STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

2013-002789

Kenneth M. Workman, ... Petitioner,

v.

State of South Carolina, ... Respondent.

PETITION FOR WRIT OF CERTIORARI

Susannah Conyers Ross
330 E. Coffee St.
Greenville SC 29601
(864) 527-5973
Attorney for Petitioner

Other Counsel of Record:

Karen C. Ratigan
Chief Assistant Attorney General
Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

INDEX

QUESTIONS PRESENTED

1. Did the PCR judge err in finding trial counsel was effective after he failed to object to the Allen charge?

2. Did the PCR judge improperly rule that no prejudice resulted from trial counsel's failure to join co-defendants motion for a full and fair cross examination of State's witness?

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Respondent at the August 2008 term for assault and battery of a high and aggravated nature (ABHAN) (2008-GS-23-5528), conspiracy (2008-GS-23-5529), armed robbery (2008-GS-23-5530, count 1), and possession of a weapon during the commission of a violent crime (2008-GS-23-5530, count 2). After a first mistrial the case was recalled for trial on January 15, 2009. The Respondent was convicted and sentenced to concurrent terms of thirty (30) days for assault and battery, five (5) years for conspiracy and possession of a weapon during the commission of a violent crime, and twenty-five (25) years for armed robbery. (App. p. 267, line 18-p. 268, line 2). A notice of appeal was filed at the South Carolina Court of Appeals. LaNelle C. DuRant, Esquire of the South Carolina Office of Appellate Defense perfected the appeal in the form of an Anders brief.[1] The Court of Appeals dismissed the appeal. State v. Workman, Op. No. 2012-UP-

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

048 (S.C. Ct. App. filed Jan. 25, 2012). (App. p. 319).

Respondent filed an application for post-conviction relief on April 5, 2012 (2012-CP-23-2386). (App. p. 320). Counsel for Respondent filed an Application Addendum on June 20, 2013, alleging ineffective assistance of trial counsel in his failure to join co-defendant's motion to fully cross examine State's witness and failing to object to the Allen charge.[2] An evidentiary hearing was convened at the Greenville County Courthouse on October 23, 2013. Respondent was present and represented by Susannah C. Ross, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented the State. (App.pp.1099-1102).

The Honorable Edward W. Miller denied the application and an Order of Dismissal was filed November 26, 2013. (App.p.390). Respondent served a Notice of Appeal December 18, 2013, and seeks a writ of certiorari to review this denial.

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

ARGUMENT

I. THE PCR JUDGE COMMITTED REVERSIBLE ERROR IN FINDING TRIAL COUNSEL EFFECTIVE AFTER HE FAILED TO OBJECT TO AN UNDULY COERCIVE AND BURDEN SHIFTING ALLEN CHARGE.

Considering the charge as a whole, the following factors are to be applied to determine whether an *Allen* charge is coercive: (1) did it speak specifically to minority jurors; (2) did it use language demanding a verdict; (3) did the judge question the jury's numerical division; and (4) the time between the charge and the verdict.[3] The first and second of these factors apply in this case.

For Kenneth workman's retrial, the jury began deliberation January 15, 2009, at 10:31 a.m. (App. p.229, l.20). The jury requested and were played the testimony of witness Timothy Wright at 10:56 a.m. (App. p. 231, l. 5). At 1:15 p.m. they had a factual question which the judge could not answer after the parties had rested. (App. p. 252, l.3). At 2:50 p.m. the trial judge gave the following variation of the *Allen* charge in response to the jury's note that they were not able to come to a unanimous verdict:

> I have some remarks to make to you at this time. And when I have concluded, then I'll send you back to your jury room to continue your deliberations.
>
> Ladies and gentlemen, the only mode or the only method that is provided by our laws for deciding questions of fact in a criminal case is the verdict of a jury. *Now I tell you that in most all cases absolute certainty cannot be obtained or even expected.*

[3] *Tucker v. Catoe* 346 S.C. 483. 492, 552 S.E.2d 712, 716 (2001) (citing *Lowinfield v. Phelps*,484 U.S. 231, 237, 108 S.Ct. 546 (1988).

When a matter is in dispute it isn't always easy for even two people to agree. Indeed, the parties to this proceeding have been unable to agree. Therefore, when twelve people must agree it becomes correspondingly more difficult.

Now I tell you that it is very unusual for a jury to go out and to quickly or immediately return with a verdict. At the same time I tell you that we usually get a verdict. So while it's normal for jurors to disagree at first we nevertheless get a verdict after the jury has laid aside all outside or extraneous matters and have determined to try the case on its merits and on the basis of the law and evidence in the case.

Now it's been said that jury service is perhaps the highest service that a citizen can perform for his or her country or state during peace-time. And I certainly agree with that. However, I tell you that a juror does not render good jury service who arbitrarily says, I know what I want to do in this case, and if and when everybody agrees with me, then we'll write a verdict. And we will not write a verdict until that time.

I tell you that it was never intended that the verdict of a jury should be the view of any one person. At the same time I tell you that every juror has a right to his or her own opinion and he or she need not give it up merely for the purpose of being in agreement. However, the verdict of a jury is the collective reasoning of all jurors. And that, of course, is why we have a jury.

I tell you that it is the duty of each of you to tell the others how you feel and why you feel that way. However, I also tell you that if much the larger number of your panel are in favor of one particular verdict, then a decenting [sic] juror or jurors should consider whether or not his or her or their positions is a reasonable one which makes no impression upon the minds of the majority.

In other words, if a majority of you are for one particular form of verdict, the minority ought to seriously ask themselves whether they can reasonably doubt the correctness of the judgment of the majority.

Now although 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, yet in order to bring twelve minds to a unanimous decision as you are required to do you must examine the question submitted to you with candor and with a proper regard to and respect for the opinions of each other.

You should also consider that you were selected in the same manner and from the same source from which any future jury might be selected. And there's certainly no reason for me to suppose that this case would be submitted to twelve people more intelligent, impartial and competent than you twelve are or that more or clearer evidence will be produced on one side or the other.

In other words, ladies and gentlemen, I tell you that a mistrial in a case is an unfortunate thing. If you cannot agree on a verdict in this case it doesn't mean anybody wins. It just means possibly that at some future time I will or one of the other judges will try this case with a jury seated where you are. The same participants will come. And the same lawyers will ask basically the same questions and I suppose probably get basically the same answers. And we'll just go through the whole process again.

In conclusion, ladies and gentlemen I tell you that if the state is entitled to guilty verdicts in this case, it is entitled to those verdicts today. Not tomorrow, next week, next month, or next year, but today. On the other hand I tell you that if the defendants are entitled to verdicts of not guilty in this case, they are entitled to those verdicts today, not next week, next month, next year, but today.

Therefore, ladies and gentlemen, I cannot accept any report at this time that you cannot agree on a unanimous verdict in this case. I am of the opinion that you have not deliberated sufficiently long that I could in good conscious accept that report. *And I tell you frankly it will take considerably more time before I am convinced that you cannot reach a verdict.*

I, therefore, humbly beseech you to return to your jury room, continue your deliberations with the hope that you can arrive at a unanimous verdict within a reasonable time. Thank you. Please retire and continue with your deliberations.

(App. p.256, l.21-p. 260, l. 10), *emphasis added.*

Trial counsel made no objection or argument against the charge, and the jury returned a verdict of guilty on all counts at 4:47 p.m.

A. The *Allen* charge was impermissibly coercive.

In the case at issue, the trial judge clearly directs his comments to the

minority voters on the jury panel. (App.p.258, l.6-17) He then goes on to state that the jurors are required to reach a unanimous verdict and that it will take considerably more time before he will accept deadlock.(App. P. 258, l.20 & p. 260, l.2). With that, jurors could have reasonably believed that unless they voted with the majority they would be there long into the night. "In South Carolina state courts, an Allen charge cannot be directed to the minority voters on the jury panel."[4] Furthermore, "The trial judge cannot threaten to keep the jurors in the jury room all night if they do not agree."[5] As such, the instruction was per se coercive and violated the due process clause of the Fifth Amendment of the United States Constitution and Article I, Sec. 3 of the South Carolina Constitution.

The minority jurors are specifically instructed to ask themselves whether they can reasonably doubt the correctness of the majority without any such instruction directed to the majority. (App.p.258, l.13-16). The disputed *Allen* charges in the comparable *Green v. State* and *United States v. Burgos* cases direct the jurors to listen to each other without so clearly asking the minority to reconsider their convictions or actually using the word minority.[6] When the judge next says that every juror has a right to his or her own convictions, he follows "yet in order to bring twelve minds to a

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[4] *Green v. State*, 351 S.C. 184, 194, 569 S.E.2d 318 (S.C. 2002).
[5] *State v. Simon*, 126 S.C. 437, 120 S.E. 230 (1923).
[6] *Green v. State*, 351 S.C. 184, 190, 569 S.E.2d 318 (S.C. 2002); *United States v. Burgos*, 55 F.3d 933, 938 (4th Cir. 1995).

unanimous decision as you are required to do you must examine the question submitted to you with candor and with the proper regard to and respect for the opinions of each other." (App. p. 258, l. 17-24). This language too strongly instructs the jurors they that are required to return a verdict and must agree with the majority to achieve unanimity. It suggests that jurors surrender their conscientious convictions and amounts to coercion.

In the one-hundred plus years since *U.S. v. Allen*, the constitutionality of the charge has been widely disputed. The American Bar Association's criticisms of the *Allen* charge are that: (1) it speaks to the minority telling them to consider majority opinion without instructing the majority to also consider minority views; (2) the timing in giving the charge after the jury had deliberated unsuccessfully causes undue pressure to arrive at a verdict; (3) it emphasizes getting a verdict over maintaining convictions; (4) it violated the due process requirement by allowing the judge to invade the province of the jury; and (5) it does not enhance efficient judicial administration because it leads to many appeals.[7] Many state and federal courts have barred the use of the *Allen* charge, often in favor of charges more in line with the standards set forth by the American Bar Association.[8] Despite criticism for its potential to

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[7] See ABA Criminal Justice Standards on Trial by Jury

[8] ABA **Standard 15- 5.4. Length of deliberations; deadlocked jury***

(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

coerce jurors to lay aside their conscientious convictions and change their votes producing majority verdicts rather than unanimous verdicts, the *Allen* charge remains at the extreme limit a judge can prompt a unanimous verdict without impermissibly pressuring dissenting jurors to relinquish their positions to the majority opinion.[9]

South Carolina has no standard *Allen* charge but allows an instructing judge to formulate a charge within constitutional guidelines which are reviewed on a case by case basis in efforts to check the danger of coercion. Based on applicable South Carolina case law, in the event of a deadlocked jury, the trial judge has a duty to urge a verdict without coercing one.[10] The *Allen* charge can remind jurors that failure to reach a verdict will require a

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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 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.
(c) The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement.
**(c) - See ABA Jury Principle 15(C)(2) (recommending that a jury not be required to deliberate after normal working hours unless the court, after consultation with the parties and the jurors, determines that evening or weekend deliberations would not impose an undue hardship upon the jurors and are required in the interest of justice.).*

[9] *United States v. Rogers,* 289 F.2d 433, 435 (4th Cir. 1961).
[10] *State v. Pauling.* 322 S.C.95, 470 S.E.2d 106 (1996)

new trial at additional expense.[11] The charge can further state that if the defendant is entitled to a verdict, he is entitled to it now and that if the State is entitled to a verdict it is entitled to it now and not at some later date.[12] However, an *Allen* charge may not be coercive as defined by the Supreme Court standard set forth in *Lowenfeld v. Phelps*.[13] In the *Burgos* opinion, recognizing that it "is critical that an Allen charge not coerce one side or the other into changing its position for the sake of unanimity", the Forth Circuit found it reversible error not to "incorporate a specific reminder both to jurors in the minority and those in the majority that they reconsider their positions in light of the other side's views."[14] Though the South Carolina Supreme Court declined to adopt the bright line rule of reversal set out in *Burgos,* it held the *Allen* charge cannot be directed to minority voters.[15]

B. The absolute certainty language used here without referencing the reasonable doubt standard is burden shifting and speaks only to the minority, those contemplating acquittal.

The *Allen* charge used in the event of a deadlocked jury is named for the 1896 *U.S. v. Allen* decision where the United States Supreme Court sanctioned a verdict urging charge derived from *Commonwealth v. Tuey,* 62

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[11] *State v. Ayers*, 284 S.C. 266, 325 S.E.2d 579 (Ct. App. 1985).
[12] *State v. Lynn*, 277 S.C. 222, 284 S.E.2d 786 (1981).
[13] *Lowinfield v. Phelps*,484 U.S. 231, 237, 108 S.Ct. 546 (1988).
[14] *Burgos* at 941.
[15] *Green v.* State, 351 S.C. 184, 194, 569 S.E.2d 318 (S.C. 2002); State *v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983).

Mass. (8 Cush.) 1 (1851).[16] Both charges state that absolute certainty cannot be expected and urge consensus by having the dissenting jurors consider whether their doubts were reasonable if they were not convincing to the majority. However, the *Allen* charge, used indiscriminately in civil and criminal cases, omits the following language from the *Tuey* instruction:

> In order to make a decision more practicable, the law imposes the burden of proof on one party or the other, in all cases. In the present case, the burden of proof is on the commonwealth to establish every part of it, beyond a reasonable doubt; and if, in any part of it, you are left in doubt, the defendant is entitled to the benefit of that doubt, and must be acquitted.[17]

In this omission, the *Allen* charge lessens the State's burden by reminding those on the jury considering acquittal that they cannot expect absolute certainty of guilt without reiterating that the defendant is entitled by law to the benefit of any reasonable doubt.

Unlike in *Burgos* where the judge instructs on the burden of proof, the instruction here opens by saying that absolute certainty cannot be obtained or even expected without ever reminding the jury that the state still must prove guilt beyond a reasonable doubt. (App. p.257, l.2).[18] The language stating that one should not expect absolute certainty is clearly addressed solely to the jurors who have doubt of guilt as absolute certainty of innocence

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[16] Also known as the "dynamite" charge, *Green v. United States*, 309 F.2d 852, 853 (5th Cir. 1962), and the "nitroglycerin" charge among other things. *Huffman v. United states, 297 F.2d 754, 759* (5th Cir. 1962).

[17] *Commonwealth v. Tuey,* 62 Mass. (8 Cush.) 1, 2-3 (1851).

[18] *Burgos* at 939.

is not expected. This compounds the pressure on minority votes for acquittal by telling them they should not expect to be certain of guilt but should consider the reasonableness of the majority, and then failing to remind all the jurors of what is likely the very defense of that dissenting voter's reasoning: the need for proof beyond a reasonable doubt.

It is also doubtful that the jury understood the use of the historical phrase "absolute certainty". Absolute certainty or a mathematical certainty is unattainable in every case, because everything relating to human affairs is open to some possible or imaginary doubt.[19] Without completely defining this term, the jury was far more likely to believe the judge was describing something far different than the philosophical term. An example is the way our Court of Appeals used this phrase in *State v. Simmons*, [20] noting an eyewitness lacked absolute certainty in identifying the defendant. It is highly doubtful the jury would understand the nuance that they were required to find the defendant guilty beyond a moral certainty, if they were not required to find absolute certainty.[21] This instruction fails to impress upon the jury the "need to reach a subjective state of near certitude of the guilt of the accused."[22]

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[19] *Victor v. Nebraska,* 511 U.S. 1,8 (1994).
[20] 682 S.E.2d 19, 384 S.C. 145 (S.C.App. 2009)
[21] For a detailed history of moral and absolute certainty, see *Victor v. Nebraska,* at 10-14.
[22] *Id* at 12.

II. THE PCR JUDGE ERRED IN FINDING NO PREJUDICE RESULTING FROM TRIAL COUNSEL'S FAILURE TO JOIN CO-DEFENDANTS MOTION FOR A FULL AND FAIR CROSS EXAMINATION OF STATE'S WITNESS.

The PCR judge found there was no prejudice resulting from trial counsel's failure to join co-defendant, Oshaun Robinson's, motion to disclose the details of the deal that witness Timothy Wright received in exchange for his testimony. (App. p. 27 & p.395). The reason stated in the Order for this finding was that the Court of Appeals affirmed the trial judge's ruling in the co-defendant's direct appeal.[23] Such reasoning is improper because it denies Mr. Workman due process in a review considered on its own merits. This is especially true because in Mr. Robinson's case applied harmless error analysis finding that "to the extent that the trial court erred by precluding evidence of the witness's specific sentence, the error was harmless...".[24] Such analysis includes a consideration of the overall strength of the prosecution's case against the appellant to determine beyond a reasonable doubt whether the error contributed to the verdict. [25]

Mr. Workman's was a close case and identification was a key issue. Mr. Wright and the victim, Sergio Espinoza, testified. Mr. Wright said co-defendant Robinson was the gunman. (App. p. 129, l.14). Mr. Espinoza

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[23] *State v. Robinson*, OP. No. 12-UP-042 (S.C. Ct. App. filed Jan 25, 2012).
[24] Id.

[25] *State v. Gillian*, 360 S.C. 433, 455, 602 S.E.2d 72, 74 (Ct. App. 2004).

testified that the five foot, three inches, Kenneth Workman was the gunman even though, as co-defendant's counsel elicited in cross, he had initially described the gunman as a six foot tall, dark skinned black man. (App. p. 97, l.20; p. 102, l.9). Mr. Espinoza's identification was also questionable because he stated he recognized robbery suspects Kenneth Workman and Oshaun Robinson during a news broadcast on television soon after law enforcement advised him charges had been made in the case. (App. p. 100, l.3). There was no corroborating evidence of guilt such as DNA, fingerprints, or a weapon.

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. *See Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984); *Sanchez v. State*, 351 S.C. 270, 274-75, 569 S.E.2d 363, 365 (2000). Here counsel failed to object to an *Allen* charge which clearly addressed the minority or join the co-defendant's motion to cross-examine witness Wright on any deal he was given in exchange for testifying. These errors amount to ineffective assistance of trial counsel.

In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry v. State*, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability

sufficient to undermine confidence in the outcome of trial." *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984)). Only after first listening to a play back of Mr. Wright's testimony which had not been fully tested by a full and fair cross examination; then questioning circumstances of the TV broadcast which was not fully explained by trial counsel; and finally receiving the coercive *Allen* charge, did the jury convict just before 5:00p.m. This deliberation undermines the confidence in the outcome of the trial and demonstrates prejudice.

CONCLUSION

For the reasons stated above, this Court should grant the Petition for Writ of Certiorari and reverse the lower court's ruling. If this Court grants certiorari, the State asks permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

Susannah Conyers Ross
330 E. Coffee St.
Greenville, SC 29609
(864) 527-5973
Attorney for Petitioner

September 15, 2014

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

2013-002789

Kenneth M. Workman, ... Petitioner,

v.

State of South Carolina,.....Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on The State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on April 3, 2014, addressed to Attorney General of South Carolina, P.O. Box 11549
Columbia, SC 29211.

Susannah Ross, Attorney at Law
330 East Coffee St.
Greenville, South Carolina 29601
(864) 242-0029
Attorney for Appellant

This 15 day of September, 2014.

ROSS & ENDERLIN, PA
ATTORNEYS AT LAW

September 15, 2014

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

Re: Kenneth Workman v. State of South Carolina
2013-002789

Dear Mr. Shearouse:

Please find the enclosed Petition and Appendix with copies.

Sincerely,

Susannah Ross
Attorney at Law

cc: Chief Assistant Attorney General
Ms. Karen C. Ratigan

330 E COFFEE ST. GREENVILLE/SC • 29601
PHONE: (864) 242-0029
E-MAIL: SUSANNAH@ROSSENDERLIN.COM

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