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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Berkeley County

Honorable Kristi F. Curtis, Circuit Court Judge

JOHN ALEXANDER DARRIEUX,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-000303

PETITION FOR WRIT OF CERTIORARI PURSUANT TO AUSTIN V. STATE

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ISSUE PRESENTED

Whether the lower court erred denying post-conviction relief where defense counsel failed to effectively object to the trial court's issuing an Allen charge in order to preserve it for appellate review and where petitioner was prejudiced because the charge impermissibly pressured the jury, violating petitioner's due process rights?

STATEMENT

On June 23, 2015, a Berkeley County grand jury indicted petitioner for third-degree burglary, first-degree burglary, three counts of armed robbery, three counts of kidnapping, and possession of a weapon during the commission of a violent crime. App. 673—688. Petitioner's case was called to trial on January 26-29, 2016, before the Honorable Benjamin H. Culbertson. App. 1—537. Rodney Davis represented petitioner. App. 1. Mason West and Daniel Poulos prosecuted for the state. App. 1.

The jury found petitioner was not guilty of third-degree burglary but was guilty of first-degree burglary, three counts of armed robbery, three counts of kidnapping, and possession of a weapon during the commission of a violent crime. App. 518, l. 20—519, l. The trial court sentenced petitioner to concurrent terms of thirty years' imprisonment for first-degree burglary, thirty years' imprisonment for each count of armed robbery, thirty years' imprisonment for each count of kidnapping, and five years' imprisonment for possession of a weapon during the commission of a violent crime. App. 535, l. 22—536, l. 6. The South Carolina Court of Appeals affirmed petitioner's convictions and sentences on May 9, 2018. *State v. Darrieux*, Op. No. 2018-UP-197 (S.C. Ct. App. filed May 9, 2018).

Thereafter, petitioner filed an application for post-conviction relief (PCR). App. 566—576. An evidentiary hearing was held on July 26, 2019, before the Honorable Michael G. Nettles. App. 595—611. Christopher Murphy represented petitioner and Benjamin Limbaugh appeared on behalf of the state. App. 595. The sole allegation raised during the hearing was that defense counsel was ineffective for failure to effectively object where the trial court issued an *Allen*[1] charge to the jury. App. 599, l. 6—601, l. 1.

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

On December 26, 2019, Judge Nettles signed an order denying PCR. App. 612—626. The PCR court found the trial transcript "directly refute[d] this allegation, showing that counsel did object to the *Allen* charge." App. 624. The court found petitioner's allegation was not proper for PCR and the *Allen* charge was "pristine in quality, stating that the majority should consider the views of the minority and vice versa." App. 625. The court concluded finding petitioner failed to show deficiency or prejudice. App. 625.

On July 6, 2021, petitioner filed another application for PCR seeking belated review of the 2019 denial of PCR. App. 627—633. The state filed its return on January 21, 2022. App. 634—642. An evidentiary hearing was held before the Honorable Kristi F. Curtis, on June 29, 2023. App. 643—649. Denise Swope represented petitioner and Danielle Dixon appeared for the state. App. 643.

Judge Curtis signed an order granting belated review pursuant to *Austin*.[2] App. 667—672. Judge Curtis found petitioner requested and was denied an opportunity to seek appellate review. App. 672.

Petitioner now files this petition for writ of certiorari pursuant to *Austin*, regarding Judge Nettles' 2019 denial of petitioner's application for PCR.[3]

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2 *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991).

3 Pursuant to *King v. State*, 308 S.C. 348, 417 S.E.2d 868 (1992), petitioner files this petition for writ of certiorari addressing the question from the previous post-conviction relief order that petitioner seeks to have reviewed. As required, petitioner is filing a separate petition raising the issue of whether Judge Curtis correctly found petitioner requested and was denied an opportunity to seek appellate review of the 2019 denial of PCR.

ARGUMENT

The lower court erred denying post-conviction relief where defense counsel failed to effectively object to the trial court's issuing an *Allen* charge in order to preserve it for appellate review and where petitioner was prejudiced because the charge impermissibly pressured the jury, in violation of petitioner's due process rights.

Relevant facts

The jury started deliberating at 11:21 a.m. App. 501, l. 10. Twenty minutes later at 11:41 a.m. the jury sent a note requesting a "breakdown of the charges." App. 501, ll. 12-15. The trial court recharged the jury on each of the charged offenses. 505—511. Two hours later, at 1:40 p.m., the jury sent another note stating, "[juror] wishes to be removed from the jury panel because she doesn't want to convict anyone." App. 513, ll. 5-8. At that point the trial court decided to give an *Allen* charge to the jury. App. 513, ll. 10-15.

Defense counsel took a moment to speak with petitioner and then stated, "I object to it, but I understand and I think that - - I don't object to the process. I object to the Allen charge." App. 513, l. 22—514, l. 1. When the court asked for clarification defense counsel volunteered, "I think I have to protect the record by objecting, but I don't have another argument for you." App. 514, ll. 4-5.

The court then issued the following charge to the jury:

> All right. Ladies and gentlemen, welcome back. I've received a note from the foreperson saying that you've been unable to reach a unanimous verdict, and one of the jurors wishes to be removed from the jury, and I understand that you've been unable to agree on a verdict in this case and that one of the jurors wishes to be removed. We cannot remove a jury -- a juror simply because you cannot reach or that you've been unable to reach a unanimous verdict. As I instructed you earlier, the verdict of the jury must be unanimous.

> Now, 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 minds. Although the verdict of the jury must be unanimous, every one of you has the 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 reevaluate your position for reasonableness, correctness and impartiality. You must lay aside all outside matters and reexamine the questions before you based on the law and 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 give basically the same answers, and we'll go through the whole process again. Now, you were selected in the same manner and from the same source as any future jury will be, and there's no reason for me to suppose that the case will be ever be submitted to 12 more intelligent, impartial, conscientious and competent jurors than you or that more or clearer evidence will be produced on one side or the other.
>
> So at this time I'm going to send you back to the jury room, and I'm going to ask that you resume your deliberations to see if you can reach a unanimous verdict on these charges.

App. 514, l. 16—516, l. 10 (emphasis added). At 2:11 p.m. a verdict was reached. App. 517, l. 25.

At petitioner's evidentiary hearing PCR counsel argued that, while defense counsel technically objected to the trial court giving an *Allen* charge, counsel failed to effectively argue

the basis for his objection such that it was not preserved for appellate review. App. 600, ll. 3-25.

Defense counsel testified that he believed that he preserved the objection for appeal. App. 604, ll. 6-8. He stated that his objection to the *Allen* charge was similar to a motion for directed verdict, "it was mostly precautionary [] to ensure that I marked it . . . even if I don't think there is a whole lot of value in it I'm going to make it because you've got to put that place mark down." App. 604, ll. 1-5. He admitted he "maybe" should have objected to the content of the charge but did not. App. 604, ll. 18-21.

Discussion

Defense counsel was deficient where he made only a superficial objection to the trial court giving the jury an *Allen* charge without any substance or basis on which the court could make any other decision. Defense counsel's half-hearted objection reflected in the record and acknowledged by counsel at the evidentiary hearing was equivalent to no objection at all. Counsel failed to make any objection at all to the substance of the *Allen* charge.

To prove ineffective assistance of counsel, 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. *Strickland v. Washington,* 466 U.S. 668 (1984); *Cherry v. State,* 300 S.C. 115, 386 S.E.2d 624 (1989). A reasonable probability is one sufficient to undermine confidence in the outcome of trial. *Id.*

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), *citing Lowenfield v. Phelps,* 484 U.S. 231, 237 (1988). The *Tucker* Court considered various factors to determine whether the given *Allen* charge was unconstitutionally coercive. The four factors adopted by this Court in *Tucker* to determine whether an *Allen* charge is

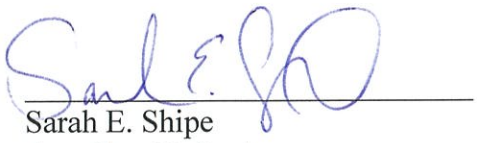
unconstitutionally coercive are: (1) does the charge speak specifically to the minority juror(s); (2) does the charge include any language such as "You have got to reach a decision in this case"; (3) is there an inquiry into the jury's numerical division, which is generally coercive; (4) does the time between when the charge was given, and when the jury returned a verdict, demonstrate coercion. *Id.*

Here the PCR court found the charge given was "pristine." It is true there is no *overt* language that the jury might misunderstand to mean they must reach a decision in the case. However, that is only one of the four factors the court should look to when determining whether the charge was unconstitutionally coercive. The charge, while addressed to the entire jury, was certainly for the one juror who asked to be removed from the jury because she did not want to convict anyone. The numerical division was not asked about but again the charge was given after one juror requested removal due to her feeling unable to convict petitioner. Lastly, and perhaps most notably the time between the juror question and the verdict was thirty minutes, which included the time where the jury was brought back to the courtroom and given the charge which demonstrates coercion.

Petitioner was prejudiced where the given charge impermissibly pressured the jury in violation of petitioner's due process rights.

CONCLUSION

By reason of the foregoing argument, a writ of certiorari should be issued to allow full briefing on this issue.



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This 22nd day of September, 2025.