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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to
Berkeley County
Benjamin H. Culbertson, Trial Judge
Michael G. Nettles, First PCR Judge
Kristi F. Curtis, Second PCR Judge

Appellate Case No. 2025-000303

JOHN ALEXANDER DARRIEUX,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO AUSTIN PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner's Question

Whether the PCR court erred in 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 chare impermissibly pressured the jury, violating petitioner's due process rights?

Respondent's Counterstatement of Question

Did the PCR court properly find Petitioner failed to prove counsel was ineffective for not further objecting to the Allen charge when (1) counsel *did* object to the giving of the charge, and Petitioner failed to set forth at the PCR hearing any further objection counsel should have made that would have reasonably changed the outcome, and (2) the language of the charge was proper and did not unconstitutionally coerce the jury or violate Petitioner's due process rights?

STATEMENT OF THE CASE

Petitioner John Alexander Darrieux is presently confined in the South Carolina Department of Corrections serving a thirty-year sentence. In June 2015, the Berkeley County Grand Jury indicted him for first-degree burglary, third-degree burglary, three counts of kidnapping, three counts of armed robbery, and possession of a weapon during the commission of a violent crime (2015-GS-08-1024, -1026, -1027, -1028, -1029, -1030, -1031, -1032, -1034). On January 26, 2016, Petitioner proceeded to a jury trial before the Honorable Benjamin H. Culbertson. Rodney Davis, Esquire, represented Petitioner. The jury acquitted Petitioner of third-degree burglary but convicted him, as indicted, to the remaining charges. Judge Culbertson sentenced him to concurrent terms of thirty years for first-degree burglary and each charge of kidnapping and armed robbery, and five years for the weapon charge.

Petitioner filed a direct appeal, arguing the trial court erred in (1) denying Petitioner's motion for a new trial based on after-discovered evidence and (2) admitting into evidence a recording of an unauthenticated jail call. The Court of Appeals affirmed on the merits. State v. Darrieux, 2018-UP-197 (S.C. Ct. App. filed May 9, 2018). The remittitur was sent May 25, 2018.

On June 14, 2018, Petitioner timely filed an application for post-conviction relief (PCR). On July 26, 2019, an evidentiary hearing convened before the Honorable Michael G. Nettles. Christopher Murphy, Esquire, represented Petitioner, and Assistant Attorney General Benjamin Limbaugh represented the State. On January 14, 2020, Judge Nettles issued an order denying relief and dismissing the application with prejudice. Petitioner did not appeal.

On July 6, 2021, Petitioner filed a second PCR application requesting a belated appeal of his first PCR hearing pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Respondent filed a return seeking an evidentiary hearing related only to the issue of the belated appeal and

moving to dismiss any other claim. On June 29, 2023, an evidentiary hearing convened before the Honorable Kristi F. Curtis. At that time, the State conceded that, based on a letter from first PCR counsel to Petitioner, the evidence did not show Petitioner voluntarily waived his right to appeal the first PCR hearing and Petitioner was thus entitled to a late appeal of that hearing. Thereafter, Judge Curtis issued an order granting Petitioner a belated appeal of his first PCR hearing. This petition followed.

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, 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).

ARGUMENT

The PCR court properly found Petitioner failed to prove counsel was ineffective for not further objecting to the Allen charge when (1) counsel *did* object to the giving of the charge, and Petitioner failed to set forth at the PCR hearing any further objection counsel should have made that would have reasonably changed the outcome, and (2) the language of the charge was not unconstitutionally coercive, and Petitioner thus cannot demonstrate prejudice.

Petitioner asserts the PCR court erred in denying relief where defense counsel failed to effectively object to the trial court's issuing an Allen charge in order to preserve it for review. He contends counsel was deficient for making only a superficial objection to the trial court giving an Allen charge without any substance or basis on which the court could make any other decision. Regarding the language of the charge itself, Petitioner concedes "there is no *overt* language that the jury might misunderstand to mean they must reach a decision" but avers the charge impermissibly pressured the jury in violation of due process. However, trial counsel *did* object to the giving of the charge, and Petitioner did not set forth any additional argument that would have had a reasonable probability of changing the outcome. Petitioner likewise did not set forth anything objectionable about the *language* of the charge at the PCR hearing and thus failed to meet his burden of proving deficiency or prejudice. Finally, the language of the charge was not unconstitutionally coercive, and Petitioner thus cannot demonstrate prejudice.

A PCR applicant bears the burden of proving the allegations. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). To establish ineffective assistance of counsel, a PCR applicant must prove (1) deficient performance and (2) prejudice from counsel's deficiency. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). In considering deficiency, courts measure an attorney's conduct by its reasonableness under prevailing professional norms. Strickland, 466 U.S. at 688. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment, and an applicant must overcome this presumption to receive

relief. Butler, 286 S.C. at 441, 334 S.E.2d at 813; Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). To prove prejudice, an applicant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

"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).

1. *Petitioner failed to set forth any further objection counsel should have made that would have reasonably changed the outcome and thus did not prove deficiency or prejudice.*

During jury deliberation, the following exchange occurred:

> The Court: All right. I've gotten a note from the foreperson. It says, '[Juror A[1]] wishes to be removed from the jury panel because she doesn't want to convict anyone. [Foreperson], January 29th, 2016, 1:40 p.m." The only thing I know to do at this point in time is bring them in, tell them I understand they've been unable to agree on a verdict, that one of the jurors wishes to be removed from the jury, that we cannot remove the jury simply because you've been unable to reach a unanimous verdict and then just give them the Allen charge to try to encourage them to reach a unanimous verdict. What is the State's position on that?
>
> Mr. West: I believe that is the only appropriate course of action at this point.
>
> The Court: Yeah, I think so, too.
>
> Mr. Davis: If I could just have a moment to explain it to my client.

[1] Respondent has redacted the name of the juror and will refer to her as "Juror A."

> The Court: All right.
>
> Mr. Davis: Thank you, Your Honor. I've explained the Allen charge process to my client. Because **we want each individual juror to vote their own conscience, I object to it**, but I understand and I think that—I don't object to the process. I object to the Allen charge.
>
> The Court: Okay. So what would you suggest?
>
> Mr. Davis: And that, Judge, Defense believes in binding that. I think I have to protect the record by objecting. I don't have another argument for you.
>
> The Court: Okay. All right. Anything from the State before we bring the jury in?
>
> Mr. West: Nothing from the State, Judge.
>
> The Court; Anything from the Defense?
>
> Dr. Davis: Nothing additional, Your Honor.
>
> The Court: All right. I'm going to overrule the objection of the defense and I'm going to proceed the way we suggested. Let's go ahead and bring the jury in.

(App. 513-14, emphasis added).

In the amended application, which was served in March 2019, Petitioner raised an allegation related to the Allen charge. Specifically, he asserted counsel was ineffective for failing to object to the Allen charge on the basis it was inappropriate because the jury had not announced it was deadlocked. At the PCR hearing, however, he raised an objection with the procedure employed by the court upon receiving the note:

> In this case the juror said via note she doesn't want to convict anyone. And we believe the proper course for the Court would have been to question the juror as to exactly what she means; whether or not she personally cannot convict anyone or whether or not the evidence was such that she doesn't believe that she can convict anyone.
>
> At that time the Court could make a decision as to whether to keep

> her on the jury and give the Allen charge or dismiss her and appoint an alternate juror to take his place, or take her place. That was never done and we believe that was error that would entitle Mr. Darrieux to a new trial.

(App. 59-600). Regarding his objection, trial counsel testified,

> [A]nytime the jury comes back and says they are at an impasse as a defense attorney I think it's appropriate you object to the Allen charge even though it's approved in the sense that it might overtly influence the minorities; meaning the smaller group of the vote.
>
> I tried to state that on the record however artfully or inartfully but I know that the Allen charge is approved and so I didn't have an alternative for the Judge to substitute for that. So, I wanted to note my objection and preserve the issue for appeal. Certainly if the judge ruled in my favor great but it was mostly a precautionary one to ensure that I marked it . . . .

(App. 603-04).

In the order dismissing this claim, the PCR court found counsel *did* object to the giving of the charge, although he "did not make a specific argument as to his objection other than wanting 'each individual juror to vote their own conscience.'" The PCR court further found the Allen charge was "pristine" and informed the jurors that "the majority should consider the views of the minority and vice versa." Finally, the court found the record did not indicate any juror gave up a firmly held belief to reach a decision, and Petitioner did not prove ineffectiveness. (App. 624-25).

The PCR court properly found Petitioner did not prove counsel was ineffective. Although Petitioner correctly notes counsel made only a superficial objection, the PCR court likewise noted the superficial nature of this objection in ruling on this issue. (App. 624-25). Critically, however, Petitioner did not advance any additional argument in his application, amended application, or at the hearing that would support a finding of ineffectiveness. Although Petitioner averred in his amended application that counsel should have objected to the giving of the charge because the jury had not announced it was deadlocked, he has not cited to any standard in South Carolina that

requires a jury to announce it is deadlocked *before* the trial court can give a jury charge and thus failed to meet his burden of proving deficiency.[2] See Strickland, 466 U.S. 668, 689 ("Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial."); Pantovich v. State, 427 S.C. 555, 562–63, 832 S.E.2d 596, 600 (2019) ("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 . . . ." (emphasis in original)). Further, Petitioner did not raise this argument in the petition currently pending before this Court and has thus waived it.

Additionally, although Petitioner asserted at the PCR hearing that the trial court should have employed a different procedure—questioning the juror individually before deciding whether to give the Allen charge—he does not raise that as a basis for ineffectiveness in his petition before this court and has waived any argument related to the procedure employed (other than the court's decision to give the Allen charge in and of itself). Petitioner failed to advance any argument that would have reasonably led to the court *not* giving the Allen charge. Thus, the PCR court properly found Petitioner did not meet his burden of proving counsel was ineffective in this regard.

2. *Because the language of the charge was not unconstitutionally coercive, Petitioner cannot prove prejudice.*

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[2] In fact, the American Bar Association permits a similar charge *before* the jury even begins deliberating—which, by extension, would be before the jury announces it is deadlocked. See ABA 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 1/2/2026).

Here, the PCR court found the language of the charge was "pristine." Although Petitioner did not raise any issue with the *language* of the charge at the PCR hearing (leaving any argument related to the language of the charge unpreserved), he now contends the charge was coercive because (1) "the charge, while addressed to the entire jury, was certainly for the one juror who asked to be removed," and (2) the time between the giving of the charge and the verdict was only thirty minutes. However, under the Tucker factors, the charge was not unconstitutionally coercive. Petitioner thus cannot demonstrate any prejudice from the charge.

> 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.

Taylor, 427 S.C. 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.

After receiving the second note from the jury, the court provided the following modified Allen-type charge:

> 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 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. 514-16, emphasis added). Petitioner did not object to the language of the charge. (App. 516).

The trial court's modified Allen charge was not unconstitutionally coercive. Relative to the first Tucker factor, the charge did not speak specifically to minority jurors. Rather, the court explicitly charged, "The majority should consider the minority's position, and the minority should consider the majority's position." (App. 515). The charge thus addressed the minority and majority *equally*. Further, the Court reminded the jurors that "every one of you has the right to your own opinion," "[t]he verdict you agree to must be your own verdict," and "you should not give up your firmly held beliefs merely to be in agreement with your fellow jurors." (App. 515). The language of the charge here was akin to the language charged in the penalty phase of State v. Hughes, 336

S.C. 585, 597-98, 521 S.E.2d 500, 506-07 (1999), which the Court found was "an even-handed admonition to both the minority and majority jurors."[3] The charge did not speak specifically to minority jurors. 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.[4] Rather, the court informed the jury, "If you do not agree on a verdict in this case I must declare a mistrial," and "I'm going to ask that you resume your deliberations to *see if you can* reach a unanimous verdict on these charges." (App. 515-16, emphasis added). The court also

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[3] In Hughes, the trial court charged:

> Well, by law I cannot tell you where to go from here, but I can ask and make a suggestion that you continue deliberations in an attempt to reach a verdict. I can tell you all of you have a duty to consult with one another and to deliberate with a view to reaching an agreement, if this can be done without violence to any one of your individual judgments. Each of you as jurors must decide the case for yourself, but only after impartial consideration of the evidence with your fellow jurors. During the course of your continued deliberations each of you should not hesitate to re-examine your own views and change your opinion if convinced that your opinion is erroneous. *Each juror who finds himself or herself to be in the minority should reconsider their views in light of the opinions of the jurors of the majority and, conversely each juror finding themselves in the majority should give equal consideration to the views of the minority.* No juror, however, should surrender their honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a unanimous verdict.

336 S.C. at 597–98, 521 S.E.2d at 506–07.

[4] Petitioner acknowledges the trial court did not use any "overt language that the jury might misunderstand to mean they must reach a decision in the case." (Pet. 7).

informed the jury, "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." (App. 515). The trial court here never told the jury it had to reach a verdict; thus, the second factor does not support a finding that this charge was unconstitutionally coercive. See Green v. State, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002) ("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)).

Regarding the third factor, the court never asked about the numerical division of the jury. Although the court gave the charge after a juror asked to be removed "because she doesn't want to convict anyone," the record does not indicate the position of the jurors. (App. 513-14). The Court never asked about the numerical division of the jury, and the jury never indicated what its division was. In fact, it isn't clear from the record if the jury had even taken any vote among itself to determine its division; the record only indicates that a juror wanted to be removed "because she doesn't want to convict" anyone. (App. 513-14). Cf. State v. Jones, 320 S.C. 555, 559, 466 S.E.2d 733, 735 (Ct. App. 1996) (finding Allen charge not unconstitutionally coercive even though judge knew the jury was "hung 11 to 1"; reasoning "nothing in the record indicates the judge knew how the jury was aligned concerning guilt or innocence. Furthermore, the judge also told the jury, as part of the Allen charge, that 'the verdict to which a juror agrees must, of course, be his or her own verdict, the result of his or her own convictions, and not a mere acquiescence in the conclusion of his or her fellow jurors.'"). Thus, the third factor does not support a finding that the charge was

unconstitutionally coercive.

Finally, although the thirty-minute timeframe between the giving of the modified Allen charge and the verdict *could* "suggest[] the possibility of coercion," Lowenfield v. Phelps, 484 U.S. 231, 240 (1988) (finding Allen charge in penalty phase of a capital case was not unconstitutionally coercive), that factor alone is not dispositive. See State v. Darr, 262 S.C. 585, 586-87, 206 S.E.2d 870, 870 (1974) (finding Allen charge not unconstitutionally coercive even though jury 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. Thus, Petitioner cannot prove prejudice.

CONCLUSION

Based on the foregoing, this Court should deny the Austin Petition for Writ of Certiorari.

Respectfully Submitted,

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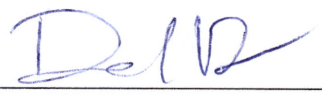

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This 23rd day of January 2026.