

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Greenville County

APR 24 2017

Honorable R. Knox McMahon, Circuit Court Judge

S.C. SUPREME COURT

\_\_\_\_\_  
GREGORY ALLAN IVERY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001723

\_\_\_\_\_  
JOHNSON PETITION FOR WRIT OF CERTIORARI

Taylor D Gilliam  
Appellate Defender

South Carolina Commission on Indigent Defense  
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ATTORNEY FOR PETITIONER

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**ISSUE PRESENTED**

Did the PCR Court err in denying Petitioner relief where trial counsel failed to object to an Allen charge following a note from the jury which indicated that eleven jurors were in favor of convicting Petitioner and one juror would not change his or her decision of not guilty “under any circumstances”?

## STATEMENT

In June 2012, a Greenville County Grand Jury indicted Petitioner for distribution of cocaine base within one-half mile of a school or park and distribution of cocaine base. App. 197 – 200. Petitioner proceeded to trial before the Honorable William Seals and a jury on October 11, 2012. App. 1. Lauren Price served as the Assistant Solicitor, and Ernie Hamilton represented Petitioner. App. 1. At trial, the State alleged that Petitioner purchased cocaine from an informant on or about June 11, 2011. App. 40 l. 4 – App. 41 l. 6; App. 54 – 57.

After both parties offered closing arguments, the case was submitted to the jury. App. 140 ll. 16 – 21. Soon thereafter, the jury submitted a note to the court, which read as follows: “We can not reach a decision. Eleven guilty, one not guilty, the juror voting not guilty will not change their vote under any circumstances.” App. 141 ll. 6 – 9. The trial judge offered to give the jury an Allen charge, and defense counsel acquiesced. App. 141 ll. 10 – 18. The Allen charge as provided was:

Ladies and gentlemen of the jury, I’m going to give you one more charge and then we’ll go from there. Members of the jury, when a matter is in dispute, it isn’t always easy for even two people to agree so when 12 people must agree it becomes even more difficult. In most cases, absolute certainty can not be reached or expected. However, you have a duty to make every reasonable effort to reach a verdict. In doing this, you should consult with one another, express your own views, and listen to the opinions of your fellow jurors, tell each other how you feel and why you feel that way, discuss your difference.

...

I want you to understand if you can not agree on a verdict in this case, we’re just going to have to come back on[e] week with another jury pool, select another jury of 12 people and one alternate. Judge is going to have to be here to try the case. Lawyers are going to have to be up here and try the case again, the baliffs will have to be here, law clerk will have to be here; all of that time, all of that effort, all of those expenses associated with trying this case again, and I don’t see how another group of 12 people will do a better job than the 12 of you.

So I would ask that you go back in your jury room, just re-examine your beliefs, think about what you're doing, respect each other's opinion and try to make a decision within a reasonable amount of time.

App. 141 l. 20 – App. 143 l. 9.

Defense counsel did not object when asked by the trial judge about these remarks. App. 143 ll. 13 – 16. The jury convicted Petitioner as indicted. App. 144 l. 23 – App. 145 l. 9. Judge Seals sentenced Petitioner to a term of twenty-three years for the distribution of cocaine base third offense charge and ten years' for the proximity charge, with the sentences to run concurrent. App. 150 ll. 10 – 14. Petitioner's conviction was affirmed. State v. Ivery, Op. No. 2014-UP-265 (S.C. Ct. App. filed June 30, 2014). It is worth noting that the Court of Appeals cited State v. King which held that the appellant in that case waived review of his complaint regarding certain activity that occurred during his trial because he failed to make an appropriate objection when the allegedly offensive activity occurred, instead waiting until after the jury delivered its verdict to object. 334 S.C. 504, 509-10, 514 S.E.2d 578, 581 (1999).

Petitioner filed a timely application for post-conviction relief on or about January 13, 2015. App. 152 – 158. The application contained allegations of ineffective assistance of counsel, prosecutorial misconduct, and judicial misconduct. App. 154. The State filed its Return on or about June 2, 2015. App. 160 – 165.

An evidentiary hearing was conducted on April 22, 2016 before the Honorable R. Knox McMahan. App. 166. Mills Ariail represented Petitioner, and the State was represented by Patrick Schmeckpeper. App. 166. Trial counsel testified at the hearing. Petitioner did not testify due to health problems which resulted in memory loss. App. 170 l. 6 – App. 173 l. 7.

On July 29, 2016, Judge McMahon issued his order denying Petitioner relief. App. 188 – 195. In particular, he found that Petitioner failed to show prejudice following counsel’s failure to object to the trial judge’s Allen charge. App. 192 – 194.

This Petition follows.

## ARGUMENT

The PCR Court erred in denying Petitioner relief where trial counsel failed to object to an Allen charge following a note from the jury which indicated that eleven jurors were in favor of convicting Petitioner and one juror would not change his or her decision of not guilty “under any circumstances”.

Counsel should have objected immediately after the charge was given to the jury. The trial judge gave counsel for both parties the opportunity to object, but neither did. App. 143 ll. 13 – 16. Because the trial judge sought to coerce the jury into reaching a verdict by lamenting the immense effort required to re-try the case, Counsel for Petitioner should have objected.

“An Allen charge is an instruction advising deadlocked jurors to have deference to each other's views, that they should listen, with a disposition to be convinced, to each other's arguments.” State v. Lee-Grigg, 374 S.C. 388, 418 n. 1, 649 S.E.2d 41, 57 n. 1 (Ct.App.2007) (internal quotation marks omitted), aff'd, 387 S.C. 310, 692 S.E.2d 895 (2010). “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.” Dawson v. State, 352 S.C. 15, 20, 572 S.E.2d 445, 447 (2002) (internal quotation marks omitted). This Court has adopted the following factors (“Tucker factors”) as the appropriate framework for which to assess whether an Allen charge is unconstitutionally coercive:

- (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?

Tucker v. Catoe, 346 S.C. 483, 492, 552 S.E.2d 712, 716–17 (2001) (holding, in a capital case, that the United States Supreme Court in Lowenfield v. Phelps, 484 U.S. 231 (1988) set the standard by which to judge a constitutional claim regarding an Allen charge); see Workman v. State, 412 S.C. 128, 130, 771 S.E.2d 636, 638 (2015) (recognizing adoption of Tucker factors in non-capital case to determine whether an Allen charge is unconstitutionally coercive).

The trial judge has the duty to urge, but not coerce, a jury to reach a verdict. Green v. State, *supra*. 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.

The trial judge explained to the jury that if they were unable to reach a verdict, the following individuals would be burdened by a second trial: a second jury pool, the judge, attorneys for both parties, bailiffs, and the law clerk. App. 142 l. 20 – App. 143 l. 5. Counsel should have recognized this coercion and objected immediately thereafter.

It follows therefore, that Petitioner correctly asserted Counsel was ineffective, because he did not object following the trial judge's coercive Allen charge. The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984). The United States Supreme Court has created a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was deficient, and (2) the deficient

performance prejudiced the defendant. Id. at 687. “[T]he court should keep in mind that counsel’s function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.” Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) (quoting Strickland at 690).

First, to be entitled to PCR, the applicant must show that counsel's performance was deficient. Payne v. State, 355 S.C. 642, 645, 586 S.E.2d 857, 859 (2003) (citing Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). In this regard, Counsel admitted that he failed to put anything on the record following a sidebar conversation with counsel and the judge. App. 254 ll. 5 – 12. Counsel admitted that an objection should have been made. App. 181 ll. 12 – 18.

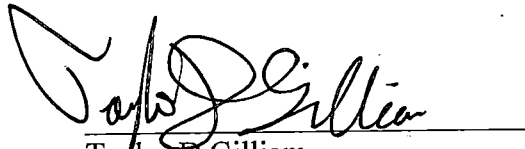
“The second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). The prejudice in Petitioner’s case manifested itself in the resulting conviction and accompanying sentence as well as the inability to contest the merits of the coercive charge on appeal.

Because Counsel failed to offer a contemporaneous objection to the Allen charge, the previously deadlocked jury convicted Petitioner. Had Counsel objected, he could have obtained an on-the-record ruling for Petitioner’s appeal or received a less coercive curative charge which could have prevented the juror who was not in favor of convicting Petitioner from wavering.

The charge placed a burden on the minority juror by forcibly indicating that "[twelve] people must agree" when in actuality, the jury was not required to reach a verdict.

**CONCLUSION**

For the foregoing reasons, Petitioner requests that the Court grant his petition for writ of certiorari to allow full briefing on this issue, reverse the charges against him, and remand the case for a new trial.

A handwritten signature in black ink, appearing to read "Taylor D. Gilliam", written over a horizontal line.

Taylor D Gilliam  
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of April, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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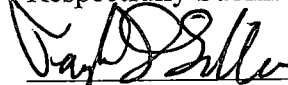
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PETITION TO BE RELIEVED AS COUNSEL  
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Counsel for Gregory Allan Ivery states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's trial before Judge R. Knox McMahon, which was held on April 22, 2016 (Evidentiary Hearing), and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Gregory Allan Ivery.

Respectfully Submitted,



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Taylor D Gilliam

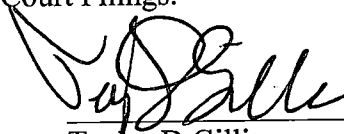
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of April, 2017.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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Taylor D Gilliam  
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ATTORNEY FOR PETITIONER

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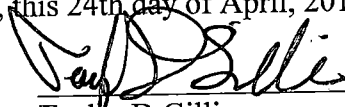
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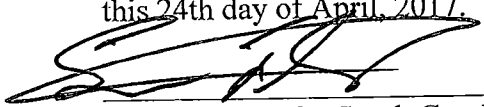
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CERTIFICATE OF SERVICE  
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The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon DeShawn H. Mitchell, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Gregory Allan Ivery, #131131, at Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936, this 24th day of April, 2017.



\_\_\_\_\_  
Taylor D Gilliam  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 24th day of April, 2017.



\_\_\_\_\_  
Notary Public for South Carolina  
My Commission Expires: 10/30/2022