ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Horry County

J. Cordell Maddox, Jr., Circuit Court Judge

LUTHER GARNER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001312

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the impermissibly coercive *Allen* charge?

STATEMENT

A Horry County Grand Jury indicted Petitioner at the March 1, 2007 term of General Sessions for murder, first degree burglary, armed robbery, and attempted armed robbery. App. 888-893. His case was called to trial on May 29, 2007 before the Honorable Edward B. Cottingham, and a jury. Solicitor Jimmy Richardson and Assistant Solicitor Candice A. Lively represented the state, and Stuart M. Axelrod represented Petitioner. App. 1.

After the state rested, the court directed a verdict of acquittal for armed robbery. App. 413, l. 15 – 414, l. 5. On June 1, 2007, the jury found Petitioner guilty of murder, first degree burglary, and attempted armed robbery. App. 539, ll. 9-17. He was sentenced by Judge Cottingham to thirty years imprisonment for murder, ten years consecutive for attempted armed robbery, and thirty years concurrent for first degree burglary. App. 555, ll. 7-16.

The South Carolina Court of Appeals affirmed Petitioner's convictions. State v. Garner, 389 S.C. 61, 697 S.E.2d 615 (2010); App. 623-628. This Court denied the Petition for Writ of Certiorari by order dated February 8, 2012. App. 704.

On March 13, 2012, Petitioner filed an application for post-conviction relief (PCR). App. 705-711. The state filed a return to this application dated April 18, 2012. App. 712-717. With the assistance of counsel, Petitioner filed an amended application for post-conviction relief on August 27, 2013 raising the issue argued in this petition. App. 718-719. The matter proceeded to an evidentiary hearing on August 27, 2013 before the Honorable J. Cordell Maddox, Jr. App. 720. Assistant Attorney General Suzanne H. White represented the state, and Tristan M. Schaffer represented Petitioner. App. 720. By order dated January 30, 2014, Judge Maddox denied Petitioner relief. App. 861-876. On March 4, 2014, Petitioner filed a Motion to Reconsider

pursuant to Rule 59(e), SCRCP. App. 877-884. The court denied the Motion to Reconsider by order dated May 2, 2014. App. 885-887.

This petition for writ of certiorari follows.

ARGUMENT

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the impermissibly coercive *Allen*[1] charge.

Facts at Trial

The state alleged at trial that Petitioner entered the home of Amadro Flores Espinozat, an illegal alien from Mexico, searching for cocaine and money. The state's only evidence against Petitioner was the testimony of Lonya Sowdon who claimed she drove Petitioner and Alonzo Lee Pierce to the house and watched Petitioner beat Espinozat to death with the handle of a pistol while Pierce unsuccessfully searched the home.[2] See App. 58, l. 20 – 65, l. 5. Sowdon claimed that Petitioner and Pierce had learned from a "topless dancer" that there was $75,000 inside the home and "anywhere from . . . eight to ten kilos of cocaine." App. 71, ll. 10-17. Sowdon admitted she was a crack addict and was caught in so many lies throughout her testimony that she had little credibility by the end of the trial. She was impeached not only with the two prior statements she gave to law enforcement, but also with the testimony of other witnesses. Moreover, there was no physical evidence connecting Petitioner to the murder or burglary. App. 291, l. 20-22.

Allen Charge

Jury deliberations began at 6:12 pm on the evening of May 31, 2007. App. 523, l. 23. Approximately two hours later, the jury requested to go home for the evening and continue

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

[2] Despite allegedly driving Petitioner and Pierce to the home and being present inside the house during the attempted robbery and murder, Sowdon was never charged. Pierce was charged with the same offenses as Petitioner. His charges were still pending at the time of Petitioner's trial. App. 103, l. 14-22.

deliberating the follow morning. Judge Cottingham dismissed the jury with instructions for them to return at 10:00 am the next day.[3] App. 526, l. 18 – 527, l. 7.

The following morning, the jury continued deliberating on time at 10:00 am. Fifteen minutes later, at 10:15 am, the jury sent a note to the court. In response to this note, the court invited the jury back into the courtroom. They entered at 10:33 am.[4] The note included several questions, including (1) "clarification of the burden of proof, beyond a reasonable doubt," (2) "What are we able to use to make a decision?," (3) "Does eyewitness testimony fall under direct?," and (4) "If the jury is not in a position at this time to reach a unanimous verdict, must our final decision in this case be not guilty?" App. 529, ll. 9-17; App. 531, ll. 17-20.

In addition to recharging the jury on reasonable doubt and direct and circumstantial evidence, the court also instructed the jury:

> Now, you have asked me another question and I again thank you for it. "If the jury is not in a position at this time to reach a unanimous verdict, must our final decision in this case be not guilty," and the answer is absolutely not. Your verdict must be unanimous either guilty or unanimous not guilty. In the event that you are unable to reach a verdict then that's what we call a hung jury and that simply means that nobody wins. It simply means that sometime in the future some 12 folks chosen just like you will come into this courtroom, basically hear the same testimony, some jury just like you will hear the whole thing again and that issue will then be resolved. I have no reason to suggest or suspect that I will ever get 12 more people more dedicated, more anxious to do their duty than you 12; and so, don't walk away thinking that somebody wins and somebody loses. **It means everybody loses and our system has failed.**

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[3] The exact time in which the jury stopped deliberating on May 31, 2007 is not included in the record. However, when dismissing the jury that evening and asking them to return the following morning, Judge Cottingham stated, "Obviously, you didn't get the case till about six o'clock. So, **two hours deliberation** in a case like this is obviously not sufficient." App. 526, ll. 21-23 (emphasis added).

[4] Before the jury entered the courtroom, there was no discussion on the record regarding the contents of the note. However, trial counsel mentioned during the PCR hearing that the parties and the court may have discussed the contents of the note in chambers before bringing the jury into the courtroom. See App. 791, ll. 16-20.

Now, I charge you as I only can the only mode providing by our laws for a direct - - deciding questions of fact is by a verdict of the jury just like you. In most all cases, ladies and gentlemen, absolute certainty cannot be obtained or expected where the matter is in dispute initially. It isn't always even, easy for even two people to initially agree; and so, when 12 people must agree it becomes correspondingly more difficult. I tell you it is very unusual for a jury to go out and to immediately or quickly retain a verdict. You have only been deliberating two hours. The case lasted three days. That's not unusual. You've got a voluminous amount of matters to deal with. That is what would happen if a jury was in agreement to begin with. At the same time, ladies and gentlemen, we usually get a verdict under our system of jurisprudence. So, while it is normal for jurors to disagree at first, and I fully understand that, we nevertheless get a verdict after the jury has laid aside all extraneous or outside matters and have determined to try this case on its merits and on the basis of the law and evidence in this case, direct and circumstantial.

It has been said that jury service is perhaps the highest service a citizen can perform for his or her own country or state during peacetime, and I certainly agree with that. **However, a juror does not render good service who arbitrarily says, "I know what I want to do in this case and when everybody else agrees with me then we will write a verdict and we will not write a verdict until that time."** It was never intended that the verdict of the jurors should be the verdict of any one person, never intended for that. At the same time I tell you that every juror has a right to his or her own opinion, and if he or she needs, he or she need not give up that merely for the purpose of being in agreement. I would never say that to you. **However, the verdict of a jury is the collective reasoning of all jurors and that is why we have a jury of 12.** It is the duty of each of a jury to tell the others how he or she feels and why he or she may feel that way. Since the verdict of a jury is the result of collective reasoning, it can be said that a verdict is a result of give and take. **With this in mind, I tell you that if the much larger of your number of panels are in favor of one position a dissenting juror or jurors should consider whether [or] not his or her position is a reasonable one, which makes no impression upon the minds of the majority. In other words, if a majority of you are of one position, the minority ought to seriously ask themselves whether they can reasonably doubt the correctness of the jury and judgment of the majority.** Although the verdict to which a jury agrees must, of course, be his or her own verdict, the result of his or her own convictions and not merely acquiescence in the conclusion of her or her fellow jurors, yet in order to bring 12 minds to a unanimous result you must examine the questions submitted to you with candor and with a proper regard to and a respect for the opinions of each other. You should also consider that you were selected in the same manner from the same source which any future jury will be and as I indicated a while ago there is certainly no reason for me to suppose that this case will ever be submitted to 12 people more intelligent, impartial and competent than you and note there's no reason for me to suspect that more or clearer evidence will ever be produced on one side or the other. **Ladies and gentlemen, in other words, a mistrial of this case is an unfortunate thing.** If you

> do not agree on a verdict of not guilty or guilty unanimously it does not mean that everybody wins. It just means that at some future time, I will try this case with some jury sitting just exactly where you are, the same participants will come and the same lawyers will ask basically the same questions and probably get basically the same answers, and we will go through the entire process again. In conclusion, if the State of South Carolina and the people it represents is entitled to a verdict in this case, they are entitled to it today, not tomorrow, not next week, not next year. Equally important, if this Defendant is entitled to a verdict, he is entitled to it today, not next month nor next year, today, and so it is, Mr. Foreman, ladies and gentlemen, recognizing that there are difficult issues for you to consider, understanding that voluminous evidence that has been in the trial of this case, I would ask that you go back, continue deliberations, have a give and take between the majority and the minority, however, however, it falls, would not ask anybody ever to give up their heartfelt opinions, but at the same time, regardless of which side your decision is to consider, too, the positions of the other side to ascertain whether or not that position, be it in the minority or majority, is a reasonable one.
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> . . . To answer your question again and that is this, if the jury is unable to reach a unanimous verdict must our final decision in the case be not guilty? The answer is absolutely no, no, never. Your verdict is either unanimously either not guilty or guilty. The only other thing would be no verdict at all, in which event I would have to declare a mistrial and we'd come in and do this whole thing again. Does that answer that question? Let there be no question about that. Your verdict has got to be unanimous either not guilt or guilty, and **we've got today and tomorrow to work through those issues.**

App. 537, l. 17 – 537, l. 13 (emphasis added).

At the end of this instruction, Judge Cottingham dismissed the jury and asked trial counsel whether he had "any exceptions or additions to the charge," to which counsel responded, "No, sir, Your Honor." App. 537, l. 21 – 538, l. 7. Less than an hour later at 11:27 am, the jury informed that court that it had reached a verdict. App. 538, l. 14. The jury found Petitioner guilty of murder, first degree burglary, and attempted armed robbery. App. 539, ll. 9-17.

PCR Hearing

Trial counsel, Stuart Axelrod, testified at the PCR hearing that the jury deliberated for two hours the first night and then was sent home for the evening. When they returned the next morning, the jury indicated it was "deadlocked." App. 750, ll. 9-19. Axelrod explained that before Judge

Cottingham gave the Allen charge, he had a conversation with Petitioner. Axelrod told Petitioner the jury was "deadlocked" and "I think I quoted to him the number of 10 to 2 or 11 to 1, not knowing which way [the jury was leaning]." App. 750, l. 20 – 751, l. 1.

Axelrod testified that language in the Allen charge given by Judge Cottingham was clearly "[s]peaking to the minority." App. 762, l. 10 – 763, l. 7. He further explained that Judge Cottingham "leans real hard on them [the jurors]," not only with his choice of words, but with his "tone." App. 765, ll. 13-25.

On cross-examination by the assistant attorney general, Axelrod testified that he did not think the Allen charge should have been given, especially since the jury had only been deliberating for two hours. He explained that he may have objected to the court giving the jury an Allen charge in chambers because he always objects "to an Allen charge if the jury is not out for at least four hours."[5] According to Axelrod, Judge Cottingham wanted to move the case quickly, which is why he gave the Allen charge so early on in the jury's deliberations. App. 789, l. 14 – 790, l. 12.

Additionally, he explained that the specific question asked by the jury was, "If the jury is not in a position at this time to reach a unanimous verdict must our final decision in this case be not guilty?" Instead of giving an Allen charge in response to this question, he testified, "what should have been done there was a note sent back, [stating] no, and just let the jury keep deliberating." App. 790, ll. 15-22. Moreover, he testified that "I made a mistake there" and "I just think it was wrong what he [Judge Cottingham] did." He explained, "Judge Cottingham's Allen charge is different than most because . . . he leans real hard. Sometimes my own opinion is that he tries to

[5] Despite Axelrod's testimony that he *may* have objected to the court giving of an Allen charge in chambers, he made no objection on the record and stated after Judge Cottingham instructed the jury that he had no additions or exceptions to the charge. See App. 538, ll. 2-7; see also App. 790, l. 23-25.

maybe . . . in a way make the jury feel stupid, like . . . you need to come back with an answer . . ." App. 792, ll. 16-25.

When questioned further by the assistant attorney general, Axelrod stated that he does not recall whether the jury came back with a particular number indicating how they were deadlocked, but he said, "I think the judge was aware of it." App. 793, ll. 8-22. He explained, "According to my client [Petitioner] I informed him of the number. I'm only telling you what I was told by my client, but I wouldn't have told my client something if I didn't know it." App. 793, l. 2 – 794, l. 12.

Petitioner testified that before the court gave the jury an Allen charge, Axelrod visited him "back in the holding area" and told him "that they [the jury] were at 11 to 1. He didn't know which way it was going to go." App. 822, ll. 2-9; App. 847, l. 21 – 848, l. 16. Petitioner explained that he thought the court's Allen charge was "coercing the jury into getting a conviction, pressuring the jury." App. 842, ll. 19-21. He explained further, "[H]e [Judge Cottingham] is supposed to be neutral, there is nothing neutral about saying I feel that [there is a] voluminous amount of evidence in this case, I ask that you go back there and continue deliberating . . . I'm telling you that I want a conviction today, not next week, not next year but today, and the State of [South] Carolina is entitled to this and the defendant is entitled to his. So he goes on to say that a mistrial would be, an unfortunate thing. Unfortunate for who? The State, not the defendant. And that's why I felt that the Allen charge was just leaning on the juror that was the one, the one juror that wasn't in agreement, that wasn't in agreement." App. 842, l. 22 – 844, l. 12.

Order of Dismissal

The PCR court found Petitioner's "allegation regarding the Allen charge to be without merit." App. 872. The court maintained that "[t]rial counsel testified he objected to the issuance of the Allen charge off the record in chambers." The court found trial counsel's testimony on this

issue to be credible. App. 872. "However, because there is no record of an objection to the charge on the record," the PCR court said it could not "determine whether trial counsel's objection constituted adequate performance." App. 872.

Nevertheless, the court found Petitioner could not "show any prejudice from the lack of an objection to the issuance of the charge or to its specific language." App. 872. The court maintained, "The record clearly indicates the jury informed the court it could not reach a unanimous verdict at the time the charge was issued." App. 872. Therefore, the court found the trial judge did not abuse his discretion by giving the Allen charge. App. 872.

Moreover, the PCR court found the Allen charge did not contain any "objectionable language." The court noted Petitioner's argument that language in the charge was identical to language found coercive by the South Carolina Supreme Court in Dawson v. State, 352 S.C. 15, 572 S.E.2d 442 (2002). The language found coercive in Dawson was:

> 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.

App. 872; see Dawson, 352 S.C. at 18, 572 S.E.2d at 444.

The PCR court admitted that the trial judge in Petitioner's case "recited that exact language to the jurors," but maintained that the judge "followed it by saying, 'I would never say that to you.'" App. 872. Thus, the court found trial judge "essentially told the jury the exact opposite of what the trial judge told the jury in Dawson." App. 873.

Additionally, the PCR court attempted to further distinguish this case from Dawson. The court explained that in Dawson the jury was deadlocked at eleven to one and our Supreme Court found "the issuance of the Allen charge in that circumstance was clearly coercive to the minority juror." App. 873. In this case, however, the court indicated that while Petitioner testified that his

jury was similarly deadlocked, "trial counsel testified that he could not recall ever knowing the exact numerical division." App. 873, ll. 873. On this point, the PCR court found trial counsel's testimony credible and Petitioner's testimony not credible. App. 873. Therefore, the court found the trial judge's charge was not coercive "because the judge was not aware of the division of the jury." App. 873.

Motion to Reconsider Pursuant to Rule 59(e), SCRCP

In his Motion to Reconsider pursuant to Rule 59(e), Petitioner challenged the PCR court's failure to make a finding on whether trial counsel "rendered adequate performance." The PCR court had maintained that it could not determine if trial counsel's performance was inadequate because, while no objection was made to the Allen charge on the record, trial counsel testified he objected to the charge in chambers. Petitioner argued "that the failure to adequately place objections on the record is deficient performance" under Strickland v. Washington, 466 U.S. 668 (1984). App. 877-878. Consequently, Petitioner asked the PCR court to find trial counsel was deficient in failing to object to the Allen charge. App. 878.

Petitioner also argued that the PCR court only addressed one portion of the Allen charge and failed to address the other language in the charge that he argued was impermissibly coercive. Petitioner identified the specific language in the lengthy charge that was coercive and explained why such language was improper. See App. 878-881.

Moreover, Petitioner challenged the PCR court's finding that the trial court "was unaware of the split in the jurors" and argued the finding was not supported by the record. App. 881. Petitioner pointed out trial counsel's testimony that he could not recall whether Judge Cottingham knew the numerical division, "but believed Judge Cottingham would have known." He also noted trial counsel testimony that while he has no independent recollection, he believed Petitioner's testimony

that trial counsel had told him the split was eleven to one. App. 881-882. Consequently, Petitioner requested the PCR court amend its order "to exclude the factual finding that the Trial Court was unaware of the split." App. 882.

Lastly, Petitioner requested the PCR court address its argument that trial counsel's failure to object to the coercive Allen charge violated his right to due process and a fair trial, noting that the court failed to address this argument in its order of dismissal. App. 882.

Order Denying Petitioner's Rule 59(e) Motion

The PCR court found that its order of dismissal adequately addressed whether trial counsel was ineffective in failing to object to the Allen charge and declined "to rule on whether trial counsel was deficient in the manner of his objection to the charge because it is not dispositive to [Petitioner's] claims."[6] App. 885. Regarding prejudice, the court indicated that it "reviewed each of the allegedly coercive statements in the trial judge's charge" and "does not find any of the statements, standing alone, to be coercive." App. 886. The court also found that the charge as a whole was not "overly coercive." App. 886.

Specifically, the court found that "the charge did not mandate the jury reach a decision; did not reduce the burden of proof the jury must hold the State to; did not directly address the minority voting jurors; and did not set an inappropriate time limit on jury deliberations." App. 886.

Lastly, the court found that Petitioner's rights to due process and a fair trial were "not offended" by the Allen charge because the instruction was not coercive. App. 886.

[6] The Court will recall that the PCR court maintained in its original order of dismissal that "[t]rial counsel testified he objected to the issuance of the Allen charge off the record in chambers" before the instruction was given. See App. 872.

Discussion

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the impermissibly coercive Allen charge. Petitioner was prejudiced by this coercive charge because it improperly influenced the jury and was directed towards the minority juror or jurors.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

"The trial judge has the duty to urge, but not coerce a jury to reach a verdict." Dawson, 352 S.C. at 20, 572 S.E.2d at 447 (citing Green v. State, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002)). "An *Allen* charge cannot be directed to the minority voters on the jury panel, but must instead be even-handed, directing both the majority and the minority to consider the other's views." Id. (citing Green, 351 S.C. at 194, 569 S.E.2d at 323); State v. Elmore, 279 S.C. 417, 423-424, 308

S.E.2d 781, 785-786 (1983), *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). "Whether an *Allen* charge is unconstitutionally coercive must be judged 'in its context and under all the circumstances.'" Id. (quoting Tucker v. Catoe, 346 S.C. 483, 491, 552 S.E.2d 712, 716 (2001)); See Lowenfield v. Phelps, 484 U.S. 231, 237 (1988).

In Tucker, the South Carolina Supreme Court adopted the standard set forth by the United States Supreme Court in Lowenfield to determine whether an Allen charge is unconstitutionally coercive. In Lowenfield, the United States Supreme Court considered, among other things, the following factors:

(1) whether the charge speaks specifically to the minority juror(s);

(2) whether the charge includes such language as "You have got to reach a decision in this case;"

(3) whether there is an inquiry into the jury's numerical division; and

(4) whether the jury returns a verdict shortly after the supplemental charge.

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

Applying the above factors, this Court found the Allen charge given in Tucker was unconstitutionally coercive. Specifically, the court concluded (1) viewed as a whole, the jury charge was directed to the minority juror where the trial court knew there was only one holdout juror, (2) while the trial court did not use mandatory language such as "You must return a verdict," the jury was told of the importance of a unanimous verdict, (3) even though the jury informed the trial judge of their numerical split, the judge failed to instruct the jurors not to disclose their division in the future, and (4) the jury returned a verdict approximately an hour and a half after receiving the Allen charge. Tucker, 346 S.C. at 492-494, 552 S.E.2d at 717-718.

In this case, trial counsel's performance was deficient, as it clearly fell below an objective standard of reasonableness. See Strickland, 466 U.S. at 687-688. Trial counsel should have

objected to the court instructing the jury pursuant to Allen because the jury had only been deliberating for two hours. Instead of giving an Allen charge, the court should have answered the jury's question[7] directly by instructing them that the verdict must be either a unanimous not guilty or a unanimous guilty and that if the jury could not reach a unanimous verdict, the court would grant a mistrial.

The PCR court's finding that trial counsel testified he objected to the court giving the charge in chambers is not supported by the record. See App. 872. Trial counsel never testified that he objected in chambers. His exact testimony was, "I don't know if he had us in chambers, I don't know if it's on the record, but I would have - - I object, I object to an Allen charge if the jury is not out for at least four hours." App. 789, ll. 20-24. He also testified, "You know, a lot of times Judge Cottingham liked to do a lot of things in chambers and I try not to go back into chambers. And ***if*** I was back there and it was discussed, **I guess I didn't put it on the record . . .**" App. 791, ll. 12-20 (emphasis added). Trial counsel never specifically said that he objected in chambers. He did not even recall whether the matter was discussed in chambers before the jury was brought back into the courtroom. Therefore, the PCR court's finding that trial counsel testified he objected in chambers is unfounded.

Furthermore, even assuming trial counsel did object in chambers, his failure to put the objection on the record was ineffective assistance of counsel because he did not preserve the issue for appellate review. See York v. Conway Ford, Inc., 325 S.C. 170, 173, 480 S.E.2d 726, 728 (1997) ("An objection made during an off-the-record conference which is not made part of the record does not preserve the question for review.").

[7] The Court will recall that the jury's question according to the record was, "If the jury is not in a position at this time to reach a unanimous verdict must our final decision in this case be not guilty?" App. 531, l. 17-20.

Not only was trial counsel ineffective for failing to object to the giving of an Allen charge on the record, he was also ineffective for failing to object to the impermissibly coercive language used by the trial court. In Dawson, this Court found that the following language included in the Allen charge was coercive because it "could be perceived as being directed toward the minority juror:"

> 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.

Id. at 18-20, 572 S.E.2d at 446-447.

In this case, the trial court instructed the jury using almost identical language:

> It has been said that jury service is perhaps the highest service a citizen can perform for his or her own country or state during peacetime, and I certainly agree with that. **However, a juror does not render good service who arbitrarily says, "I know what I want to do in this case and when everybody else agrees with me then we will write a verdict and we will not write a verdict until that time."** It was never intended that the verdict of the jurors should be the verdict of any one person, never intended for that. At the same time I tell you that every juror has a right to his or her own opinion, and if he or she needs, he or she need not give up that merely for the purpose of being in agreement. *I would never say that to you.*

App. 533, ll. 3-15 (emphasis added).

While the PCR court admitted that Petitioner's trial judge used the exact same language found coercive in Dawson, the court maintained that the trial judge followed this language by saying, "I would never say that to you." App. 872. Consequently, the PCR court found the "trial judge essentially told the jury the exact opposite of what the trial judge told the jury in Dawson." App. 873. This finding is not supported by the record.

In this case, when the trial judge said, "I would never say that to you," he was telling the jury that he would never say a juror needed to give up his or her own opinion "merely for the purpose of being in agreement." His statement, 'I would never say that to you" came

two sentences after the language found coercive by this Court in Dawson and did not refer to that language. Consequently, the PCR court's finding was error.

Just as in Dawson, this contested language was clearly directed toward the minority juror or jurors. Petitioner testified that trial counsel told him while he was in the holding cell before the Allen charge was given that the jury indicated it was deadlocked at eleven to one. App. 822, ll. 2-17. Trial counsel also testified that the jury was deadlocked. App. 750, ll. 17-19. He explained, "I had a discussion with him [Petitioner] that they [the jury] were deadlocked, and I think **I quoted to him the number of 10 to 2 or 11 to 1**, not knowing which way [the jury was leaning]." App. 750, l. 20 – 751, l. 4 (emphasis added). He further testified that the trial judge was aware of the numerical division of the jury at the time he gave the Allen charge. App, 793, l. 19 – 794, l. 4. Therefore, the above language was clearly directed towards the holdout juror or jurors and trial counsel's failure to object to the charge was unreasonable.

The language from Dawson is just one example of coercive language found in the trial court's instruction to the jury. Another striking example is the following language:

> Since the verdict of a jury is the result of collective reasoning, it can be said that a verdict is a result of give and take. **With this in mind, I tell you that if the much larger of your number of panels are in favor of one position a dissenting juror or jurors should consider whether [or] not his or her position is a reasonable one, which makes no impression upon the minds of the majority. In other words, if a majority of you are of one position, the minority ought to seriously ask themselves whether they can reasonably doubt the correctness of the jury and judgment of the majority.**

App. 533, l. 19 – 543, l. 1.

This part of the court's charge was also unquestionably directed toward the minority juror or jurors and trial counsel's failure to object to it was unreasonable.

In addition to the specific language used by the trial court, the tone used by Judge Cottingham also added to the coercive nature of the charge. Trial counsel testified, "I think that it's one thing to read it as I'm reading it, but" the "tone" used by Judge Cottingham "makes it objectionable . . . because he, he leans real hard on them [the jurors]." App. 765, ll. 15-22. This is further evidence that the charge was directed towards the minority juror or jurors. The tone used by a trial judge can have a great impact on the jury.

Not only is the first factor from Lowenfield and Tucker, that the charge was directed toward the minority jurors, met in this case, the other factors have also been met. See Tucker, 346 S.C. at 492, 552 S.E.2d at 716. First, while no mandatory language that "you must return a verdict" was used, Petitioner's jury was told of the importance of a unanimous decision numerous times.[8] For example, the jury was told that if they could not reach a unanimous decision then "everybody loses and our system as failed" and that "a mistrial of this case is an unfortunate thing." App. 532, ll. 6-7; App. 534, l. 19. Additionally, there was evidence that the jury's numerical division was either eleven to one or ten to two and that the trial judge was aware of the exact division. See App. 793, ll. 19-25. And, most notably, after the court gave the Allen charge, the jury came back with a verdict of guilty less than an hour later.[9] These factors weigh heavily in favor of a finding of coercion. See Tucker, 346 S.C. at 494, 552 S.E.2d at 718.

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[8] Trial counsel testified that Judge Cottingham "was leaning on them [the jury] to come back with a verdict." App. 765, ll. 23-25.

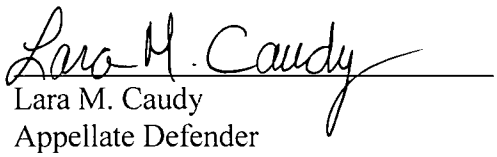
[9] The record states the jury entered the courtroom at 10:33 am to receive the supplemental instructions and ultimately returned with a verdict fifty-four minutes later at 11:27 am. While the record does not indicate how long the jury was in the courtroom while it received the additional charges, the court's supplemental instructions, including the Allen charge, were lengthy and take up nine pages of the appendix. Thus, it is likely the jury deliberated for less than thirty minutes after receiving the Allen charge. See App. 528, l. 18 – 538, l. 14.

Therefore, the PCR court erred in finding trial counsel provided effective assistance of counsel because "there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); See Strickland, 466 U.S. 668.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing on the issue presented.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of February, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County
J. Cordell Maddox, Jr., Circuit Court Judge

LUTHER GARNER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

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 Joshua L. Thomas, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 23rd day of February, 2015.

Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 23rd day of February, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.