

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Greenville County

John C. Hayes, Circuit Court Judge

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BRYAN BYRD,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-002425

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JOHNSON PETITION FOR WRIT OF CERTIORARI
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Wanda H. Carter
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

 ORIGINAL

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S.C. SUPREME COURT

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ISSUE PRESENTED

Trial counsel erred in failing to object to a coercive Allen¹ charge given in the case.

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

STATEMENT

Petitioner Bryan Keith Byrd was convicted per jury trial of first degree burglary during the October, 2016 term of the Greenville County General Sessions Court before Judge Letitia H. Verdin and sentenced to imprisonment for a period of twenty years. App. 1-346. Petitioner was represented at trial by Randall Chambers and Assistant Solicitor W. Jeff Weston appeared on behalf of the state. Petitioner appealed, but then withdrew the appeal. Attorney K.J. Anthony represented petitioner on direct appeal.

Petitioner filed a PCR application with the Greenville County Office of the Clerk of Court on September 8, 2014. App. 347 – 388. A return was filed by the respondent on February 12, 2015. App. 389–394. A PCR hearing was convened on October 25, 2016, at the Greenville County Courthouse before Judge John C. Hayes. App. 395–399. Petitioner was present at the PCR hearing and represented by Brian P. Johnson, and Assistant Attorney General Patrick L. Schmeckpeper appeared on behalf of the state.

On October 31, 2016, Judge Hayes signed an Order denying petitioner’s allegations of ineffective assistance of counsel in the case. App. 489 – 493.

Petitioner appealed. This petition follows.

ARGUMENT

Trial counsel erred in failing to object to a coercive Allen² charge given in the case.

At trial, Berry Butler testified that around 3:00 am on April 16, 2011, he was inside his house watching television with James Rector when he heard a knock at his door. Butler stated that he ignored it, but later saw a man walking around in the backyard behind his house. After seeing this, Butler stated that he dialed 911, and that in the process of doing so, the man, who was later identified as petitioner, broke through the door and entered the house saying “you are going to give it up” while waving a tool around. Butler and Rector both subdued petitioner until the police arrived on the scene. Tr. 78, l. 7 – p. 117, l. 13.

Officer James Metcalf testified that he was dispatched to the crime scene and twice used a taser on appellant to keep him lying on the ground. Officer Metcalf stated that petitioner kept saying that Butler’s house was a gambling house. App. 196, l. 7 – p. 210, l. 25.

Petitioner testified at trial and explained that Butler’s house was a gambling house that contained gambling machines and people selling dope inside. Petitioner stated that he did not break into the house and that the two men attacked him. App. 248, l. 1 - p. 266, l. 25.

During the PCR hearing held in the case, both petitioner and trial counsel testified in reference to the trial judge’s Allen charge given to the jury in the case. App. 51, l. 1-3; App. 53, l. 4-12; App. 72, l. 14-20.

The trial judge’s Allen charge follows:

Ladies and Gentlemen, you stated you have been unable to agree on a verdict in this case. As I instructed you earlier, the verdict of the jury must be a unanimous one. When a matter is in dispute, it isn’t always easy for even two people to agree. So when 12 people

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

must agree, it becomes even more difficult. In most cases, absolute certainty can't be reached or expected.

However, you have a duty to make every reasonable effort to reach a unanimous 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 differences with open minds.

Although the verdict of the jury must be a unanimous one, every one of you has the right to your own opinion. The verdict you agree to must be your own verdict, the result of your own convictions. You should not give up your firmly held beliefs merely to be in agreement with your fellow jurors. The majority should consider the minority's position and the minority should consider the majority's position. You should carefully consider and respect the opinions of each other and reevaluate your position of reasonableness, correctness and impartiality. You must law aside all outside matters and reexamine the questions before you based on the law and evidence in this case.

If you do not agree on a verdict in this case, I must declare a mistrial. In that case, it does not mean that anybody wins. It just means that at some future time, I will try this case with some other jury sitting exactly where you now sit. The same participants will come and the same lawyers will ask pretty much the same questions and give pretty much the same answers and we will go through this process again.

You were selected in the same manner from the same sources any further jury will be. There is no reason for me to suppose that a case will ever been submitted to 12 or more intelligent, impartial, conscientious or competent jurors than you are or that more or clearer evidence will be produced on one side of the other. I therefore ask you, based on the instructions, to return to your deliberations and continue to deliberate. Thank you so much. App. 361, l. 14 – p. 363, l. 11.

The trial judge's instruction to the jury that they had a "duty" to reach a verdict that was unanimous was the coercive element of the Allen charge in this case that rendered it improper. Trial counsel erred in failing to object to this improper portion of the Allen charge.

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). In Dawson, where the trial judge

asked about the numerical division (for and against) of the jurors and then charged in effect that the one hold out was not being a good citizen,³ the Dawson Court held that counsel was ineffective in failing to object to that Allen charge because the charge was deemed to be coercive. Clearly, whether an Allen charge is unconstitutionally coercive must be judged in its context and under all of the circumstances. Dawson, *supra* citing to Tucker v. Catoe, 346 S.C. 483, 552 S.E.2d 712 (2001). In Tucker, the Court held that the Allen charge given in that case was coercive because the jurors were told that although they should not do violence to their conscience; nonetheless, they were advised of the importance of returning a unanimous verdict and that they must return such a verdict, particularly since the trial judge knew of two hold outs and then the one hold out, and it appeared that the Court surmised that the “jury charge was directed to the minority jurors.” Compare also, State v. Middleton, 218 S.C. 452, 63 S.E.2d 163 (1951), where the Court reversed due to coerciveness after the jury was urged to agree on a verdict, but the trial judge “went too far” by recharging on the law of self-defense three times and inquired of the numbers on the deadlocked jury. See also Green v. State, 351 S.C. 184, 569 S.E.2d 318 (2002).

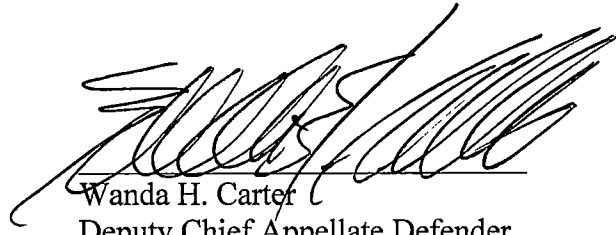
Clearly, under the totality of the circumstances, the trial judge’s Allen charge in the case at bar was unduly coercive and thus unconstitutional; and as a result, trial counsel erred in failing to object to the same at trial. Trial counsel’s failure to object to the unduly coercive Allen charge in this case constituted deficient legal representation at petitioner’s trial in violation of the Sixth Amendment; and but for counsel’s error in this regard, a reasonable probability exists that the

³ In Dawson, the judge’s improper Allen charge was directed to the one hold out where he stated that “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.”

outcome of petitioner's trial would have been different. See Strickland v. Washington, 466 U.S. 668 (1984).

CONCLUSION

Based on the foregoing argument, petitioner requests that this Court grant the petition and allow full briefing on the issue raised above.

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', is written over a horizontal line.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of August, 2017.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County

Honorable John C. Hayes, Circuit Court Judge

BRYAN BYRD,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

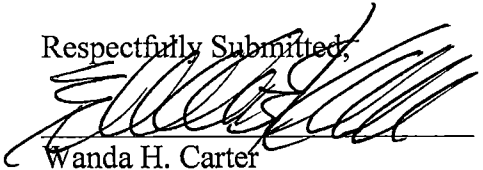
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Bryan Byrd states that:

1. She is Deputy Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
 2. She has reviewed the record of petitioner's trial before Judge John C. Hayes, which was held on October 25, 2016, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
 3. She 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 her as counsel for Bryan Byrd.

Respectfully Submitted,

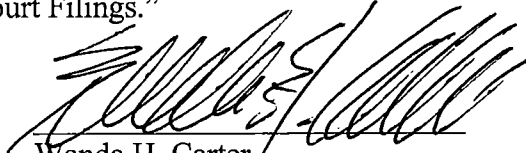


Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 7th day of August, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her 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."



Wanda H. Carter
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ATTORNEY FOR PETITIONER

This 7th day of August, 2017.

STATE OF SOUTH CAROLINA

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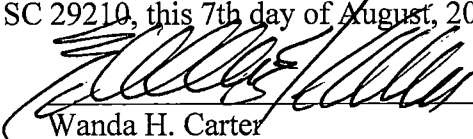
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STATE OF SOUTH CAROLINA,

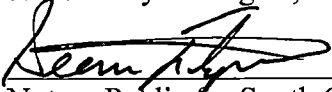
RESPONDENT

CERTIFICATE OF SERVICE

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 Bryan Byrd, #305294, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 7th day of August, 2017.


Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 7th day of August, 2017.



Notary Public for South Carolina
My Commission Expires: October 30, 2022.