 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Greenville County  
G. Edward Welmaker, Circuit Court Judge  
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**RECEIVED**

JAN - 6 2015

**S.C. Supreme Court**

OSHAWN J. ROBINSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000933  
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PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

WANDA H. CARTER  
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Division of Appellate Defense  
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ISSUE PRESENTED

Trial counsel erred in failing to object to the trial judge's unduly coercive Allen<sup>1</sup> charge given to the jury in the case.

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<sup>1</sup> Allen v. United States, 164 U.S. 492 (1896).

## STATEMENT

Petitioner O'Shaun Joseph Robinson was found guilty of armed robbery, possession of a weapon during the commission of a violent crime, conspiracy, and assault and battery per jury trial held during the January 2009 term of the Greenville County General Sessions Court before C. Victor Pyle, Jr. and received an aggregate twenty-five year prison sentence. App. 1 – 265. Scott Robinson and Andrew Moorman represented petitioner at trial, and Assistant Solicitor Lucas Marchant appeared on behalf of the state.

Petitioner appealed his convictions and sentences. Petitioner's and respondent's final briefs were filed on January 24, 2011, and January 21, 2011, respectfully. App. 267-299. On January 25, 2012, the South Carolina Court of Appeals affirmed petitioner's convictions and sentences. See State v. Robinson, Unpublished Opinion No. 2012-UP-042 (S.C. Ct. App. January 25, 2012). App. 301-302.

On December 5, 2012, petitioner filed a PCR application with the Greenville County Office of the Clerk of Court. App. 303-312. The respondent filed a return dated June 21, 2013, requesting that a hearing be held in response to petitioner's PCR action. App. 313-318.

A PCR hearing was convened on February 18, 2014, at the Greenville County Courthouse before Judge G. Edward Welmaker. App. 324 – 351. Petitioner was present at the PCR hearing and represented by Caroline Horlbeck, and Assistant Attorney General Karen Ratigan appeared on behalf of the state. On March 19, 2014, Judge Welmaker issued an Order of Dismissal denying petitioner's allegations of ineffective assistance of trial counsel in the case. App. 352 – 359.

Petitioner appealed Judge Welmaker's Order of Dismissal. This petition follows.

## ARGUMENT

Trial counsel erred in failing to object to the trial judge's unduly coercive Allen<sup>2</sup> charge given to the jury in the case.

At trial, Sergio Espinoza testified that after he parked his vehicle in front of the apartment where he lived, he was met by a black male wearing a red hoodie who put a gun in his face and took his wallet. Espinoza added that he realized that while this was happening there was another black male standing watch at the rear of his vehicle on the passenger side. At some point, this black male standing at the rear of the vehicle approached near the front of the vehicle, and at that time took possession of the gun from the gunman. Soon thereafter, the two men fled to a get-a-way car parked nearby and the driver (3<sup>rd</sup> perpetrator) of the car drove off. App. 731, l. 15 – p. 85, l. 12.

Timothy Wright testified that he and Marcus Workman (get-a-way car driver) and petitioner were connected to the events involving Espinoza. Wright stated that petitioner held a gun to Espinoza and that he (Wright) was standing near petitioner. Wright stated that they all ran after petitioner “snatched a wallet from the victim.” App. 121, l. 19 – p. 129, l. 5.

During the PCR hearing, petitioner testified that trial counsel erred in failing to object to the trial judge's coercive Allen charge given at trial. App. 332, lines 2 – 6. Trial counsel testified at the PCR hearing and stated there was no reason to object to the Allen charge. App. 344, lines 3 – 5.

The PCR judge ruled that petitioner failed to establish that counsel erred in failing to object to the Allen charge because said charge was not improper. App. 357 – 358.

The trial judge's Allen charge in the instant case follows:

Ladies and gentlemen, the only mode or the only method that is provided by our laws for deciding questions of facts 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. When a

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<sup>2</sup> Allen v. United States, 164 U.S. 492 (1896).

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 dissenting juror or jurors should consider whether or not his or her or their positions [are] reasonable ones 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 questions submitted to you with a 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 day 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 possible 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 defendant's 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 conscience 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. 252, l. 24 – p. 256, l. 9.

A judge has a duty to urge a jury to reach a verdict, but a judge cannot coerce a jury to reach a verdict. Dawson v. State, 352 S.C. 15, 572 S.E.2d 445 (2002). In Dawson, where the trial judge asked about the numerical division (for and against) of the jurors and then charged in effect that the one hold out was not being a good citizen,<sup>3</sup> the Dawson Court held that counsel was ineffective in failing to object to that Allen charge because the charge was deemed to be coercive. Clearly, whether an Allen charge is unconstitutionally coercive must be judged in its context and under all of

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<sup>3</sup> In Dawson, the judge's improper Allen charge was directed to the one hold out where he stated that "I have sometimes thought that the juror who could render less service to the Court and to the country than any other juror is the juror who says I know what I want to do in this case and when and if everybody agrees with me then we'll write a verdict, and we'll not write a verdict until that time.

the circumstances. Dawson, *supra* citing to Tucker v. Catoe, 346 S.C. 483, 552 S.E.2d 712 (2001). In Tucker, the Court held that the Allen charge given in that case was coercive because the jurors were told that although they should not do violence to their conscience; nonetheless, they were advised of the importance of returning a unanimous verdict and that they must return such a verdict, particularly since the trial judge knew of two hold outs and then the one hold out, and it appeared that the Court surmised that the “jury charge was directed to the minority jurors.” Compare also, State v. Middleton, 218 S.C. 452, 63 S.E.2d 163 (1951), where the Court reversed due to coerciveness after the jury was urged to agree on a verdict, but the trial judge “went too far” by recharging on the law of self-defense three times and inquired of the numbers on the deadlocked jury. See also Green v. State, 351 S.C. 184, 569 S.E.2d 318 (2002).

In the case at bar, the trial judge went too far also in giving a coercive Allen charge by advising the jurors of the same charge that was identical to the one struck down in Dawson. In Dawson, the judge’s Allen charge was found improper due to following remarks to the one hold out: “I have sometimes thought that the juror who could render less service to the Court and to the country than any other juror is the juror who says I know what I want to do in this case and when and if everybody agrees with me then we’ll write a verdict, and we’ll not write a verdict until that time.” Likewise, this trial judge in the case at bar gave the same coercive Dawson charge as follows:

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 writ a verdict until that time. App. 254, lines 19-23.

Furthermore, this trial judge in the case at bar went on to burden the jury with the consequences of failing to reach a verdict as follows:

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. App. 256, lines 7-15

Moreover, the trial judge went on to advise the jury that he would not accept a deadlocked jury as follows:

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 conscience accept that report. And I tell you frankly it will take considerably more time before I am convinced that you cannot reach a verdict. App. 256, l. 23, - p. 257, l. 4.

Finally, the trial judge belittled the jury by comparing the jury to other jury members who were successful in agreeing and returning verdicts as follows:

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. App. 254, lines 8 – 15.

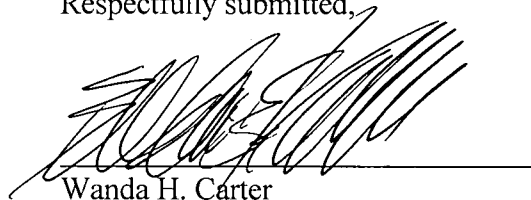
Clearly, under the totality of the circumstances, the trial judge's Allen charge in the case at bar was unduly coercive and thus unconstitutional; and as a result, trial counsel erred in failing to object to the same at trial. Trial counsel's failure to object to the unduly coercive Allen charge in this case constituted deficient legal representation at petitioner's trial in violation of the Sixth Amendment; and but for counsel's error in this regard, a reasonable probability exists that the

outcome of petitioner's trial would have been different. See Strickland v. Washington, 466 U.S. 668 (1984).

CONCLUSION

Based on the foregoing argument, petitioner requests that this Court grant the petition and allow full briefing on the issue raised above.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', is written over a horizontal line.

Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of December, 2014.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Greenville County

G. Edward Welmaker, Circuit Court Judge

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OSHAWN J. ROBINSON,

PETITIONER,

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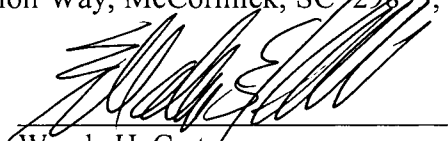
RESPONDENT

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CERTIFICATE OF SERVICE

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I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Oshawn J. Robinson #327798, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29859, this 6th day of January, 2015.



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Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 6th day  
of January, 2015.



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(L.S.)  
Notary Public for South Carolina

My Commission Expires: October 30, 2022.