RECEIVED

Aug 08 2022

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The 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.

REPLY TO STATE'S RETURN TO PETITION FOR WRIT OF *CERTIORARI*

E. Charles Grose, Jr.
S.C. Bar Number 66063
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466
(864) 538-4405 (fax)
Email: charles@groselawfirm.com

Attorney for Petitioner Arthur W. Macon

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

ARGUMENTS IN REPLY

Arthur Macon replies to the State's Return to his Petition for a Writ of Certiorari ("Petition" or "Return") as follows.

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 alleges his trial counsel was deficient in multiple respects when his jurors were deliberating regarding his guilt or innocence 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. Petition at 5-17. The State contends the order of dismissal does not contain an error of law and is supported by probative evidence. Return at 10. For the reasons discussed below, this Court should reject the state's contention.

Initially, Mr. Macon argues his trial counsel should have requested an *Allen*[1] charge when the jurors first announced they had not reached a verdict and the prosecutor announced, "They are deadlocked." Even if this Court accepts the State's unsubstantiated argument that a career prosecutor was being "sarcastic and tongue-in-cheek" (Return at 11), with the trial judge, this Court still is obligated to grant Mr. Macon relief. The jurors fourth note stating, "Still at a stalemate"[2] (A. 431-32, 854) triggered S.C. Code Ann. § 14-

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

[2] As pointed out in Mr. Macon's Petition, at 14, "stalemate" is a synonym for "deadlock."

7-1330. However, even if this Court agrees with the State that the jurors' suggestion the jurors "were simply requesting a break" (Return at 12-13), the jurors' sixth note finally caused the trial judge to issue an *Allen* charge when they stated:

> 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.

At this point, the trial judge, parties, and jurors were aware that the jurors had been deadlocked 11-1 for at least 24 hours.[3] The *Allen* charge instructed the lone holdout to "consider the majority's position," return to deliberations, and "arrive at a verdict within a reasonable time." A. 444-46. The trial judge, prosecutor, and trial counsel recognized and agreed that continued "deadlock" by the jurors would require a mistrial under section 14-7-1330. Under the circumstances of this case, the *Allen* charge was unduly coercive. *Tucker v. Catoe*, 346 S.C. 483, 552 S.E.2d 712 (2001).

Section 14-7-1330 mandated a mistrial after the jurors returned their ninth note when the jurors were "still in the same position" as they were for the prior two days and were at the "mercy" of the trail court. A. 449-50. Contrary to prior interactions with the jurors, the trial judge did not bring all the jurors into the courtroom. As a result, only the foreman had direct knowledge if the discussions with the trial judge. Contrary to the prior understanding between the trial judge and the parties, the trial judge did not declare a mistrial. Trial counsel did not move for a mistrial. But for trial counsel's deficient

[3] The State contends the trial judge neither "inquired into the jury's numerical division nor acknowledged it." Return at 16. While this statement might be technically true, it is beyond dispute that the trial judge, parties, and jurors were aware of the numerical division.

performance—failing to move for a mistrial—the trial judge would have declared a mistrial. *Strickland v. Washington,* 466 U.S. 668 (1984). Mr. Macon was prejudiced by trial counsel's deficient performance. *Id.*; *Smalls v. State,* 422 S.C. 174, 810 S.E.2d 836 (2018).

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 State contends no conflict existed and Mr. Macon did not establish the conflict affected trial counsel's performance. Return at 17-19. This Court must reject the State's contention for at least three reasons. First, the State does not deny that Mr. Macon's trial counsel was married to a Richland County Deputy Solicitor at the time of the trial. Second, Mr. Macon established trial counsel, at a minimum, mishandled juror deliberations. Third, the State did not address the caselaw cited in Mr. Macon's Petition, at 17-19: *Commonwealth v. Croken*, 432 Mass. 266, 273, 733 N.E.2d 1005, 1011 (2000); *People v. Jackson*, 167 Cal. App. 3d 829, 213 Cal. Rptr. 521 (Ct. App. 1985).

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 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."). The State acknowledges trial counsel's testimony admitting "she was unaware of any case law that prohibits a solicitor from calling the defendant a liar" and "this Court has previously held it is improper to call a party a liar in closing arguments." Return at 20. The State, therefore, concedes deficient performance. *Strickland, supra.* Rather, the State argues the prosecutor's comments did not "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." Return at 20-21. Had trial counsel objected, then the trial judge would have given a curative instruction or declared a mistrial. The State's evidence was not overwhelming, the case turned on the credibility of Jason Calon, and the jurors struggled to reach a verdict. Mr. Macon, accordingly, established prejudice. *Smalls, supra.*

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 by failing to object to improper vouching of a prosecution witness by another prosecution witness during the trial and the prosecutor during closing

argument. The State contends Mr. Macon did not identify any specific comments durng the closing argument that were objectionable. Return at 22-23. In fact, 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.

Question V

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

Arthur Macon disagrees with the State's argument that he did not establish multiple constitutional errors. Return at 23-24. Much confusion exists in our state regarding the application of the cumulative error doctrine in post-conviction cases. This Court should grant the writ, consider the issue and resolve the confusion.

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?

Arthur Macon advocates for a rule requiring PCR judges to draft final orders in post-conviction cases. The State advocates for maintaining a "common practice" that

benefits the prosecution. This Court continues to express dissatisfaction with the practice of the State drafting final orders. *See, e.g.*, *Fishburne v. State*, 427 S.C. 505, 832 S.E.2d 584 (2019); *Kevin S. Epting v. State*, Appellate Case No. 2017-000696, Oral Argument, November 21, 2019, at 11:17 – 13:05.[4] This Court should grant the writ, consider the issuer, and adopt a rule requiring PCR judges to draft the final orders in PCR cases.

CONCLUSION

For the reasons set forth in Arthur Macon's petition for a writ of certiorari and this reply, this Court should grant the writ and consider the issues.

Respectfully Submitted,

By s/*E. Charles Grose, Jr*

E. Charles Grose, Jr.
S.C. Bar Number 66063
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466
(864) 538-4405 (fax)
Email: charles@groselawfirm.com

Attorney for Arthur W. Macon

August 8, 2022
Greenwood, South Carolina

[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.