

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

J. Cordell Maddox, Jr., Circuit Court Judge

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APR 17 2015

S.C. Supreme Court

LUTHER GARNER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001312

REPLY TO RETURN TO
PETITION FOR WRIT OF CERTIORARI

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

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ARGUMENT IN REPLY

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.

Respondent acknowledges that the exact language found coercive by this Court in Dawson v. State, 352 S.C. 15, 572 S.E.2d 445 (2002) was used by the trial judge during his Allen charge in this case. However, Respondent argues that the context and circumstances that led this Court in Dawson to find the Allen charge was coercive are not present in this case. Ret. at 9. Respondent asserts that in Dawson, "It was the language, together with the fact that the trial judge 'confirmed the existence of one minority juror immediately before the Allen charge' that led the court to conclude the language was 'clearly directed to the holdout.'" Ret. at 9 (citing Dawson, 352 S.C. at 21, 571 S.E.2d at 447-448). Respondent also noted that in Dawson, the trial judge "failed to warn the jury not to disclose their division in the future . . ." Ret. at 9 (citing Dawson, 352 S.C. at 17-18, 571 S.E.2d at 446-447). Respondent's assertions are incorrect. According to the actual jury note that was marked as Court's Exhibit No. 5, the jury asked the trial judge, "If the jury is at an 11 to 1 stand still, must our final decision in this case be not guilty?" Supp. App. 1. Based on this note, it is clear the trial judge knew of the existence of one minority holdout juror immediately before he gave his Allen charge. The trial judge in this case also failed to warn the jury not to disclose its numerical division in the future. Therefore, the circumstances that led this Court to find the Allen charge in Dawson coercive were also present in Petitioner's case.

Respondent also attempted to distinguish this case from Tucker v. Catoe, 346 S.C. 483, 552 S.E.2d 712 (2001) by arguing that one of the "key factors" in Tucker was "that 'the trial judge knew, and apparently the jury knew that he knew' the numerical split." Ret. at 9 (citing Tucker, 346

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

S.C. at 493, 552 S.E.2d at 717); See Lowenfield v. Phelps, 484 U.S. 231, 237 (1988)). However, again the jury's note that was marked as Court's Exhibit No. 5 clearly shows that the trial judge knew the numerical division of the jury, and the jury obviously knew that the judge knew its numerical division. Supp. App. 1.

Respondent also argued that there was probative evidence to support the PCR court's finding that the record did not contain evidence the trial judge had knowledge of the jury's numerical division. Ret. at 10. However, the note from the jury marked as Court's Exhibit No. 5 is conclusive proof that the trial judge was aware the jury was divided at eleven to one, meaning there was only one minority juror, before he gave the Allen charge. See Supp. App. 1.

Furthermore, Respondent argued that "the overall tone of the Allen charge was neutral and not aimed at the minority juror, and therefore not unduly coercive." Ret. at 13. Respondent again is incorrect. This Court just issued an opinion in Workman v. State, Op. No. 27514 (Filed April 15, 2015) finding that the exact language used by the trial court in Petitioner's case made the Allen charge given in Workman unconstitutionally coercive. The language highlighted by this Court in Workman as unconstitutionally coercive was as follows:

Now it's 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, 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 else agrees with me, then we'll write a verdict. And we will not write a verdict until that time.

....

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 large number of your panel are in favor of one particular verdict, then a dissenting [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 a verdict, the minority ought to seriously ask themselves whether they can reasonably doubt the correctness of the judgment of the majority.

By comparison, the language used by the trial judge in Petitioner's case was as follows:

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."**²

.....

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

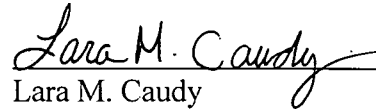
As can be seen, the language used by the trial court in this case was almost identical to the language found unconstitutionally coercive by this Court in Workman. Not only did this Court find that the Allen charge was coercive in Workman, the Court also found that Workman's trial counsel was ineffective for failing to object to the charge and that Workman was prejudiced by counsel's deficient performance. Respectfully, this Court should likewise, and consistently, hold that Petitioner's trial counsel was ineffective for failing to object to the nearly identical Allen charge given in his case, and that Petitioner was prejudiced by trial counsel's deficient performance.

² This emphasized portion of the charge is also the language this Court found unconstitutionally coercive in Dawson, 352 S.C. at 18, 572 S.E.2d at 446.

CONCLUSION

For these additional reasons, 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 17th day of April, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

LUTHER GARNER,

PETITIONER,

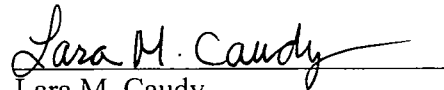
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STATE OF SOUTH CAROLINA,

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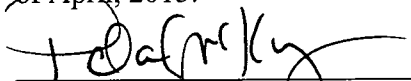
CERTIFICATE OF SERVICE

I certify that a true copy of the reply to the return to petition for writ of certiorari in this case have been served on Joshua L. Thomas, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 17th day of April, 2015.


Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 17th day
of April, 2015.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: July 24, 2022.