THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

DAMIAN ANDERSON,

APPELLANT

APPELLATE CASE NO 2014-001779

Appeal from Charleston County

William Jeffrey Young, Circuit Court Judge

Opinion No. 2015-UP-568

PETITION FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, appellate counsel would petition for rehearing in the above titled case with respect to this Court's holding that S.C. Code Ann §14-7-1330 (1976)[1] was not violated despite the fact that the jurors deliberated thrice, which is prohibited, after they deadlocked twice where there was nothing in the record indicating that the jury consented to re-deliberate for a third time, and because it was the Allen[2] charge in effect that forced the jury to deliberate three times. In support of this petition, counsel would submit the following points.

[1] ....[I] if [a jury] returns a second time without having agreed upon a verdict, it shall not be sent out again without its own consent...

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

1.) Appellant was convicted of assault on a police officer while resisting arrest and sentenced to imprisonment for a period of ten years.

2.) During jury deliberations, the jurors stopped to inquire as to what constituted "under arrest" and "how does one know if not being told that they are under arrest" and "when does resisting arrest cross the line to assault." App. 309, l. 3 – 9. Then, the jury stopped and requested to hear appellant's testimony. That testimony was played. Tr. 308, l. 23 – p. 309, l. 7. Thereafter, the jury indicated that they had reached a verdict finding appellant guilty as charged, but when polled, juror # 391 stated that her verdict was not guilty. Tr. 309, l. 22 – p. 313, l. 17. As a result, the trial judge sent the jury back to the jury room to deliberate further. Tr. 313, l. 18 – 23. Minutes later, the jury requested two copies of appellant's testimony. Tr. 313, l. 24 – p. 314, l. 11. Defense counsel objected on the ground of "undue influence" Tr. 314, l. 9 – 13. Soon afterwards, the jury returned indicating that they were deadlocked. Tr. 315, l. 5 – 6. In response, the judge gave an Allen charge to the jury. Defense counsel's objection follows:

> Defense Counsel: I will put an objection on the record. Under 14-7-1330, says when a jury, after doing thorough deliberations, returns into the court without having agreed upon a verdict, the Court may state evidence, or any part of it, and explain to it a new applicable to the case and send it for deliberations. I would argue when the jury came out before, they had come out once and were – had not agreed upon a verdict. So if they come back again, I don't think they can be sent back without their consent...I was just worried, Judge, because – when she came out the first time... maybe she was coerced in going along with the other 11, and when she came out in the open courtroom, feels more comfortable to share her views. App 315, l. 14 – 23.

At this juncture, the trial judge overruled the objection under 14-7-1330, issued the Allen charge to the jury, and vowed to declare a mistrial if the deadlocked persisted. Tr. 316, l. 8 – p. 318, l. 11. Finally, the jury returned with a verdict finding appellant guilty as charged. Tr. 319, l. 19 –

24. A jury polling followed, after which time each juror answered in the affirmative. Tr. 320, l. 3 – p. 322, l. 21. Trial counsel renewed the motion and moved for a renewed objection and grounds for a mistrial regarding a coerced verdict in the case. The trial judge denied the motion. Tr. 325, line 8 – 23.

S.C. Code Ann. § 14-7-1330 reads as follows:

> When a jury, after due and thorough deliberation upon any cause, return 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 law.

3.) On appeal, appellant raised the following issue:

> The trial judge erred in forcing the deadlocked jury in this case to deliberate for a third time without their consent.

4.) This Court affirmed and addressed the issue on appeal as follows:

> State v. Kelly, 372 S.C. 167, 171-172, 641 S.E.2d 468, 470-71 (Ct. App. 2007)(holding "[t]here is no case law requiring or suggesting that an *Allen* charge be given when a juror retracts her verdict during polling and this [c]ourt will not impose such a requirement" and finding that when a juror states the announced verdict is not her verdict during jury polling, it does not necessarily indicate the jury is hopelessly deadlocked); *State v. Barnes*, 402 S.C. 135, 136-139, 739 S.E.2d 629, 629-631 (2013) (holding the trial a third time); *Freely*, 105 S.C. at 248, 89 S.E. at 644 ("if the circumstances satisfied the [court], in a wise exercise of [its] discretion, that the jury consented to the return, then it was lawful to return to them."; *State v. Robinson*, 360 S.C. 187, 194, 600 S.E.2d 100, 103 (Ct. App. 2004) ("The jury's consent to resume or to discontinue deliberations is determined, either expressly or impliedly, by its response to the trial [court's] comments." (quoting *Buff v. S.C. Dep't of Transp.*, 342 S.C. 416, 422, 537 S.E.2d 279, 282 (2000)); *State v. Rowell*, 75 S.C. 494, 509, 56 S.E. 23, 28-29, (1906) (holding the jury's consent was implied when the jury did not indicate it was unwilling to deliberate a third time.

5.) This Court addressed this issue of whether it was proper for the trial judge to give an Allen charge; however, the efficacy of an Allen charge in the case was not the substantive issue raised on appeal. The issue on appeal concerned the violation of the statute that a deadlocked jury is prohibited from deliberating more than two times. See S.C. Code Ann 14-7-1330. Nonetheless, the Allen charge did come into play in the case because it was precisely the Allen charge that forced the jury to deliberate three times and denied them the autonomy of consenting to deliberate for a third time. Thus, the Allen charge was coercive in its relevance to the 14-7-1330 violation in the case. 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); Tucker v. Catoe, 346 S.C. 483, 552 S.E.2d 712 (2001); State v. Middleton, 218 S.C. 452, 63 S.E.2d 163 (1951).

6.) Also, this Court held in effect that there was an indication that the jury gave implied or express consent to return to the jury room for a third time after it returned deadlocked per its second deliberation. The record is devoid of any such proof establishing that the jury consented to re-deliberate for a third time. To the contrary, the Allen instruction took away the free will of the jury to consent to continue deliberating for a third time.

7.) A judge is prohibited from returning a jury for further deliberations, without its own consent, if it returns twice without having reached a verdict. Buff v. South Carolina Department of Transportation, 342 S.C. 416, 537 S.E.2d 270 (2000), reversing the Court of Appeals in Buff v. Department of Transportation, 332 S.C. 472, 505 S.E.2d 360 (1998); Tucker v. Moore, 56 F. Supp. 2d 611 (1999). In Buff, the Court held that the purpose of the S.C. Code Ann. § 14-7-1330 is to prevent undue severity of jury service, and that a trial may return the jury to deliberate for a third time if the jury consents to do so or is willing to do so. When a jury has twice indicated it is deadlocked, the jury's consent to resume or discontinue deliberations is determined (either expressly

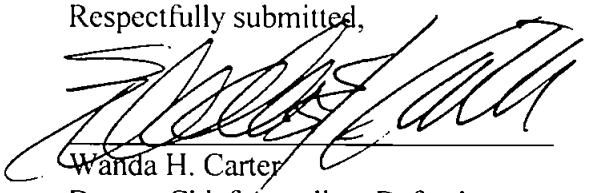
or impliedly) by the trial judge. State v. Freely, 105 S.C. 243 89 S.E. 643 (1916); State v. Rowell, 75 S.C. 494 56 S.E. 23 (1906) and State v. Drakeford, 120 S.C. 400, 113 S.E. 307 (1822). Compare coercion in the case of State v. Kelley, 45 S.C. 659 24 S.E. 45 (1896), where the foreman stated that they had deliberated for twenty four hours and could not agree, and thus the judge's instructions for them to continue resulted in a coerced jury verdict. Also compare the dissent in Buff to the extent that it was noted that the jury's silence was not tantamount to implied consent to continue deliberating[3] and that "simply because the jury expressed no unwillingness to continue, [would not translate that] into implied consent.

Here, the circumstances of the case established that the trial judge erred in sending the jury back to deliberate for a third time in the case. After the first polling of the jury indicated the guilty verdict was not unanimous, the trial judge sent the jury back to deliberate. This was the equivalent of a deadlocked jury and that send back constituted the first send back. Then, the jury reappeared with questions and requests to rehear testimony and were apparently hopelessly deadlocked because they announced that they could not come to a decision and what would be the next step, which clearly can be interpreted as a plea for the deliberations to end rather than a desire to continue deliberating. In other words, the second deadlock did not represent any consent (implied or express) to continue deliberations. Therefore, the trial judge's subsequent Allen charge that was given to the jury in this case and his order for then to continue deliberating resulted in a violation of a § 14-7-1330 and a coerced jury verdict.

[3] This was the Court of Appeals holding in Buff, 332 S.C. 472, 505 S.E.2d 360 (1998), prior to the South Carolina Supreme Court's renewal in Buff, 342 S.C. 416, 537 S.E.2d 279 (2000)

WHEREFORE, based on the foregoing points, counsel for appellant would request a rehearing with respect to the violation of S.C. Code Ann. § 14-7-1330 that occurred in the case.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

This 7th day of January, 2016.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Henry Gunter, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Damian D. Anderson #316387, at Marion County Prison Camp, 2723 Highway 76 East, Mullins, SC 29574, this 7th day of January, 2016.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 7th day
of January, 2016.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.