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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Kershaw County
Honorable G. Thomas Cooper, Circuit Court Judge

Opinion No. 2023-UP-295 (S.C. Ct. App. Filed August 16, 2023)

Lower Court Case No. 2016-CP-28-00963

MITCHELL LOGAN HINSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2018-001643

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on November 3, 2023.

QUESTION PRESENTED

1. Did the Court of Appeals err in affirming the PCR judge's finding that trial counsel was not ineffective for failing to object to the Allen[2] charge before the jury indicated that it was deadlocked?

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[2] Allen v. United States, 164 U.S. 492, 17S.Ct.154, 41 L.Ed.528 (1896).

STATEMENT OF THE CASE

In March of 2011, the Kershaw County Grand Jury indicted Petitioner, Mitchell Logan Hinson, for burglary first degree, indictment #2011-GS-28-0220. On June 27, 2011, Petitioner proceeded to jury trial before the Honorable L. Casey Manning. C.J. "Neil" Riley represented Petitioner at trial. Ronald W. Moak prosecuted the case. The jury returned a verdict of guilty and Judge Manning sentenced Petitioner to fifteen (15) years. On July 8, 2011, Petitioner filed a motion for a new trial. (App. p. 205). On November 3, 2015, while the motion for new trial was still pending, Petitioner filed an application for post-conviction relief [PCR]. The application was dismissed without prejudice because the motion for a new trial was still pending. In an order signed March 24, 2016, filed April 4, 2016, the trial judge denied the motion for a new trial.

On November 4, 2016, Petitioner filed a second PCR application. Petitioner filed an amended application on May 24, 2017. The State filed a return on June 23, 2017. On July 19, 2017, an evidentiary hearing was held before the Honorable G. Thomas Cooper, Jr. Kristy Goldberg represented Petitioner at the PCR hearing. Jessica Kinard represented the State. In a written order filed April 12, 2018, Judge Cooper denied relief and dismissed the application. A timely motion to alter or amend was filed April 24, 2018, and then denied on September 5, 2018. A timely notice of intent to appeal was served on September 10, 2018. The petition for writ of certiorari was filed on April 26, 2019. The State filed a return on September 9, 2019. On September 24, 2019, the South Carolina Supreme Court, pursuant to Rule 243(l), transferred the case to the South Carolina Court of Appeals. On December 10, 2021, the South Carolina Court of Appeals granted the petition for writ of certiorari as to issues 3 and 4.

On April 13, 2023, a three-judge panel of the South Carolina Court of Appeals heard

arguments in the case. On August 16, 2023, the Court of Appeals affirmed the finding by the PCR judge that trial counsel was not ineffective for failing to object when the trial court gave an Allen charge before the jury indicated it was deadlocked. The Court of Appeals found the PCR judge erred in in finding that Petitioner willingly waived his right to a direct appeal. Addressing the belated appeal issue the Court of Appeals found that the trial judge did not err in denying the motion for new trial without a hearing based on a juror misconduct. Hinson v. State, Op. No. 2023-UP-295 (S.C.Ct.App. filed August 16, 2023). A timely petition for rehearing was filed and then denied on November 3, 2023. This petition for writ of certiorari follows.

STANDARD OF REVIEW

The appellate courts defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). The appellate courts réview questions of law de novo, with no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)). Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, (2018).

REASON WHY CERTIORARI SHOULD BE GRANTED

This Court should grant the petition for writ of certiorari to clarify that an Allen "dynamite" charge should only be given when the jury has indicated deadlock.

ARGUMENT

The Court of Appeals erred in affirming the PCR judge's finding that trial counsel was not ineffective for failing to object to the Allen[3] charge before the jury indicated that it was deadlocked.

The jury found Petitioner guilty of burglary in the first degree for going into a school mate's house at night and taking a Play Station Three gaming system console, three games, a game controller and a watch. The items were all returned. (App. p. 67, lines 15-17). Petitioner was seventeen years old at the time of trial. (App. p. 308, lines 18-19). The jury began deliberating 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,

[3] Allen v. United States, 164 U.S. 492, 17S.Ct.154, 41 L.Ed.528 (1896).

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 should have objected to the Allen charge.

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[4]—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). 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 room. The record does not reflect that the jury indicated they were deadlocked or having difficulty.

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

[4] 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).")

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).

In the amended application for post-conviction relief Petitioner alleged, "Ineffective assistance of counsel for failing to object to the Court's Allen charge." (App. p. 219). 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). Trial counsel testified, "And we may have discussed it in chambers. In fact, he says that: I have discussed this with the lawyers in chambers. I didn't object to it, no. Perhaps I should have." (App. p. 268, line 24 – p. 269, lines 1-2). 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). Trial counsel testified there was no particular reason he did not object to the Allen charge, and indicated he believed it was within the judge's discretion. (App. p. 293, line 21 – p. 294, lines 1-3). 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).

At the close of the PCR hearing PCR counsel argued, "In researching Allen charges in preparation for this, I couldn't find any case law on this because all says when a jury says they're deadlocked, then you do this. I don't see any law that says what happens when they're not, and that's because a judge should not issue an Allen charge if the jury does not say they're deadlocked because that would be, per se, coercive." (App. p. 309, lines 15-22).

In the order of dismissal the PCR judge wrote:

> Despite the apparent propriety of the Allen charge itself, Applicant argues the instruction was nonetheless impermissible because the jury did not state on the record that it was deadlocked or otherwise unable to reach a verdict. However, this argument is without merit, as there is not such requirement before the trial court can give an Allen instruction. See Darr, 262 S.C. at 587, 206 S.E.2d at 870 ("It is the duty of the trial judge to urge the jury to agree upon a verdict provided he does not coerce them."); Ayers, 284 S.C. at 269, 325 S.E.2d at 581 ('The trial judge has a duty to urge the jury to agree on a verdict, so long as his not coercive."). Therefore, this Court finds this allegation must be denied and dismissed with prejudice.

(App. p. 340). The PCR judge erred.

"An Allen charge is 'an instruction advising **deadlocked** jurors to have deference to each other's views, that they should listen, with a disposition to be convinced, to each other's argument; deriving its name from the case of Allen v. United States, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896).' *Black's Law Dictionary,* 74 (6th ed.1990)." State v. Lee-Grigg, 374 S.C. 388, 418, 649 S.E.2d 41, 57, fn #1 (Ct. App. 2007) (emphasis added). The jurors in the present case, however, never advised the judge that they were deadlocked. The jury never advised the judge that they had completed their deliberations.

In Workman v. State, 412 S.C. 128, 130–31, 771 S.E.2d 636, 638 (2015), the South Carolina Supreme Court found that trial counsel was ineffective in failing to object to an unconstitutionally coercive Allen and wrote:

> Whether an Allen charge is unconstitutionally coercive must be judged in its "context and under all the circumstances." Tucker v. Catoe, 346 S.C. 483, 490–91, 552 S.E.2d 712, 716 (2001). The four factors adopted by this Court in Tucker to determine whether an Allen charge is unconstitutionally coercive are:
>
> (1) Does the charge speak specifically to the minority juror(s)?
> (2) Does the charge include any language such as "You have got to reach a decision in this case"?
> (3) Is there an inquiry into the jury's numerical division, which is generally coercive?
> (4) Does the time between when the charge was given, and when the jury returned a verdict, demonstrate coercion?

While the Court in Workman found the specific language used by the trial judge coercive, using the framework of analysis from Workman and Tucker, and judging the context and circumstances of the present case, the Allen charge given, without an indication that the jury completed deliberation or was deadlocked, was coercive. The Allen charge in the present case was coercive, not because the charge spoke specifically to the minority or inquired into the jury's numerical division. Instead, the charge was coercive because it urged the jury to hurry and reach a verdict before any indication from the jury that deliberations were complete and the jury was deadlocked.

The PCR judge's reliance on State v. Darr, 262 S.C. 585, 206 S.E.2d 870, (1974), in the order of dismissal is misplaced. In Darr the trial judge simply instructed the jury upon the importance of reaching a verdict and then, based on a question from a juror, re-charged the law on self-defense. The instruction was not referred to in the opinion as an Allen charge. On direct appeal Darr challenged the judge's instruction on the importance of reaching a verdict. The Court wrote:

> The case was submitted to the jury at 3:10 p.m. on September 13. At 5:42 p.m. the trial judge recalled the jury, which had not yet reached a verdict, and instructed it upon the importance of reaching a verdict. In response to a question from a juror, he charged further upon the law of self-defense. The jury retired, but defense counsel requested its immediate recall and a further clarification by the trial judge of his instructions as to the law of self-defense, which request was granted. Following this the jury retired again at 5:51 p.m. and returned a verdict of guilty at 6:23 p.m.
>
> The appellant first contends that His Honor erred in urging the jury to reach an agreement. There is no merit in the contention. It is the duty of the trial judge to urge the jury to agree upon a verdict provided he does not coerce them. See numerous cases collected in West's South Carolina Digest, Criminal Law, 865. We find nothing whatever in the charge of the trial judge which was in any manner coercive of the jury.

State v. Darr, 262 S.C. 585, 587, 206 S.E.2d 870, 870 (1974). The simple instruction to the jury in Darr, on the importance of reaching a verdict, is distinguished from the long full "dynamite" Allen charge given in the present case. The instruction in Darr was not challenged on the basis that the jury had not indicated it was deadlocked. Additionally, in Darr there was an intervening re-charge on the law of self-defense between the instruction on the importance of reaching a verdict and the actual verdict. In the present case the jury reached a verdict shortly after the judge gave the Allen charge.

The PCR judge's reliance on State v. Ayers, 284 S.C. 266, 325 S.E.2d 579 (Ct.App. 1985), is also misplaced because in Ayers there was a clear indication from the jury that they were deadlocked. The jury in the present case did not indicate that they were deadlocked. The jury in the present case did not indicate they had completed their deliberations.

In the motion to alter or amend judgment PCR counsel wrote:

> The order of the Court spends several pages defending the propriety of an Allen charge in general, which has not been contested by the Applicant in this matter. Rather, the Applicant argues the Court cannot and should not provide an Allen charge to the jury when the jury had not yet indicated that it is deadlocked. The Applicant contends that trial counsel should have objected to the use of an Allen charge under these circumstances. The Applicant argues that an Allen charge given to a still-deliberating jury is coercive in nature as it may cause an individual

> abandon their own opinion and bend to the will of the group or rush to judgement. Due to the fact that the jury reached a verdict very shortly after the Allen charge was given there is a reasonable likelihood that the charge affected the jury's deliberations. (*See* trial transcript pages 185-193)

(App. pp. 345-346).

A non-coercive Allen charge is proper when the jury indicates they have completed their deliberations and are unable to reach a verdict. Without the predicate indications from the jury that they are finished deliberating and are deadlocked, the "dynamite" Allen charge becomes coercive. Trial counsel was ineffective in failing to object to the Allen charge when the jury had not indicated that they were deadlocked or had even completed deliberations.

In State v. Taylor, 427 S.C. 208, 214, 829 S.E.2d 723, 726–27 (Ct. App. 2019), this Court 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." As this Court noted in Taylor, 427 S.C. at 214, 829 S.E.2d at 727:

> Although labelled the "dynamite" charge because of its proven ability to "blast a verdict out of a jury otherwise unable to agree," United States v. Bailey, 468 F.2d 652, 666 (5th Cir. 1972), the 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. Like dynamite, the charge must be handled with extreme care.

In State v. Rampey, 438 S.C. 519, 524–25, 885 S.E.2d 366, 369 (2022), the South Carolina Supreme Court again noted that the dynamite Allen charge must be handled with extreme care writing:

> However, an Allen charge, due to its potential for coercion, must be viewed with a more heightened scrutiny than a general jury charge. See State v. Taylor, 427 S.C. 208, 214, 829 S.E.2d 723, 727 (Ct. App. 2019) ("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."). In United States v. Bailey, 468 F.2d 652, 666 (5th Cir. 1972), the federal court labeled it a "dynamite" charge because of its proven ability to "blast a verdict out of a jury otherwise unable to agree." And our court of appeals, citing to Bailey, has noted that "[l]ike dynamite, the charge must be handled with extreme care." Taylor, 427 S.C. at 214, 829 S.E.2d at 727. We thus scrutinize this charge with increased care and concern compared to our analysis of a general charge.

The Allen "dynamite" charge in the present case was not handled with extreme care. The judge gave the "dynamite" charge before the jury indicated they had completed their deliberations. The judge gave the "dynamite" charge before the jury indicated that they were deadlocked. The premature instruction told the jury that they should hurry and decide the case.

In Taylor the judge gave the Allen charge **after** the jury deliberated for seven hours and twenty minutes and then informed the judge that they were at an impasse. This Court found that the failure tell the jurors they should not surrender their conscientiously held beliefs simply for the sake of reaching a verdict in addition to the overemphasis of the cost and expense of a retrial rendered the Allen charge unconstitutionally coercive. In Rampey the judge gave the Allen charge **after** the jury informed the judge that they were deadlocked. The Court found that the trial judge's overemphasis of the resources expended and the need for a verdict, combined with the absence of the critical cautionary language not to compromise their firmly-held beliefs, despite being requested by defense counsel, rendered the Allen charge unconstitutionally coercive.

In the present case the judge gave the Allen charge **before** the jury had completed deliberations and informed the judge they were deadlocked. Unlike Taylor and Rampey, the Allen charge in the present case included cautionary language that a juror should not give up his or her opinion. (App. p. 186, lines 6-13). Unlike Taylor and Rampey, the Allen charge in the present did not overemphasize the cost of a retrial. Although disfavored, See United States v. Hylton, 349 F.3d 781, 788 (4th Cir. 2003), the money involved with the trial of the case was only mentioned once in this Allen charge. The language of the Allen charge in the present case is not what rendered the charge unconstitutionally coercive as in Taylor and Rampey. Instead, the Allen charge in the present case was rendered unconstitutionally coercive because it urged the jurors to hurry and make a decision before they had completed their deliberations or indicated deadlock.

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.

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[5] 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 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

[5] 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.

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.

In affirming the PCR court, the Court of Appeals wrote, "Hinson failed to meet his burden of proving trial counsel's failure to object to the charge was unreasonable under the prevailing professional norms at the time of trial. See Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (holding a reviewing court 'will uphold [the factual findings of the PCR court] if there is any evidence of probative value to support them'). . . " Hinson v. State, No. 2023-UP-295 (S.C. Ct. App. August 16, 2023). The determination of whether counsel's failure to object to the charge was unreasonable depends on a determination that the charge was unconstitutionally coercive. The determination of whether an Allen charge is unconstitutionally coercive is a conclusion of law, not a finding of fact. In Smalls v. State, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839–40 (2018) (n. 2 omitted), the South Carolina Supreme Court wrote:

> Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). We review questions of law de novo, with no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)).

The PCR court erroneously found that the Allen charge was not coercive because the judge found there was no requirement that a jury be deadlocked or unable to reach a verdict before the judge can give an Allen charge, a conclusion of law. This Court should review that question of law de novo. Under de novo review this Court should find that 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.

In affirming the PCR court, the Court of Appeals failed to address the fact that the judge gave the Allen charge without the jury indicating that they were deadlocked or having difficulty and without the jury deliberating for a lengthy amount of time, instead writing:

> We hold the PCR court did not err in finding trial counsel was not ineffective for failing to object to the trial court giving an Allen charge before the jury indicated it was deadlocked. Hinson failed to meet his burden of proving trial' counsel's failure to object to the charge was unreasonable under the prevailing professional norms at the time of trial. See Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (holding a reviewing court "will uphold [the factual findings of the PCR court] if there is any evidence of probative value to support them"); Speaks v. State, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008) ("In order to establish a claim for ineffective assistance of counsel, the applicant must show that: (1) counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) counsel's deficient performance prejudiced the applicant's case."); Strickland v. Washington, 466 U.S. 668, 700 (1984) ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim."); Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) ("Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" (quoting Strickland, 466 U.S. at 690)); Chappell v. State, 429 S.C. 68, 74-75, 837 S.E.2d 496, 499 (Ct. App. 2019) ("To prove trial counsel's performance was deficient, a[ ] [PCR] applicant must show [trial] counsel's representation fell below an objective standard of reasonableness." (quoting Smalls v. State, 422 S.C. 174, 181, 810 S.E.2d 836, 840 (2018))); id. at 75, 837 S.E.2d at 499 ("[T]his court will find trial counsel's failure to object was deficient performance only if it was unreasonable under the prevailing professional norms at the time of trial."); Speaks, 377 S.C. at 399, 660 S.E.2d at 514 ("In [PCR] proceedings, the burden of proof is on the applicant to prove the allegations in his application."); Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993) (stating the appellate courts have "never required an attorney to anticipate or discover changes in the law"); State v. Taylor, 427 S.C. 208, 214, 829 S.E.2d 723, 727 (Ct. App. 2019) ("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."); Tucker v. Catoe, 346 S.C. 483, 491, 552 S.E.2d 712, 716 (2001) ("Whether an Allen charge is unconstitutionally coercive must be judged 'in its context and under all the circumstances.'" (quoting Lowenfield v. Phelps, 484 U.S. 231, 237 (1988))); State v. Darr, 262 S.C. 585, 586-87, 206 S.E.2d 870, 870 (1974) (affirming a trial court's recall of a jury that had not yet reached a verdict to instruct it on the importance of reaching a verdict); id. at 587, 206 S.E.2d at 870 ("It is the duty of the trial judge to urge the jury to agree upon a verdict provided he does not coerce them.").

The Court of Appeals erred in refusing to find that the Allen charge given in the present case was unconstitutionally coercive because it was given by the trial judge before the jury announced that they were deadlocked, at an impasse or unable to agree or having difficulty reaching a decision. The timing of the charge rendered it coercive. Trial counsel was ineffective in failing to object to the premature Allen charge. As discussed above with regard to the PCR judge's reliance on State v. Darr, 262 S.C. 585, 206 S.E.2d 870, (1974), in the order of dismissal, the Court of Appeals' reliance on Darr is also misplaced. The simple instruction to the jury in Darr, on the importance of reaching a verdict, is distinguished from the long full "dynamite" Allen charge given in the present case. As the Court wrote in Rampey when discussing the second Tucker factor, "As noted by our court of appeals in Taylor: 'There is a glaring difference between the trial court's obligation to tell jurors they have a duty to attempt to reach a unanimous verdict and telling them they 'should come to a decision.' ' 427 S.C. at 215, 829 S.E.2d at 727." Rampey, 438 S.C. at 526, 885 S.E.2d at 369 (2022). The premature Allen charge did not simply tell the jurors they have a duty to attempt to reach a unanimous verdict. By giving the Allen charge prematurely, the judge implied that the jurors should hurry and come to a decision. Additionally, the instruction in Darr was not challenged on the basis that the jury had not indicated it was deadlocked. Finally, in Darr there was an intervening re-charge on the law of self-defense between the instruction on the importance of reaching a verdict and the actual verdict. In the present case the jury reached a verdict shortly after the judge gave the Allen charge.

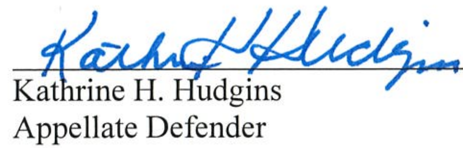
The PCR judge erred as a matter of law in finding that the Allen charge was not coercive. Trial counsel was ineffective in failing to object to the unconstitutionally coercive Allen charge. Petitioner met his burden of establishing deficient performance. There is a reasonable

probability that, but for counsel's deficient performance, the result of the proceeding would have been different. The prejudice prong is supported by the fact that the jury reached a verdict shortly after the judge improperly gave the Allen charge, a factor discussed in Workman and Tucker in deciding if the language of the charge is coercive. Petitioner was prejudiced by trial counsel's failure to object to the Allen charge when the jury had not yet indicated that they were deadlocked or had completed deliberations. The prejudicial error requires reversal and a remand for a new trial.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certioari to allow further briefing on the issue.

Respectfully Submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of December, 2023.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED
Dec 04 2023
SC Court of Appeals

Certiorari to the Court of Appeals
Appeal from Kershaw County
Honorable G. Thomas Cooper, Circuit Court Judge

Opinion No. 2023-UP-295 (S.C. Ct. App. Filed August 16, 2023)

Lower Court Case No. 2016-CP-28-00963

MITCHELL LOGAN HINSON,

PETITIONER,

V.

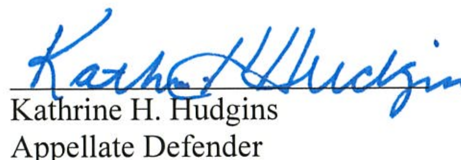
STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2018-001643

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the petition for writ of certiorari to the Court of Appeals and appendix in the above-referenced case has been served upon Danielle E Dixon, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and the South Carolina Court of Appeals; and on Mitchell Logan Hinson, #346676, at 2740 Dawson Drive, Chester, SC 29706, this 4th day of December, 2023.



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