STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Kershaw County

Honorable G. Thomas Cooper, Circuit Court Judge

MITCHELL LOGAN HINSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO 2018-001643

REPLY BRIEF OF PETITIONER

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ARGUMENT IN REPLY

The PCR judge erred in refusing to find trial counsel ineffective for failing to object to the Allen charge when the jury had not yet indicated that they were deadlocked.

The Allen charge in the present case was unconstitutionally coercive because it was given prematurely, prior to the jury indicating they were deadlocked or having difficulty and prior to lengthy deliberations. The timing of the charge rendered it coercive. "Whether an Allen charge is unconstitutionally coercive must be judged 'in its context and under all the circumstances.' Lowenfield, supra." Tucker v. Catoe, 346 S.C. 483, 491, 552 S.E.2d 712, 716 (2001). Under the circumstances of this case, the Allen charge was unconstitutionally coercive. The trial judge abused his discretion by giving the coercive charge. Trial counsel was ineffective in failing to object to the premature Allen charge. There is a reasonable probability that if trial counsel had objected to the Allen charge and the jury had been allowed to continue to deliberate without the unconstitutionally coercive charge, the outcome of the proceedings would have been different.

The jury began deliberating in this trial for burglary in the first degree on the afternoon of June 28, 2011, after the lunch break, after hearing closing arguments, and after receiving instructions from the judge. (App. pp. 159-173). During deliberations the jury asked to see the home surveillance video tape, asked about the penalty for the offense, and asked for a mug shot or profile picture of Petitioner. (App. pp. 174-175). After a discussion about possibly ordering dinner, the jury instead elected to stop deliberations for the day. (App. pp. 177, lines 13-14). Jury deliberations resumed the next morning at 9:30 AM. (App. p. 178, lines 4 – 17). As soon as the jury was excused to the jury room to continue deliberations the judge said, "In the next hour and a half from now if they haven't made a decision, perhaps we should consider the Allen charge. Let's

give them some time. We'll be at ease." (App. p. 179, line 24 – p. 180, lines 1-2). The judge suggested the Allen charge after the jury had only deliberated a few hours the afternoon before.

During their deliberations the jury asked for the definition of burglary and the judge re-charged the jury on the law of burglary first degree. (App. p. 180, line 5 – p. 181, 182, 183, 184, lines 1-15). The jury continued to deliberate for some amount of time, presumably before a lunch break was needed, when the judge stated, "I have discussed this with the lawyers in Chambers, and the bottom line is I can give the Allen charge, so I will read the Allen Charge unless the lawyers object." (App. p. 184, lines 18-21). Trial counsel did not object.

When the jury returned to the courtroom the judge said, "Welcome back, members of the jury. As I indicated to you back in the jury room[1]—I shared my conversation with the lawyers that I had with you in the room and this is the additional charge I was telling you about." (App. p. 184, line 25 – p. 185, lines 1-3). Respondent argues that this statement "suggests that the jury may have conveyed that it was deadlocked." (BOR p. 5, n. 1). Respondent's argument is speculative as the communication between the judge and the jury that took place in the jury room was never made a part of the record. It is unclear from the record why the judge was in the jury

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[1] The judge's presence in the jury room was not raised during the PCR hearing. See State v. Elmore, 279 S.C. 417, 421–22, 308 S.E.2d 781, 784–85 (1983), overruled by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), and overruled by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019)("Appellant's final contention of error as to the guilt phase of the trial concerns the trial judge's entering the jury room, accompanied by counsel from both the state and defense, to answer a question of the jury. Although we find no actual prejudice in this instance, we hold this conduct to be reversible error regardless of the presence of counsel. We caution the bench that this procedure is highly improper and also runs counter to the requirement that in a death case the defendant be present at all stages of trial. State v. Taylor, 261 S.C. 437, 200 S.E.2d 387 (1973); State v. James, 116 S.C. 243, 107 S.E. 907 (1921).")

room. The record does not reflect that the jury indicated they were deadlocked or having difficulty. During the post-conviction relief hearing trial counsel did not recall the jury indicating that they were deadlocked. (App. p. 267, line 21 – p. 268, lines 1-6). Later, on cross-examination, when asked again if the jury indicated it was deadlocked, trial counsel testified:

> No. That puzzles me. You know, had I not been able to read over the transcript of the trial, I would have sworn that they had somehow communicated to the judge that they were unable to reach a unanimous verdict. But the transcript doesn't reflect that, so I think the judge just felt that after sending out three different questions, that that indicated that there was some sort of problem that had surfaced in the jury room reaching a decision.
>
> And again, I don't know, other than we were in the second day of the jury's deliberations, which isn't a whole lot of time. But the transcript doesn't reflect times of day, so when it was that the judge started thinking in terms of the Allen charge, what time of day it was –

(App. p. 292, line 14 – p. 293, lines 1-4).

The judge gave a lengthy Allen charge taking up seven pages in the transcript. (App. pp. 184-191). During the charge the judge told the jury, "A mistrial in a case is a very unfortunate thing. If you cannot agree on a verdict it does not mean anybody wins or the case is over, but simply means that at some future time another jury will sit where you are." (App. p. 187, lines 15-18). The judge also told the jury, "This is an important case, as to time, effort and money by the Defense and the Prosecution, and if you fail to agree on a verdict the case is left open and undecided. Like all cases, it must be disposed of and decided at some time." (App. p. 189, lines 7-11). After the charge the jury was provided lunch and then returned a verdict of guilty at 2:43 PM. (App. p. 192, lines 2-24). Trial counsel was ineffective in failing to object to the Allen charge when the jury had only deliberated for a short period of time and had not indicated deadlock or difficulty. Trial counsel admitted that perhaps he should have objected to the Allen charge. (App. p. 269. Lines 1-2).

In State v. Taylor, 427 S.C. 208, 214, 829 S.E.2d 723, 726–27 (Ct. App. 2019), the South Carolina Court of Appeals wrote:

> The United States Supreme Court continues to approve Allen-type charges, see Jones v. United States, 527 U.S. 373, 382 n.5, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999), but many states have banned the original Allen charge, with some embracing a charge developed by the American Bar Association (ABA) that must be given to juries before deliberation begins. Thomas & Greenbaum, *Justice Story Cuts the Gordian Knot of Hung Jury Instructions*, 15 Wm. & Mary Bill of Rts. J. 893, 914–16 (2007). Versions of the charge vary in the federal circuits, but all circuits allow them, though several recommend the ABA version. See Lowenfield v. Phelps, 484 U.S. 231, 238 n.1, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988) ("All of the Federal Courts of Appeals have upheld some form of a supplemental jury charge.").

While not banned, South Carolina law requires that the Allen "dynamite" charge be handled with "extreme care." Taylor, 427 S.C. at 214, 829 S.E.2d at 727. The charge in the present case was not handled with extreme care. The charge in the present case differs substantially from the ABA standard.

The American Bar Association's proposed standard 15-5.4 dealing with the length of deliberations; deadlocked jury provides:

> (a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:
>
> > (1) that in order to return a verdict, each juror must agree thereto;
> >
> > (2) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
> >
> > (3) that each juror must decide the case for himself or herself but only after an impartial consideration of the evidence with the other jurors;
> >
> > (4) that in the course of deliberations, a juror should not hesitate to reexamine his or her own views and change an opinion if the juror is convinced it is erroneous; and

> (5) that no juror should surrender his or her honest belief as to the weight or effect of the evidence solely because of the opinion of the other jurors, or for the mere purpose of returning a verdict.
>
> (b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in section (a). The court should not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

America Bar Association Criminal Justice Standards for Trial by Jury, Standard 15-5.4, available at https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_jurytrial_blk/#5.4 (last visited 7/8/2022).

Section (a) of the proposed standard provides an instruction to be given **prior** to the start of deliberations. The instruction given to the jury in this case **prior** to deliberations is not challenged. Section (b) of the proposed standard provides an instruction to be given **if it appears to the court that the jury has been unable to agree.** If it appears that the jury has been unable to agree, the court may require continued deliberations or give a supplemental instruction as provided in section (a). The jury in the present case did not indicate on the record that they were unable to agree. The record in the present case fails to reflect that the jury had sufficient time to deliberate. The Allen charge given in the present case was given prematurely. Additionally, the charge given differs substantially from the instruction provided in section (a) of the proposed standard.

Respondent argues that, "In the absence of any South Carolina case contradicting or rejecting this standard, it strains credibility to suggest that a South Carolina criminal defense attorney would be acting *below the prevailing professional norms* in not objecting to an Allen-type charge prior to a jury announcing it is deadlocked when the ABA standard permits a similar charge *prior to deliberations.*" (BOR p. 14). The Allen charge in the present case was given during the course of deliberations rather than during the course of the standard jury instructions

prior to the start of deliberations as provided in section (a) of the ABA standard. The supplemental instruction of section (b) of the ABA standard is only permitted **if the jury is unable to agree**, which is not shown on this record. The timing of the Allen charge in the present case rendered it coercive. The jury had only deliberated for a short time and the record fails to reflect that the jury was deadlocked or having difficulty. The jury should have been given more time to continue and deliberate before the judge gave the "dynamite" Allen charge.

In People v. Sullivan, 392 Mich. 324, 220 N.W.2d 441 (1974) the Michigan Supreme Court renounced the use of the Allen charge and adopted the ABA standard jury instruction 5.4[2] for use as supplemental instructions to deadlocked juries. In People v. Hardin, 421 Mich. 296, 313, 365 N.W.2d 101, 108–09 (1984), the Michigan Supreme Court recognized that even the ABA instruction was somewhat coercive writing:

> Indeed, in People v. Goldsmith, 411 Mich. 555, 309 N.W.2d 182 (1981) (per curiam), this Court impliedly recognized that even ABA instruction 5.4 was

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2 As noted in the footnotes in People v. Hardin, 421 Mich. 296, 313, 365 N.W.2d 101, (1984), at the time ABA standard jury instruction 5.4 provided:

Length of deliberations; deadlocked jury.
(a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:
(i) that in order to return a verdict, each juror must agree thereto;
(ii) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
(iii) that each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;
(iv) that in the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and
(v) that no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.
(b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in subsection (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.
(c) The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement." American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Trial by Jury (Approved Draft, 1968), § 5.4.

> somewhat coercive. We issued the opinion in People v. Goldsmith to make it clear that a proper Sullivan instruction may be given as part of the main charge to the jury. We asserted that the effect of delivering the ABA charge prior to deliberation differed from its effect when given in a deadlocked situation. "When given during the original instructions, the ABA charge's *coercive impact* upon the jury is greatly diminished." Id., p. 559, 309 N.W.2d 182 (emphasis supplied).

The coercive impact of the charge is diminished when it is given during the course of the standard jury instructions **prior** to the start of deliberations. The coercive impact remains when the charge is given during the course of deliberations, as in the present case. The coercive impact was heightened in the present case by the fact that the jury had not indicated that they had completed their deliberations or that they were deadlocked or were having difficulty. Additionally, the charge given in the present case differs from the ABA jury instruction 5.4 discussed in Hardin.

Federal courts recognize the danger of giving an Allen charge during the course of deliberations. In United States v. Blandin, 784 F.2d 1048, 1050 (10th Cir. 1986)(emphasis added) the Tenth Circuit Court of Appeals wrote:

> We have approved the Allen instruction as permissible in the Tenth Circuit, but urge caution in its use. United States v. Brunetti, 615 F.2d 899 (10th Cir.1980); United States v. Dyba, 554 F.2d 417 (10th Cir.), cert. den. 434 U.S. 830, 98 S.Ct. 111, 54 L.Ed.2d 89 (1977). If the Allen instruction is given at all, it should be incorporated into the body of the court's original instructions to the jury. **It should not be given during the course of deliberations.** Munroe v. United States, 424 F.2d 243 (10th Cir.1970); United States v. Wynn, 415 F.2d 135 (10th Cir.1969), cert. den. 397 U.S. 994, 90 S.Ct. 1133, 25 L.Ed.2d 402 (1970); United States v. Winn, 411 F.2d 415 (10th Cir.) cert. den. 396 U.S. 919, 90 S.Ct. 245, 24 L.Ed.2d 198 (1969). Caution should be used to ensure the Allen instruction is not coercive.

While South Carolina law does not prohibit the Allen charge from being given during the course of deliberations as the Tenth Circuit does, South Carolina law prohibits the use of a coercive Allen instruction. The instruction in the present case was coercive because it was premature and not clearly warranted. Trial counsel was ineffective in failing to object to the charge.

In United States v. Contreras, 463 F.2d 773 (9th Cir. 1972), the Ninth Circuit Court of Appeals reversed and remanded because the Allen charge, given during the course of deliberations, was premature, was coercive and was not clearly warranted. In Contreras the Ninth Circuit wrote:

> The jury received the case on a Friday afternoon, and deliberated for forty minutes without reaching a verdict. It reconvened at 8:45 on Monday morning, and deliberated until 3:45 p. m., when it requested and was given further instructions on the definitions of evidence and conspiracy. On the trial judge's inquiry, the jury foreman disclosed that the panel had not reached a verdict on any count of the indictment. *Sua sponte,* the judge then gave the jury a modified version of the instruction approved in Allen v. United States, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896). The jury retired, and thirty-five minutes later returned with the guilty verdict.
>
> Within the circumstances of this case, the Allen charge was premature. We have a profound feeling that it was coercive upon the jury. The Allen instruction "certainly should be given only when it is apparent to the district judge from the jury's conduct or the length of its deliberations that it is clearly warranted." Sullivan v. United States, 414 F.2d 714, 716 (9th Cir. 1969). Here, although the jury had deliberated for nearly eight hours, there was no indication that it was deadlocked. Compare Sullivan, supra, and Dearinger v. United States, 378 F.2d 346 (9th Cir. 1967). In seeking clarification of the judge's instructions, the jury did not indicate that it was having trouble reaching a unanimous verdict.

463 F.2d at 774. As in Contreras, the Allen charge in the present case was premature, was coercive, and was not clearly warranted.

In United States v. Beattie, 613 F.2d 762, 765 (9th Cir. 1980), the Ninth Circuit Court of Appeals distinguished Contreras finding the charge was not coercive because, "First, the charge given by the trial judge in this case contained all of the elements of the charge initially sanctioned by the Supreme Court in Allen." The charge in the present case differs substantially from the quoted portion from Allen in footnote #1 of the Beattie opinion.

Next the Ninth Circuit in Beattie distinguished Contreras writing:

> Second, the period of deliberation following the Allen Charge was sufficiently long to permit jury members to reach a reasoned decision, based upon their individual perception of the evidence and the law. Here, no suspicion of coercion was raised by an immediate post-charge guilty verdict. We have considered the length of

> deliberation following an Allen charge as a significant factor in detecting coercion, United States v. Moore, supra, 429 F.2d at 1307, as have other circuits, E. g., United States v. Robinson, 560 F.2d 507, 517-18 (2d Cir. 1977) (en banc), Cert. denied, 435 U.S. 905, 98 S.Ct. 1451, 55 L.Ed.2d 496 (1978); United States v. DeStefano, 476 F.2d 324, 337 (7th Cir. 1973); United States v. Pope, 415 F.2d 685, 690-91 (8th Cir. 1969), Cert. denied, 397 U.S. 950, 90 S.Ct. 973, 25 L.Ed.2d 132 (1970). While the time elapsed between charge and verdict is significant, it is not dispositive of the issue. It is but one of the total circumstances to be considered. The jury in this case, however, deliberated for three and one-half hours after the Allen charge before reaching a guilty verdict. By contrast, the jury in Contreras, where coercion was found, took only 35 minutes to find the defendant guilty after receiving its Allen charge.

Beattie, 613 F.2d at 765–66. The record does not reflect what time the Allen charge was given in the present case. The jury restarted deliberations at 9:30 AM. During these deliberations the jury was re-charged on the law of burglary first degree. ((App. pp. 180-184). After the judge gave the Allen charge lunch was provided and the jury returned a verdict at 2:43 PM. (App. p. 192, lines 2-13). This time frame is another factor to consider in determining that the charge was coercive.

The Ninth Circuit finally distinguished Contreras writing:

> Third, we cannot say that the total time of jury deliberation, approximately twelve hours, was so disproportionate to the task before the jury as to raise an inference that the Allen charge coercively produced the result. The time needed to reach a verdict is "best left to a trial judge," United States v. Goldstein, 479 F.2d 1061, 1069 (2d Cir.), Cert. denied, 414 U.S. 873, 94 S.Ct. 151, 38 L.Ed.2d 113 (1973), and he apparently found it to be adequate.

Beattie, 613 F.2d at 766. The jury had only been deliberating for a short amount of time in the present case before the judge gave the "dynamite" Allen charge. The present case is factually distinct from Beattie. This Court should find that, under the circumstances of the case, the Allen charge was coercive.

The Allen charge in the present case was unconstitutionally coercive because it was given prematurely, prior to the jury indicating they were deadlocked or having difficulty and prior to lengthy deliberations. The timing of the charge rendered it coercive. Trial counsel was ineffective

in failing to object to the premature Allen charge. There is a reasonable probability that if trial counsel had objected to the Allen charge and the jury had been allowed to continue to deliberate without the unconstitutionally coercive charge, the outcome of the proceedings would have been different.

CONCLUSION

Based on the above argument this Court should reverse the finding of the PCR judge, grant relief and remand for a new trial.

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ATTORNEY FOR PETITIONER

This 8th day of July, 2022.