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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Thomas L. Hughston, Jr., Circuit Court Judge

Case No. 2026-002104

Opinion No. 2026-UP-307 (Ct. App. filed June 24, 2026)

Mia Anderson, on Behalf of the Estate of Jessie Heyward a/k/a Jessie Bell Anderson, Respondent,

v.

Richard Miles Thompson, M.D. and ACS Primary Care Physicians - Southeast, P.C., Petitioners.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Neither of the petition's questions merits certiorari. Petitioners first ask the Court to dismiss an estate's appeal because an exhibit, one of the four documents in its new-trial submission, contained unredacted personal information. That exhibit was the death certificate of the estate's decedent. With the trial court's permission, Respondent, Mia Anderson on behalf of the Estate of Jessie Heyward ("the Estate"), had submitted the motion on the tenth day after the jury was discharged. The E-Filing System had transmitted a Notice of Electronic Filing to Petitioners' counsel. The next morning the clerk rejected the submission for "personal information on Exhibit"; the Estate refiled the documents three and a half hours later with the exhibit redacted; the clerk accepted them; Petitioners said nothing to the trial court about timeliness; and a week later, the trial court denied the motion on the merits.

The Estate served its notice of appeal 29 days later. Petitioners then claimed that the clerk's next-morning rejection had made the motion untimely, which made the trial court's order a nullity, which made the notice of appeal untimely. The Court of Appeals, in an unpublished opinion and without dissent, rejected that claim; the petition seeks to revive it. Petitioners reach their conclusion only by misreading the South Carolina Electronic Filing Policies and Guidelines ("the Guidelines"), on which they rely.

This petition should be denied on Petitioners' I.

Petitioners also ask the Court to hold that the Court of Appeals misapplied *State v. Hurd*. That is a fact-bound inquiry of little if any relevance to anyone

beyond the parties, and one on which the petition misstates the facts. The Court need not reach it; if it does, the Court of Appeals was right.

Petitioners have argued throughout this appeal that the Estate's arguments should not be considered: the appeal should be dismissed because of the clerk's rejection-then-acceptance, and the Estate's issue on appeal was not stated concisely enough. Yet their petition does not present, "with accuracy, brevity, and clarity," the information "essential to a ready and adequate understanding of the points requiring consideration." Its 310-word "Questions Presented" includes one of 164 words that is not a question; its statement of the case misstates the record; it begins its Argument by misquoting a case; and it raises unpreserved arguments.

A writ of certiorari "is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." A petitioner's failure to present the essential information "with accuracy, brevity, and clarity" is "a sufficient reason for denying the petition." Petitioners ask the Court to overlook their own failures to follow the rules while ending an estate's appeal over an unredacted death certificate. The petition should be denied.

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. The Estate left unredacted information in a death certificate filed as an exhibit to a new trial motion on the tenth day after the jury was discharged. Did the Court of Appeals err in holding that the clerk's rejection of the submission the next morning, cured within hours, did not require dismissal of the appeal?

2. Did the Court of Appeals misapply *State v. Hurd*, 325 S.C. 384, 480 S.E.2d 94 (Ct. App. 1996), in holding the juror issue preserved and the failure to question the foreperson an abuse of discretion?

COUNTER-STATEMENT OF THE CASE

This medical malpractice, wrongful death, and survival action was tried to a Berkeley County jury from September 11 to 15, 2023, and ended in a verdict for Petitioners. (R. pp. 4, 42, 155, 159).

A. The trial

On the third day of trial, after the lunch recess, the court reported "some negative reaction from some of the jurors, rather inappropriate language and so forth, contrary to my instructions." (R. p. 105, lines 4-7). The court called the clerk of court as a witness. The clerk testified that when the court dismissed the jury for the break, "the forelady stood up. You admonished them to not discuss the case, she stood up and said ---"; the court asked, "She said something about the 'F' word?"; and the clerk answered,

> She said, "F you" in the courtroom. The officer overheard her, and they went in the jury room and someone -- one of the jurors in the jury room was heard, "I'll discuss this case, if I want to. What is he going to do to me, throw me in jail?"

(R. p. 107, lines 11-20).

Petitioners' counsel asked the clerk, "So the forelady was the one that said the 'F you?'" and the clerk answered, "Yes." (R. p. 109, lines 1-3). The juror who made the second statement was not identified. (R. p. 108, line 22-p. 109, line 12).

The court announced that it would "admonish them again about not discussing the case, even amongst themselves, in as strong a language that I can, you know, and see where we go from there." (R. p. 109, lines 15-20). Anderson's counsel (Mr. Jekel) objected immediately: "If they have begun deliberating or discussing the case, I think that's completely inappropriate. Either way, they might be in our favor; they might be in their favor. But I don't think you can go on with the jury, if they've already started deliberating." (R. p. 109, line 23-p. 110, line 3).

Anderson's other counsel (Ms. Seithel) asked: "Your Honor, I'm wondering if there's anything that you can do to try to fair it out who the other juror was, or if it was the forelady. I mean, I think it's completely inappropriate for anyone on that jury to use 'F you,' especially towards Your Honor." (R. p. 110, lines 8-13). Petitioners' counsel (Ms. Simmons) said, "We would agree." (R. p. 110, line 14).

The court said: "I'm going to bring the jury out here, and I'm going to see if we can go on, you know. You can renew your motions; you can make more motions, if you want to, you know, later on in the case[.]" (R. p. 110, lines 19-22). The court questioned no juror.

Instead, it told the jury:

> So it was reported to me after I got back from lunch that some of the people involved in this -- in bringing you in and out in the courtroom and so forth, perhaps, overheard some negative comments about nobody is going to tell me what to do about this, or I'm going to talk about it, if I want to, or things like that. That's a violation of your oath, and I can deal with you in a very harsh fashion, if you don't do what you said you would do when you took that oath.

(R. p. 112, line 21-p. 113, line 4). It then resumed the testimony: "Doc, I believe you were on the stand, come on back up." (R. p. 113, lines 11-12).

When that witness's testimony ended, Anderson's counsel asked that the jury be excused: "Ms. Simmons and I would like to ---." (R. p. 117, lines 15-17). With the jury out, she reported that "the foreperson gave a big roll of her eyes," that "honestly, I don't think she wants to be here at all, Your Honor, because she shot the same daggers at both of us," and that "I think it taints the entire jury; I think that it taints the entire process." (R. p. 117, line 25-p. 118, line 14). Petitioners' counsel agreed and added, "we have two alternates who appear to be listening attentively and certainly capable. So, I am in agreement to release the forelady, if the Court -- if Your Honor agrees." (R. p. 118, lines 11-23). The court asked: "So, as I understand -- what you're telling me is both of y'all want me to remove the foreperson from the jury?" (R. p. 118, line 24-p. 119, line 1). Anderson's counsel answered: "Or check in with her, because something is different today with her than yesterday and the day before." (R. p. 119, lines 2-4). The court said the foreperson "was paying particular attention . . . and was taking notes," and Anderson's counsel answered, "I think we all were." The court continued: "I try to not pay particular attention to her once she got out here since, you know, she was the one that kind of -- maybe I should have, you know. But I kind of was trying to avoid making her feel like she was under the microscope, so to speak, you know." (R. p. 119, lines 5-22). The court thus said in the same exchange that the foreperson had been "paying particular attention" before the incident and that it had "tr[ied] to not pay

particular attention to her once she got out here." Petitioners' counsel said: "I just think if we know she's the one that had the expletives directed towards you, and just watching her now, as a mother of four, she looked like she was having an internal temper tantrum. I've seen those before. I feel very concerned whether she could really listen to the evidence if she is ---." (R. p. 119, line 25-p. 120, line 5). The court stated:

> I appreciate that, and I'm going to keep that in mind, you know, and I'm not making a final decision about it at this point, but I'm not going to take her off right now and everything. I'm going to again at the end of -- later on, again admonish the jury about what they are to do and not do and so forth and everything, you know. And I certainly will take that into consideration before we submit the case to the jury after closing and everything, and will make *a* final decision about that then. But right now, I'm not going to take her off right now.

(R. p. 120, lines 6-16) (emphasis added). Anderson's counsel said, "Yes, sir. Thank you." Petitioners' counsel said, "Thank you, Your Honor." Anderson's counsel added, "We just wanted to bring that to your attention." The court said, "Okay. Appreciate that." Anderson's counsel asked for "[m]aybe two minutes" before the jury returned, saying "I don't want to annoy them any more than they're annoyed already," then: "We're good, Your Honor." (R. p. 120, line 17-p. 121, line 4).

At the close of testimony, before closing arguments, Petitioners' counsel said: "we would like to renew our earlier motion in the trial to remove the forelady from the jury." (R. p. 157, lines 4-7). The court ruled:

> Okay. I appreciate that. And I thought about that and everything, but she has really paid attention, at least in my observation, you know. She's really been focused on what's going on here in court, taken notes, and so forth

> and so on. And with my instructions to them otherwise, I think she's still a good member of the jury, a fair and impartial member of the jury. And I appreciate your position, but *I'm going to leave her on*.

(R. p. 157, lines 8-16) (emphasis added). Petitioners' counsel asked again, citing "that earlier misconduct by her;" the court said, "I appreciate that, but I'm not going to do that [replace her]." (R. p. 157, lines 17-24).

B. The motion for a new trial

After closing arguments and the charge, the alternates were excused. (R. p. 159, line 7). The jury returned its verdict and was discharged on Friday, September 15. (R. p. 155; R. p. 159, lines 16-22; R. p. 160, lines 18-21). The court then granted "ten days for any posttrial motions." (R. p. 160, line 24-p. 161, line 6). *See* Rule 59(b), SCRCP ("The motion for a new trial shall be made promptly after the jury is discharged, or in the discretion of the court not later than 10 days thereafter."). On September 18, the court entered a Form 4 order ending the case. (R. pp. 4-7).

At 7:54 p.m. on Monday, September 25, the tenth day after discharge, the Estate submitted through the E-Filing System four separate PDF documents. One was a motion for new trial. The others were a memorandum and two exhibits. (R. pp. 198-99, 202-03). The System transmitted a Notice of Electronic Filing listing Petitioners' trial counsel among the "people [who] were served electronically." (R. p. 199). At 9:16 a.m. the next day, September 26, the clerk rescinded the notice ("The filing was not filed") and sent a rejection notice listing all four documents. It gave one reason: "Dear Filer, Please redact personal information on Exhibit. Thank you,". (R. pp. 200-01). The exhibit was the death certificate of the Estate's decedent.

(R. p. 191); Petitioners' brief in the Court of Appeals ("Br. of Resp't") 4 n.1. At 12:51 p.m. the same day, the Estate refiled the motion and the exhibits, with the death certificate redacted, together with the receipt, the rescission, and the rejection notice. The clerk accepted them. (R. pp. 191-203). On October 2 the trial court denied the motion on the merits: "I have carefully considered the motion of the Plaintiff and respectfully decline to grant it." (R. p. 10).

Petitioners never told the trial court they considered the motion late, not then, not later. As Petitioners put it, "the trial judge was not asked whether the motion was filed timely, and he decided to deny the motion on its merits." Reply to Return to Mot. to Dismiss Appeal 3.

The Estate served its notice of appeal on October 31. (R. pp. 204-05).

C. The motion to dismiss the appeal

Petitioners first raised timeliness to the Court of Appeals, and did so roughly 45 days after the appeal was noticed. Mot. to Dismiss Appeal (filed December 18, 2023). On their theory, the clerk's rejection made the motion late, and the only recourse for any problems the Estate had with the trial court's rulings was to appeal. ("[T]he trial court lost jurisdiction of the case the day before Appellant filed the Motion for New Trial," *id*. at 4; *id*. at 3, 6, 9 (similar); Br. of Resp't 5, 8, 11 (similar); the Estate's "only recourse was to file a notice of appeal," Mot. to Dismiss Appeal 9; *id*. at 4 (similar); Br. of Resp't 11 (similar).) Their theory continued that the clerk's rejection had made the motion untimely, which meant the order denying the motion was without jurisdiction, and so the time to serve the notice of appeal had also lapsed before the Estate served it.

In response, the Estate sought relief under Section 4(d)(2) of the Guidelines. Return to Mot. to Dismiss Appeal 4. Petitioners replied that "the Electronic Filing Rules apply to circuit courts and the court to which relief can be requested is the trial court and not an appellate court." Reply to Return to Mot. to Dismiss Appeal 4.

The Court of Appeals denied the motion and left timeliness for the briefs. Order of Apr. 16, 2024.

D. The Court of Appeals' opinion

Petitioners' brief devoted pages 2-26 to reasons the Court of Appeals should not reach the merits (timeliness, the Estate's statement of the issue on appeal, and preservation) and pages 26-27 to the merits. The Court of Appeals rejected Petitioners' arguments. It held the motion timely filed "on the tenth day after the discharge of the jury as the circuit court allowed her to do," found that "Anderson specifically requested the circuit court 'check in' with or remove the foreperson," found these "sufficiently specific and contemporaneous" to preserve the issue, and concluded that a further request would have been "futile." Op. 2-3. It held the trial court abused its discretion by failing to question the foreperson: "A juror exhibiting hostile behavior and explicitly pronouncing that he or she would not follow the court's instructions would make that juror unqualified to render a verdict and the circuit court was therefore required to 'conduct a probing and tactful inquiry' to determine whether the juror was unqualified." Op. 4 (quoting *Hurd*, 325 S.C. at 389-90, 480 S.E.2d at 97 (quoting *People v. Valerio*, 529 N.Y.S.2d 350, 351 (N.Y. App. Div. 1988))). A unanimous panel, Williams, C.J., and Konduros and Vinson, JJ., reversed for a new trial in an unpublished per curiam opinion.

Petitioners petitioned for rehearing on July 7, 2026. The rehearing petition gave the merits two sentences. Pet. Reh. 6. Rehearing was denied on August 24, 2026, without dissent. The petition for writ of certiorari followed on September 23.

ARGUMENT

I. Petitioners Want a Decided Appeal Dismissed Because an Estate Left Personal Information on a Death Certificate. That Cannot Be Right.

A. The Guidelines provide for an amended document, like the one filed here, not rejection.

Petitioners' I seeks to have the appeal dismissed due to personally identifying information left on a death certificate. That cannot be right. And it is not right. "These Policies and Guidelines shall be liberally construed to ensure substantial justice for all parties, and *that cases are disposed of on the merits*." Section 11(e) of the Guidelines (emphasis added). "Except as provided in Section 9, nothing in these Policies and Guidelines should be construed to reduce or extend any filing or service deadlines set by statute, the South Carolina Rules of Civil Procedure, or orders of the court." Section 4(c). (Section 9 concerns technical failures of the E-Filing System and is not involved here.) "A document transmitted and received by the E-Filing System on or before 11:59:59 p.m., Eastern Standard Time, shall be considered filed with the Clerk of Court on that date, provided it is subsequently accepted by the Clerk of Court." Section 4(c). "The Clerk of Court shall promptly review an Electronic Filing to determine whether it conforms to applicable filing requirements." Section 4(d). "If the Clerk of Court discovers unredacted personal identifying information in an E-Filed document, the Clerk may require that the

party E-File an amended document that properly redacts personal identifying information." Section 10(b)(2).

These apply here. The Estate E-Filed the amended document three and a half hours after the notice; the clerk accepted it. The Court of Appeals' disposition follows from these provisions.

B. Additional Problems with Petitioners' I.

Petitioners' Argument opens by misquoting this Court. Petitioners begin, Pet. Cert. 12, "Back in 2008 the Supreme Court reminded us, 'It is not the Clerk of Court's authority to request to perform her duty based on her opinion that a filing lacks merit or is untimely. *Miller v. State*, 377 S.C. 99, 659 S.E.2d 492 (2008)." The Court actually wrote,

> In addition, although a habeas corpus petition may be flawed on a number of procedural and substantive grounds, *it is not within the Clerk of Court's authority to refuse to perform her duty based on her opinion that a filing lacks legal merit or is untimely*. 21 C.J.S. Courts § 338 (2006) ("*[A] clerk of court cannot ordinarily determine questions of law [or] render judgments*.").

377 S.C. at 102, 659 S.E.2d at 493 (emphasis added) (alterations in original). Properly quoted, *Miller* says a clerk may not decide that a filing "is untimely."

Petitioners contended for more than a page of their Court of Appeals brief that the Estate's sixteen-word, one-sentence statement of the issue was not "concise and direct." Br. of Resp't 12-14. Yet Petitioners' first Question Presented fails the standard they urged there. The argumentative, multi-layered "question," with two substantive parentheticals and three "sinces" in the final sentence, is not even a

question. And at 164 words, it is ten times the length of the statement they complained about.

The petition's arguments that the Estate should have sought relief from the trial court, Pet. Cert. 1, 4, 14, contradict Petitioners' position in their brief. "[T]he trial court had lost jurisdiction to hear such a motion, and Appellant's only recourse was to file a notice of appeal . . . ." Br. of Resp't 11. *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party may not argue one ground at trial and an alternate ground on appeal."); *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 46, 691 S.E.2d 135, 147 (2010) (quoting *TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 617, 503 S.E.2d 471, 474 (1998) ("An issue conceded in a lower court may not be argued on appeal.")); Rule 242(d)(1), SCACR.

The petition never quotes Rule 59(b), SCRCP, the rule that governs.

Petitioners write that South Carolina's E-Filing "system ensures that documents that are timely submitted are deemed timely served and filed, regardless of whether they are reviewed and formally accepted by the clerk of court that day or on a subsequent day"—except for the Estate's. *See* Pet. Cert. 14.

* * *

The Estate submitted its motion through the E-Filing System on the tenth day; the clerk's notice the next morning identified an unredacted exhibit (R. pp. 200-01); the Estate corrected it and refiled within hours; the clerk accepted the filing; and the trial court ruled on the merits. The Court of Appeals announced no rule for rejected filings. It held that this defect, which the Guidelines say the clerk

"may require" be cured by "an amended document," did not make this motion untimely. Op. 2.

The unpublished decision here does not conflict with any decision of this Court, contains no dissent on either the opinion or the denial of rehearing, nor does it raise any federal question or any constitutional issue, substantial or otherwise. Petitioners' one claimed reason for review is that the question is novel. Pet. Cert. 1. Rule 242(b), SCACR, lists that reason among those that are "neither controlling nor fully measuring" the Court's discretion; the writ issues "only where there are special and important reasons." This case has none.

The question arrives without any request to, or ruling by, the trial court. No one asked the trial court for anything under Section 4(d)(2) or any other filing guideline; it ruled on the merits with the rejection and rescission notices in the record and without objection from Petitioners. (R. pp. 198-201). The opinion below "has no precedential value." Op. 1. And if the Court sees anything in the Guidelines that needs saying, it has said such things by order four times, and can do so again. *See* Orders of Aug. 10, 2016; Oct. 12, 2017; Oct. 6, 2021; and May 27, 2022.

Petitioners' I attempts to deny the Estate its relief due to a failure to comply with a procedural rule—a failure to redact a non-required exhibit filed with a motion. Yet Petitioners fail to comply with Rule 242's requirement that the essential information be presented "with accuracy, brevity, and clarity." Rule 242 explicitly sets forth the penalty: this is "a sufficient reason for denying the petition." If that requirement is not enforced against a petition that seeks dismissal of the

opposing party's appeal for a minor infraction, it is difficult to conceive of where it would be enforced. The petition should be denied on Petitioners' I.

II. Petitioners' II Is Inappropriate for Certiorari, as It Turns Solely on Details of the Record. Moreover, the Court of Appeals Decided It Correctly: Petitioners Misstate the Record.

Petitioners' II makes two arguments. The merits argument is not preserved (Part II.A below). What remains, the contention that the Estate did not preserve the *Hurd* issue, is fact-heavy, of no apparent importance to anyone except the parties, and wrong on the record (Parts II.B-D below).

A. Petitioners' merits argument is not preserved.

1. Governing law

A petition for rehearing is required before a party files a petition for a writ of certiorari to the Court of Appeals, Rule 242, and the petition for rehearing is required to "state with particularity the points supposed to have been overlooked or misapprehended by the court," Rule 221, SCACR. This comports with general principles of preservation. "Second, a great number of [South Carolina authorities] have emphasized the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004); *Austin*, 387 S.C. at 46, 691 S.E.2d at 147 (an issue conceded in a lower court may not be argued on appeal); *Dunbar*, 356 S.C. at 142, 587 S.E.2d at 694 ("A party may not argue one ground at trial and an alternate ground on appeal.").

2. Facts and application

The petition's entire merits argument is about discretion. And its entire discretion argument, under its heading "No Abuse of Discretion," is two sentences:

> No Abuse of Discretion
>
> We submit that the Court of Appeals should not have replaced the trial court's discretion with its own regarding the trial court's decisions to replace the juror or to question the Clerk of Court rather than the forelady. The trial court showed that it was keenly aware of the juror's attentiveness in the trial. (R. pp. 118 - 119 and p. 157, lines 8 - 16).

Pet. Cert. 17. But Petitioners told the Court of Appeals that an evidentiary hearing is required where there is credible evidence supporting juror misconduct, and that no hearing was held. "We do not contest the proposition that where evidence supporting juror misconduct is credible, the trial court must conduct an evidentiary hearing to determine if misconduct occurred." Br. of Resp't 25. "We submit that the Court overlooked our argument that the trial court did not abuse its discretion in declining to replace the juror or to hold a hearing." Pet. Reh. 6.

Nor did they claim below that evidence of misconduct was not credible. Their positions below thus concede that a hearing was required.

What they argued below addressed an entirely different question than their petition addresses. Their evidentiary argument below was only that misconduct was not proved. E.g., Br. of Resp't 25 (the clerk's "third-hand testimony is not sufficient to support a conclusion that misconduct actually occurred."); *see also id.* at 21, 27 (similar). Whether evidence suffices for an ultimate conclusion of wrongdoing and whether it suffices to require investigation are about two different stages.

What is left, at best for Petitioners, is an argument first made in the petition: that the trial court had discretion to investigate only part way. That argument is not preserved either. The Court of Appeals held that the investigation must be "probing and tactful." Op. 4 (quoting *Hurd*). Petitioners have not challenged that holding; it is the law of the case. *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010). Nor does the petition argue that the inquiry here met that standard. Any argument that it did is therefore not preserved.[1]

Petitioners' merits argument is not preserved.

B. The remaining issue, preservation, is not suitable for certiorari, and the petition does not argue that it is.

What remains of Petitioners' II is whether the Estate preserved the *Hurd* issue, a technical, fact-heavy question that matters to no one but the parties, and one on which the petition's account of the record is not accurate (Part II.D). It is inappropriate for the discretionary writ. There are no "special and important reasons" to grant it, *see* Rule 242(b), SCACR, and it meets none of the five reasons the rule lists. *See id.*, subparagraphs (1)-(5). The petition does not argue otherwise. It offers no reason under Rule 242 for reviewing Petitioners' II.[2] In addition, Petitioners are wrong on the merits and misstate the record, as shown below.

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[1] Moreover, even were the merits point preserved, it would not prevail. There can be no serious doubt, on these facts, that questioning the Clerk of Court, who could not say which juror made the second statement (R. p. 109, lines 10-12), without questioning a single juror, falls far short of the "probing and tactful inquiry" the Court of Appeals held was required.

[2] If Petitioners have a reason Petitioners' II deserves a writ, they have not put it in their petition and should not be heard to supply one in reply. Rule 242(d)(3) requires the petition itself to present the "information and arguments that are

C. The preservation argument fails on the merits. The Estate made the same request Hurd made, and the trial court ruled on it the same way.

The petition's attempt to distinguish *Hurd* fails because the Estate made the same request as in *Hurd*, and the trial court ruled on it as the trial court in *Hurd* did: on his own observation, without questioning the juror.

Anderson's request was the same in substance as Hurd's. The entirety of the request in *Hurd* was, "I would ask the court to remove him and replace him with the alternate. Or bring him in and question him as to whether he knows what you said because I think it's important that he—." *State v. Hurd*, 325 S.C. 384, 389, 480 S.E.2d 94, 97 (Ct. App. 1996). The defendant there thus asked the trial court to remove the juror or, in the alternative, to question him to determine whether to remove him—as the Estate did here, first by asking the court to find out which juror had spoken, then by asking it to "check in with her" as the alternative to removal:

> MS. SEITHEL: Your Honor, I'm wondering if there's anything that you can do to try to fair it out who the other juror was, or if it was the forelady. I mean, I think it's completely inappropriate for anyone on that jury to use "F you," especially towards Your Honor.

(R. p. 110, lines 8-13).

Anderson's counsel tried again.

> MS. SEITHEL: Well, I think we're sort of collectively in agreement on this. But we all watched pretty intently the jurors while you were giving your instructions, and as Dr.

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essential"; appellate practice generally does not let a reply fill the gap, *see Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 106 n.3, 439 S.E.2d 283, 285 n.3 (Ct. App. 1993); and it would not be fair to grant the writ on reasons the petition does not advance and to which the Estate will have had no chance to respond.

> Streiff -- as you called him up, the foreperson gave a big roll of her eyes at, I'm not sure if it was you, Dr. Streiff, myself, or Ms. Simmons.
>
> But -- and then also as Ms. Ballentine proceeded with her questioning, and I did with mine -- honestly, I don't think she wants to be here at all, Your Honor, because she shot the same daggers at both of us.
>
> MS. MASON [Petitioners' co-counsel]: Yes.
>
> MS. SEITHEL: And it's very -- I think it taints the entire jury; I think that it taints the entire process. It's very -- I mean ---
>
> MS. MASON: It's very disruptive.
>
> MS. SEITHEL: Very disruptive, not just to the jury, but also to the witnesses and to the lawyers.
>
> MS. MASON: I mean, it's distracting.
>
> MS. SEITHEL: Yes, agreed.
>
> MS. SIMMONS: Your Honor, also we have two alternates who appear to be listening attentively and certainly capable. So, I am in agreement to release the forelady, if the Court -- if Your Honor agrees.
>
> THE COURT: So, as I understand -- what you're telling me is both of y'all want me to remove the foreperson from the jury?
>
> MS. SEITHEL: *Or check in with her*, because something is different today with her than yesterday and the day before.

(R. p. 117, line 25-p. 119, line 4) (emphasis added).

The Estate here did everything the appellant in *Hurd* did, and did it twice, and did more.[3] If anything, the present case is an a fortiori version of *Hurd*: the

[3] The Estate also stated its position as, "I don't think you can go on with the jury, if they've already started deliberating." (R. p. 109, line 23-p. 110, line 3); asked the

conduct reported here was willful, not a juror nodding off, and the juror here was the foreperson, who presides over deliberations.

Like the judge in *Hurd*, the judge here removed no one and questioned no juror. Like the judge there, the only reason the judge here provided was his individual observation of a juror. The *Hurd* trial judge stated, "I noticed him nodding off a couple of times, but he was alert during most of the charge. I'm not going to remove him." 325 S.C. at 389, 480 S.E.2d at 97. The judge here stated, "she has really paid attention, at least in my observation, you know. . . . And I appreciate your position, but *I'm going to leave her on*." (R. p. 157, lines 8-16) (emphasis added).

Earlier, the judge here said he would "see if we can go on" and that counsel could "renew your motions; you can make more motions, if you want to, you know, later on in the case." (R. p. 110, lines 19-22). But he then said, "I'm not going to take her off right now and everything." (R. p. 120, lines 8-9). He added that he "will make a final decision about that then," before submitting the case, and he did, before closing arguments: "I'm going to leave her on." (R. p. 120, lines 12-16; R. p. 157, lines 8-16).

The Court of Appeals held similarly in both cases. There, the trial judge was reversed: "The trial judge committed reversible error by refusing defense counsel's request to question the juror as to whether he heard all of the charge." *Hurd,* 325 S.C. at 390, 480 S.E.2d at 97. Here, the trial judge was reversed:

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court to identify the second juror (R. p. 110, lines 8-10); and told it that the foreperson's conduct "taints the entire jury; I think that it taints the entire process." (R. p. 118, lines 12-14).

> [T]he circuit court abused its discretion by failing to question the foreperson regarding the alleged juror misconduct when the foreperson allegedly used an expletive towards the court and an unknown juror allegedly stated behind a closed door that he or she would "discuss [the] case, if [he or she] want[ed] to."

Op. 4 (first alteration added; others in original). The trial judge was properly reversed here: "A juror exhibiting hostile behavior and explicitly pronouncing that he or she would not follow the court's instructions would make that juror unqualified to render a verdict and the circuit court was therefore required to 'conduct a probing and tactful inquiry' to determine whether the juror was unqualified." *Id.* (quoting *Hurd* and citing additional authorities).

Petitioners' argument hinges on a claim that the trial judge initially stated he was not making a final decision and invited counsel to renew their motion at the end of testimony. But Petitioners' counsel renewed "our earlier motion." (R. p. 157, lines 4-7). Petitioners say that "Appellant did not join in the motion," Pet. Cert. 12, but even if the post-testimony motion was meant to exclude the Estate, Petitioners have no argument as to why it would not have been futile to re-ask, and no counter to the Court of Appeals' "[W]e hold it would have been futile for Anderson to make the exact same—just denied—request as Respondents for what would have been the fourth time." Op. 3. The petition's extensive block quotations quoting the judge's tentative denial of the motion and his invitation to renew it are non-responsive to the Court of Appeals' point that the motion was renewed, and rejected. The petition

provides no reason the judge would have immediately reversed himself based on the identity of the requesting party.[4]

Also non-responsive are the petition's citation to *Tupper v. Dorchester Cnty.*, 326 S.C. 318, 487 S.E.2d 187 (1997), and *Tupper's* citation of *Brock v. Bd. of Adjustment*, 308 S.C. 539, 419 S.E.2d 773 (1992). *Tupper* and *Brock* concern parties who made no objection of their own and are inapplicable here. The petition cites no futility case of its own. Here, the trial judge even said he was going to "make a final decision about that then," not multiple final decisions about that then.

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[4] The Court of Appeals' holding is consistent with this Court's holdings. It is Petitioners' position that conflicts with precedent. *See Dunn v. Charleston Coca-Cola Bottling Co.*, 311 S.C. 43, 45-46, 426 S.E.2d 756, 758 (1993) ("The judge had a fair opportunity to rule upon the issue and did so. It was not incumbent upon defense counsel to harass the judge by parading the issue before him again, by asking for a mistrial."); *State v. Wiles*, 383 S.C. 151, 157 n.4, 679 S.E.2d 172, 175 n.4 (2009) (quoting *Staubes v. City of Folly Beach*, 339 S.C. 406, 415, 529 S.E.2d 543, 547 (2000)) ("This Court does not require parties to engage in futile actions in order to preserve issues for appellate review."); *Bowers v. Watkins Carolina Express, Inc.*, 259 S.C. 371, 376, 192 S.E.2d 190, 192 (1972) (similar); *Carter v. Peace*, 229 S.C. 346, 355, 93 S.E.2d 113, 117 (1956) (objecting "would have been futile and was therefore unnecessary"); *State v. Van Williams*, 212 S.C. 110, 116, 46 S.E.2d 665, 668 (1948) ("It is no answer to suggest that appellant should have asked for a mistrial, because . . . it is obvious that a motion for a mistrial would have been a futile thing."); *J. W. Green Co. v. Turbeville*, 263 S.C. 456, 459, 210 S.E.2d 743, 744 (1974) (citing *Carter*, 229 S.C. 346, 355, 93 S.E.2d 113; *Smith v. City of Greenville*, 229 S.C. 252, 92 S.E.2d 639 (1956)) ("Any further motion or exception would have been futile and was unnecessary."). The petition adds that "Appellant never moved for a mistrial." Pet. Cert. 11. She did not need to: "A motion for new trial is not necessary to preserve for review on appeal a question which has been fairly and properly raised in the trial court and passed upon there." *Dunn*, 311 S.C. at 45-46, 426 S.E.2d at 758 (quoting *Hubbard v. Rowe*, 192 S.C. 12, 5 S.E.2d 187 (1939)); *City of Columbia v. Myers*, 278 S.C. 288, 289, 294 S.E.2d 787, 788 (1982) (motions for mistrial or new trial after an overruled objection "would be futile and are not necessary to preserve a timely objection for review"). The court's post-charge question, "Any exceptions," concerned the charge. (R. p. 158, lines 14-16).

D. The petition's account of the record on this issue is not accurate.

The petition's "Error Preservation" argument does not describe the record "with accuracy." Rule 242(d)(3), SCACR. It states that "all Appellant did was to ask the trial court to 'Check in with her.'" Pet. Cert. 16. Anderson's counsel objected to going on with the jury "if they've already started deliberating," asked the court to find out "who the other juror was, or if it was the forelady," and asked it to "check in with her." (R. p. 110, lines 1-3, 8-10; R. p. 119, lines 2-4); *see also* Pet. Cert. 8-10 (quoting the same passages).[5]

The petition states that "Defendants (who had never asked for an inquiry) asked the trial court to remove the juror," Pet. Cert. 16, after itself quoting Petitioners' counsel's "We would agree" to the Estate's request for an inquiry. Pet. Cert. 8. It states that the Estate "withdrew her concerns" by saying "We just wanted to bring that to your attention," Pet. Cert. 11 (citing R. p. 120, lines 19-20), omitting that the court had just ruled and both counsel, Petitioners' included, had thanked it (R. p. 120, lines 6-18); the quoted sentence closed an exchange the court had decided and withdrew nothing. In its preservation argument it cites R. p. 157, lines 4-7 and 17-22, for Petitioners' renewed motion, Pet. Cert. 16, 17, and never mentions lines

[5] In the Court of Appeals, Petitioners said the Estate "never asked the court to question her" and "never asked for such a thing." Br. of Resp't 21, 26. The petition now says she asked, but, under its heading "Not Specific Enough," not specifically enough, and calls the request a "weak, imprecise objection" held as "an ace card up his sleeve." Pet. Cert. 16 (quoting *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)). The objection the petition calls weak is the one Petitioners told the Court of Appeals was never made.

23-24, the second refusal. It cites lines 8-16, the first refusal and its reason, only to show that the court "was keenly aware of the juror's attentiveness." Pet. Cert. 17.

The petition's account of the record is not accurate; a preservation argument built on that account is not one this Court should take up.

* * *

Petitioners' II comes to this Court as a preservation dispute on a cold record, with the governing rule conceded below, the preservation argument resting on two cases about a different question, and a factual argument that misstates the facts. All of these are factors the Court should weigh in deciding whether to exercise its discretion to grant the writ. The petition should be denied on Petitioners' II.

III. The Petition's Failure to Present the Essential Information and Arguments with Accuracy, Brevity, and Clarity Warrants Denial of the Petition, and at the Least Weighs Against a Grant.

As noted above, the petition's failure "to present with accuracy, brevity, and clarity the information and arguments that are essential to a ready and adequate understanding of the points requiring consideration" for Petitioners' I is itself "a sufficient reason" for declining to grant certiorari on that issue. Rule 242(d)(3), SCACR. The same applies to the petition as a whole. Petitioners' II has no good argument that the judge would have granted the motion if only the Estate had asked him again what the Estate had already asked more than once; but they maintain, in effect, that rules are rules and must be followed no matter the disproportion between the infraction and the result.

Litigants who throw stones should not build glass houses. Petitioners' arguments, timeliness and preservation, each fault the Estate for a technical failure

to follow a rule. If rules are rules, the petition fails Rule 242(d)(3) and denial follows. If they are not, the Estate's exhibit was cured in three and a half hours and denial follows. The Court should not excuse Petitioners' failures while enforcing a redaction rule against the Estate. The Estate asks the Court, in deciding whether to exercise its discretion under Rule 242(b), to weigh whether the party asking the Court to enforce the rules against its opponent should have its own failures excused.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

s/Brooks R. Fudenberg November 6, 2026

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