STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Kershaw County
Casey Manning, Trial Judge
G. Thomas Cooper, Jr., PCR Judge

RECEIVED

Jan 03 2024

S.C. SUPREME COURT

MITCHELL LOGAN HINSON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

APPELLATE CASE NO. 2023-001862

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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QUESTION PRESENTED

Petitioner's Question

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 charge before the jury indicated that it was deadlocked?

Respondent's Counterstatement of Question

In this post-conviction relief action, did the Court of Appeals properly find Petitioner did not prove counsel's failure to object to the modified-Allen charge was unreasonable under the prevailing professional norms at the time of trial when (1) no standard requires the jury to announce it is deadlocked before a Court can give a modified-Allen charge and (2) the language of this charge was not unconstitutionally coercive.

STATEMENT OF THE CASE

Petitioner Mitchell Logan Hinson is presently confined in the South Carolina Department of Corrections serving a fifteen-year sentence. In January of 2011, he was arrested after a home video surveillance captured him entering the home of his schoolmate and removing several items. In March of 2011, the Kershaw County Grand Jury indicted Petitioner for first-degree burglary. On June 27-29, 2011, Petitioner proceeded to a jury trial before the Honorable L. Casey Manning. Public Defender Cornelius J. Riley represented Petitioner and Assistant Solicitor Ron Moak prosecuted the case. The jury convicted Petitioner as indicted, and Petitioner was sentenced on June 29, 2011.

On July 8, 2011, trial counsel filed a motion to reconsider the sentence or, in the alternative, a motion for a new trial. On November 3, 2015, Petitioner filed an application for post-conviction relief (PCR). Because his post-trial motions were still pending, the State moved to summarily dismiss his PCR application without prejudice. On January 12, 2016, the Honorable Alison Renee Lee dismissed Petitioner's first PCR application without prejudice.

On April 4, 2016, the trial court denied Petitioner's post-trial motions. Petitioner did not appeal. Petitioner commenced this current PCR action on November 4, 2016. On July 19, 2017, an evidentiary hearing was held before the Honorable G. Thomas Cooper. Kristy Goldberg represented Petitioner and Assistant Attorney General Jessica E. Kinard represented the State. On April 12, 2018, Judge Cooper issued an order denying relief and dismissing the application. Petitioner filed a motion to alter or amend, which was denied on September 5, 2018.

Petitioner filed a notice of intent to appeal on September 10, 2018. On April 26, 2019, he filed a petition for writ of certiorari. The South Carolina Supreme Court transferred this case to the South Carolina Court of Appeals on September 24, 2019, pursuant to Rule 243(l), SCACR.

On December 10, 2021, the South Carolina Court of Appeals granted the petition for writ of certiorari as to issues three and four.[1]

In a motion dated April 5, 2022, Respondent conceded the PCR court erred in finding Petitioner did not knowingly and intelligently waive his right to a direct appeal and moved to hold the time for filing Respondent's brief in abeyance until Petitioner filed his White v. State brief. On April 19, 2022, this Court issued an order denying the abeyance motion and directing the parties to file briefs pursuant to White v. State. Thereafter, on April 13, 2023, the Court of Appeals heard oral argument. On August 16, 2023, the Court of Appeals affirmed the PCR court's finding that Petitioner did not prove counsel was ineffective for failing to object when the trial court gave a modified-Allen charge. The Court of Appeals further found the PCR court erred in denying Petitioner a belated direct appeal and affirmed the direct appeal issue. Petitioner filed a timely petition for rehearing, which was denied. This petition for writ of certiorari followed.

[1] In issue four, Petitioner alleged the PCR court erred in not granting a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

STANDARD OF REVIEW

The standard of review for post-conviction relief depends on the specific issue before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the PCR court's factual findings and will uphold them if any probative evidence in the record supports them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. However, pure questions of law will be reviewed *de novo* without deference to the PCR court. Id. Appellate courts will reverse the decision of the PCR court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

Reason Certiorari Should be Denied.

This Court should deny certiorari because Petitioner is seeking to use this post-conviction relief action as a vehicle to make a substantive change in criminal law.

ARGUMENTS

The Court of Appeals properly found Petitioner failed to prove counsel's failure to object to the modified-Allen charge was unreasonable under the prevailing professional norms at the time of trial when (1) no standard requires the jury to announce it is deadlocked before a court can give a modified-Allen charge and (2) the language of this charge was not unconstitutionally coercive.

Petitioner does not challenge the substance of the trial court's charge; rather, Petitioner argues the trial court improperly gave the charge because there was no indication the jury was deadlocked. However, Petitioner does not cite any South Carolina case or standard that requires a jury to announce it is deadlocked before a trial court can give a modified-Allen charge. In asking this Court to "clarify" that a modified-Allen charge should only be given when the jury has announced it is deadlocked, Petitioner asks this Court to use a post-conviction relief action as a vehicle to modify existing substantive criminal law. However, as this Court has noted,

> Fundamentally, a collateral review proceeding is ill-suited for announcing a new rule of substantive law pertaining to an underlying trial; appellate courts are to do so only in the rarest of circumstances. This is especially true in a retrospective PCR analysis under Strickland, which seeks to determine whether counsel was ineffective at the time of the alleged error. . . . [W]e do not require attorneys to be clairvoyant in anticipating changes to the law . . . .

Pantovich v. State, 427 S.C. 555, 562-63, 832 S.E.2d 596, 600 (2019). In arguing counsel was ineffective for not objecting to the trial court's *decision* to give a modified-Allen charge, Petitioner asks this Court to hold—for the first time—that a jury *must* affirmatively announce it is deadlocked before the trial court can give a modified-Allen charge. However, because the Strickland standard requires courts to assess the reasonableness of counsel's conduct *at the time of trial*, this Court

should decline to make any clarification that would substantively change the law.[2]

"There is a strong presumption trial counsel provided adequate assistance." Green v. State, 351 S.C. 184, 192, 569 S.E.2d 318, 322 (2002). To prove ineffective assistance of counsel, an applicant must show counsel was deficient, and that deficiency prejudiced the applicant. Strickland v. Washington, 466 U.S. 668, 687 (1984). In other words, "the applicant must show trial counsel's performance fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different." Green, 351 S.C. at 192, 569 S.E.2d at 322. "A reasonable probability is one sufficient to undermine confidence in the trial's outcome." Id.

[2] Much of Petitioner's argument is premised on speculation because the Appendix does not conclusively establish that the jury *never* said it was deadlocked. C.f. Green v. State, 351 S.C. 184, 195, 569 S.E.2d 318, 324 (2002) (noting "mere speculation" was a "fatal flaw" in petitioner's allegation of ineffectiveness based on failure to object to Allen charge). Although the transcript does not clearly indicate the jury said it was deadlocked, evidence in the Appendix suggests the jury may have conveyed it was deadlocked. Prior to giving the charge, the trial court indicated on the record it had held a conference in chambers with the attorneys. (App. 184). Additionally, right before giving the charge, the court stated, "As I indicated to you back in the jury room—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. 184-85). Based on the foregoing—especially the court's statement to the jury—it is reasonable to infer the jury may have conveyed its inability to reach a verdict to the trial court. Unfortunately trial counsel's memory at the PCR hearing, which occurred six years after trial, was somewhat fuzzy. Although he initially testified he did not recall the jury stating it was deadlocked, he later qualified that by testifying:

> 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 surfaced in the jury room reaching a decision.

(App. 267-68, 292). This suggests that prior to reviewing the transcript, trial counsel believed the jury had communicated it was deadlocked.

a. The Court of Appeals properly determined Petitioner 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 when (1) no standard requires a jury to announce it is deadlocked before the trial court can give a modified-Allen charge, and (2) the trial court acted within its discretion in giving the charge.

Petitioner argues trial counsel was deficient for not objecting to the court's decision to give an Allen charge when the jury had not indicated it was deadlocked. However, no standard requires a jury to announce it is deadlocked before a court can give a modified-Allen charge. Further, the trial court acted within its discretion in giving the charge, rendering trial counsel's failure to object to the decision to give the charge reasonable under prevailing professional norms. Thus, the Court of Appeals properly determined Petitioner did not prove counsel's failure to object was unreasonable under the prevailing professional norms at the time of trial.

Critically—especially in the context of a PCR—Petitioner does not cite any South Carolina case squarely on point. To support his proposition that a jury must indicate it is deadlocked before a court can give an Allen-type charge, Petitioner cites a footnote from State v. Lee-Grigg, 374 S.C. 388, 418 n.1, 649 S.E.2d 41, 57 n.1 (Ct. App. 2007), wherein the Court quoted the definition of an Allen charge from Black's Law Dictionary. (App. Br. 8). However, Lee-Grigg did not involve the propriety of an Allen charge and cannot be relied on for creating a standard as to when such charges may be given. In short, Petitioner has not shown the standard in South Carolina requires a jury to announce it is deadlocked before a court can give a modified-Allen charge. Because no standard exists, the Court of Appeals properly found Petitioner did not prove deficiency from counsel's failure to object to the court's decision to give a modified-Allen charge.

Petitioner also cites to Workman v. State, 412 S.C. 128, 771 S.E.2d 636 (2015) to support his proposition that a trial court cannot give a modified-Allen-charge before the jury announces it is deadlocked. Again, Workman did not deal with the issue of whether a jury must announce it is

deadlocked before a court can give a modified-Allen charge. Rather, Workman dealt with whether the *language* of an Allen charge was unconstitutionally coercive. Here, Petitioner does not challenge the actual langue of the modified-Allen charge, making Workman inapposite.[3]

In short, there is simply no legal support for Petitioner's bare assertion that "Without the predicate indications from the jury that they are finished deliberating and are deadlocked, the 'dynamite' Allen charge becomes coercive." (PWC 13). Petitioner has not cited *any* South Carolina case or standard that requires a jury to announce it is deadlocked before a court can give a modified Allen-charge. Thus, assuming *arguendo* the jury did not indicate it was deadlocked, Petitioner did not prove deficiency because he failed to show a standard that requires a jury to announce it is deadlocked before a court can give an Allen-type charge.

Notably, ABA Standard 15- 5.4[4] permits a trial court to give an Allen-type charge *prior to*

[3] In fact, Petitioner concedes, "The language of the Allen charge in the present case is not what rendered the charge unconstitutionally coercive." (PWC 15).

[4] (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

deliberations.[5] Although South Carolina has not adopted this standard, Petitioner has not pointed to any South Carolina case directly contradicting it or otherwise indicating an Allen-type charge may only be given *after* a jury announces it is deadlocked. In the absence of any South Carolina case contradicting or rejecting this ABA 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*.

Here, due to the length of time the jury had been deliberating[6] and the court's duty to "urge the jury to agree upon a verdict provided he does not coerce them," the trial court did not abuse its discretion in giving the charge, making trial counsel's failure to object reasonable under prevailing professional norms. State v. Darr, 262 S.C. 585, 587, 206 S.E.2d 870, 870 (1974); id. at 870-71, 206 S.E.2d at 870 (finding court did not err in "urging the jury to reach an agreement" two hours

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> 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 6/2/2022) (emphasis added).

[5] In addition to being consistent with South Carolina law, the trial court's language was consistent with what is proposed in this ABA standard.

[6] The jury began deliberating sometime after lunch on June 28, 2011, and continued deliberating until the court questioned whether it should order dinner. (App. 160, 175). Thereafter the jury retired for the evening and was instructed to return at 9:30 the next morning. (App. 177-78). Sometime after deliberations resumed the following morning, the court stated, "In the next hour and a half from now if they haven't made a decision, perhaps we should consider the Allen charge." (App. 179-80). The court later recharged the jury on burglary (at the jury's request) and addressed other unrelated matters while the jury continued deliberating. (App. 180-84). Shortly after the court gave the Allen charge, the judge stated, "Let's feed them lunch, and it will probably take them a while to consider all of that." (App. 184-92). This suggests the jury deliberated most of the morning prior to receiving the charge and received the charge before lunch, which presumably occurred sometime between noon and 1:00 p.m. At 2:43 p.m., the jury returned to the courtroom with a verdict. (App. 192).

and thirty-two minutes after the jury began deliberating); State v. Bridges, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982) ("[T]he conduct of a criminal trial is left largely to the sound discretion of the presiding judge and [appellate courts] will not interfere unless it clearly appears that the rights of the complaining party were prejudiced in some way."); 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."); id. at 212, 829 S.E.2d at 726 (noting "the trial court's superior position to observe the courtroom atmosphere, the jury's demeanor, and the tenor and rhythm of the trial"). Because (1) Petitioner has not cited to a standard that requires a jury to announce it is deadlocked before the trial court can give a modified-Allen charge and (2) the trial court acted within its discretion in giving the charge, the Court of Appeals properly found Petitioner did not prove deficiency.

b. Petitioner cannot prove prejudice because he did not appeal the PCR court's ruling that the trial court did not err in the language of the charge, making it law of the case. Further, the charge was not unconstitutionally coercive, and thus no reasonable probability exists that the outcome would have been different if the court had not given the charge.

Petitioner argues merely that the charge was coercive because it was given prior to the jury announcing it was deadlocked.[7] However, the only legitimate way to measure whether the outcome of the trial would have been different without the charge is to analyze whether the charge

[7] Although South Carolina does not appear to have a case on point, at least one jurisdiction has recognized an Allen-type charge is less coercive if given when a jury is not deadlocked. See People v. Hardin, 421 Mich. 296, 313, 365 N.W.2d 101, 109 (1984) ("[T]he effect of delivering the ABA [Standard 15- 5.4[7]] 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.'" (quoting People v. Goldsmith, 309 N.W.2d 182 (Mich. 1981)). Because the charge is less coercive if given before a jury announces it is deadlocked, it follows that no reasonable probability exists that the outcome of Petitioner's trial would have been different had counsel objected to the giving of the charge on the basis the jury had not announced a deadlock. Thus, Petitioner has failed to prove prejudice.

was unconstitutionally coercive. Notably, Petitioner does not argue the language of the charge was unconstitutionally coercive.[8] This is likely because, when viewed as a whole, the charge was not unconstitutionally coercive. Because it was not unconstitutionally coercive, it is not reasonably likely the outcome of trial would have been different without the charge.

"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, 491, 552 S.E.2d 712, 716 (2001) (quoting Lowenfield v. Phelps, 484 U.S. 231 (1988)). "South Carolina approves the use of a modified Allen charge, which must be neutral and even-handed, instruct both the majority and minority to reconsider their views, and cannot be directed at the jurors in the minority." State v. Taylor, 427 S.C. 208, 214, 829 S.E.2d 723, 727 (Ct. App. 2019).

> No set definition of coercion has emerged; instead, we detect its presence by viewing the charge in context and in light of four factors: (1) whether the charge speaks "specifically to minority jurors"; (2) whether the charge includes "you must return a verdict" type language; (3) whether there was an "inquiry into the jury's numerical division," which is generally coercive; and (4) whether the time between when the charge was given and when the jury returned a verdict demonstrates coercion.

Id. at 214-15, 829 S.E.2d at 727 (citing Tucker, 346 S.C. at 492-95, 552 S.E.2d at 178-19). "Like most multi-factor constructs, the Tucker test does not tell us the relative weight each factor carries, nor is the list of factors exclusive." Id. at 215, 829 S.E.2d at 727.

Here, the PCR court found the charge was "even handedly delivered to both the minority and majority jurors, did not convey to the jury that reaching a verdict was mandatory, and constituted a correct statement of the law." (App. 339-40). Petitioner has not challenged this finding, making it law of the case. See Smith v. State, 413 S.C. 194, 196, 775 S.E.2d 696, 697 (2015) (providing an unappealed ruling is the law of the case). Because this finding is law of the

[8] Petitioner concedes the language of the charge was not unconstitutionally coercive. (PWC 15).

case, Petitioner is precluded from demonstrating prejudice.

Further, the PCR court did not err in this finding because the charge was not unconstitutionally coercive. Relative to the first factor set forth in Tucker, the court charged:

> Each juror must decide the case for himself but only after impartial consideration of the evidence by fellow jurors. You should not hesitate to re-examine your own views and change your opinion if you are convinced it is erroneous. Each juror who finds themselves to be in the minority must consider his view in light of the opinions of the majority jurors. Conversely, each juror finding himself in the majority should give equal consideration to the views of the minority.

(App. 190). The charge did not speak specifically to minority jurors but rather addressed minority and majority jurors equally. (App. 190). Likewise, immediately after asking each juror to consider the perspectives of other jurors, the court reminded the jury that "[n]o juror, however, should surrender his 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." (App. 190). Thus, under the first Tucker factor, this charge was not unconstitutionally coercive.

Regarding the second factor, the trial court did not admonish the jury that it must return a verdict. Notably, the court informed the jury, "[I]if you simply cannot reach a verdict, then return to the Courtroom and I will declare this case mistried and discharge you with appreciation for your services." (App. 189). The court also informed the jury it would be better for it to *not* reach a verdict than to reach one that violated any juror's individual consciences and beliefs. (App. 191). Finally, each time the court informed the jury of its duty to deliberate and reach a verdict, it qualified that duty by adding language such as "if you can do so without violating your individual judgments." (App. 185, 188-90). See Green, 351 S.C. at 194, 569 S.E.2d at 323 ("It is not coercion to charge every juror has a right to his own opinion and need not give up the opinion merely to reach a verdict."); Taylor, 427 S.C. at 218, 829 S.E.2d at 729 ("The most troubling thing about the charge here is what it did not say: it did not tell the jurors they should not surrender their

conscientiously held beliefs simply for the sake of reaching a verdict, **an essential message that sometimes saves borderline charges from crossing the line into coercion."** (emphasis added)). Overall, the court did not admonish the jury it must return a verdict, and thus the second Tucker factor does not support a finding that the charge was coercive. Likewise, the court never asked about the numerical division of the jury, and the jury did not volunteer that information. Thus, the third Tucker factor does not support a finding of coerciveness.

Finally, although the record does not indicate what time the court gave the charge, the charge was given before lunch. (App. 191-92). Assuming the jury received lunch sometime between noon and 1:00, it is reasonable to infer the jury heard they charge before noon and no later than 1:00 p.m. Assuming *arguendo* the jury received the charge as late as 1:00 p.m., it would have deliberated for an hour and forty-five minutes before rendering a verdict at 2:43 p.m., which is at least three times as long as the thirty-two minutes the jury in Darr deliberated after being "urged" by the court to reach a verdict. (App. 192). See Darr, 262 S.C. at 586-87, 206 S.E.2d at 870 (finding trial court did not coerce a jury that deliberated for only thirty-two minutes after the court "urged it" to reach a verdict). Overall, the Tucker factors do not support a finding that the charge was unconstitutionally coercive.[9] Thus, Petitioner has not shown a reasonable probability exists that the outcome would have been different without the charge.

[9] Although the trial court briefly mentioned the expense of trial, this brief reference did not render the charge unconstitutionally coercive. See State v. Singleton, 319 S.C. 312, 316, 460 S.E.2d 573, 575-76 (1995) ("It is not coercion when a trial judge instructs the jury that failure to reach a verdict will require a new trial at additional expense . . . ."). Here, the court charged: "If you are unable to reach a verdict, it is possible this case will be tried again, and it is obvious that that means to the State and a Defendant anxiety and effort." (App. 188). Shortly thereafter the court charged, "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. 189). Viewed in the context of the charge as a whole, these brief references did not render the charge unconstitutionally coercive.

CONCLUSION

Based on the foregoing, this Court should deny certiorari.

Respectfully Submitted,

s/Danielle Dixon
Assistant Attorney General

ATTORNEY FOR THE RESPONDENT

This 3rd day of January, 2024.