

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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SC Court of Appeals

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APPEAL FROM ANDERSON COUNTY  
Court of General Sessions

The Honorable R. Lawton McIntosh, Circuit Court Judge

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Appellate Case No. 2019-001542

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THE STATE,.....RESPONDENT,  
V.  
LARRY E. ADGER, III.....APPELLANT.

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FINAL REPLY BRIEF OF APPELLANT

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ATTORNEYS FOR RESPONDENT

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APPELLANT'S FINAL REPLY  
TO  
RESPONDENT'S FINAL BRIEF

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." (R.p. 21 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.

decision that “whether an Allen Charge is unconstitutionally coercive must be judged in its context and under all the circumstances. (P8 Lines 10-12 of Respondent’s Final Brief)

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. (R.p. 12- Lines 12-13 and R.p. 17 Lines 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.

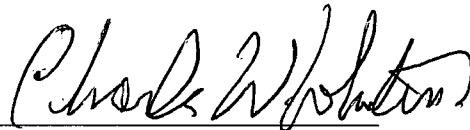
This time of return of the verdict after the Allen Charge along with other compelling circumstances set forth herein, is persuasive that the Allen Charge was coercive. Tucker v. Catoe supra, United States v. United States Gypsum Company, 57 L.Ed.2d 854, 98 S.Ct. 2864, 438 U.S. 422 (1978)

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.

March 19, 2021

Respectfully submitted:

A handwritten signature in black ink, appearing to read "Charles W. Whiten, Jr.", written over a horizontal line.

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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

Jur #	Name	Certificate #	Race	Sex	Age	Birth Date
Status	Address		Education		Home Phone	Bus Phone
	Juror Occupation	Employer			Years Employed	
	Marial Status/Spouse	Spouse's Occupation			Spouse's Employer	
161	Walker, Beatrice G	70349	B	F	82	02/23/1936
AGE	1003 Furman Gambrell Rd Anderson, SC 29621					
162	Warner, Melinda R	4225193	W	F	55	09/30/1962
SU	245 Indian Trl Anderson, SC 29625		HIGH SCHOOL		(864)376-3576	(864)716-4060
	SECRETARY/BOOKI	GLENVIEW MIDDLE SCHOOL			7	
	M / WILLIAM D WARNER	MESSAGE THERAPIST			SELF EMPLOYED	
163	Waterman, Larry E	6381548	W	M	70	04/28/1948
SU	217 Seagull Ln Anderson, SC 29625					
164	Waters, Katrina C	4203072	W	F	48	01/09/1970
TO	2201 Rush St Anderson, SC 29621					
165	Watt, Linda D	1516637	B	F	62	07/03/1955
UTL	102 Leon Dr Anderson, SC 29621					
166	West, Susie G	1908574	W	F	85	09/28/1932
DEC	105 John Ave Anderson, SC 29626					
167	White, Kristie M	4274342	B	F	44	03/10/1974
SU	1032 Sand Palm Way Anderson, SC 29621		BACHELORS DEGREE		(864)622-8025	
	EDUCATION EVAL.	NCEES			12	
	D					
168	Whitfield, Cassandra S	4288538	B	F	32	06/20/1985
UTL	1020 Willie Rice Rd Anderson, SC 29621					

EXHIBIT 1