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April 21, 2020

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: State vs Larry E. Adger, III
Appellate Case No.: 2019-001542

Dear Ms. Kitchings:

Enclosed for filing please find Appellant's Reply Brief to Respondent's Initial Brief in the above reverenced case along with a Proof of Service for same.

By copy of this letter I am serving Attorney's for Respondent of same.

Thank you for your usual courtesies in these matters.

Sincerely,

Charles W. Whiten, Jr.
Attorney at Law

CWW/crw

cc: Alan Wilson
William F. Schumacher, IV
David R. Wagner

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None of the cases cited by the Respondent address the issue of the extraneous, irrelevant comments from the trial judge included in the trial judge's Allen Charge. These comments are confusing and misleading to the jury and are reversible error.

Respondent's cite in State v Peer 320 S.C. 546, 466 s.e.2D 375 (Ct. App. 1996) referring to the trial court's duty to include requested instructions by the defense which correctly state the law does not apply to this case. No instructions were requested by the defense counsel.

However, State v Peer, supra does provide, in the same paragraph (paragraph 380) of the case "it is error to give instructions which are calculated to confuse or mislead the jury" and "the giving of conflicting and irrelevant instructions is reversible error".

Here the Trial judge's extraneous comments in his Allen charge

"if you do not agree on the verdict in this case, I must declare a mistrial. In that case it does not mean that anyone wins.

It just means that at some point in the future, I will try this case with some other jury sitting where you now sit. The same participants will come in, and the same players are asked basically the same questions and give basically the same answers and we'll go through this whole process again.

You were selected in the same manner and from the same sources 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 more clearer evidence will be produced on one side or the other." RT 245 lines 7-22.

This is inaccurate and misleading in several respects..

First, in his charge that "If you do not agree to the verdict in this case, I must declare a mistrial," "the" implies that "the" verdict is one that the trial judge expects.

Next Respondent's counsel cited State v. Lee-Grigg, 649 S.E.2d 41, 374 S.C. 388 (S.C. App. 2007) as confirmation that "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 argument"

The Lee-Grigg case was a forgery case challenging a denial of a motion for a directed verdict, a request to charge the jury on a good faith defense and a request to charge the jury on use of evidence of good character.

The Lee-Grigg case only reports that the trial court "issued an Allen charge" but does not report the language given to the jury. Here, the trial judge did not charge that the jury should listen "with a disposition to be convinced to each other's arguments" as implied by Respondent.

Further, Respondent's reliance on Allen itself is misplaced as has been noted in numerous cases in Supreme Courts across the United States which have declared Allen charges coercive. Reference is particularly made to People v. Gainer, 19 Cal.3d 835, 139 Cal.Rptr. 861, 566 P.2d 997 (Cal. 1977) in which the Supreme Court of California, sitting *In Bank*, found the Allen charge under circumstances almost identical to the charges in this case, to be in error where the trial court gives an instruction which either (1) encourages jurors to consider the numerical division or preponderance of opinion on the jury in forming or reexamining their views on the issues before them; or (2) states or implies that if the jury fails to agree the case will necessarily be retried. Gainer also cites the American Bar Association as recommending global abandonment of the charge.

Respondent then cites Tucker v. Catoe, 346 S.C. 483, 552 S.E.2d 712 (S.C. 2001) and Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988) for the court's

decision that "whether an Allen Charge is unconstitutionally coercive must be judged in its context and under all the circumstances P8 Lines 10-12.

The constitutionality of the Allen charge is not the only issue here, (though Appellant challenges the constitutionality of the charge) because, here, when the Allen charge, as given by the trial judge, instructs the jury to consider extraneous irrelevant, and improper factors, ie, the introduction of a personal interest in the outcome of the case, the charge inaccurately states that he would have to retry the case to hear future facts that may be presented to a future jury of the case if a mistrial results and gives the jury a false impression of the law as applied to the present case.

The charge carries a potentially coercive impact, and burdens rather than felicitates the administration of justice. The issue of the inaccurate charge of the law that might be applied to a potential future trial suffices to render error requiring reversal of the conviction and remand for a new trial.

Further, Respondent's citing of Tucker v. Catoe, supra, fails to note that the court in Tucker found the Allen Charge to be coercive under circumstances set forth in Lowenfield.

Lowenfield was a 5-3 decision on the issue of coercion where, unlike this case, the defense counsel did not object to the supplemental Allen instruction.

The language of the charge, contrary to Respondent's contention that the trial judge never told the jury they were forced to make a decision in this case, does carry a direction that "you have a duty to make a reasonable effort to reach an unanimous verdict."

The only duty a jury has is to consult with one another, to consider each other's views and to discuss the evidence in arriving at a decision whether that decision be guilty or not guilty.

For the court to impose a "duty" on the jury to reach a unanimous verdict is unconstitutionally coercive.

The Respondent mistakes the time the jury deliberated after the Allen Charge was given in an effort to expand the actual time the jury considered its verdict after the Allen Charge. The jury only deliberated for one hour after the Allen Charge given by the trial judge, and this was after the jury had twice informed the court that they were at an impasse on two of the three charges and 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. Rt. 236- Live 12-13 and 241 Line 5-9.

One hour is a short period of time given the fact that the juror or jurors holding out had been holding out for several hours and through two reports from the jury that the jury was at an impasse.

This time of return of the verdict after the Allen Charge along with other compelling circumstances set forth herein, is persuasive that the Allen Charge was coercive. Tucker v. Catoe supra, United States v. United States Gypsum Company, 57 L.Ed.2d 854, 98 S.Ct. 2864, 438 U.S. 422 (1978)

CONCLUSION

The argument of the Respondent must therefore be discounted, and the conviction of Appellant should be reversed and the case remanded for a new trial.

April 21, 2020

Respectfully submitted:

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ATTORNEY FOR APPELLANT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of General Sessions

The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2019-001542

THE STATE.....RESPONDENT,

V.

LARRY E. ADGER, III.....APPELLANT.

PROOF OF SERVICE

I, Carla R. Whiten, certify that I have served the within Reply Brief of Appellant on Respondent by sending one copy, via mail, of same to:

ALAN WILSON
Attorney General

WILLIAM F. SCHUMACHER, IV
Assistant Attorney General

P.O. Box 11549
Columbia, SC 29211

DAVID R. WAGNER
Solicitor, Tenth Judicial Circuit
100 South Main Street
Anderson, SC 29624

Digital copies of the same documents have also been sent, via electronic mail to Mr. Wilson, Mr. Schumacher, IV and Mr. Wagner at the following addresses:

I further certify that all parties required by Rule to be served have been served this 21st day of April, 2020.

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