ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Orangeburg County

Maite Murphy, Circuit Court Judge

CEDRIC FLOOD,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002164

PETITION FOR WRIT OF CERTIORARI

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<u>INDEX</u>

INDEX 1

ISSUE PRESENTED 2

STATEMENT 3

ARGUMENT

The PCR judge erred in refusing to find counsel ineffective for failing to move for a mistrial pursuant to S.C. Code §§14-7-1330 when the jury indicated they were deadlocked a second time after receiving an <u>Allen</u> charge, and failing to object to the judge's coercive second instruction to continue deliberations. 4

CONCLUSION ....

ISSUE PRESENTED

Did the PCR judge err in refusing to find counsel ineffective for failing to move for a mistrial pursuant to S.C. Code §14-7-1330 when the jury indicated they were deadlocked a second time after receiving an Allen charge, and failing to object to the judge's coercive second instruction to continue deliberations.

STATEMENT

In February of 2010, the Orangeburg County Grand Jury indicted Flood for criminal sexual conduct first degree and kidnapping, indictments #2009-GS-38-1775, 1776. On July 19, 2011, Flood proceeded to jury trial before the Honorable Edgar W. Dickson. Douglas Mellard and Mark Wise represented Flood at trial. Glenn Justice and Harrison Bell prosecuted the case. The jury found Flood not guilty of criminal sexual conduct but guilty of kidnapping. Judge Dickson sentenced Flood to life without parole pursuant to S.C. Code §17-25-45. Flood filed a timely notice of intent to appeal and the direct appeal was perfected. On April 10, 2013, the South Carolina Court of Appeals affirmed the sentence and conviction. State v. Flood, Op. No. 2013-UP-140 (S.C. Ct.App. April 10, 2013).

On July 29, 2015, Flood filed an application for post conviction relief. The State filed a return on October 9, 2013. On May 27, 2014, an evidentiary hearing was held before the Honorable Maite Murphy. Jonathan D. Waller represented Flood at the evidentiary hearing. Megan E. Harrigan represented the State. In a written order signed August 27, 2014, Judge Murphy denied relief and dismissed the application. A timely notice of intent to appeal was served on October 7, 2014. This petition for writ of certiorari follows.

ARGUMENT

> The PCR judge erred in refusing to find counsel ineffective for failing to move for a mistrial pursuant to S.C. Code §§14-7-1330 when the jury indicated they were deadlocked a second time after receiving an Allen charge, and failing to object to the judge's coercive second instruction to continue deliberations.

The trial in this case lasted two days with jury deliberation beginning at 4:25 PM on the second day. (App. p. 330, lines 20-21). Based on a request from the jury, the judge, at 5:05 PM, recharged the law of kidnapping and criminal sexual conduct. (App. pp. 330 – 334). The jury then asked for a transcript of the prosecuting witness' testimony. (App. p. 335, lines 4-19). The parties agreed to allow the jury to retire for the evening and return in the morning when the jury could listen to the requested testimony. (App. pp. 335-341). The next morning, after rehearing the testimony from the prosecuting witness, the jury sent the trial judge a note that informed him that they could not come to a unanimous decision on either charge. (App. p. 350, line 24 – p. 351, lines 1-2). The judge stated "they probably haven't been given enough time to deliberate is the Court's position." (App. p. 351, lines 2-3). The judge, without objection, then gave the jury an Allen[1] charge and the jury was sent back to continue deliberations. (App. pp. 351-354).

The jury then sent out two more notes, marked as Court's Exhibits #9 and #10. The juror notes indicated that, "We have one juror that has said for two days of deliberation that he will 'never' change his mind." (App. p. 495). The judge addressed the jury:

> I've gotten two notes from you. I did not respond to the first one, so I got the second one that's essentially the same thing. You know, it reminds me of when my children repeat things like I was hard of hearing, and I apologize for not getting back to you sooner than that. But let me tell you, I'm not going to recharge the law to you again, I'm not going to do that. But I want ya'll—if ya'll have ever been involved in Court proceedings before, ya'll know that it takes a lot of people a lot of time and a lot of work just to get to Court. Okay? And we've been in this trial now for a few days, and I know these deliberations have been hard on ya'll, and I know that they are some very hard decisions that you are being asked to make, and I know that there's

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

serious disagreement among you. But I want to remind you that if you think it is tough on you, I want you to think about how tough it is on the parties.

Now, the parties want you to make a decision in this case, and they want you to make that decision without compromising any of your convictions or your beliefs. Now, considering that and considering that it's still early in the day, I want to apologize to you and tell you that rather than try this case again I'm treating this as a work day. Sometimes you got to work overtime. So, I'm asking y'all to return to your deliberations and bring back a fair, just and impartial verdict. Okay? Thank ya'll very much.

(App. p. 354, line 16 – p. 355, lines 1-14). Trial counsel did not move for a mistrial pursuant to S.C. Code §§14-7-1330 and did not object to the instruction. At 2:50 PM the jury returned to the jury room to continue deliberations. (App. p. 355, lines 15-17). Two hours later, at 5:00 PM, the jury came back with a verdict of not guilty of criminal sexual conduct but guilty of kidnapping. (App. p. 356, lines 15-16).

In the *pro se* application for post conviction relief Petitioner Flood alleged that trial counsel was ineffective "for failing to object to the trial judge not comporting with South [Carolina] Code ann. §14-1-1330 (1976)" and "for his failure to object to a coercive supplemental charge being given to the jury after the jury advised the trial judge that they could not reach a unanimous decision on either charge, and after the trial judge had given an Allen charge." (App. p. 385). During the PCR hearing the following took place between PCR counsel and lead trial counsel Mellard:

Q. Are you familiar with Title 14, Chapter 7, section 1330 of the South Carolina Code?

A. Refresh my memory.

Q. Procedure when jury fails to agree.

A. At this time I am, at that time I was not. You're talking about the second Allen charge?

Q. Yes.

A. Yeah.

(App. p. 424, lines 17-24).

When asked why he did not object to the second instruction, trial counsel testified:

> Because that was about the best jury we were going to get. That jury for a day and a couple of hours, they were screaming at each other, they were yelling at each other, they had to send bailiffs in to break them up. That was pretty much the best jury we were going to possibly get. We didn't know which way it was leaning, but we knew we had about as good a jury as we were going to get.

(App. p. 425, lines 12-19). Counsel again admitted that, at the time of Petitioner's trial, he was not aware of S.C. Code §14-7-1330. (App. p. 425, lines 20-22).

S.C. Code §14-7-1330 provides:

> When a jury, after due and thorough deliberation upon any cause, returns into court without having agreed upon a verdict, the court may state anew the evidence or any part of it and explain to it anew the law applicable to the case and may send it out for further deliberation. But if it returns a second time without having agreed upon a verdict, it shall not be sent out again without its own consent unless it shall ask from the court some further explanation of the law.

The jury in Petitioner's case returned a second time without having agreed upon a verdict. The jury did not request further instruction on the law. Trial counsel was ineffective in failing to move for a mistrial.

Trial counsel Wise, sitting as second chair, testified that he "thought" he was aware of S.C. Code Section 14-7-1330 at the time of Petitioner's trial. (App. p. 442, line 25 – p. 443, lines 1-5). When asked if they discussed the code section, counsel testified, "No, because the issue that we were confronting was one of whether or not we could get a mistrial or whether or not the judge should make the jury continue to deliberate. And Mr. Flood wanted them to continue to try to reach a decision. So we did not, I did not do – tell Mr. Mellard that he should ask for a mistrial or do anything to stop that process." (App. p. 443, lines 7-14). The issue was not whether counsel

"could get a mistrial." S.C. Code §14-7-1330 required the judge to declare a mistrial regardless of any purported wishes of the defendant.

During the PCR hearing Petitioner testified that his attorneys did not tell him about the contents of the jury notes and the record reflects that the judge did not read the jury notes, marked Court's exhibits #9 and #10, into the record. (App. p. 414, lines 13-22; App. pp. 354-356). Petitioner testified at the evidentiary hearing that, "Only thing really that he been telling me say to stop the trial. Then I tell him say no, I want to keep on going with it." (App. p. 415, lines 17-19). This may have been in response to the plea offer made by the State on the second day of deliberations. (App. p. 424, lines 1-14).

In the order of dismissal the PCR judge wrote, "This Court finds the instant case to be akin to Edwards and finds that the trial court did not violate S.C. Code Ann. §14-7-1330." (App. p. 460). The PCR judge erred. In Edwards v. Edwards, 239 S.C. 85, 93, 121 S.E.2d 432, 436 (1961), the Court found that the jury impliedly consented to further deliberations. The judge in Edwards told the jury, "I'm going to ask you in all seriousness, Gentlemen, to make one more attempt at this case. When you tell me you can't do it, that's going to be the end of it, because I'm not going to send you back again. So, I'm putting it right straight up to you, see what you can do with it, Gentlemen. Was there any question any of you Gentlemen wanted to ask?" 239 S.C. at 93, 121 S.E.2d at 436.

The instruction given in the present case was far more coercive than the instruction given in Edwards. In Edwards the judge made it clear to the jury that he was only going to ask them to continue to deliberate one more time and if they still could not reach a decision, he would not send them back again. In contrast, the judge in the present case told the jury that "[s]ometimes you got to work overtime." The judge then "asked" the jury to return to deliberations and render a

verdict. The judge in the present case did not indicate to the jury that if they could not reach a decision, he would not send them back again, leaving the impression with the jury that this judge was going to keep them in deliberations until they reached a verdict. Given the coercive charge, the jury could not impliedly consent to continue deliberating.

As noted by the Court in Buff v. S. Carolina Dep't of Transp., 342 S.C. 416, 422, 537 S.E.2d 279, 282 (2000):

> ... where the trial judge's comments clearly coerce the jury into reaching a verdict, the Court has found a violation of the statute and mistrial the appropriate remedy. Rowland v. Harris, 218 S.C. 42, 61 S.E.2d 397 (1950) (statute violated where trial judge indicated jury would spend weekend in jury room until it reached a unanimous verdict); State v. Simon, 126 S.C. 437, 120 S.E. 230 (1923) (statute violated where trial judge notified jury it would spend night in jury room unless it reached a unanimous verdict); State v. Kelley, 45 S.C. 659, 24 S.E. 45 (1896) (statute violated where jury deliberated from 4:00 p.m. until 6:00 p.m. the next day without lunch, indicated it could not agree, judge instructed jury to retire again, and foreman responded "[w]e have been in the room for twenty-four hours, and can't agree").

In Buff v. S. Carolina Dep't of Transp., 342 S.C. 416, 422, 537 S.E.2d 279, 282 (2000) the Court wrote:

> Instead, we conclude the trial judge who is in the best position to observe the jury's demeanor should have some flexibility in guiding a case to its final resolution while protecting the parties' rights to a fair, impartial, and conscientious verdict. Accordingly, when a jury has twice indicated it is deadlocked, the trial judge should diplomatically discuss with the jury whether further deliberations could be beneficial. The jury's consent to resume or to discontinue deliberations is determined, either expressly or impliedly, by its response to the trial judge's comments.

The judge in the present case failed to diplomatically discuss with the jury whether further deliberations could be beneficial. Instead, he ordered that the jury work overtime and render a verdict. The judge's comments to the jury were coercive and the jury did not impliedly consent

to continue deliberations. The judge violated S.C. Code §14-7-1330 when he failed to declare a mistrial when the jury returned deadlocked a second time.

In State v. Barnes, 402 S.C. 135, 739 S.E.2d 629 (2013), the Court noted that while there was no requirement that the judge inform the jury that its consent is necessary, coercion was not permitted. The Court in Barnes wrote:

> Here, the judge appears to have inadvertently coerced the jury when he indicated that he could order the jury to continue to deliberate. In the context of this case, we view the foreman's diplomatic response, that is, that he did not think that further deliberations would be fruitful, as manifesting a lack of consent.

402 S.C. at 139, 739 S.E.2d at 631. In the present case the judge coerced the jury by ordering them to work overtime and render a verdict. The two notes indicating that one juror will never change his mind indicate a lack of consent to continue deliberating. The judge should have declared a mistrial pursuant to S.C. Code §14-7-1330. Trial counsel was ineffective in failing to move for a mistrial.

The PCR judge addressed trial counsel's failure to move for a mistrial in the order of dismissal writing, "This Court finds that counsel's decision to refrain from objecting or move for a mistrial was based on informed conversations with their client and his adamant insistence that the jury proceed forward under guidance from the court to reach a verdict was prudent and in accordance with their client's wishes." (App. p. 459). The PCR judge erred. Any purported conversation between lead counsel and Petitioner could not have been an informed conversation as counsel was not aware of the code section mandating a mistrial.

Additionally, neither the State nor the defendant could have elected to allow the jury to continue to deliberate because S.C. Code §14-7-1330 required the judge to declare a mistrial. As

noted by the Court, "The purpose of § 14-7-1330 is 'to prevent forced verdicts, and to prevent undue severity of jury service.' State v. Freely, 105 S.C. 243, 247, 89 S.E. 643, 644 (1916)." Buff v. S. Carolina Dep't of Transp., 342 S.C. 416, 420, 537 S.E.2d 279, 281 (2000). The statute is designed to protect members of the jury and the requirements of the statute can not be waived as part of some alleged trial strategy. Allowing this jury to continue to deliberate in this case violated the law.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To establish a claim of ineffective assistance of trial counsel, a PCR applicant must show that: (1) counsel's representation fell below an objective standard of reasonableness and, (2) but for counsel's errors, there is a reasonable probability the result at trial would have been different. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings

would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Trial counsel was ineffective in failing to move for mistrial pursuant to S.C. Code §14-7-1330 when the jury returned deadlocked a second time. There is a reasonable probability that if trial counsel had objected pursuant to §14-7-1330 the judge would have granted the mistrial. If the judge had refused to grant the mistrial, Petitioner could have raised the issue on direct appeal and there is a reasonable probability that Petitioner would have prevailed on direct appeal. In his direct appeal Petitioner raised the issue of whether the trial court judge erred when he improperly coerced the jury into rendering a guilty plea after sending them back to deliberate a second time, and having given them a second, coercive jury charge, after they insisted they were deadlocked, in violation of S.C. Code Ann. §14-7-1330 (1976). (App. p. 467). The South Carolina Court of Appeals affirmed, finding the issue was unpreserved. State v. Flood, Op. No. 2013-UP-140 (S.C. Ct.App. April 10, 2013). (App. pp. 496-497).

Trial counsel was additionally ineffective in failing to object to the coercive jury instruction. There is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. The judge's instruction coerced the jury into reaching a compromise verdict.

In Workman v. State, Op. No. 27514 (S.C. Filed April 15, 2015) this Court found trial counsel ineffective in failing to object to a coercive Allen charge and granted a new trial. In Workman this Court wrote:

> In South Carolina state courts, an Allen charge cannot be directed to the minority voters on the jury panel. Green v. State, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002). Instead, an Allen charge should be even-handed, directing both the majority and the minority to consider the other's views. Id. A trial judge has a duty to urge, but not coerce, a jury to reach a verdict. Id. Whether an Allen charge is unconstitutionally coercive must be judged in its "context and under all the

> circumstances." Tucker v. Catoe, 346 S.C. 483, 490-91, 552 S.E.2d 712, 716 (2001). The four factors adopted by this Court in Tucker to determine whether an Allen charge is unconstitutionally coercive are: (1) Does the charge speak specifically to the minority juror(s)? (2) Does the charge include any language such as "You have got to reach a decision in this case"? (3) Is there an inquiry into the jury's numerical division, which is generally coercive? (4) Does the time between when the charge was given, and when the jury returned a verdict, demonstrate coercion?

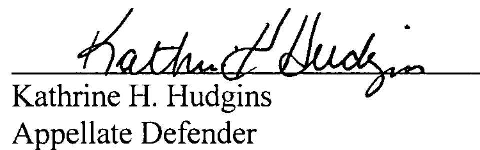
(footnotes omitted).

Based on the four Tucker factors, the second instruction was unconstitutionally coercive. The judge knew that there was one hold out juror based on the jury notes marked Court's Exhibits #9 and #10. (App. p. 495). The judge indicated that the jury must reach a decision in the case by telling the jury that "[s]ometimes you got to work overtime" and then "asking" the jury to return to deliberations and render a verdict. (App. p. 355, lines 8-14). See State v. Williams, 386 S.C. 503, 690 S.E.2d 62 (2010) at note 7 (cautioning trial judges against using the language "with the hope that you can arrive at a verdict" because the language could potentially be construed as coercive, as jurors are not required to reach a verdict after expressing they are deadlocked). The jury returned with a verdict two hours after receiving the coercive charge.

CONCLUSION

Based on the above argument, the petition for writ of certiorari should be granted to allow further briefing on the issue.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of May, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Orangeburg County

Maite Murphy, Circuit Court Judge

CEDRIC FLOOD,

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V.

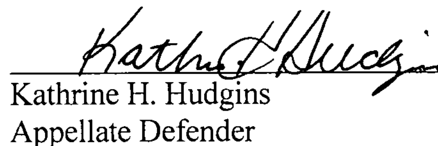
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002164

CERTIFICATE OF SERVICE

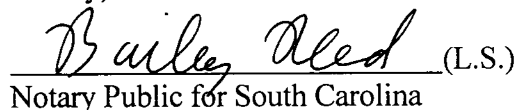
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan Jameson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Cedric Flood #217089, at Lieber Correctional Institution this 12th day of May, 2015.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 12th day
of May, 2015.


(L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021.