THE STATE OF SOUTH CAROLINA
In The Supreme Court

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Feb 22 2022
S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Brooks P. Goldsmith, Circuit Court Judge

Appellate Case Number: 2021-000946

Arthur W. Macon .... Petitioner,

v.

State of South Carolina, ... Respondent.

PETITION FOR WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

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Did trial counsel render constitutionally deficient and prejudicial assistance of counsel—in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 3 and 14 of the South Carolina Constitution—by failing to obtain a mistrial when the jurors were deadlocked for several days, fatigued, and forced to continue deliberations even though some of the jurors wanted to be released from jury service?

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STATEMENT OF CASE

The State charged Arthur Macon with armed robbery and four counts of kidnapping for an incident occurring on August 30, 2012. The Richland County grand jury indicted Mr. Macon on January 16, 2013. A. 2-3, 869-70. The grand jury amended the indictment. A. 867-68. A. From September 29 to October 3, 2014, the State tried Mr. Macon before the Honorable Deandrea G. Benjamin and a jury. A. 6-512. Richard C.R. Cathcart and Jeremiah J. Shellenberg, both of the Fifth Circuit Solicitor's Office, represented the State. Kristy G. Goldberg[1] represented Mr. Macon. The jurors convicted Mr. Macon of armed robbery and acquitted him of four counts of kidnapping. A. 457-61. On October 3, 2014, Judge Benjamin sentenced Mr. Macon to twenty-three years imprisonment. A. 1, 474.

The South Carolina Court of Appeals affirmed Mr. Macon's conviction and sentence. *State v. Macon*, Appellate Case No. 2014-002126, Unpublished Opinion No. 2018-UP-031 (Filed January 17, 2018). A. 557-59. On March 28, 2018, the Court of Appeals denied Mr. Macon's Petition for Rehearing. A. 566-67. On October 18, 2018, this Court denied Mr. Macon's petition for a writ of *certiorari*. *State v. Macon*, Appellate Case No. 2018-000737. A. 610. The Remittitur issued on November 6, 2018. A. 611.

On September 23, 2019, through undersigned counsel, Mr. Macon submitted an application for post-conviction relief ("PCR"), which the Clerk of Court refused to file. A. 612-26. On October 4, 2019, Mr. Macon served a petition for a writ of mandamus requiring the Clerk of Court to file his PCR application. A. 627-43. The Clerk of Court filed the PCR application on October 4, 2019, rendering the petition for a writ of mandamus moot. A.

[1] At the time of Mr. Macon's jury trial, Ms. Goldberg was married to Richland County Deputy Solicitor Daniel Goldberg. A. 752-53, 798. Deputy Solicitor Goldberg had supervisory authority over the Assistant Solicitors prosecuting Mr. Macon. A. 796-97.

612, 614, 621, 627. On December 23, 2019, Mr. Macon amended his PCR application. A. 644-54. The State served its return on June 15, 2020. A. 667-79. On April 16, 2021, the Honorable Brooks P. Goldsmith convened an evidentiary hearing via WebEx. A. 687-850. Undersigned counsel represented Mr. Macon. Lindsey A. McCallister and Michael Davidson, both of the South Carolina Attorney General's Office, represented the State.

By written order dated June 29, 2021, Judge Goldsmith dismissed Mr. Macon's PCR application. A. 875-907. On July 16, 2021, Mr. Macon served his Rule 59(e), SCRCP. A. 908-82. On July 26, 2021, 2021, the State responded to the motion. A. 982-1001. On August 5, 2021, Mr. Macon replied. A. 1002-06. On August 10, 2021, Judge Goldsmith denied the Rule 59(e) motion. A. 1007. This petition for a writ of *certiorari* follows.

STANDARD OF REVIEW

Under the first prong of *Strickland v. Washington*, a defendant "must show that counsel's representation fell below an objective standard of reasonableness," which must be judged under "prevailing professional norms." 466 U.S. 668, 688 (1984). "The first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (internal quotations omitted). "If the State contends the alleged deficiency resulted from a strategic decision made at trial, counsel must articulate a valid reason for employing a certain strategy." *Freiburger v. State*, 413 S.C. 243, 247, 775 S.E.2d 391, 393 (Ct. App. 2015); *cf. Ingle v. State*, 348 S.C. 467, 560 S.E.2d 401 (2002).

The second prong of *Strickland* requires a defendant establish that this deficiency prejudiced him. "The 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." *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* "In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial." *Smalls v. State*, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018) (citing *Strickland*, 466 U.S. at 695-96 (explaining that the court must analyze how individual errors of counsel affect the important factual findings in a particular case)). "In addition, the PCR court should consider the strength of the State's case in light of all the evidence presented to the jury." *Id.* (citing *Jones v. State*, 332 S.C. 329, 333, 504 S.E.2d 822, 824 (1998) ("In deciding whether Jones was prejudiced, we must bear in mind the strength of the government's case …," and "we must consider the totality of the evidence before the jury.")). "In general, the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice." *Id.* "Ordinarily, the existence of 'overwhelming evidence' does not automatically preclude a finding of prejudice." *Id.* 422 S.C. at 189, 810 S.E.2d at 844. "[F]or the evidence to be 'overwhelming' such that it categorically precludes a finding of prejudice . . . the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of 'a reasonable probability … the factfinder would have had a reasonable doubt' cannot possibly be met." *Id.* 422 S.C. at 191, 810 S.E.2d at 845.

This Court's "standard of review in PCR cases depends on the specific issue before" it. *Mangal v. State*, 421 S.C. 85, 91-92, 805 S.E.2d 568, 571 (2017). This Court will "defer to a PCR court's findings of fact and will uphold them if there is any evidence in the record

to support them." *Id*. This Court will "not defer to a PCR court's rulings on questions of law." *Id*. "Questions 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." *Id.* "On review of a PCR court's resolution of procedural questions arising under the Post-Conviction Procedure Act or the South Carolina Rules of Civil Procedure, [this Court] appl[ies] an abuse of discretion standard." *Id*.

ARGUMENTS

Question I

Did trial counsel render constitutionally deficient and prejudicial assistance of counsel—in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 3 and 14 of the South Carolina Constitution—by failing to obtain a mistrial when the jurors were deadlocked for several days, fatigued, and forced to continue deliberations even though some of the jurors wanted to be released from jury service?

Arthur Macon's trial counsel rendered deficient and prejudicial assistance of counsel—in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 3 and 14 of the South Carolina Constitution—by failing to obtain a mistrial when the jurors were deadlocked for several days, fatigued, and forced to continue deliberations even though some of the jurors wanted to be released from jury service altogether. A. 647-48, 650-51. Trial counsel failed to ask for an *Allen*[2] charge when the jurors first announced a deadlock, failed to object to an *Allen* charge that singled out a

[2] *Allen v. United States*, 164 U.S. 492 (1896). An *Allen* charge is sometimes "labelled the 'dynamite' charge because of its proven ability to 'blast a verdict out of a jury otherwise unable to agree.'" *State v. Taylor*, 427 S.C. 208, 214, 829 S.E.2d 723, 727 (Ct. App. 2019) (quoting *United States v. Bailey*, 468 F.2d 652, 666 (5th Cir. 1972)). "[T]he label could just as well describe the *Allen* charge's success in blowing up otherwise error-free trials by introducing volatile elements into the fluid and emotionally charged atmosphere prolonged jury deliberations often create." *Id*. "Like dynamite, the charge must be handled with extreme care." *Id*.

single juror, failed to move for a mistrial—on multiple occasions—when required by S.C. Code. § 14-7-1330, and failed to object to the trial court's deference to the majority jurors to the detriment of the minority juror and her client.

The Sixth Amendment to the United States Constitution guarantees an accused the right to a trial by impartial jurors. The Sixth Amendment is applicable to the states through the Fourteenth Amendment. *E.g. Klopfer v. North Carolina*, 386 U.S. 213 (1967), *Pointer v. Texas*, 380 U.S. 400 (1965), *Gideon v. Wainwright*, 372 U.S. 335 (1963). "The verdict of the jury should represent the opinion of each individual juror." *Allen*, 164 U.S. at 501. A trial court may properly instruct jurors to consider "opinions of each other" and "decide the case if they could conscientiously do so." *Id*. "[J]urors may not be coerced into surrendering views conscientiously held." *Jenkins v. United States*, 380 U.S. 445, 446 (1965). Determining whether "the jury was improperly coerced requires that [an appellate court] consider the supplemental charge given by the trial court in its context and under all the circumstances." *Lowenfield v. Phelps*, 484 U.S. 231, 237 (1988) (citing *Jenkins,* 380 U.S. at 446). "South Carolina approves the use of a modified *Allen* charge, which must be neutral and even-handed, instruct both the majority and minority to reconsider their views, and cannot be directed at the jurors in the minority." *State v. Taylor*, 427 S.C. 208, 214, 829 S.E.2d 723, 727 (Ct. App. 2019) (citing *Workman v. State*, 412 S.C. 128, 130, 771 S.E.2d 636, 638 (2015) and *Green v. State*, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002)).

Brewster v. Hetzel, 913 F.3d 1042 (11th Cir. 2019) reviewed the history of trial courts coercing jurors to reach a verdict. "From the fourteenth through the eighteenth centuries, one method of accelerating unanimity was to prohibit jurors from eating or drinking until they all agreed on a verdict." 913 F.3d at 1046 (citing 3 William Blackstone,

Commentaries 375). Judges could "carry" jurors around "the circuit from town to town in a cart. . . . until a judgment bounced out." *Id*. (internal quotations and citations omitted) (citing Blackstone at 376 and *Renico v. Lett*, 559 U.S. 766, 780 (Stevens, J., dissenting)). *Brewster* acknowledged our judicial system has "come a long way and now accept[s] that some jury deliberations will end in deadlock." 913 F.3d at 1047. In *Brewster*, the trial judge gave a "lengthy charge emphasiz[ing] that the jurors had taken an oath to follow the law, which meant they must deliberate more [and] his instructions with the challenge that he had taken his oath seriously and hoped they would do the same." 913 F.3d at 1047. "[W]hen told that the one juror who wouldn't vote to convict was doing crossword puzzles, the judge ordered all the reading materials taken out of the jury room." *Id*. Eighteen minutes later, the jurors returned a guilty verdict. *Id*. *Brewster* observed, "Though the judge addressed his admonitions to the entire jury, the lone holdout must have felt as though they were aimed at her." 913 F.3d at 1055. After all, "the holdout juror was using [crosswords puzzles] to keep holding out" and resist the pressure of the majority jurors. *Id*. 913 F.3d at 1054. *Brewster* held, "the coercive circumstances that led to the verdict undermined the fundamental fairness of the trial and the reliability of the verdict." 913 F.3d at 1056. *Brewster* thus recognized the Sixth Amendment allows a juror to cease deliberating to protect a consciously held view from the pressure of the majority jurors.

The facts set forth below support this claim and, by reference, the facts and legal argument raised elsewhere in this pleading relevant to this claim are fully incorporated herein.

After instructing the jurors their verdict must be unanimous (A. 418), the trial judge submitted the case to the jurors at 10:51 a.m. on Wednesday, October 1, 2014 (A. 422). At

1:10 p.m., the jurors asked several questions including the "definition of reasonable doubt," which the trial court re-instructed. A. 423-26, 851. At 3:01 p.m., the jurors announced, "We are not unanimous on any of the charges yet." A. 428, 853. The jurors returned to the courtroom, and the trial court instructed, "You have to continue your deliberations. Okay? I'm going to send you all back in the jury room." A. 429. At 6:10 p.m., the jurors asked:

> Please give us a copy of "hand of one is hand of all" or re-explain it.
>
> Update. ***Still at a stalemate***. Progress is really slow. Do we need to come back tomorrow? Suggestion. We feel if we sleep on it we might be clearer in the morning.

A. 430-31, 854 (emphasis added). At 6:21 p.m., the trial judge excused the jurors until 9:30 a.m. on Thursday, October 2, 2014. A. 436.

The Jurors resumed deliberations at 9:53 a.m. on October 2, 2014. A. 439. At 1:02 p.m., the jurors announced:

> Update. We are now at 11 to 1. Same as yesterday at this time. And when we left. The one person is not in agreement with the majority and said that they will not change their mind.

A. 442-43, 856. The trial judge gave an *Allen* charge that instructed the single juror not in agreement with the majority to "make every reasonable effort to reach a unanimous verdict," "consider the majorities position," and "re-evaluate your position for reasonableness, correctness, and impartiality." Finally, the trial judge instructed the jurors "to return to your deliberations ***with the hope you can arrive at a verdict*** within a reasonable time." A. 444-46 (emphasis added). After the jurors left the courtroom, the trial judge stated, "If they come back again and say they are deadlocked, I will declare a mistrial." Both the Solicitor and trial counsel agreed a mistrial would be required under those circumstances. A. 446. The jurors resumed deliberations at 1:24 p.m. *Id*.

At 6:21 p.m., the jurors announced, "Your Honor, we have deliberated for the past eight hours and we are still in the same position. Fatigue has now set in and we need freshness." A. 448, 859. The foreman returned to the courtroom without the rest of the jurors, and the following exchange occurred:

> THE COURT: I received your note, which we have marked as Court's Exhibit Number 12. And it reads: Your Honor, we have deliberated for the past eight hours and are still in the same position. [Fatigue has now set] in and we need freshness. I am not sure quite what you are asking for.
>
> MR. FOREMAN: Well, ***many of them are feeling like we are at an impasse.*** We don't know how much longer we can deliberate and still be soundly doing what we need to do. ***But we're at your mercy.***
>
> MR. CATHCART: Your Honor, I would just ask if it means come back tomorrow or take a break or dinner or –
>
> THE COURT: I mean, do you all need to go outside or are you asking to come back tomorrow or are you asking for food or are you asking – do you want to go back and just –
>
> MR. FOREMAN: Some of them – well, ***a good bit of them just want to get out of that room.*** That is the biggest thing.
>
> THE COURT: ***Now or forever?***
>
> MR. FOREMAN: ***Two or three want to be forever.*** But, you know, we are willing to do what we need to do, but just don't want to be in that room right now. You know, some people are having claustrophobia problems. But somebody even mentioned, If I can just get fresh air for an hour.
>
> THE COURT: Why don't you go try to see what it is that they need.
>
> MR. CATHCART: Your Honor, I would point out it is 6:30 almost, so come back tomorrow.
>
> THE COURT: Well, they have not asked me for that.
>
> MR. CATHCART: I understand that.
>
> THE COURT: They have not asked me to come back tomorrow. So I can send you back in and try to find out what it is they are looking for.

MR. FOREMAN: Okay.

THE COURT: What it is that y'all want.

MR. FOREMAN: Okay.

THE COURT: And then

MR. FOREMAN: In a note?

THE COURT: You can send a note or come back in, either way.

MR. FOREMAN: I'll come back in. Thank you, Your Honor.

(Foreman exits courtroom.)

(Pause.)

(Foreman returns to courtroom at 6:40 p.m.)

MR. FOREMAN: All right. ***The majority stated that they wouldn't mind coming back tomorrow. However, the question is, what is the reasonable amount of deliberation time that you mentioned earlier before you declare –***

THE COURT: Oh, in the charge when I said reasonable?

MR. FOREMAN: Yes, amount of time.

THE COURT: I can't give you an amount. It is up to y'all.

MR. FOREMAN: So after we feel that a certain amount of time, it is up to us?

THE COURT: Reasonable for you all. I can't give you a time.

MR. FOREMAN: Well, we'll come back tomorrow at whatever time you give me.

THE COURT: We'll start back at 10:00 in the morning. Once they get here they can begin their deliberations. I mean, we don't have anything to do. You can just start deliberations. Since it is almost 7:00 now, we will let y'all get home and we'll start back at 10:00. I have got to bring them all in.

A. 449-52 (emphasis added).

At 6:42 p.m., all of the jurors returned to the courtroom. The trial judge excused the juror until 10:00 on Friday, October, 3, 2014 with instructions to resume deliberations once all the jurors were present. A. 452-53.

According to the trial transcript, deliberations resumed at 10:00 a.m. on October 3, 2014. A. 454. At 12:18 p.m., the Clerk of Court inquired whether it would be necessary to order lunch. The foreman returned to the courtroom without the rest of the jurors. Initially, the foreman informed the trial judge that "lunch may help," but the matter was left unresolved after the trial judge stated, "[I]t takes maybe an hour or two to get the food here." A. 454-55. At 12:47 p.m., the jurors returned a guilty verdict on the armed robbery charge. A. 456.

State v. Taylor summarized:

> 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. No set definition of coercion has emerged; instead, we detect its presence by viewing the charge in context and in light of four factors: (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.

427 S.C. 208, 214-15, 829 S.E.2d 723, 727 (Ct. App. 2019) (citing *Tucker v. Catoe*, 346 S.C. 483, 492-95, 552 S.E.2d 712, 717-18 (2001) (per curiam)) (hereinafter "*Tucker* factors").

The *Tucker* factors demonstrate the coercive and, therefore, unconstitutionality of the *Allen* charge in this case. This Court "must examine the charge in the context and setting it was given." *Taylor*, 427 S.C. at 215, 829 S.E.2d at 727. "Under the circumstances here,

analysis of this first factor is shaded by considerations related to the third factor's concern with knowledge of the jury's numerical split." The third factor will be discussed below.

Regarding the second *Tucker* factor, the trial judge instructed the jurors "to return to your deliberations ***with the hope you can arrive at a verdict*** within a reasonable time." A. 444-46 (emphasis added). This Court, however, "cautioned trial judges against using the following language: with the hope that you can arrive at a verdict." *Id.* (internal quotations omitted) (citing *State v. Williams*, 386 S.C. 503, 515, n. 7, 690 S.E.2d 62, 68, n. 7 (2010)). "Because jurors are not required to reach a verdict after expressing that they are deadlocked, we believe this language could potentially be construed as being coercive." *Id*. The *Allen* charge, accordingly, was coercive.

Regarding the third *Tucker* factor, although the trial judge did not inquire into the numerical division of the jurors, the jurors reported the 11-1 split, adding, "The one person is not in agreement with the majority and said that they will not change their mind." A. 442-43, 856. The trial judge did not instruct the jurors not to report their division in the future. *Tucker*, 346 S.C. at 494, 552 S.E.2d at 717 (trial court "did not act to prevent the jury's self-reporting); *State v. Middleton*, 218 S.C. 452, 63 S.E.2d 163 (1951) (improper for judge to require the jury to publicly reveal the nature or extent of their division). After the *Allen* charge and at the end of the second day of deliberations, the jurors reported, "We are still in the same position." A. 448, 859. The parties and court personnel were aware the split was 11-1 in favor of conviction. A. 792-94. As *Taylor* recognized, "The problem exists whether the judge asked for the information or the jury disclosed it without any prompting." 427 S.C. at 216-17, 829 S.E.2d at 728 (quoting *Brewster*, 913 F.3d at 1054-55 ("Pressure on jurors, especially on holdout jurors, is increased when the instructions to

keep trying to reach unanimity come from a judge who knows how split the jury is and in which direction."). "If the jury is aware that the court knows it is divided in favor of convicting the defendant, and the court repeatedly instructs the jury to continue deliberating, the jurors in the minority may feel pressured to join the majority in order to placate the judge." *Id*. Thus, the first and third *Tucker* factors, when considered together, establish the *Allen* charge was directed to the single hold out juror.

"The fourth *Tucker* factor in determining whether an *Allen* charge is unconstitutionally coercive is whether the time between the charge and the verdict demonstrates coercion." *Id.,* 427 S.C. at 217, 829 S.E.2d at 728. "This factor is notoriously difficult to apply without indulging in speculation given the secrecy of jury deliberations." *Id*. Here, the circumstances establish the coerciveness. After receiving the *Allen* charge, the jurors deliberated for 4 hours, 57 before announcing, "[W]e are still in the same position." A. 448, 859. According to the foreman of the jurors, several of the jurors were ready to be released from jury service and lever the jury room "forever." A. 450. Rather than declaring a mistrial—as the court and counsel had already agreed would be the remedy—the trial court instructed the jurors to resume deliberations at 10:00 a.m. the following morning. A. 452-53. The jurors rendered a guilty verdict in 2 hours, 47 minutes. A. 454, 456.

Under the first prong of *Strickland,* trial counsel was deficient in her handling of the deadlocked jury and *Allen* charge. After deliberating for over four hours, the jurors informed the trial court they were not unanimous. A. 428, 853. The jurors returned to the courtroom, and the trial court instructed, "You have to continue your deliberations. Okay? I'm going to send you all back in the jury room." A. 429. Mr. Macon contends trial counsel

failed to object to the trial judge instructing the jurors to continue deliberating when that instruction did not instruct the jurors that "the verdict of the jury should represent the opinion of each individual juror," not "a mere acquiescence in the conclusion of his fellow[]" jurors, and the jurors in the majority should listen to the minority juror and consider the "correctness of a judgment which was not concurred in by the majority." *Allen,* 164 U.S. at 501. A. 647-48, 650. The PCR court concluded, "[T]he instruction given by the trial court to be appropriate and, as it was not an *Allen* charge, Counsel had no basis to object on the ground that the instruction did not comport with *Allen's* requirements." A. 900. The PCR court erred as a matter of law. The Solicitor's contemporaneous comment about the jurors being "deadlocked" is evidence that an *Allen* charge was warranted at that point. A. 428. Regardless, it is beyond dispute that the trial judge instructed the jurors, "You have to continue your deliberations. Okay? I'm going to send you all back in the jury room." A. 429. This communication was the first time the trial judge instructed the jurors to continue to deliberations.

Three hours later, the jurors announced they were "[s]till at a stalemate." A. 430-31, 854. "Stalemate" and "deadlock" are synonyms. *Compare* Dictionary.com defining "stalemate" as "any position or situation in which no action can be taken or progress made; deadlock," https://www.dictionary.com/browse/stalemate (last viewed Feb. 20, 2022) *with* Dictionary.com defining "deadlock" as "a state in which progress is impossible, as in a dispute, produced by the counteraction of opposing forces; standstill; stalemate." https://www.dictionary.com/browse/deadlock (last viewed Feb. 20, 2022). The PCR judge, therefore, erred as a matter of law by concluding "still at a stalemate" "does not indicate deadlock." A. 901. Mr. Macon contends this communication was the second time the jurors

announced a deadlock, meaning a mistrial was appropriate. A. 647-48, 650. At the very least, this communication called attention to the need for an *Allen* charge. At this point, the trial judge was not aware of the jurors' numerical division. Regardless, it is beyond dispute that the trial judge instructed the jurors to resume their deliberations at the following morning. A. 434-35, 438-39. This communication was the second time the trial judge instructed the jurors to continue deliberations.

The next day, the jurors deliberated from 9:53 a.m. to 1:02 p.m. when they announced the 11-1 numerical division and revealed the single holdout "said they will not change their mind." A. 442-43. The trial judge finally provided an *Allen* charge. This communication was the third time the trial judge instructed the jurors to continue deliberations. Mr. Macon contends trial counsel should have moved for a mistrial at this point. A. 647-48, 650. Alternatively, Mr. Macon contends trial counsel "failed to object to the trial judge's *Allen* charge that singled out the sole juror that was holding out for acquittal." A. 647-48, 650-51. The PCR court rejected the first contention "[b]ecasue this [note was] only the first indication of deadlock, not the second or more as required by the statute." A. 902. As seen, using the plain meaning of "stalemate" and "deadlock," this communication was the third time the jurors announced a deadlock. The PCR court rejected the second contention because the *Allen* charge "comports with language" approved by this Court. A. 902-03. This ruling reflects three errors of law. First, although citing *Williams*, this Court overlooked footnote 7 in *Williams* where this Court "cautioned trial judges against using the following language: with the hope that you can arrive at a verdict." *Williams*, 386 S.C. at 515, n. 7, 690 S.E.2d at 68, n. 7. Second, before concluding the *Allen* charge "was not coercive," the PCR court failed to apply the *Tucker* factors. In fact, this

section of the order of dismissal does not even cite *Tucker*. Third, as discussed above, this instruction was coercive under the *Tucker* factors. Trial counsel, accordingly, was deficient under the first prong of *Strickland* for not objecting.

Mr. Macon additionally contends trial counsel was deficient under the first prong of *Strickland,* for not moving for a mistrial when the jurors announced at 6:21 p.m. on October 3rd they were fatigued, at an impasse, and some of the jurors wanted to be released from the jury room "forever." A. 647-48, 651. This communication was the fourth time the trial judge instructed the jurors to continue deliberations. The PCR court rejected this claim and ruled, "[T]his Court finds that even if this note could be considered a second indication of deadlock, the jury, after consultation with the judge, consented to continue deliberations." A. 905.[3] "Impasse" is a synonym of "deadlock." Dictionary.com defines "impasse" as "a position or situation from which there is no escape; deadlock." https://www.dictionary.com/browse/impasse (last viewed Feb. 20, 2022). The foreman correctly observed the jurors were at the "mercy" of the trial court. "Because the trial judge is the authority figure in the courtroom, jurors look to the trial judge for guidance not only on the law, but for matters such as courtroom conduct and protocol, even permission for

[3] The PCR court also found "credible Counsel's testimony that had she known with certainty the split was 11-1 against Applicant, she would have changed her strategy and pursued a mistrial." A. 905. This ruling was error for two reasons. First, this finding is not supported by the record. *Smalls, supra.* The Attorney General recalled trial counsel to contradict Mr. Macon's testimony about the conversation he had with counsel prior to the Allen charge and that the bailiff informed them the numerical split was 11-1 to convict. Trial counsel testified she recalled an occasion "where a bailiff overheard kind of where the jurors were leaning," but she could not recall whether it occurred in this trial or not. Although acknowledging she had a conversation with Mr. Macon, trial counsel could not recall "what we had a conversation about." Second, the order of dismissal overlooks the requirement that excusing deficient performance for making a strategic decision requires the strategy to be valid. *Ingle* and *Freiburger, supra*. Trial counsel testified the proper strategy would be to seek a mistrial when the jurors are split 11-1 to convict. A. 809-13.

breaks, meals, and telephone calls." *Taylor*, 427 S.C. at 215-16, 829 S.E.2d at 727. The jurors, very literally, had "no escape" from the jury room. The sole holdout juror must have believed the only way "to escape" from the jury room was to return a guilty verdict. One purpose of an *Allen* charge is to protect the jurors in the minority. The trial judge, accordingly, erred by deferring to the majority jurors. The PCR court repeated this error.

Regarding the prejudice prong of *Strickland*, this Court must "consider the specific impact counsel's error had on the outcome of the trial." *Smalls*, 422 S.C. at 188, 810 S.E.2d at 843. As seen, the trial judge instructed the jurors to continue deliberations on four occasions over three days of deliberations. On the third occasion, the trial judge finally gave an *Allen* charge. The *Allen* charge singled out the sole holdout juror. The trial judge, Solicitor, and trial counsel agreed a mistrial would be ordered if the jurors again announced a deadlock. The fourth instruction to continue deliberations occurred when the jurors were fatigued, at an impasse, and some of the jurors wanted to be released from the jury room forever. A. 647-48, 651. But for trial counsel's deficient handling of the *Allen* charge and the deadlocked jurors, Mr. Macon's trial would have resulted in a mistrial.

Question II

Did trial counsel render constitutionally deficient and prejudicial assistance of counsel—in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 3 and 14 of the South Carolina Constitution—when she had a conflict of interest because she was married to the Deputy Solicitor who had supervisory responsibility for the assistant solicitors prosecuting Arthur Macon.

Arthur Macon contends his trial counsel had had a conflict of interest because, at the time of his trial, she was married to the Richland County Deputy Solicitor who had supervisory responsibility for the two assistant solicitors who prosecuted the case. A. 647, 648. The material facts underlying this claim are beyond dispute. First, at the evidentiary

hearing, all witnesses agree that trial counsel was married to the Deputy Solicitor who had supervisory responsibilities for the two assistant solicitors prosecuting the case. A. 752-53, 796-98. Second, trial counsel failed to secure a written disclosure of her relationship with the Deputy Solicitor and a waiver of the conflict. A. 700, 882. Mr. Macon testified trial counsel did not disclose the relationship, and, if the relationship had been disclosed, then he would have requested different counsel. A. 788-89. Trial counsel testified "[i]t was generally [her] practice" to discuss the relationship with her husband with a client, but she did not "recall specifically" disclosing the relationship to Mr. Macon. A. 752.

The PCR court relied on Rule 702, SCSCR, Rule 1.8(k), RPC, including the general rule that a familiar relationship in personal and not imputed under Rule 1.10, RPC, to resolve the issue. A. 895. Other states, however, require written disclosure and consent. *See, e.g., Commonwealth v. Croken*, 432 Mass. 266, 273, 733 N.E.2d 1005, 1011 (2000) ("where a criminal defense lawyer represents a client and a close relative or an intimate companion is a colleague of the prosecutor who seeks to convict the client, the requirements of the [ethical] rule must be met") (citing Massachusetts Bar Association, Committee on Professional Ethics, Opinion No. 95–3 (relative of a district attorney could represent criminal defendants whom the district attorney's office prosecuted, provided [1] the relative not represent clients in cases in which the district attorney is involved; and [2] the conflict be fully disclosed in writing and consented to by the client)); *People v. Jackson*, 167 Cal. App. 3d 829, 213 Cal. Rptr. 521 (Ct. App. 1985) (failure of appointed trial counsel to inform defendant of counsel's ongoing "dating" relationship with prosecutor denied defendant his right to effective assistance of counsel under the California Constitution).

Despite finding no conflict of interest, the PCR court noted trial counsel "testified if [Mr. Macon] had told her he had a problem, she would have conflicted herself out of the representation and passed it to someone else." A. 753, 983. This testimony and finding of fact should trouble this Court. The Rules of Professional Conduct require "informed consent, confirmed in writing." *See, e.g.,* Rule 1.7(b)(4) and 1.8(a)(3), RPC. If there was any evidence of written, informed consent, then there would never have been a need for the PCR court to address this issue. No doubt, this very concerns is the reason why other states require full disclosure and written consent. As this Court reminded, "the Sixth Amendment guarantee of effective assistance of counsel is a bedrock principle in our justice system." *Mangal,* 421 S.C. at 99, 805 S.E.2d at 575. The bench and bar would benefit from this Court's guidance on how to resolve this issue in the future.

Question III

Did trial counsel render constitutionally deficient and prejudicial assistance of counsel—in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 3 and 14 of the South Carolina Constitution—by failing to object to the prosecutor's improper closing argument calling Arthur Macon a liar.

Arthur Macon contends his trial counsel render constitutionally deficient and prejudicial assistance of counsel—in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 3 and 14 of the South Carolina Constitution—by failing to object to the prosecutor's improper closing argument calling Arthur Macon a liar. A. 373 ("Every time he is confronted with a line, he changes his story. Why? Because he's a liar."). South Carolina appellate courts consistently holds calling the accused a liar improper. *See, e.g., Major v. Alverson*, 183 S.C. 123, 190 S.E. 449, 450 (1937) ("referring to defendant as a 'bare faced liar'" during closing argument required new trial); *State v. Blurton*, 342 S.C. 500, 512, 537 S.E.2d 291, 297 (Ct. App. 2000)

(cumulative error of solicitor's improper argument calling defendant a liar and improperly excluded evidence warranted reversal), *reversed on other grounds by State v. Blurton,* 352 S.C. 203, 573 S.E.2d 802 (2002).

Trial counsel could not recall whether she was aware of any of this case law. A. 707-08. Based on this testimony, the PCR court found, "Counsel admitted she was not aware of any case law to support an objection" to this argument. A. 897. The PCR court, nevertheless, concluded "an objection would have been contrary to her overall trial strategy." *Id*. The PCR court then proceeds to dismiss trail counsel's deficiency as a strategic decision. A. 898. The PCR court erred for two reasons. First, "[d]ecisions made in ignorance of relevant, available information cannot be characterized as strategic." *Weik v. State*, 409 S.C. 214, 236, 761 S.E.2d 757, 768 (2014). Second, an objection to the prosecutor calling Mr. Macon "a liar" is entirely consistent with trial counsel's testimony "that the statements Arthur made were not lies." A. 707, 897.

Finally, the PCR court seemed to be influenced by trial counsel's "general strategy in trying cases is for the jury to like her and think she is more reasonable than the State." A. 758, 884. Although appearing more reasonable than the prosecutor is a legitimate goal, this Court should reject the likability argument on its face. Here, the trial court explained the process of considering objections and legal matters. A. 133-34. A proper objection, accordingly, would not reduce an attorney's likability. Rather, defense counsel has a Sixth Amendment obligation to make objections and preserve legal issues for appellate review. *See Weldon v. State*, No. 2017-002000, 2021 WL 4566750, at *7 (S.C. Ct. App. Oct. 6, 2021) ("we can conceive of no *valid* trial strategy supporting trial counsel's failure to call at least one of the alibi witnesses," including reservation of final argument.)

Question IV

Did trial counsel render constitutionally deficient and prejudicial assistance of counsel—in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 3 and 14 of the South Carolina Constitution—by failing to object to improper vouching of a prosecution witness by another prosecution witness during the trial and the prosecutor during closing argument.

Arthur Macon contends his trial counsel render constitutionally deficient and prejudicial assistance of counsel—in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 3 and 14 of the South Carolina Constitution—by failing to object to improper vouching of a prosecution witness by another prosecution witness during the trial and the prosecutor during closing argument. A. Our state's appellate courts consistently reject improper vouching. *See, e.g*. *State v. Simmons*, 423 S.C. 552, 816 S.E.2d 566, (2018); *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013); *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011); *Gilchrist v. State*, 350 S.C. 221, 565 S.E.2d 281 (2002); *State v. Dawkins*, 297 S.C. 386, 377 S.E.2d 298 (1989); *State v. McKerley,* 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012).

Here, the State relied on the testimony of Mr. Macon's co-defendant Jason Calon. During the direct examination, the prosecutor questioned Mr. Calon's grandfather about a gunshot wound to Mr. Calon's temporal lobe, resulting in "a lobotomy from a bullet," leading to a diagnosis of schizophrenia, causing Mr. Calon to function "with a mind of a 13-year old even though he was 28 at the time of trial," leading the family to bring Mr. Calon to South Carolina "to be amongst family and be safe, not be taken advantage of." The prosecution emphasized this testimony during closing argument and set up a contrast between Mr. Calon as vulnerable and sympathetic and Mr. Macon as heinous and despicable. A. 305-09, 375, 704-07.

Although trial counsel tried to keep this evidence from the jurors, she did not object during closing argument. This Court should grant the writ and consider the issue.

Question V

Should this Court order a new trial based on the cumulative crror doctrine?

The 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." *Strickland,* 466 U.S. at 694 (emphasis added). If the Court did not intend a cumulative analysis it would have discussed the prejudice analysis in terms of "individual error" or error-by-error evaluation instead of formulating the prejudice test in light of counsel's "errors." *Cf. Kyles v. Whitley*, 514 U.S. 419, 436 (1995) (the prejudice must be "considered collectively, not item-by-item"); *Williams v. Taylor*, 529 U.S. 362, 399 (2000) ("the entire postconviction record . . . as a whole and cumulative of mitigation evidence presented originally" in conducting its prejudice analysis and finding counsel ineffective for failing to adequately prepare and present mitigation evidence).

The order of dismissal denies relief based on the cumulative error doctrine for two reasons. A. 905-07. First, the PCR court concluded, "Because this Court has found Counsel committed no errors, relief must be denied as to this issue." Once this Court reconsiders the matters raised in this petition, it is apparent trial counsel committed multiple errors.

Second, the order of dismissal, drafted by the Attorney General's Office, devotes significant time arguing that "appellate courts in South Carolina have not recognized the cumulative-error doctrine as a basis for post-conviction relief." The order of dismissal overlooks caselaw that incorporates the cumulative error analysis into the *Strickland* analysis by requiring the prejudice must be "considered collectively, not item-by-item."

Kyles, 514 U.S. at 436. The United States Supreme Court's opinion in *Williams*, 529 U.S. at 399, reveals that the Court considered "the entire postconviction record . . . as a whole and cumulative of mitigation evidence presented originally" in conducting its prejudice analysis and finding counsel ineffective for failing to adequately prepare and present mitigation evidence. "[A]s a whole" implies a cumulative analysis. Likewise, in *Strickland*, the Court stated, "The 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." 466 U.S. at 694 (emphasis added).

At a minimum, this Court should collectively consider the prejudice of trial counsel's errors in handling the deadlocked jury and *Allen* charge.

Question VI

Should this Court require post-conviction relief judges to draft the final orders in PCR cases in order to ensure the findings of fact and conclusions of law, required by S.C. Code Ann. § 17-27-80, are those of the court, rather than an advocate, and to preserve the separation of powers between the judicial branch and executive branch as required by S.C. Const. Art. I, § 8?

The procedure followed by the PCR court denied Arthur Macon his right to have his PCR claims adjudicated by a judicial officer. *See* A. 912-13, 926-61, 1001-03. "S.C. Code Ann. § 17-27-80 (1976), requires the PCR court to 'make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented.'" *McCray v. State*, 305 S.C. 329, 330, 408 S.E.2d 241, 241 (1991). *See also Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992). The PCR court did not do that, but rather delegated that responsibility to the Attorney General's Office. Such delegation of a judicial branch function to the executive branch violates the separation of powers required by S.C. Const. Art. I, § 8. *See, e.g., State v. Langford*, 400 S.C. 421, 735 S.E.2d 471 (2012).

The PCR court singed the proposed order of dismissal, drafted by the Attorney General's Office. Addressing section 17-27-80 in the context of a capital post-conviction relief case, this Court "strongly encourage[d] PCR judges to draft their own findings of fact and conclusions of law." *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004). Section 17-27-80, however, makes no distinction between capital and non-capital cases.

This Court recently expressed its ongoing frustration with the validity of final orders in PCR cases during the oral argument in *Kevin S. Epting v. State*, Appellate Case No. 2017-000696, on November 21, 2019, at 11:17 – 13:05.[4] One Justice referred to the Attorney General's Office drafting the final PCR order as "the classic case of the fox guarding the henhouse," observed PCR applicants have the right to have their issues litigated, and called on the criminal defense bar "to fix this problem." Another Justice stated the entire Court shares these concerns.

In *Fishburne v. State*, this Court recognized the significant issues involved in drafting PCR orders:

> [B]ecause the United States Constitution's Sixth Amendment guarantee to a defendant's right to effective assistance of counsel is engrained in PCR cases, we cannot continue to permit a party's procedural shortcoming—such as the failure to file a Rule 59(e) motion—to prevent this Court from remanding claims of ineffective assistance of counsel when the PCR court's order does not comply with section 17-27-80.

427 S.C. 505, 516, 832 S.E.2d 584, 589 (2019). *Fishburne* set a lofty goal for "[t]he preparation and finalization of a PCR order [to be] a collaborative effort." 427 S.C. at 516,

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[4] http://media.sccourts.org/videos/2017-000696.mp4 (last viewed June 22, 2020). *Epting* involved the Attorney General's Office drafting the final order, the PCR judge signing the order that failed to address all the issues, and the applicant's attorney not filing a Rule 59(e), SCRCP motion. On December 4, 2019, this Court dismissed *certiorari* as improvidently granted.

832 S.E.2d at 589 (2019). The final order in this case was not a "collaborative effort." Although Mr. Macon engaged in the process endorsed by *Fishburne*—reviewing the final order, and filing a Rule 59(e) motion—the final order is an advocacy position drafted by "the fox guarding the henhouse," rather than true judicial findings of fact and conclusions of law. The time has arrived for this Court to require PCR courts to draft the final orders.

CONCLUSION

For the foregoing reasons, this Court should grant the writ and consider the issues.

Respectfully Submitted,

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February 21, 2022
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