

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY  
Court of General Sessions

R. Lawton McIntosh, Circuit Court Judge

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**SC Court of Appeals**

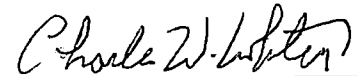
Case No. 2019-001542

The State,.....Respondent.

V.

Larry E. Adger, III.....Appellant.

INITIAL BRIEF OF APPELLANT



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**STATEMENT OF ISSUE ON APPEAL**

- I. DID THE TRIAL COURT ERR IN CHARGING THE JURY UNDER ALLEN VS UNITED STATES IN COERCIVE LANGUAGE?"**

## STATEMENT OF THE CASE

The Defendant was charged and indicted for trafficking in crack cocaine; trafficking in methamphetamines, and possession of a controlled substance.

After the jury was charged and sent to the jury room for deliberations the court was advised by the jury foreman, after deliberating for one hour and forty four minutes, that the jury was at an impasse on two of the charges and asked the court for advice.

The judge sent the jury back to the jury room to continue deliberations. After fifty three minutes, the jury announced ‘We have discussed the testimony and evidence thoroughly and repeatedly and there does not appear to be any chance of receiving 100 percent vote on two of the three charges.’”

The judge provided his proposed Allen Charge to both the State and the Defense. Defense Counsel objected to the Allen Charge stating that asking the jury to reevaluate their decision was in some way coercing them to make a decision.

**The Court:** “Oh, it is. I mean obviously, that’s what it’s designed to do”. (Tr R. p. 242 line 9,10) Defense Counsel continued to object stating,

**Mr. Whiten:** “It’s an Allen Charge, but I don’t - - I don’t agree with the Allen Charge the way it’s written - - - (Tr R. p. 242 lines 11-13)

**Mr. Whiten:** “because of that - - because, in effect, it’s taking their decision away from one individual, two individuals, however many it is. (Tr. R p. 242 lines 15-18)

The Defense Counsel continued to object.

**Mr. Whiten:** “I object to it, Your Honor.” (Tr. R. p. 242 line 20)

**The Court:** “I gotcha. And I note your objection. (Tr. R. p. 242. lines 21-22)

The judge acknowledged that the Defense Counsel never agreed to the Allen Charge.

**The Court:** Now let me just point out that earlier when we discussed what would – how you wanted to handle this, you were in agreement with me sending them back and not giving them an Allen Charge and continue to, but I guess you never agreed to the Allen Charge, period?” (Tr. R. p. 242 line 23 through Tr. R. p. 243 line 3)

After the judge read the Allen Charge to the jury, Defense Counsel renewed his objection for the record.

**Mr. Whiten:** “Your Honor, I renew my objection and I’ll read it for the record. (Tr. R. p. 246 lines 8-9) Primarily, for the provision of the Allen Charge that says that you should carefully consider and respect the opinion of each other and reevaluate your position for reasonableness and correctness and impartiality. Reevaluate is the problem word for me on this Allen Charge, your Honor.” (Tr. R. p. 246 lines 11-17)

The Judge then charged the Allen Charge to the jury over the objections of Defendant’s counsel.

After the Allen Charge was given to the jury, the jury returned after one hour with a verdict of guilty on all charges.

The jury was polled and all jurors including juror No. 167, the sole black juror, responded guilty. (Tr. R. p. 249, line 17)

## ARGUMENT

### I. DID THE TRIAL COURT ERR IN CHARGING THE JURY UNDER ALLEN VS UNITED STATES USING COERSIVE LANGUAGE?

Because the Allen Charge given by the Trial Judge:

(1) Spoke specifically to the only minority juror on the jury panel, the charge was unconstitutionally coercive. (Tr R. p. 243 line 14 – Tr R. p. 245 line 25)

The judge and the entire jury knew that there was only one minority juror on the jury panel, a young black woman. (Juror 167, Kristie M. White) Exhibit 1. The Defendant was black.

The judge instructed:

**The Court:** “As I instructed you earlier, in order for your verdict to stand, it will have to be unanimous, The verdict – when a matter is in dispute, it is amazing for even 2 people to agree on the matter, much less when you have 12 people. That even becomes more difficult.

In most cases, an absolute certainty cannot be reached or even expected; however, you have a duty to make a 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 always be unanimous, every one of you has the right to your own opinion. The verdict that you agree upon must be your own verdict,

the result of your own convictions, and you should not give up a firmly held belief merely to be in agreement with your fellow jurors.

The majority should consider the minorities' position, and the minorities should consider the majority's positions. You should carefully consider and respect the opinions of each other and reevaluate your position for reasonableness, correctness, and impartiality. You must lay aside all outside matters and reexamine the questions before you based on the law and evidence in this case." (Tr. R. p. 244 line 1 through Tr. R. p. 245 line 6)

The attorney for the Defendant objected to the charge on numerous occasions.  
(Tr. R. p. 242 lines 3-22)

**The Court:** "You object to it?"

**Mr. Whiten:** Yes, sir.

**The Court:** Why?

**Mr. Whiten:** Well, asking the jury to reevaluate their decision, I think that's in some way coercing them to make a decision.

**The Court:** Oh, it is. I mean, obviously, that's what it's designed to do.

**Mr. Whiten:** It's an Allen Charge, but I don't - - I don't agree with the Allen Charge the way it's written - - -

**The Court:** Okay.

**Mr. Whiten:** - - - because of that - - because, in effect, it's taking - - it's taking their decision away from one individual, two individuals, however many it is.

**The Court:** All right.

**Mr. Whiten:** I object to it, Your Honor.

**The Court:** I gotcha. And I note your objection.

The judge, including that “however, you have a duty to make a reasonable effort to reach a unanimous verdict.” is directed at the sole minority juror on the jury panel in language of an almost identical substance as was found to be directed to the minority juror in *Tucker v. Catoe*, 346 S.C. 483, 552 S.E.2d 712 (S.C. 2001). In *Tucker*, the Supreme Court of South Carolina held:

1. Did the charge speak specifically to minority jurors?

While these jurors were told that they should not do "violence to his or her own conscience" in order to reach a verdict, and not to give up an opinion "based on reasoning

[346 S.C. 493]

satisfactory to himself or herself merely for the purpose of ... agreement ...", the jurors were also charged:

[W]hen 12 men and women must agree as to a particular decision, it becomes correspondingly more difficult, but it's important that jurors reach a unanimous verdict...

It was never intended that the verdict of the jury should be the view of any one person. On the other hand, the verdict of the jury is the collective reasoning of all of the men and women serving on the panel. That's why we have a jury, so that we may have the benefit of collective thought and of collective reasoning.

Now, it becomes each of your duties as jurors to tell the other jurors how you feel about the case and why you think as you do. It becomes each of your duties to exchange views with the

other jurors, and you should listen to each other and give to the other's thought such meaning as you think it should have.

Viewed as a whole, this jury charge was directed to the minority juror. The trial judge knew, and apparently the jury knew that he knew, that while there had been two hold-out jurors as of 5 p.m. the night before, there was now only one.

Further, the South Carolina Supreme Court, in Workman vs State 412 S.C. 128, 771 S.E.2d 636 (S.C. 2015) held: "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, 569 S.E.2d 318 (S.C. 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." The Allen Charge in Workman Supra was found to be unconstitutionally coercive because the language could potentially be construed as coercive, as jurors are not required to reach a verdict after expressing they are deadlocked. In this case, now before the court, the Allen Charge, viewed as a whole, was impermissibly directed to the sole minor juror. The judge and all white jurors knew that there was only one black juror on the jury panel. When the jury returned a guilty verdict an hour and forty minutes after receiving the Allen Charge and the Court had not addressed the jury that "Jurors are not required to reach a verdict after expressing they are deadlocked" the language could, potentially be construed as coercive.

Viewed as a whole and under the known circumstances by the judge, and the jury panel, and in the context of the four factors set forth by the court in Tucker vs Catoe, Supra, after the jury expressed that they were deadlocked, the noted charge was coercive to the minority juror.

**Mandatory language used in the charge.**

(2) The Judge's charge that "you have a duty to make a reasonable effort to reach a unanimous verdict" is coercion in its own right. There is no "duty" to reach a unanimous verdict and to charge "a duty" to reach a unanimous verdict is coercion to the only black juror on the panel. Additional language by the judge that "you should carefully consider and "respect the opinion of each other and reevaluate your position for reasonableness, correctness and impartiality" is extremely coercive in the context and makeup of this jury panel. To tell a sole black juror to respect the opinion of eleven white jurors in a closed room is not only coercive but borderline historically racist language.

**Judge's personal interjection of his opinion as to future of the case.**

(3) The trial judge interjected himself into the decision of the jury when he informed the jury;

**The Court:** "If you do not agree on the verdict in this case, I must declare a mistrial. In that case, it does not mean anyone wins. It just means that at some point in the future, I will try this case with some other jury setting where you now sit. The same participants will come in, and the same players are asked the same questions and give basically the same answers and we'll go through whole process again.

You were selected in the same manner and from the same source as any future jury will be. And there's no reason for me to suppose that the case will ever be submitted to 12 more intelligent, impartial, conscientious, and competent jurors than you or that more clearer evidence will be produced on one side or the other."

Therefore, Mr. Foreman, I'm going to ask that you go back and continue your deliberations if you will, please sir. Thank you." (Tr. R. p. 245 lines 7-25)

This instruction to the jury, and especially to the one minority member is an explicit direction that she must agree on a verdict, or else he would personally have to retry the case. That is an erroneous and totally misleading statement. Another option would be that the State could make a decision not to retry the case for any reason or for no reason. Secondly, the judge's charge that "the same players are asked basically the same questions and give basically the same answers is projecting to the sitting jury an erroneous projection of what they now know will happen at a next trial if a trial is ever held, leaving with the sitting jury a judgment on further facts from the judge and an impression that they might as well go ahead and find a verdict. The instruction is a finding of fact by the judge, evidence they may or may not be presented at future proceedings, if any.

Also, the judge included in this instruction that "we'll go through the whole process again." Who is the judge referring to when he says "we'll go through the whole process." This language infers that "we" the community will convict this man if you don't.

This instruction unlawfully introduced the coercive factor that the judge would have to work longer under what he described as identical circumstances. The language is coercive and is unconstitutional as a violation of due process provisions of the Fifth and Fourteenth Amendments to the United States Constitution. Neither the time or cost of a jury trial is a factor for determination by the jury.

### TIME OF REACHING A VERDICT

(4) One hour after the jury received the Allen Charge, the jury announced its verdict of guilty on all charges.

The jury panel began deliberations at 12:17 p.m. on June 19, 2018. At 1:34 p.m. the jury returned to the courtroom for a question not related to the Allen Charge. At 1:35 the jury resumed deliberations. At 2:03 p.m. the jury advised the court that “We are at an impasse on two of the three charges. Advice.”

At 2:10 p.m. the judge advised the jury to go back and reevaluate the position of the jury. At 2:11 the jury continued deliberations. At 3:04 p.m. the jury announced by note that “We have discussed the testimony and evidence thoroughly and repeatedly and there does not appear to be any chance of receiving 100 percent vote on two of the three charges.” The judge then gave the jury the Allen Charge set forth above.

In Tucker v. Catoe supra, the Supreme Court of South Carolina held the hold out of a single juror “where every member of the jury knew that a single juror was holding out should not prevent the majority from their verdict” and that the return of a verdict one and one half hours after an Allen Charge was a factor weighing in favor of a judge’s finding of coercion. Tucker v. Catoe, supra.

In this case, there is no indication that the jury panel would have changed their opinion, after two notices of impasse to the judge and after two instructions for the jury to continue deliberations. The Allen Charge was an impermissible coercion given in the context and circumstances of the case.

The jury verdict after only one hour of the Allen Charge, along with the other facts noted above render the charge coercive to the sole minority juror.

Problems arising from the inherently coercive effect of the Allen Charge have caused other courts of appeals and state courts to prohibit or to restrict severely its use.

Several states have banned use of the traditional Allen Charge in all criminal cases.

State v. Czachor, 82 N.J. 392, 413 A.2d 593 (N.J. 1980);

Kersey v. State, 525 S.W.2d 139 (Tenn. 1975) ;

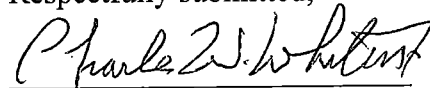
People v. Gainer, 19 Cal.3d 835, 139 Cal.Rptr. 861, 566 P.2d 997 (Cal. 1977)

#### CONCLUSION

The Allen Charge given at Appellant's trial was unconstitutionally coercive and violates Appellant's right to due process. The conviction in his case therefore should be reversed and the case remanded for a new trial.

February 4, 2020

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY  
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R. Lawton McIntosh, Circuit Court Judge

Case No. 2019-001542

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V.

Larry Edward Adger III,.....Appellant.

PROOF OF SERVICE

I certify that a copy of the Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal has been served on Respondent by depositing a copy of the Initial Brief and Designation of Matter to be Included in the Record on Appeal in the United States Mail, postage prepaid, on February 5, 2020, addressed to the counsel(s) of record as follows:

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February 5, 2020

The Honorable Jenny Abbott Kitchings  
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Re: State vs Larry E. Adger, III  
Appellate Case No.: 2019-001542

Dear Ms. Kitchings:

Enclosed for filing please find an Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal in the above revered case along with a Proof of Service for same.

Thank you for your usual courtesies in these matters.

Sincerely,



Charles W. Whiten, Jr.  
Attorney at Law

CWW/crw

cc: Kristin W. Reeves, Esquire  
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