STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Sumter County
Court of Common Pleas
R. Ferrell Cothran, Jr., Circuit Court Judge

Appellate Case No. 2013-000623

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S.C. Supreme Court

RAHIM CARTER, Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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Attorney General

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ATTORNEYS FOR RESPONDENT

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ISSUE PRESENTED

Is there evidence of probative value in the record to support the post-conviction relief court's finding that Counsel was not ineffective for not objecting to the trial court's Allen charge, where trial court's Allen charge was proper?

STATEMENT OF THE CASE

Petitioner was indicted during the May 2008 term of the Sumter County Grand Jury for Murder and Possession of a Weapon during the Commission of a Violent Crime (2008-GS-43-0597. He was represented by Charles T. Brooks, III, Esquire (hereinafter "Counsel"). On August 5-6, 2009, Petitioner proceeded to trial before the Honorable W. Jeffrey Young and a jury, where he was convicted as indicted. Judge Young sentenced Petitioner life imprisonment for Murder and five years imprisonment for Possession of a Firearm during the Commission of a Violent Crime, with both sentences to be served concurrently.

A notice of appeal was filed and an appeal perfected on Petitioner's behalf. Following the submission of an Anders[1] brief and Petitioner's *pro se* brief, the South Carolina Court of Appeals dismissed Petitioner's appeal. State v. Carter, Op. No. 2011-UP-020 (Ct. App. filed January 25, 2011). The Remittitur was sent on February 18, 2011.

Petitioner filed an application for post-conviction relief on October 14, 2011, alleging that he was being held in custody unlawfully for:

1. "Denial of effective assistance of counsel."
   a. "Counsel failed to adequately investigate case; counsel failed to preserve motions for review."
2. "Denial of equal protections of the law."
   a. "The jury was coerced into rendering a verdict denying me my right to a fair and impartial trial."

Respondent made its Return on January 18, 2012, requesting an evidentiary hearing be held. An evidentiary hearing was convened on December 13, 2012, at the Sumter County Courthouse before the Honorable R. Ferrell Cothran, Jr. Petitioner was present and represented by William A.W. Buxton, Esquire. Respondent was represented by Assistant Attorney General Megan E.

[1]Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967).

Harrigan of the South Carolina Attorney General's Office. Petitioner testified on his own behalf. Respondent presented testimony from Counsel. Judge Cothran denied and dismissed Petitioner's application for post-conviction relief by written Order dated February 14, 2013 and filed February 21, 2013.

Petitioner filed a Petition for Writ of Certiorari on November 14, 2013. This Return follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether "'*any* evidence' of probative value" exists to sustain the post-conviction relief court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (emphasis added). This Court will affirm if there is any evidence to support the post-conviction relief court's ruling. Moore v. State, 399 S.C. 641, 646, 732 S.E.2d 871, 873 (2012).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, Id.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland; supra. An applicant must overcome this presumption in order to receive relief. Cherry, supra.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, supra. Second, counsel's deficient performance must have prejudiced the applicant such that "there is 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.

ARGUMENT

There is evidence of probative value in the record to support the post-conviction relief court's finding that Counsel was not ineffective for not objecting to the Allen charge, where the trial court's Allen charge was proper.

Petitioner asserts that the post-conviction relief court erred in determining that Counsel was not ineffective for failing to object to the trial court's Allen[2] charge, as the charge was improper and coercive. Petitioner elaborates that the court's "remarks went too far when [it] explained at great length that the same trial would be held again with everything being the same," which he argues is an "insinuation to the jury that they were wasting everyone's time if they did not reach a verdict." PWC p. 7. This argument is without merit, as the trial court's Allen charge was proper and prudent given the circumstances. As there is evidence of probative value in the record to support its ruling, the post-conviction relief court should be affirmed.

"Whether an *Allen* charge is unconstitutionally coercive must be judged in its context and under all the circumstances." State v. Williams, 386 S.C. 503, 512, 690 S.E.2d 62, 66-67 (2010) (citations omitted). "In South Carolina state courts, an Allen charge cannot be directed to the minority voters on the jury panel. Instead, an Allen charge should be even-handed, directing both the majority and the minority to consider the other's views. A trial judge has a duty to urge, but not coerce, a jury to reach a verdict. 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." Green v. State, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002) (citations omitted). In State v. Tucker, 346 S.C. 483552 S.E.2d 712 (2001), this Court adopted the standard set by the United States Supreme Court in

[2] Allen v. United States, 164 U.S. 492 (1896).

Lowenfield[3] to determine whether an Allen charge is unconstitutionally coercive. In Lowenfield, the Supreme Court set forth the following factors to be considered:

> (1) the charge did not speak specifically to the minority juror(s);
> (2) the judge did not include in his charge any language such as "You have got to reach a decision in this case;"
> (3) there was no inquiry into the jury's numerical division, which is generally coercive; and
> (4) while the jury returned a verdict shortly after the supplemental charge, which suggests a possibility of coercion, weighing against this is the fact that trial counsel did not object either to the inquiry into whether the jurors believed further deliberation would result in a verdict, nor to the supplemental charge.

Tucker, 346 S.C. at 492, 552 S.E.2d at 716 (citing Lowenfield. 484 U.S. at 237).

In the present case, the trial court gave the following Allen charge:

> The verdict must unanimous. Now when a matter is in dispute it isn't always easy for even tow 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 verdicts of the jury must be unanimous, everyone has the right to your own opinion. The verdict you agree on must bbe your own verdict, a result of your own convictions. You should not give up on firmly held beliefs merely to be in agreement with your fellow jurors.
>
> The majority should consider the minority position. And the minority should consider the majority position. You should 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 question before you based upon the law and the evidenced of this case. And if you do not agree on a verdict, I must declare a mistrial.

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[3] Lowenfield v. Phelps, 484 U.S. 231 (1988).

> In that case it does not mean that anybody wins. It just means that at some future time, either I or another judge will try this case, with some other jury sitting where you are sitting now. The same participants will come. And the same lawyers will ask basically the same questions. And get basically the same answers. And we go through this whole process again. You were selected in the same manner, and from the same source as any other future jury will be. And although there is no reason for me to suppose that the case would ever be submitted to more, to 12 more intelligent, impartial, contentious and competent jurors than you are, and or that more clearer evidence will be produced to you from one side or another, I don't think anything will change.
>
> There for I will now ask you to return to your deliberations. With the hope that you can arrive at a verdict in a reasonable time.

App. pp. 376 ln. 12 – p. 378 ln 17. Following this instruction, the jury deliberated for fifty-two minutes before requesting to hear additional testimony. App. p. 378 lns. 22-25. Following the replay of requested testimony, the jury continued to deliberate until a verdict was reached a short time later. App. pp. 378-384.

The trial court's charge was proper based on the standards set forth above. The jury charge does not single out the minority. It does not state that the jury *must* reach a decision. It does delve into the numerical split amongst the jurors. Furthermore, the jury asked to re-hear testimony from particular witnesses before ultimately returning with its verdict. Based on Lowenfield factors that this Court adopted in Tucker, this Allen charge was not coercive and was proper. As this charge was proper, Counsel was reasonable in not objecting to it. Petitioner failed to establish any deficiency of Counsel, and the post-conviction relief court properly determined that Counsel was not ineffective. This Petition should be denied.

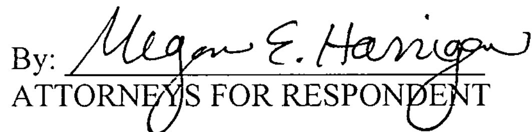
CONCLUSION

For the foregoing reasons, the State submits that the Petition should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN E. HARRIGAN
SC Bar No. 100108
Assistant Attorney General

By: 
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March 3, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Sumter County
The Honorable R. Ferrell Cothran, Jr., Circuit Court Judge
Case No. 2011-CP-43-1918
Appellate Case No. 2013-000623

RAHIM FAREED CARTER, PETITIONER,

v.

STATE OF SOUTH CAROLINA, RESPONDENT.

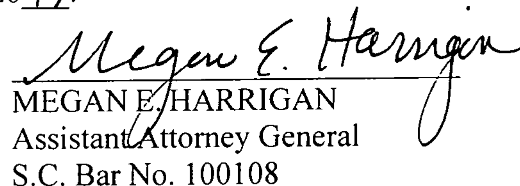
PROOF OF SERVICE

I, Megan E. Harrigan, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

LaNelle C. Durant, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.

This 3rd day of March, 2014.



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ALAN WILSON
ATTORNEY GENERAL

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MAR 03 2014

S.C. Supreme Court

March 3, 2014

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Rahim Fareed Carter v. State of South Carolina
Appellate Case No. 2013-000623

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of Respondent's Return to Petition for Writ of Certiorari.

Sincerely,

Megan E. Harrigan
Assistant Attorney General
S.C. Bar No. 100108

MEH/ko
Enclosures

cc: LaNelle C. Durant, Esquire, Appellate Defense
Trisha Allen, Victim's Services