon Kimble claimed petitioner told him the crime was supposed to be a robbery that evening, and the robbery "went bad." Kimble said he understood "Bird was selling drugs or whatever, so I guess [it was] for that." App. 203, l. 7 – 204, l. 6. Kimble denied on cross-examination that he told defense investigator Tony Taylor that he did not want to talk to him because there "wasn't nothing in it for me." App. 205, l. 12 – 206, l. 23. Investigator Taylor later testified that when he interviewed Kimble, "the first thing out of his mouth was what's going to be in it for me." App. 266, ll. 6-20. Charles Lott claimed he talked to petitioner at the Bamberg County Detention Center. Lott asserted

petitioner told him he was “going to hit a lick” and that he was at a house across 301 near the Dollar Tree. Lott said petitioner got frightened when a car pulled up and he ran away. App. 208, l. 22 – 210, l. 21. As with Kimble, Lott was facing substantial prison time for pending charges and had an extensive criminal record. App. 211, l. 21 – 212, l. 23.

Petitioner testified in his own defense that he was at his Uncle Duck’s house on the day of the shooting and that nothing out of the ordinary occurred. App. 259, l. 17 – 262, l. 18. Petitioner related that he was open and honest with the police and he told them he was wearing a blue shirt on the night of the shooting and “my story hasn’t changed” since his initial interview with law enforcement. The solicitor acknowledged this fact: “I grant you, your story has not changed.” App. 262, l. 15 – 263, l. 18.

Petitioner was indicted for the murder by a Bamberg County grand jury. App. 369. Petitioner was tried before the Honorable Doyet A. Early III and a jury from June 19 – 21, 2018. App. 1 & 327. Ola Johnson represented petitioner and David Miller and R. Jackson Cooper appeared on behalf of the state. App. 1. After deliberating for several hours over a two day period, the jury found petitioner guilty. App. 338, l. 25 – 339, l. 3. Judge Early sentenced petitioner to incarceration for thirty years. App. 351, l. 24 – 352, l. 2.

Petitioner was represented by Robert Dudek on direct appeal who raised an issue regarding the hearsay evidence of the color of the shirt petitioner was wearing on the night of the murder. The Court of Appeals denied error in an unpublished opinion. *See State v. Ross*, No. 2018-001212, (S.C. Ct. App. Mar. 31, 2021).

Petitioner sought post-conviction relief. App. 373. Petitioner’s counsel, Tommy Thomas, filed an amended petition alleging trial counsel was ineffective for failing to object to a coercive *Allen* charge. App. 397-398. An evidentiary hearing was held before the Honorable Kristi F. Curtis

on February 1, 2024. App. 399. Mr. Thomas represented petitioner and Travis Cruise Mitchell appeared on behalf of the State. App. 399. Judge Curtis denied relief by written order of dismissal. App. 495.

This Court granted *certiorari* to review the assertion that the *Allen* charge was unconstitutionally coercive. This Brief of Petitioner follows.

STANDARD OF REVIEW

The standard for appellate review 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.

ARGUMENT

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.

A. How the issue impacted trial.

From this mix of contradictory descriptions and unreliable informants, the jury was asked to convict petitioner for Bird's murder. Jury deliberation began on June 20, 2018, at 3:09 p.m. App. 318, ll. 11 – 16. While a time was not noted in the record, the jury sent out a note inquiring about the problems with petitioner's leg during his testimony. App. 319, ll. 7- 8. The trial court noted that petitioner visibly struggled with the leg immobilizer used for security when taking the stand. App. 319, ll. 9 – 16. The trial judge responded by telling the jury: "For security purposes, all people being tried wear leg immobilizers while in the courtroom." App. 319, ll. 17 – 19. Counsel for petitioner objected, observing that the response defeated the entire purpose of wearing the leg immobilizer "since the purpose of hiding the restraints was so that they [the jury] would not learn about the restraints." App. 320, ll. 1 – 3; 356. Despite trial counsel's objection, this error by the trial court in telling the jury facts outside of the record and drawing attention to the need to physically restrain petitioner during trial was not briefed on direct appeal and not sought as a basis for relief at PCR.⁴ The jury also asked an additional question regarding why petitioner was on

⁴ The solicitor incorrectly told the trial judge that petitioner had brought up his pre-trial incarceration during direct exam so that the "jury was aware that he had been in jail leading up to the trial." App. 320, ll. 15 – 19. To the contrary, the solicitor elicited the testimony that petitioner had been incarcerated prior to trial during cross. App. 261, l. 21 – 262, l. 20.

probation in this same note.⁵ In response, the trial court replied that “This is not in evidence therefore I can’t answer.” App. 318, l. 21 – 319, l. 19; 356.

Two additional questions related to why petitioner became a suspect and the content of Bannister’s original statement in 2015 were asked. App. 321, ll. 16 – 19. The trial court informed the jury “I can’t answer. Your decision must be made on the evidence presented” as to both questions. App. 357. At 7:15 pm, the jury informed the trial court that they had not reached a verdict and would like to break for the evening, indicating the results to the court and parties of the three votes they had taken: 7-5; 8-4; 10-2. App. 322; l. 6 – 323, l. 16; 358. The following day, the jury again informed the trial court of the vote split (8-4 again) and that they were unable to reach a verdict at 10:16 a.m., having only started the day at 10:01 a.m. App. 330, l. 20 – 331, l. 2; 360. The trial court gave a version of an *Allen* charge to the jury at 11:18 a.m. App. 332, l. 5 - 335, l. 3. The jury was returned to deliberate at 11:21 a.m. and then requested to replay the testimony of several witnesses at 11:23 a.m. App. 335, ll. 4 – 16. There was a delay in prepping the replay from 11:23 a.m. until 11:48 a.m. App. 335, ll. 11 – 16. The testimony was estimated to take between 30 to 40 minutes. App. 335, ll. 17 – 21. While the record does not note the conclusion of the replayed testimony, based upon the estimated playback time, the jury returned to deliberate sometime between 12:18 p.m. and 12:38 p.m. The verdict was reach at 1:10 p.m. App. 337, ll. 16 – 19. Adding the three minutes after the *Allen* charge and the jury’s note to replay testimony to the estimated deliberation time after the replayed testimony, the jury deliberated for a total of between 55 minutes to one hour and five minutes before reaching a verdict after the *Allen* charge.

⁵ Petitioner had avoided mentioning his probation status on direct, but on cross the solicitor wanted the jury to hear how petitioner was contacted to speak to investigators by his probation office. App. 261, ll. 10 – 14.

The "by the clock" time between the *Allen* charge and the verdict was one hour and fifty-two minutes (11:18 a.m. until 1:10 p.m.).

The jury deliberated for over four hours on the first day of deliberations. The following morning, they began deliberations at 10:01 a.m. App. 330, ll. 20 – 23. Almost immediately, the jury sent a note regarding being deadlocked. The trial court gave the following *Allen* charge:

Madam forelady, ladies and gentlemen of the jury, I received your latest note 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.

Now your other question was about -- y'all sound like me: To compensate for full memories can we have access to records what witnesses have already testified.

I don't have any records that I can give you. I can do this: If you want to hear a portion of a witness's testimony you can tell me what you want to hear and I can get the court reporter to identify it and we can go back and replay it. You can come go back out and listen to that testimony being replayed.

For instance, if you wanted to hear what the pathologist said I can go to that point of the pathologist's testimony and highlight it and come back out and we will play it.

So what -- if you want to hear some testimony send me a note as to what you want to hear and which witness. We will go ahead and set it up out here and we will bring you back out and replay it. That is the only thing I have to offer on that.

So I am going to let you go back. And if you want to hear some testimony let me know what it is. And I am going to ask you to give it one final shot. If you can, you can. If you can't, I understand. And I thank you no matter which way it turns out.

And it is 11:30. I don't know how long you want to go, but you might get -- start getting hungry in a little bit. So let me know if you want me to send you something to eat.

App. 332, l. 6 – 335, l. 3. (emphasis added).

The trial court made no mention that a juror should not give up a firmly held belief just for the sake of agreeing on a verdict. See Tucker v. Catoe, 346 S.C. 483, 487, 552 S.E.2d 712, 714 (2001) (noting the charge in question informed jurors that “At the same time no juror is expected

to give up an opinion based on reasoning satisfactory to himself or herself merely for the purpose of being in agreement with others.”).

B. How the matter was addressed at PCR.

Petitioner testified extensively about his belief that the *Allen* charge was coercive in nature during the PCR hearing. App. 478, l. 6 – 481, l. 23. This included petitioner’s concern the trial judge failed to include any language regarding a juror’s firmly held beliefs: “*But with every juror understanding that each -- each vote is just as important as the next*, it has to be given the correct way.” App. 479, ll. 10 – 12 (emphasis added). Petitioner testified regarding his opinion of the impact of the *Allen* charge as a whole:

And if you go to the factors in determining whether an *Allen* charge was unconstitutionally coerced is they have a couple of issues that determine that, and the one that catches my attention in the matter is whether the charge include any language such as, you have got to reach a decision in this case and not verbatim, you know, words, but if you put the jury in that mindset that they have to reach a decision, the -- the Code say that that's unconstitutional, and I feel like it was -- it was given in a manner that the jury was given -- was under -- put under the wrong impression.

App. 479, l. 25 – 480, l. 9.

Trial counsel admitted he made no objection to the *Allen* charge at trial.

Q: Do you remember an *Allen* charge being given?

A: I believe so. I think the jury was out for two days, and I think there was an *Allen* charge.

Q: Okay. And did you see anything that was wrong with the -- with the *Allen* charge? Was it identifying any particular juror or –

A: I didn't see any -- I don't think I objected to it.

Q: Okay. All right. Did you see any reason to object?

A: No, sir. Not that I can remember.

App. 437, ll. 1 – 9.

C. How the PCR court ruled.

In rejecting relief on this ground, the PCR court found the Allen charge was not coercive.

This Court finds this charge was not constitutionally coercive. Here, the trial court was speaking to both majority and minority jurors; the charge did not include language informing the jurors they must return a verdict-the trial court specifically informed the jury they will not be criticized if they cannot come to a verdict; there was no inquiry into the jury's numerical division; and the record from Applicant's trial indicates the jury began redeliberating, after the *Allen* charge was given, at 11 :21 am and returned a verdict at 1: 10 p.m., which this Court finds does not indicate coercion. (Trial Tr. dated June 21, 2018, p.8; p.11). This Court finds the *Allen* charge was not constitutionally coercive; thus, Counsel had no meritorious reason to object.

App. 510.

D. How the PCR court erred.

“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 *Lowenfield*⁶ 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.

⁶ Lowenfield v. Phelps, 484 U.S. 231, 235 (1988).

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). An *Allen* charge, due to its potential for coercion, must be viewed with a more heightened scrutiny than a general jury charge. *See Taylor*, 427 S.C. at 214, 829 S.E.2d at 727 (“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.” This Court, 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. Our Supreme Court has held that 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. State v. Rampey, 438 S.C. 519, 531, 885 S.E.2d 366, 372 (2022).

Did the charge speak to specifically to the minority jurors?

By using the phrase “see if you can't accomplish your civic duty of reaching a unanimous verdict” the trial judge focused on the minority jurors (since the Court knew the split, the not guilty jurors were consistently in the minority) to do their duty and reach a unanimous verdict. While the trial court did ask for both the majority and minority jurors to listen to the other perspective, the stated goal was to do the jury’s duty and reach a verdict.

Critical to this factor and speaking to the minority jurors is what is absent from the *Allen* charge here. As in *Rampey*, this charge suffers “from a serious flaw in that they fail to tell jurors not to surrender their conscientiously-held beliefs for the sake of a verdict. This language is one of the hallmarks of a typical *Allen* charge.” Rampey, 438 S.C. at 530, 885 S.E.2d at 371.

This focused attention and pressure on the minority jurors and favors petitioner in finding the charge was coercive.

Did the charge make an imperative about reaching a verdict?

In several respects, the *Allen* charge at issue here mirrors that in *Rampey*. In *Rampey*, the trial court failed to include the standard instruction that a juror should “not to surrender any strongly held view.” *Rampey*, 438 S.C. at 527, 885 S.E.2d at 370. This Court found that the critical omitted language, combined with the emphasis on the expense of retrial and that the parties deserved a verdict, made the charge coercive by creating an imperative to reach a verdict. Here, the trial court’s charge lacked the critical element of an *Allen* charge: that a juror was not required to give up their firmly held beliefs simply to reach consensus. Moreover, the charge emphasized the desire to “accomplish your civic duty of reaching a unanimous verdict” and doing so would simply be “doing your job.” App. 332, l. 6 - 335, l. 3. This language, combined with the claim that a second trial would be exactly the same witnesses and testimony (which was contradicted by the several witnesses who offered contradictory testimony during trial), created an imperative for the jury to reach a verdict. 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).

Combined with the omitted language regarding not surrendering firmly held beliefs, this factor favors petitioner in finding the *Allen* charge coercive.

Did the trial court know the split in the jury?

Contrary to the PCR court's ruling, the trial court knew the split of the jury after each vote it took because the jury included that information on its notes to the Court. At 7:15 p.m. on the first day of deliberation, the jury informed the trial court that they had not reached a verdict and would like to break for the evening, indicating the results to the court and parties of the three votes they had taken: 7-5; 8-4; 10-2. App. 322; 1, 6 – 323, l. 16; 358. The following day, the jury again informed the trial court of the vote split (8-4 again) and that they were unable to reach a verdict at 10:16 a.m., having only started the day at 10:01 a.m. App. 330, l. 20 – 331, l. 2; 360.

The PCR court's finding that the trial court did not know the split is without support in the record. Moreover, the factor is not whether the trial court inquired about the split, but whether the trial court in deciding to use an *Allen* charge knew about the split. "Here, the first and third factors favor the State *because the trial court did not know the numerical split* when the jury informed him it was deadlocked." Rampey, 438 S.C. at 526, 885 S.E.2d at 369 (emphasis added). While a direct inquiry into the split by the trial court would itself be a form of coercion, this factor involves knowledge by the trial court of the numerical split and the *Allen* charge's tendency to focus pressure on the minority jurors. It is knowledge of the split that matters more than the source of that knowledge. This factor favors petitioner in finding coercion because the jury knows the trial court is aware of their vote split.

Was the time of the verdict indicative of coercions?

Moreover, the timing of the verdict after the *Allen* charge also closely mirrors *Rampey*. "Concerning the fourth *Tucker* factor, our case law suggests the one hour and seventeen minutes of deliberation following the *Allen* charge weighs in favor of *Rampey*." Rampey, 438 S.C. at 527, 885 S.E.2d at 370. Here, the jury deliberated for between 55 minutes to one hour and five minutes

before reaching a verdict after the *Allen* charge, excluding the time spent listening to replayed testimony while sitting in open court. In *Rampey*, the jury took one hour and seventeen minutes after the *Allen* charge to reach a verdict and the Supreme Court found that duration supported the finding of coercion. This factor favors petitioner in finding the *Allen* charge coercive.

Based upon the balancing of the *Lowenfield* factors, the PCR court erred in failing to find the *Allen* charge coercive. Specifically, petitioner would argue that all of the *Lowenfield* factors weigh in favor of finding the charge coercive making the PCR court's finding that trial counsel had not basis to object an error of law. Trial counsel was thus ineffective in failing to protect petitioner from facing a coerced jury verdict.

E. Prejudice.

The existence of this coercive *Allen* charge deprived petitioner of his fundamental right to have a jury of his peers decide his fate free of the improper pressure and influence of the trial court. 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.”). 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. *State v. Rampey*, 438 S.C. 519, 531, 885 S.E.2d 366, 372 (2022). The determination of whether the charge was coercive is a question of law for this Court to answer *de novo*. If coercive, prejudice has been established since petitioner was deprived of his right to an impartial jury of his peers reaching a verdict free of coercion or improper influence from the court. See *State v. Rivera*, 402 S.C. 225, 247, 741 S.E.2d 694, 705 (2013) (“[D]espite the strong interests

upon which the harmless-error doctrine is based, there are certain constitutional rights which are ‘so basic to a fair trial that their infraction can never be treated as harmless error.’”).

Moreover, even if this Court were to apply the prejudice prong, the evidence against petitioner was not overwhelming and prejudice would follow. The strength of the state’s case was based upon the jury accepting Bannister’s identification of a complete stranger she saw for a brief period of time (either only once as she originally stated or twice as she claimed at trial). Other witnesses contradicted her description of the assailant. No physical evidence tied petitioner to the crime, be it fingerprints or DNA. Petitioner consistently denied involvement and was one of the only witnesses, as acknowledged by the prosecutor during trial, that was consistent in his story. As there was enough reasonable doubt for the several members of the jury panel to refuse to convict over the course of two days of deliberation but for the coercive charge. 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).

Moreover, the strength of the state’s case against an applicant must be weighed against the impact of counsel’s deficiency and *other relevant factors*:

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 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 v. State, 422 S.C. 174, 190, 810 S.E.2d 836, 844 (2018) (emphasis added). Here, in addition to petitioner’s counsel failure to object to a coercive *Allen* charge, other relevant factors weigh in

favor of finding prejudice. As noted, the trial court, over objection of trial counsel, drew the attention of the jury to the fact petitioner had been physically restrained during trial for security reasons.⁷ App. 319, l. 17 –320, l. 1 3; 356.

First, the criminal process presumes that the defendant is innocent until proved guilty. Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process. It suggests to the jury that the justice system itself sees a “need to separate a defendant from the community at large.”

Deck v. Missouri, 544 U.S. 622, 630 (2005) (internal citations omitted).

Trial courts have been warned against indiscriminate shackling of “all defendants” and the restraint of an accused during trial requires an individualized finding of need on the Record.

Thus, a defendant in a criminal trial may not be required to wear handcuffs, leg shackles, or other restraints in the presence of the jury unless the trial court makes specific findings on the record as to the particular reasons the restraints are necessary. If the court finds restraints are necessary, it must make every reasonable effort to ensure the restraints are not visible to the jury.

State v. Heyward, 441 S.C. 484, 493, 895 S.E.2d 658, 663 (2023).

Here, the error was not in failing to follow *Heyward* and have an individualized hearing on the need for petitioner to wear an immobilizer during trial. *Heyward* was decided after petitioner’s original trial, although the propriety of drawing attention to his physical restraint would have been reviewable on direct appeal under *Deck* and existing law in South Carolina. See State v. Tucker, 320 S.C. 206, 209, 464 S.E.2d 105, 107 (1995) (noting that the “trial judge took precautions to minimize any prejudice the restraints might have caused throughout the trial and offered to give a curative instruction to explain appellant’s failure to stand when the judge entered and exited the courtroom.”). Rather, the trial court abused its discretion in actively drawing the jury’s attention

⁷ Petitioner concedes this matter was preserved for appellate review during trial and not raised as an issue on direct appeal and not asserted as a basis for relief at PCR.

to the need to physically restrain all criminal defendants as a class. App. 356. This abuse of discretion by the trial court, over objection of trial counsel, further supports a finding of prejudice.

Additionally, the solicitor actively interjected petitioner's probation status before the jury is an additional relevant consideration regarding prejudice. Petitioner had avoided mentioning his probation status on direct, but on cross the solicitor wanted the jury to hear how petitioner was contacted to speak to investigators by his probation office. App. 261, ll. 10 – 14. Prior to testifying, the state informed the Court petitioner had no prior record for impeachment purposes.

Q. Does he have any type of prior record that would involve impeaching him Mr. Miller?

MR. MILLER: No, sir, Your Honor

App. 253, ll. 16 – 18.

Despite this representation, the solicitor actively interjected petitioner's probation status to the jury. The jury asked why petitioner was on probation during deliberations, and the only guidance provided by the trial court was "This is not in evidence therefore I can't answer." App. 318, l 21 – 319, l. 19; 356. There was no curative instruction or other limitation placed upon the jury's knowledge, elicited without objection by trial counsel, of petitioner's probation status.⁸

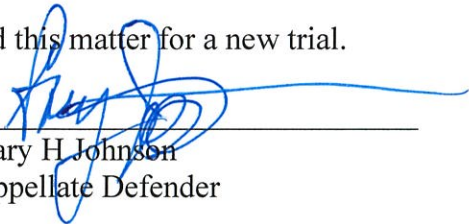
As the Supreme Court stated in *Smalls*, the prejudice analysis involves considering the strength of the case along with the specific impact of counsel's error *and other relevant considerations* in determining whether petitioner can demonstrate prejudice in this matter. Weighed against the state's evidence of guilt, trial counsel's error in failing to object to the coercive *Allen* charge

⁸ As with the issue regarding the trial judge abusing his discretion regarding the physical restraint of petitioner, this matter was not raised during PCR as a basis for finding ineffective assistance of counsel.

combined with the other relevant considerations surrounding errors of petitioner's attorneys, prejudice has been established as required by Strickland v. Washington, 466 U.S. 668 (1984).

CONCLUSION

The PCR court erred in finding counsel had no basis to object to the coercive *Allen* charge. As that charge created a structural error in petitioner's trial, prejudice is established by the improper charge itself. Moreover, should an independent determination of prejudice be required under *Strickland*, 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 determine if 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. Here, this Court should find the impact of *other relevant considerations* in the prejudice analysis required by *Strickland* has been satisfied and remand this matter for a new trial.



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This 23rd day of October, 2026.