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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Hon. R. Scott Sprouse, Circuit Court Judge

Common Pleas Case No. 2022-CP-23-05979

Appellate Case No. 2021-001177

JEREMY ALAN WATSON,

v.

Petitioner,

THE STATE,

Respondent.

Petition for *Writ of Certiorari*

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COMES NOW Petitioner Jeremy Alan Watson and would respectfully show the Court as follows.

QUESTIONS PRESENTED

1.Was trial counsel ineffective for failing to object to an improperly worded *Allen* charge?

2. Was trial counsel ineffective for not filing a motion for new trial?

STATEMENT OF THE CASE

I. The Criminal Conviction

In November 2021, Mr. Watson was tried in the Court of General Sessions in Greenville County on two charges: domestic violence second degree as to Deanna Winkler and assault and battery third degree as to Kristina Watson. [App. 50-51].

The trial was brief, with testimony lasting only about four hours. [App. 235]. Rather than being an unprovoked attack when Mr. Watson had returned home, as Ms. Winkler and Ms. Watson had alleged, Mr. Watson raised self-defense, [App. 172-174 ("And [Ms. Watson] just kept getting in my face…. I shut the door, she started kicking the door like she was doing the rest of the house…. [Ms. Watson] went and got her gun….I went to the bedroom and locked the door. And then she come, used her whole body beating against the door to break it in.")].

After four hours and multiple jury questions, the jury indicated that it was deadlocked. [App. 230-234]. Without exception, the trial judge gave the following *Allen* charge:

> THE COURT: All right. Ladies and gentlemen, welcome back to the courtroom.
>
> I have your note. And you've stated that you have been unable to reach, to agree on a verdict on one count, one of the counts in this case. As I instructed you earlier, the verdict of the jury must be unanimous. I will tell you that when a matter is in dispute, it isn't always easy for even two people to agree, so when 12 people must agree, it becomes even more difficult.
>
> In most cases absolute certainty cannot be reached or expected. However, you have a duty to make every reasonable effort to reach a unanimous verdict. In doing this, you should consult with one another, express your own views, and listen to the opinions of your fellow jurors. Tell each other how you feel and why you feel that way. Discuss your differences with open mind.
>
> Although the verdict of the jury must be unanimous, every one of you has a right to your own opinion. The verdict you agree to must be your own verdict, the result of your own convictions, and you should not give up your firmly held beliefs merely to be in agreement with your fellow jurors. The majority should consider the minority's position, and the minority should consider the majority's position. You should carefully consider and respect the opinions of each other and re-evaluate your position for reasonableness, correctness and impartiality. You must lay aside all outside matters and re-examine the questions before you based on the law and the evidence in this case.
>
> If you do not agree on a verdict in this case, I must declare a mistrial. In that case it does not mean that anybody wins. It just means that, at some future time, I will try this case with some other jury sitting where

> you now sit, the same participants will come and the same lawyers will ask basically the same questions and get basically the same answers, and we will go through the whole process again. You were selected in the same manner and from the same source as any future jury will be , and there is no reason for me to suppose that the case will ever be submitted to 12 more intelligent, impartial, conscientious and competent jurors than you 12 or that more or clearer evidence will be produced on one side or the other. I therefore ask you to return to your deliberations with the hope that you can arrive at a verdict within a reasonable time.
>
> Okay. Thank you very much.

[App. 235-37].

After thirty more minutes of deliberation, the jury returned with verdicts. [App. 237]. The jury returned a guilty verdict to the lesser-included offense of domestic violence in the third-degree as to Ms. Winkler and a not guilty verdict to the charge of assault as to Ms. Watson. [App. 238].

Mr. Watson was sentenced to 45 days to serve, along with a permanent restraining order and a firearms ban. [App. 1-6].

No motion for new trial nor notice of appeal was filed in the criminal case.

II. The Petition for Post-Conviction Relief ("PCR").

Mr. Watson timely filed a petition for PCR. As relevant here, he alleged that his trial counsel was ineffective for not objecting to the *Allen* charge and for not filing a motion for new trial. [App. 25].

A. The PCR Evidentiary Hearing

At the evidentiary hearing, trial counsel testified that he did not take exception to the *Allen* charge because it had seemed correct to him. [App. 252]. If he "had thought that there was some basis to object, [he] would have done so." [App. 253].

Although trial counsel was aware that Mr. Watson was not happy with the trial result, including the firearms ban, trial counsel admitted that he did not consult with Mr. Watson at all during the period for post-trial motions / or a notice of appeal. [App. 250, 256].

Mr. Watson testified that if he had been consulted and told that a motion for new trial was possible, he would have directed one to be filed. [App. 280].

B. The Denial of PCR

The Court of Common Pleas, via Judge Sprouse, denied relief. [App. 30-39]. With respect to the failure to take exception to the *Allen* charge, the PCR court determined that the charge was not coercive. [App. 17]. Consequently, no deficient

performance obtained from failing to take exception and, even if deficient performance had been present, no prejudice was shown as any exception would have been overruled on appeal. [App. 17-20].

With respect to the failure to consult about a motion for new trial, the PCR court found no prejudice. In its view, it was legally impossible to request thirteenth-juror review of a criminal conviction, and the failure to take exception to the jury charge would have precluded any relief on that basis, if it had been presented to the trial judge. [App. 11-12].

ARGUMENT

Ineffective assistance requires a two-part showing: (1) "a reasonable probability that, but for counsel's unprofessional errors, [(2)] the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). That test for constitutional prejudice is lower than a preponderance. *See Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) ("[*Strickland* does] not require a showing that counsel's actions more likely than not altered the outcome…" (quotation omitted).

I. Trial Counsel Was Ineffective When He Failed to Object to the Improper *Allen* Charge.

Trial counsel's failure to complain about the *Allen* charge reflected a lack of familiarity with controlling caselaw. Out of concern that the "language could potentially be construed as being coercive," this Court has previously "caution[ed] trial judges against [*Allen* charges] using the following language: 'with the hope that you can arrive at a verdict.'" *State v. Williams*, 386 S.C. 503, 515 n.7 (2010). Yet the trial court's *Allen* charge used that disapproved language. [App. 237 ("I therefore ask you to return to your deliberations with the hope that you can arrive at a verdict within a reasonable time.")]. Had the conscientious trial judge been altered to the problematic language by trial counsel and this Court's clear directive, the judge surely would have corrected it. Yet, trial counsel did not take exception. He should have. Indeed, he readily conceded that if he had been able to articulate any objection, he would have made it; raising an available objection would have comported with his strategy. [App. 253].

The PCR court's finding of no deficient performance appears to impermissibly collapse the issue of the propriety of the charge language with a prejudice analysis—that is, whether the charge was in fact coercive. *See* [App. 20 (noting that it was the

"same" reason why deficient performance and prejudice were not shown: a belief that "the charge, when considered as a whole, was not unduly coercive.")].

A reasonable probability exists that the charge was coercive and contributed to the result in what was—given the lengthy deliberations and mixed verdicts—a very close case as to the lesser-included charge of conviction. As the PCR court noted, [App. 18], this Court evaluates coercion on direct appeal under four considerations:

> (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?

Workman v. State, 412 S.C. 128, 131 (2015) (citation omitted).

Contrary to the PCR court's belief that all four factors pointed to non-coercion, [App. 18], the fourth factor—time—supports potential coercion here. This Court has found that a 1.5-hour period between an *Allen* charge with problematic language and a verdict was "a relatively short period of time" that "weighs in favor of a finding of coercion." *Tucker v. Catoe*, 346 S.C. 483, 494 (2001). Here, of course, only 30

minutes (or less) elapsed. The shorter the deliberation after the *Allen* charge, the stronger the potential that coercion may have been present.

For ineffectiveness, only a reasonable probability of prejudice is required. *Strickland,* 466 U.S. at 694. Prejudice was present here given the closeness of the case.

II. Trial Counsel Was Ineffective When He Failed to File a Motion for New Trial.

"[E]very federal circuit to consider this issue… has relied on settled Supreme Court precedent in determining that the motion for new trial, during the post-trial, pre-appeal period, is a critical stage [at which the defendant is entitled to the effective counsel]." *McAfee v. Thaler*, 630 F.3d 383, 393 (5th Cir. 2011). Consequently, ineffectiveness can be asserted at the motion-for-new trial stage. It was present here.

By statute, "[a]ll the circuit courts of this State shall have power to grant new trials in cases in which there has been a trial by jury for reasons for which new trials have usually been granted in the courts of law of the United States." S.C. Code § 17-23-110. Contrary to the view of the PCR court below, a new trial would have been statutorily authorized, if trial counsel had bothered to have requested one.

First, the trial court would have had discretion to grant a new trial due to the improper *Allen* charge. Although trial counsel did not object, his failure to have done

so was constitutionally deficient performance, as shown above. Mr. Watson ought not be held responsible for his counsel's failings.

Second, and in any event, "courts of law of the United States," S.C. Code § 17-23-110, allow trial judges to have discretion to grant a new trial in the interest of justice even absent an error that could be remedied on direct appeal. Thus, for example, in *United States v. Vicaria*, 12 F.3d 195, 198 (11th Cir. 1994), the Eleventh Circuit affirmed a district court's grant of a new trial predicated upon the district court's later dissatisfaction with the jury instructions, even though the instructions given would not have been reversible on appeal. "The basis for granting a new trial [in federal court] is whether it is required in the interest of justice. That is a broad standard. It is not limited to cases where the district court concludes that its prior ruling, upon which it bases the new trial, was legally erroneous." *Id.* at 198. Similarly, in *Richards v. Gruen*, 214 N.W.2d 309 (Wis. 1974), trial counsel's failure to object to a jury charge did not deprive the trial court of the discretion to grant a new trial, even though the defendant could not complain if the exercise of discretion went against him. *See id.* at 314-15 ("True, the respondent-Gruen cannot insist upon a new trial as a matter of right because of a procedural failure of his own making. It does not follow that a trial court cannot grant a new trial in the interest of justice when it is of the opinion that justice has miscarried or a verdict is returned based upon

erroneous instructions as the law."). Consequently, it was statutorily possible here to have received a new trial on the basis of the problematic *Allen* charge.

Finally, "courts of law of the United States," S.C. Code § 17-23-110, allow trial judges to sit as a thirteenth juror and order a retrial if they are not satisfied with the guilty verdict. It was true prior to the Revolution. *See* William Blackstone, Commentaries on the Laws of England, Book IV, Chapter 27 (1769) ("Yet in many instances, where contrary to evidence the jury have found the prisoner guilty, their verdict hath been mercifully set aside, and a new trial granted by the court of king's bench; for in such case, as hath been said, it cannot be set right by attaint." (footnotes omitted)), *available at* https://avalon.law.yale.edu/18th_century/blackstone_bk4ch27.asp That common law tradition of the criminal judge as the thirteenth juror has continued after the Revoluation. For example, Georgia and North Carolina both allow criminal judges to order a new trial if they are not satisfied with a guilty verdict, even where legally sufficient evidence exists. *White v. State*, 753 S.E.2d 115, 116 (Ga. 2013) ("Even when the evidence is legally sufficient to sustain a conviction, a trial judge may grant a new trial if the verdict of the jury is 'contrary to … the principles of justice and equity,' OCGA § 5-5-20, or if the verdict is 'decidedly and strongly against the weight of the evidence.' OCGA § 5-5-21."); N.C. Gen. Stat. § 15A-1414(2) (authorizing relief from a verdict when "the verdict is contrary to the

weight of the evidence"). And Tennessee not only allows criminal judges to do sit as a thirteenth juror, but it requires them to do so even in the absence of a defense request. *State v. Carter*, 896 S.W.2d 119, 122 (Tenn. 1995) ("Rule 33(f) imposes upon a trial court judge the mandatory duty to serve as the thirteenth juror in every criminal case, and that approval by the trial judge of the jury's verdict as the thirteenth juror is a necessary prerequisite to imposition of a valid judgment [of guilt]."),

The PCR court below incorrectly thought that the thirteenth-juror doctrine in South Carolina is limited to civil cases. Not so.[1] "South Carolina's thirteenth juror doctrine is so named because it entitles the trial judge to sit, in essence, as the thirteenth juror when he finds the evidence does not justify the verdict, and then to grant a new trial based solely *upon the facts*. As the 'thirteenth juror,' the trial judge can hang the jury by refusing to agree to the jury's otherwise unanimous verdict." *Norton v. Norfolk S. Ry. Co.*, 350 S.C. 473, 478 (2002) (citation omitted) (emphasis added). This Court has previously recognized the power of the criminal judge to order a new trial, although not an outright acquittal, "on the facts." *State v. Dasher*, 278 S.C. 395,

[1] It would be a curious situation indeed for civil defendants to have more protection from injustice than criminal defendants. *United States v. Oppenheimer*, 242 U.S. 85, 87 (1916) ("It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt.").

399 (1982) ("This is not a case in which a trial judge has granted a *new trial* upon the facts (a power which he admittedly has), but rather one in which a trial judge has entered a verdict of *not guilty* in the face of conflicting evidence (a power he has never had in this jurisdiction).").[2]

In short, a new trial would have been legally available had trial counsel asked for it. He did not do so because of a misunderstanding of the law. That constitutes deficient performance. A reasonable probability exists that the motion for new trial would have been granted (indeed, not even the PCR court suggested that the trial judge would have refused a discretionary grant of a new trial if legally empowered to grant one).

Trial counsel was ineffective for depriving Mr. Watson of obtaining a new trial.

[2] A jnov thus differs from a grant of a new trial in that the former results in the entry of judgment for a party, while the latter results in no judgment. *See generally McEntire v. Mooregard Exterminating Servs*., 353 S.C. 629, 632 (Ct. App. 2002) (explaining the difference between a jnov/directed verdict and a new trial and noting that "[t]he granting of a new trial upon the facts is not the equivalent of granting a directed verdict").

CONCLUSION

This Court should grant the Petition, reverse the judgment below, and order the State to either retry Mr. Watson within a reasonable period or else dismiss the charge against him.

Dated this 18th day of July, 2024.

Respectfully submitted,

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