Circuit Court for Prince George's County
Case No. CT04-1104X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2386

September Term, 2016

ROBERT EUGENE HEAD, JR.

v.

STATE OF MARYLAND

Meredith,
Leahy,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: December 19, 2017

This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

In this appeal, Robert Eugene Head, Jr., contends that the Circuit Court for Prince George's County wrongly denied his petition for post-conviction relief. He asks:

> Was appellant denied the effective assistance of counsel at trial and on appeal with respect to the trial court's instructions to the deadlocked jury?

For the reasons we will explain below, we answer that question "no," and affirm.

FACTS AND PROCEDURAL HISTORY

Following a five-day jury trial in the Circuit Court for Prince George's County in January 2005, Head was convicted of second-degree murder, two counts of using a handgun in the commission of a crime of violence, attempted second-degree murder, first-degree assault, and second-degree assault.[1] The charges arose out of a 2004 Memorial Day shooting allegedly perpetrated by Head, which resulted in the death of Kevin Darby and the wounding of Roderick Sanders. At trial, Sanders testified that Head was the shooter. And Officer Jeremy George, the Prince George's County officer who first responded to the scene of the shooting, testified that Darby told him — in response to his question "Who shot you?" — that "Bobby" (a nickname for Head) was the perpetrator. Head was sentenced to a total of ninety-five years' incarceration.

Head filed several post-trial motions, including a motion for reconsideration of his sentences (which was denied) and an application for review of his sentences by a three-judge panel (which affirmed the sentences without a hearing). Head also filed a direct

[1] The jury acquitted Head of first-degree murder and attempted first-degree murder. Before the case was submitted to the jury for deliberation, the State nol prossed two counts of reckless endangerment and a count of wear/carry/transport a handgun.

appeal to this Court, which resulted in a reported opinion affirming his convictions. *Head v. State*, 171 Md. App. 642 (2006) ("*Head I*"), *cert. denied*, 398 Md. 315 (2007). In Head's direct appeal, he contended that Officer George's testimony that Darby told him that "Bobby" was the shooter violated his confrontation rights under the Sixth Amendment. We disagreed, finding Darby's statement to Officer George to be nontestimonial and not a confrontation-clause issue. Head also argued that Darby's dying declaration was wrongly admitted because the court failed to consider whether it was reliable. Again, we disagreed, noting that both dying declarations and excited utterances "are hearsay exceptions 'firmly rooted' in the common law," and that, as such, no independent inquiry into reliability needed to be undertaken. 171 Md. App. at 662-64.

Head's final issue raised on direct appeal complained of the trial court's instruction given to the jury in response to a note reporting a "stalemate," with 10 jurors voting for a verdict of guilty, and only two jurors voting for not guilty. We held that the specific question being argued on appeal had not been preserved at trial, and we declined to consider the argument that the trial court had been coercive. We said, *id*. at 664-67:

> Appellant's last claim is that "the trial court erroneously used coercive language to instruct the deadlocked jury to continue to deliberate" after gaining knowledge regarding "the jury's numerical split."
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> The jury in this case commenced deliberation at 9:30 a.m. on the fifth day of trial. That afternoon, at 3:30 p.m., the jury sent the judge a note that read: "We have been stalemated[:] not guilty two, guilty ten."
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> After hearing this bad news, counsel for appellant asked the court to declare a mistrial on the grounds that "the Court and the parties are now privy to the numerical split and further deliberation, knowing that this is the numerical split, gets to be coercive." The trial judge disagreed and told

counsel that he was going to give the jury an "interim instruction." Defense counsel objected to any further instruction on the ground that such an instruction was "even more coercive . . . if you now give them a specific instruction dealing with [the stalemate]." After defense counsel's objection was noted, the trial judge gave the jury the following instruction:

> I have your note. And I appreciate the time you've already put in. But I'm going to have you continue to deliberate with one additional instruction. And I'll say now that *it is not unusual for there to be difficulty [sic] in part of the system. The verdict that we hope you reach must be the considered judgment of each of you, as I told you earlier. In order to reach a verdict, obviously, all of you must agree. And that is where the problem is coming in.*
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> Your verdict must be unanimous. You must consult with one another and deliberate with a view toward reaching agreement if you can do so without doing violence to your individual judgment. And each of you must decide this case, as I told you earlier, for yourself, but only after an impartial consideration of the evidence with your fellow jurors.
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> So what that means is during these deliberations, and when you go back to deliberate, don't hesitate to re-examine your own views.
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> You should change your opinion if you are convinced that you are wrong, but you should not surrender your honest belief as to the weight or effect of the evidence only because of the opinion of your fellow jurors or for the mere purpose of reaching a verdict or an agreement on a particular charge.
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> My suggestion is that you re-examine the evidence, discuss it further, as if anew. And see where that takes you. It is 10 after 3:00. It is my intention to continue to have you continue to deliberate until probably around the 4:15, 4:30 mark, and then we'll see where we are, all right? So with that further instruction, please resume your deliberations.[2]

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[2] The second, third and fourth subparagraphs of this supplemental instruction track very closely the wording of MPJI-Cr 2.01 (2d ed., 2013 Supp.). *See also Thompson*

continued…

(Emphasis added [by the panel considering Head's direct appeal].)

After the court gave the jury the above instruction, defense counsel voiced the following objection:

> Well, Your Honor, now that the Court has actually given the instructions, I renew my request for the mistrial now that the numerical split has been revealed. And not only the numerical split. It appears they have reached a verdict as to Count 1. They are working on Count 2. We now know the inner workings of that jury. So now, giving them . . . that type of instruction, it is going to be coercive to the jurors who are in the minority, the two jurors. And I believe that is the problem with the Court's instruction. So I renew my request for a mistrial.

The trial judge disagreed with defense counsel and observed that he had no way of knowing whether the jury had reached a verdict as to Count 1. He also said (perceptively) that he did not believe that the fact that the jury had "revealed a split on a particular count" would make further instructions coercive inasmuch as the split would have existed whether or not the jury had announced the nature of their division. The court went on to reject defense counsel's argument because in its view if such logic were to obtain, any further instruction would be coercive, as would *any* further deliberation, which the court did not believe to be the law. [In a footnote, this Court said that the trial judge was correct in making that statement, and cited *Mayfield v. State*, 302 Md. 624, 631-32 (1985).]

The jury continued its deliberation until 4:35 p.m., at which time they were excused for the evening. Jury deliberations commenced the next morning, and at 10:50 a.m., the jurors returned their verdict.

Except for the emphasized portion of the instructions, and the benign two and one-half sentences that preceded it [and the benign four sentences in the concluding subparagraph], the court's instructions were in

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v. State, 371 Md. 473, 482-83 (2002); *Burnette v. State*, 280 Md. 88, 96 (1977). At oral argument in the present appeal, counsel for Head raised no objection with respect to those three subparagraphs, or the fifth (final) subparagraph. The only portion of the supplemental instruction Head is challenging in this appeal as coercive is in the first subparagraph, and specifically, the last four sentences of that subparagraph.

> conformity with the ABA approved Allen charge, which is set forth in the Maryland Criminal Pattern Jury Instructions. *See* MPJI-Cr 2:01 at 16 (1997).
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> Appellant now complains that the trial judge deviated from the approved language of the ABA Allen charge when he included in the instruction the words that we have emphasized [in italics] in the instructions. More specifically, appellant complains that it was improper for the court to tell the jury "that a hung jury is a difficulty for the judicial system." Also, according to appellant, it was improper for the court to tell the jury that "the fact that two of them are in disagreement with the others is a 'problem.'" Appellant argues that, while "the deviation from the approved ABA instruction may appear to be slight, the coercive effect on the two jurors voting to acquit is immeasurable because the trial court is telling them they [the dissenters] are the problem." None of these reasons for objecting to the instruction were raised below.
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> Maryland Rule 4-325(e) provides that unless an appellate court, on its own initiative or at the suggestion of a party, takes cognizance of "plain error" contained in an instruction, "[n]o party may assign as error [on appeal] the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection." In light of the provisions of Maryland 4-325(e), appellant waived the aforementioned objections.
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> As an alternate argument, appellant alleges that the trial court abused its discretion by giving the American Bar Association version of the Allen charge after the court and counsel were advised as to the "numerical split" among the jurors. This exact contention was considered and rejected in *Mayfield v. State,* 302 Md. 624, 631-32, 490 A.2d 687 (1985). For the reasons set forth in *Mayfield,* we find no abuse of discretion.

(Footnotes omitted.)

After the unsuccessful appeal, Head filed a petition for post-conviction relief in the circuit court. *See* Maryland Code (2001, 2008 Repl. Vol.), Criminal Procedure Article ("CP"), § 7-101 et seq. The post-conviction court conducted a hearing on March 16, 2016, and denied the petition in an order filed on December 22, 2016. We granted an

application for leave to appeal the post-conviction court's rulings on Head's claims that his trial counsel provided ineffective assistance by failing to properly preserve the "coercive instruction" issue at trial, and the same attorney provided ineffective assistance on appeal by failing to ask this Court to take notice of the unpreserved argument as plain error. *See Strickland v. Washington*, 466 U.S. 668 (1984).

As to the "coercive instruction" issue, the post-conviction court found, first, that our determination in *Head I* that we would not exercise our discretion to review the issue as a plain error "constitutes a final decision on the merits and as such [the issue] is finally litigated." Accordingly, the court found that the issue could not be raised in a petition for post-conviction relief. *See* CP §§ 7-102(b), 7-106(a).

But the post-conviction court nevertheless ruled in the alternative that, if it were "to address the merits it would still find that [Head] has not met his burden under *Strickland*[.]" The court explained:

> Upon examining the additional language given to the jury in toto, this court concludes that the court's statements to the jury did not directly or indirectly imply that a "hung jury was a difficulty for the system" or that the two jurors who were voting not guilty were a "problem." This court finds nothing in the additional language spoken by the court when taken in context that was coercive or erroneous. As such, trial counsel's failure to object did not constitute ineffective assistance of counsel and a fortiori there was no prejudice to [Head].
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> However even if this court found that trial counsel was deficient in his performance, this court finds [Head] is unable to prove prejudice. Support for this conclusion, this court surmises, is found in the fact that [the] Court of Special Appeals concluded that [Head] had waived this issue and the Court affirmatively stated they would not review the matter under the plain error doctrine. Such action taken by the Court of Special [A]ppeals indicates to this court that the matter did not have a reasonable

> probability of success on appeal even if trial counsel would have objected or if appellate counsel had asked for review under the plain error [doctrine]. *State v. Donta Newton a/k/a Jason Jones*, 230 Md. App. 241, 271, 146 A.3d 1204, 1222 (2016) (stating that one factor in determining whether an issue has the possibility of success on appeal is whether that claim was waived at trial).
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> It is well established that failure to make a meritless objection does not amount to ineffective assistance of trial counsel. *Gross* [*v. State*], 371 Md. 334, 350, 809 A.2d 627 (2002). Similarly, it is permissible for appellate counsel to refrain from raising an issue he or she believes will be denied. *Mitchell v. Esparza*, 540 U.S. 12m 124 S.Ct. 7, 157 L.Ed. 263 (2003). Although during the post-conviction hearing, trial counsel confessed ineffectiveness with respect to this issue, this court finds that his "Monday morning quarterback" testimony . . . is not supported by the evidence or law.
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> . . . [U]pon a review of the entire record this court finds that the evidence supporting [Head's] conviction was significantly such that the reliability of [Head's] conviction is neither undermined by the failure of trial counsel to object to the trial court's additional language nor appellate counsel's failure to ask the appellate court to review the matter under the plain error doctrine.

(Footnotes omitted.)

The post-conviction court further noted that the jury had been polled, with each juror responding that the foreman's verdict was his or her personal verdict. The court concluded its ruling on the "coercive instruction" issue by stating that it found that Head had failed to meet his burdens:

> As this court previously stated, to prove a claim of constitutionally ineffective assistance of counsel, [Head] must establish that counsel's performance was deficient and that the deficient performance prejudiced the defense. To show a deficiency, [Head] must (1) demonstrate that

> counsel's acts or omissions, given the circumstances, fell below an objective standard of reasonableness considering prevailing professional norms and (2) overcome the presumption that the challenged conduct be considered sound trial strategy. To show that a deficiency prejudiced the defense, a petitioner must establish that counsel's error was so serious as to deprive [him] of a fair trial, a trial whose result is reliable. Deficient performance is prejudicial to a petitioner if there is a substantial possibility that, but for counsel's unprofessional errors, the result of the proceedings would have been different. With respect to appellate counsel[,] to establish ineffectiveness, Petitioner must prove that there is a substantial possibility that on appeal he would prevail on the merits of his claim. This court finds that [Head] has not met these burdens. Accordingly, relief is denied as to this issue.

Head filed an application for leave to appeal, which we granted as to one issue: "to consider [Head's] claim that he was denied the right to effective assistance of counsel with respect to the instructions given to the deadlocked jury[.]"

STANDARD OF REVIEW

"The review of a postconviction court's findings regarding ineffective assistance of counsel is a mixed question of law and fact." *Newton v. State*, 455 Md. 341, 351 (2017). In *State v. Gross*, 134 Md. App. 528, 558–60 (2000), *aff'd*, 371 Md. 334 (2002), we described appellate review of a post-conviction court's rulings as follows:

> In reviewing a hearing judge's determination on a claim of ineffective assistance of counsel, we will, of course, extend great deference to the hearing judge's findings of disputed, first-level, historic facts, but will nonetheless make our own independent decision with respect to the ultimate legal significance of those facts. *Strickland v. Washington,* 466 U.S. at 698, 104 S.Ct. 2052, was emphatic in this regard:
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> > *Ineffectiveness is not a question of "basic, primary, or historical fac[t]."* Rather, . . . it is a mixed question of law and fact. . . . *[B]oth the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.*

(Citations omitted; emphasis supplied).

Within a year of *Strickland*'s having been decided, Judge Orth set out clearly the function of appellate review in *Harris v. State,* 303 Md. 685, 698, 496 A.2d 1074 (1985):

> *[I]n making our independent appraisal,* we accept the findings of the trial judge as to what are the underlying facts unless he is clearly in error. *We then re-weigh the facts as accepted in order to determine the ultimate mixed question of law and fact,* namely, was there a violation of a constitutional right as claimed. *Walker v. State,* 12 Md. App. 684, 691-95, 280 A.2d 260 (1971)[.]

(Emphasis supplied [in *State v. Gross*]).

Cirincione v. State, 119 Md. App. at 485, 705 A.2d 96, relied on *Strickland* in pointing out the distinction between first-level facts and ultimate, conclusory, or constitutional facts. Judge Thieme explained that although "we will defer to the post-conviction court's findings of historic fact, absent clear error," when it comes to the dispositive and conclusory fact "we make our own, independent analysis of the appellant's claim." *See also State v. Thomas,* 328 Md. 541, 559, 616 A.2d 365 (1992).

State v. Purvey, 129 Md. App. 1, 10, 740 A.2d 54 (1999), was equally clear as to the standard of appellate review:

> Within the *Strickland* framework, *we will evaluate anew the findings of the lower court as to the reasonableness of counsel's conduct and the prejudice suffered.* Whether counsel's performance has been ineffective is a mixed question of fact and law. *Strickland,* 466 U.S. at 698[, 104 S.Ct. 2052] . . . . As a question of whether a constitutional right has been violated, *we make our own independent evaluation* by reviewing the law and applying it to the facts of the case.

DISCUSSION

I.

Head makes two arguments in this appeal. First, he contends that the trial court erred in concluding that his claim regarding the allegedly "coercive instructions" had been "finally litigated" by this Court in *Head I*. Head points out that we held that the question was unpreserved and declined to exercise our discretion to review the court's instruction for plain error. The State agrees with Head's contention that his present arguments regarding coerciveness have not been finally litigated.[3]

[3] In its brief, the State addressed the post-conviction court's ruling that the issue had been "finally litigated," stating:

> The State agrees with Head that the post-conviction court's "finally litigated" holding is inconsistent with the Court of Appeals' opinion in *State v. Hernandez*, 344 Md. 721 (1997). There, the Court noted: "The term 'finally litigated' is defined by statute as 'when an appellate court of the *State has rendered a decision on the merits thereof*.'" *Id*. at 728. *See also* Md. Code Ann., Crim. Proc. § 7-106(a)(1) (2008 Repl. Vol.).
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> The record of Head's appeal confirms that this Court did not address the merits of his challenge to the court's preliminary comments. On direct appeal, this Court held that Head's challenge to the court's preliminary comments was not preserved for appellate review. *Head v. State*, 171 Md. App. 642, 667 (2006). The Court also did not address the claim under the guise of plain error. *Id*. at 667 n.13. The Court, therefore, did not address the merits of Head's complaint about the comments.
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> Moreover, to the extent that the post-conviction court concluded that when this Court declined to address Head's complaints under the guise of plain error its decision not to do so constituted a "decision on the merits", that holding also is not supported by the record. As this Court noted on direct appeal, it was not asked to recognize plain error. *Id*. Under those

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We agree that the issue was not "finally litigated." CP § 7-102(b) provides that a person who has been convicted of a crime in this State, and who is either still confined under a sentence or on parole or probation, may file a petition for post-conviction relief "to set aside or correct the judgment or sentence" if "the alleged error has not been previously and finally litigated[.]" "The term 'finally litigated' is defined by statute as 'when an appellate court of the State has rendered a decision on the merits thereof.' Maryland Code (1957, 1996 Repl. Vol.) Art. 27, § 645A(b)." *State v. Hernandez*, 344 Md. 721, 728 (1997) (citing the predecessor code provision of current CP § 7-106(a)(1)). In *Head I*, we expressly declined to review the "coercive instructions" issue on the merits because the arguments made on appeal had not been raised before the trial court, and we declined to exercise our discretion to conduct plain error review, which appellate counsel had not requested, as we stated in footnote 13. Consequently, our ruling in *Head I* was not a decision on the merits of the claim raised in the post-conviction petition, and the issue was not finally litigated.

II.

Head's second argument is that the post-conviction court's alternative ruling, on the merits of his petition, was erroneous. We disagree.

"In order to establish ineffective assistance of counsel, petitioner must satisfy the two prong test set out in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80

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circumstances, the State agrees with Head that the Court's decision not to recognize plain error does not constitute a "decision on the merits."

L.Ed.2d 674 (1984): that counsel's performance was deficient and that the deficient performance prejudiced the defendant." *Walker v. State*, 391 Md. 233, 237 (2006). Discussing *Strickland* in *Newton v. State*, 455 Md. 341, 355-56 (2017), the Court of Appeals said:

> As to the first prong, the defendant must show that his "counsel's representation fell below an objective standard of reasonableness, and that such action was not pursued as a form of trial strategy." *Coleman v. State*, 434 Md. 320, 331, 75 A.3d 916 (2013) (quoting *Strickland*, 466 U.S. at 687-89, 104 S.Ct. 2052) (internal quotation marks omitted). We have explained that "[p]revailing professional norms define what constitutes reasonably effective assistance, and all of the circumstances surrounding counsel's performance must be considered." *Mosley v. State,* 378 Md. 548, 557, 836 A.2d 678 (2003) (citation and internal quotation marks omitted). Accordingly, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052.
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> To establish the second prong — prejudice — the defendant must show either: (1) "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"; or (2) that "the result of the proceeding was fundamentally unfair or unreliable." *Coleman*, 434 Md. at 340-41, 75 A.3d 916 (citations omitted). The *Strickland* Court explained, "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052.
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> *Strickland* also instructs that courts need not consider the performance prong and the prejudice prong in order, nor do they need to address both prongs in every case. *Id.* at 697, 104 S.Ct. 2052; *Oken v. State*, 343 Md. 256, 284, 681 A.2d 30 (1996). As the *Strickland* Court explained, "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland*, 466 U.S. at 697, 104 S.Ct. 2052.

Head challenges the post-conviction court's finding that he failed to demonstrate prejudice, calling the trial court's "instructional error . . . egregious," and asserting that the trial court's comments "likely caused the two jurors holding out for a not guilty verdict to change their vote to conform to the majority."

In support of Head's assertion that post-conviction relief was warranted because trial counsel was deficient in failing to object to the non-pattern portion of the jury instructions the trial judge gave after the jury communicated that it was locked in a "stalemate," Head makes the following argument in his brief:

> Post conviction relief plainly was warranted here because the trial court pressured the jury, which had revealed that it was "stalemated not guilty two, guilty ten," into rendering a verdict by describing its non-unanimity as "a difficulty for the judicial system" and the minority hold-outs for acquittal as "a problem." (T. 1/24/05 at 6, 7). In failing to except to the court's instruction on this basis, and then, in light of that failure, in not asking the Court to invoke plain error review, counsel rendered ineffective assistance to Appellant at both the trial and appellate levels.
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> The Court of Appeals has condemned the giving of . . . the "traditional *Allen* charge" on the basis that its wording "encourages jurors to reach a verdict by stressing deference of the minority jurors to the views of the majority." *Thompson v. State*, 371 Md. 473, 487 (2002). Inasmuch as the traditional *Allen* charge has a coercive effect on minority jurors, our appellate courts instead "ha[ve] approved the modified *Allen* charge recommended by the American Bar Association." *Browne v. State*, 215 Md. App. 51 (2013). *See Burnette v. State*, 280 Md. 88, 96 (1977) (observing that the ABA-recommended instruction "does not charge the minority to doubt the reasonableness of its convictions when they are not concurred in by the majority . . . . All jurors, in the approved charge, are encouraged to deliberate and consult with one another. The minority is not portrayed as somehow the cause of the deadlock.").

Trial courts are admonished, when dealing with a deadlocked jury, to closely adhere to the ABA-approved form of the so-called *Allen* instruction: “After the jury has been sequestered to deliberate, we think it advisable that a trial judge, who decides to give an Allen-type charge because of an apparent deadlock, should closely adhere to the wording of the ABA recommended instruction.” *Kelly v. State*, 270 Md. 139, 144 (1973). Any deviation is to be “subjected to careful scrutiny in order for it to be determined whether the province of the jury has been invaded and the verdict unduly coerced.” *Id.* “Although the trial court has some discretion to decide what precise language to use when giving an Allen-type charge describing the deliberative process, substantial deviations in substance from the approved pattern instructions mandate a reversal and a new trial.” *Goldsberry v. State*, 182 Md. App. 394, 415 (2008), *aff’d in part, rev’d in part*, 419 Md. 100 (2011).

* * *

This Court has warned that, when giving an *Allen*-type instruction following an indication that the jury is deadlocked, the trial court must take care that its instruction does not coerce the jury into reaching a verdict. *Hall v. State*, 214 Md. App. 208, 219 (2013). “The concept of unanimity . . . embraces not only numerical completeness but also completeness of assent, i.e., each juror making his or her decision freely and voluntarily, without being swayed or tainted by outside influences.” *Caldwell v. State*, 164 Md. App. 612, 635 (2005).

In *Burnette v. State*, 280 Md. at 91, the Court of Appeals rejected the following instruction: [“]. . . If your views are contrary to those of the vast majority you should consider whether your views, which make no impression on the minds of so many equally intelligent jurors, are correct.[”] The Court held that the instruction was impermissibly coercive: “It is difficult to imagine a minority juror who would not be placed in some discomfort on hearing this instruction. Criticism runs directly to him, and he might understandably conclude that proper “deference” to the opinions of the majority demands that he abandon his conscientious position.” *Id.* at 100.

In *Thompson v. State*, 371 Md. at 487, the Court of Appeals held that an instruction that suggested “the primacy of collective judgment over individual principle and honest conviction” was reversible error. This was so because the instruction encouraged jurors to surrender their individual convictions in order to reach a collective judgment. *Id.* The Court reached

> this conclusion despite the fact that the instruction also told jurors they should consult with one another "to arrive at a just verdict" but were not required "to yield an honest conviction after such consultation or deliberation." *Id*. at 479.
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> In *Goldsberry v. State*, 183 Md. App. at 413, the trial judge instructed the jury that "anything short of a unanimous verdict is not acceptable. Unanimous means a 12 to nothing vote." This Court held that the jury "could easily have construed [that language] to mean that they should sacrifice their individual judgment to reach a collective verdict." *Id*. at 416.
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> Similarly, at Appellant's trial, in responding to the jury's note that it had reached an impasse, the court told the jury that the deadlock was a "problem" and that a non-unanimous jury posed a "difficulty" for the juridical system. Considering that two of the jurors were holding out for acquittal, and that the court knew this, the instruction was particularly coercive to the jury and problematic for Appellant because it was those minority hold-outs who stood in the way of a unanimous verdict. Although trial counsel objected and moved for a mistrial on the grounds that revelation of the numerical split rendered any direction to continue deliberating "coercive to the jurors who are in the minority," no exception was taken to the particular language used by the trial court characterizing non-unanimity as a problem and a difficulty. Had trial counsel objected to the instruction on this basis, there is a reasonable possibility that the court would have amended its remarks and ameliorated their coercive nature.

Although we recognize that trial judges must be scrupulously careful to avoid any substantive deviation from MPJI-Cr 2:01 (which is a version of the ABA-approved Allen charge), *see Burnette, supra*, 280 Md. at 101 ("deviations in substance will not meet with our approval"), we are not persuaded that the introductory comments the trial court made in the course of responding to the jury's note in this case, when read in context with the comments that followed, resulted in a deviation in substance from the approved pattern instruction.

At oral argument, counsel for Head urged us to focus on certain words the trial court used in its introduction to MPJI-Cr 2:01, namely, “difficulty” and “the problem.” Head asserts that the two jurors in the minority might have construed the court’s comments as chastising them for being “the problem” and creating an undesirable “difficulty” in getting to the unanimous “verdict that we hope you reach.” Head contends that, if trial counsel had brought this specific concern to the attention of the trial judge, “there is a reasonable possibility that the court would have amended its remarks and ameliorated their coercive nature.”

We would be much less likely to find the introductory comments acceptable if they had not been immediately followed by instructions that have been approved by the Court of Appeals – instructions that clearly communicated to the jurors that they were to work toward “reaching an agreement **if you can do so without doing violence to your individual judgment. And each of you must decide this case, as I told you earlier, for yourself** . . . . You should change your opinion if you are convinced that you are wrong, **but you should not surrender your honest belief** as to the weight or effect of the evidence only because of the opinion of your fellow jurors or **for the mere purpose of reaching a verdict or an agreement on a particular charge**.” (Emphasis added.) Even if we were to agree with Head’s assertion that the introductory comments might have been perceived by the minority jurors as coercive, we cannot fathom how any juror would have failed to understand, after being reinstructed in accordance with MPJI-Cr 2:01, that each juror was obligated to exercise individual judgment, and was under no

obligation or compunction to change a firmly-held belief merely to reach agreement with other jurors.

Consequently, although we do not condone the trial court's introductory comments or recommend that trial judges add any personalized comments that might imply to jurors that their lack of unanimous agreement is causing a problem for the court, we are satisfied that the court's instruction given in Head's case, when considered as a whole, was not coercive. The lack of a more specific objection by trial counsel was therefore not ineffective assistance, and there was no plain error in this respect that should have been argued on direct appeal. The post-conviction court did not err in denying relief.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.