

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Kershaw County

Honorable G. Thomas Cooper, Circuit Court Judge

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MITCHELL LOGAN HINSON,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001643

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PETITION FOR WRIT OF CERTIORARI

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<sup>1</sup> Allen v. United States, 164 U.S. 492, 17S.Ct.154, 41 L.Ed.528 (1896).

## ISSUES PRESENTED

1. Did the PCR judge err in refusing to find trial counsel ineffective for allowing the jury to view Petitioner in leg shackles as he walked to the witness stand to testify?
2. Did the PCR judge err in refusing to find trial counsel ineffective for failing to object to the State's use of Petitioner's prior conviction for receiving stolen goods for impeachment purposes?
3. Did the PCR judge err in refusing to find trial counsel ineffective for failing to object to the Allen<sup>2</sup> charge when the jury had not yet indicated that it was deadlocked?
4. Did the PCR judge err in finding that Petitioner knowingly and intelligently waived his right to a direct appeal?
5. Did the PCR judge err in refusing to find trial counsel ineffective in failing try to obtain a plea agreement that would allow concurrent sentences for the burglary and a probation revocation?

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<sup>2</sup> Allen v. United States, 164 U.S. 492, 17S.Ct.154, 41 L.Ed.528 (1896).

## **STATEMENT OF ISSUE ON APPEAL**

1. Did the trial judge err in refusing to conduct a hearing and grant Petitioner's motion for a new trial based on an allegation that the jury foreman failed to disclose his relationship with both the victim and Petitioner?

## STATEMENT

In March of 2011, the Kershaw County Grand Jury indicted Petitioner, Mitchell Logan Hinson, for burglary first degree, indictment #2011-GS-28-0220. On June 27, 2011, Petitioner proceeded to jury trial before the Honorable L. Casey Manning. Neil Riley represented Petitioner at trial. Ron Moak prosecuted the case. The jury returned a verdict of guilty and Judge Manning sentenced Petitioner to fifteen (15) years. On July 8, 2011, Petitioner filed a motion for a new trial. (App. p. 205). On November 3, 2015, while the motion for new trial was still pending, Petitioner filed an application for post-conviction relief [PCR]. The application was dismissed without prejudice because the motion for a new trial was still pending. In an order signed March 24, 2016, filed April 4, 2016, the trial judge denied the motion for a new trial.

On November 4, 2016, Petitioner filed a second PCR application. Petitioner filed an amended application on May 24, 2017. The State filed a return on June 23, 2017. On July 19, 2017, an evidentiary hearing was held before the Honorable G. Thomas Cooper, Jr. Kristy Goldberg represented Petitioner at the PCR hearing. Jessica Kinard represented the State. In a written order filed April 12, 2018, Judge Cooper denied relief and dismissed the application. A timely motion to alter or amend was filed April 24, 2018, and then denied on September 5, 2018. A timely notice of intent to appeal was served on September 10, 2018. This petition for writ of certiorari follows.

## STANDARD OF REVIEW

The appellate courts defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). The appellate courts review questions of law de novo, with no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)). Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, (2018).

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. “Under this prong, ‘[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id.

## ARGUMENTS

1. **The PCR judge erred in refusing to find trial counsel ineffective for allowing the jury to see Petitioner in leg shackles as he walked to the witness stand to testify.**

The jury found Petitioner guilty of going into a school mate's house at night and taking a Play Station Three gaming system console, three games, a game controller and a watch. The items were all returned. (App. p. 67, lines 15-17). Petitioner was seventeen years old at the time of trial. (App. p. 308, lines 18-19). Petitioner took the stand and testified at his trial. When he was called to the witness stand the following took place:

The Court: Come around, Mr. Hinson.

(Whereupon, the Defendant came forward to be sworn by the Clerk)

The Court: Stop. Go back around, son.

(Colloquy at the bench between counsel and the Court off the record)

The Court: Mr. Foreman, members of the jury, I have a matter that I need to take up in your absence. Don't talk about it; go to your jury room.

(Jury excused from Courtroom)

The Court: Is he still shackled?

Mr. Riley [Trial counsel]: Yes, sir.

The Court: Take them off. When you put him on the witness stand, you have to take them off. Anybody can see that. You all have to help me out. I can't see everything that goes on. I'm shocked. We'll take a short break.

(App. p. 132, lines 2-19).

In the amended application for post-conviction relief Petitioner alleged, "Ineffective assistance of counsel for failing to ensure that the jurors did not witness Applicant in leg

shackles.” (App. p. 219). During the PCR hearing, when asked about the jury viewing Petitioner in leg shackles, trial counsel testified, “Right. That’s when I – the judge asked, call your next witness, and I called Mr. Hinson. He came out from around from where he was seated at the table. And that was the first time that I -- that it registered in my mind that he was still shackled. I take full blame for it. I should have noticed it and made sure that didn’t happen. Judge Manning was perturbed, as you can imagine. I was also. He did ask – he excused the jury. So, you, I take full responsibility for that mistake.” (App. p. 265, lines 4-14). When asked if Petitioner was visible to the jury when he approached the witness stand in leg shackles, counsel answered, “Oh, yeah.” (App. p. 289, lines 20-23). Trial counsel admitted that this was totally his fault and an oversight he deeply regretted. (App. p. 290, lines 1-7).

In the order of dismissal the PCR judge cited Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001), and Holbrook v. Flynn, 475 U.S. 560 (1986), and without specifically finding deficient performance, found no prejudice. (App. pp. 334-335). The PCR judge wrote, “In the present case, there is overwhelming evidence establishing Applicant was guilty of the charged offense, including an identification by a victim who knew Applicant by sight and testimony from a cooperating co-defendant. This Court finds there is no reasonable likelihood the result of Applicant’s trial would have been different but for the fact that the jury saw Applicant in shackles. For these reasons, this allegation is denied and dismissed.” (App. p. 335). The PCR judge erred. Trial counsel was deficient in allowing the jury to view Petitioner in leg shackles as he approached the witness to testify. Petitioner was prejudiced by the deficient performance.

#### **A. Deficient Performance**

Trial counsel admitted that he should not have allowed the jury to view Petitioner in leg shackles. (App. p. 265, lines 4-14). In Deck v. Missouri, 544 U.S. 622, 624, 125 S. Ct. 2007,

2009, 161 L. Ed. 2d 953 (2005), the United States Supreme Court wrote, “We hold that the Constitution forbids the use of visible shackles during the penalty phase, as it forbids their use during the guilt phase, *unless* that use is ‘justified by an essential state interest’—such as the interest in courtroom security—specific to the defendant on trial. Holbrook v. Flynn, 475 U.S. 560, 568–569, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986); see also Illinois v. Allen, 397 U.S. 337, 343–344, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970).” In the present case there is nothing in the record to justify the use of leg shackles in view of the jury.

In Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001), the South Carolina Supreme Court found that trial counsel was deficient for allowing the trial to proceed while petitioner was dressed in prison clothing but found no prejudice. The present case can be distinguished from the finding of no prejudice in Humbert, as discussed below. Like the trial counsel in Humbert, however, trial counsel in the present case was deficient for allowing the jury to view Petitioner in leg shackles. The PCR judge erred in failing to make a specific finding of deficient performance.

### **B. Prejudice**

In determining if a PCR applicant has met his burden of proving prejudice the PCR court should consider the strength of the State’s case along with the specific impact of counsel’s error. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). “In rare cases, using ‘overwhelming evidence’ as a categorical bar to preclude a finding of prejudice is not error.” Id. 422 S.C. at 190, 810 S.E.2d at 844. The State’s evidence in the present case is not such that it would bar a finding of prejudice. The State’s evidence consisted of a surveillance video from the security system installed by the homeowner and testimony from a co-defendant who was allowed to resolve his charges in family court in exchange for his cooperation.

In contrast, Humbert may have been one of the rare cases where the overwhelming evidence served as a categorical bar to finding prejudice. In Humbert the Court found that counsel was deficient for allowing the trial to proceed with the petitioner dressed in prison clothing. The Court, however, found no prejudice writing:

We find the evidence of record supports the PCR judge's conclusion petitioner was not prejudiced by counsel's deficient performance. The store clerk identified petitioner as the robber shortly after the crime and, then again, at trial. The clerk's description of the perpetrator's clothing matched the clothing petitioner was wearing approximately 1 ½ hours after the robbery. A blue "Lincoln-Mercury" jacket and baseball cap with the letter "A" on it-items which the clerk stated the robber was wearing-were found in petitioner's vehicle. Petitioner was driving a truck which matched the description of the getaway vehicle. Food and postage stamps were found in the backseat of the patrol car after petitioner was removed from the vehicle. The clerk testified food and postage stamps had been taken from the cash register. Due to the overwhelming evidence against petitioner, there is not a reasonable probability the outcome of his trial would have been different had petitioner not been dressed in his prison jumpsuit.

345 S.C. at 338, 548 S.E.2d at 865–66. The State's evidence in Humbert was far greater than the State's evidence in the present case.

The jury struggled to reach a verdict in this case. While the jury never announced that it was deadlocked, the trial judge gave an Allen charge after the jury returned the next morning to continue deliberating. (App. pp. 178-192). In Deck v. Missouri, 544 U.S. 622, 635, 125 S. Ct. 2007, 2015–16, 161 L. Ed. 2d 953 (2005), the Court, addressing the State's argument that Deck suffered no prejudice wrote:

The third argument fails to take account of this Court's statement in Holbrook that shackling is "inherently prejudicial." 475 U.S., at 568, 106 S.Ct. 1340. That statement is rooted in our belief that the practice will often have negative effects, but—like "the consequences of compelling a defendant to wear prison clothing" or of forcing him to stand trial while medicated—those effects "cannot be shown from a trial transcript." Riggins, supra at 137, 112 S.Ct. 1810. Thus, where a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation. The State must prove "beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict

obtained.” Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

The inherently prejudicial nature of the jury viewing Petitioner in leg shackles in the present case where there was not overwhelming evidence of guilt meets the prejudice requirement of Strickland. Petitioner is entitled to relief.

**2. The PCR judge erred in refusing to find trial counsel ineffective for failing to object to the State’s use of Petitioner’s prior conviction for receiving stolen goods for impeachment purposes.**

Prior to Petitioner testifying at trial the State moved to admit a receiving stolen goods conviction from 2010. (App. pp. 112-113). The trial judge ruled that the State could use the conviction for impeachment purposes because receiving stolen goods was a crime of moral turpitude. (App. p. 113, lines 2-15). Trial counsel agreed that receiving stolen goods was a crime of moral turpitude and did not object. (App. p. 113, line 4). The State questioned Petitioner about the receiving stolen goods conviction on cross examination. (App. p. 136, lines 1-18).

In the amended application for post-conviction relief Petitioner alleged, “Ineffective assistance of counsel for failing to object to admission the Applicant’s prior conviction for Receiving Stolen Goods.” (App. p. 219). During the PCR hearing trial counsel testified that he believed the prior conviction for receiving stolen goods was admissible because it was within ten years and was a crime of moral turpitude. (App. p. 290, line 18 – p. 291, lines 1-3). Trial counsel admitted that he did not argue the prior conviction was more prejudicial than probative because of the theft similarity between the prior and the burglary for which Petitioner stood trial. (App. p. 291, line 4 – p. 292, lines 1-8).

In the order of dismissal the PCR judge noted in a footnote that the common law rule applying the moral turpitude standard was no longer appropriate in light of the adoption of the Rules of Evidence in 1995. (App. p. 335). The PCR judge, however, found trial counsel was not ineffective writing, “At the time of Applicant’s trial in 2011, receiving stolen goods was recognized as a crime of dishonesty pursuant to Rule 609(a)(2), SCRE. See State v. Williams, 380 S.C. 336, 669, S.E.2d 640 (Ct.App.b2008) (acknowledging a witness’ conviction for receiving stolen goods was a crime of dishonesty). Therefore, counsel was not ineffective for failing to object or otherwise present an argument as to why Applicant’s prior conviction for receiving stolen goods should have been inadmissible for impeachment purposes.” (App. p. 336). The PCR judge erred.

#### **A. Deficient Performance**

Trial counsel was ineffective in failing to challenge the State’s use of the prior receiving stolen goods conviction. Trial counsel operated under the outdated moral turpitude standard. The correct standard is found in Rule 609(a), SCRE, which provides:

For the purpose of attacking the credibility of a witness,

- (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
- (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

Trial counsel was ineffective in failing to argue that the prejudicial effect of the prior receiving stolen goods conviction outweighed the probative value pursuant to Rule 609(a). In

Green v. State, 338 S.C. 428, 433–34, 527 S.E.2d 98, 101 (2000), the South Carolina Supreme

Court wrote:

We decline to hold similar prior convictions inadmissible in all cases. Trial courts must weigh the probative value of the prior convictions against their prejudicial effect to the accused and determine, in their discretion, whether to admit the evidence. The following factors, along with any other relevant factors, should be considered:

1. The impeachment value of the prior crime.
2. The point in time of the conviction and the witness's subsequent history.
3. The similarity between the past crime and the charged crime.
4. The importance of the defendant's testimony.
5. The centrality of the credibility issue.

See State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000).

The trial court in the present case did not weigh the probative value of the prior conviction against the prejudicial effect because trial counsel failed to challenge the admission of the prior conviction. Trial counsel was deficient. In the motion to alter or amend judgment PCR counsel wrote, “Trial counsel could have also requested that the Court conduct an analysis regarding the general probative value of the prior conviction weighed against its prejudicial effect. Finally, counsel could and should have requested the Court to conduct a 403 analysis on the matter specifically focusing on the fact that the conviction for Receiving Stolen Goods is substantially similar to what was being alleged in the Burglary trial and accordingly is overly prejudicial.” (App. p. 345). Trial counsel did not challenge the prior conviction as more prejudicial than probative pursuant to Rule 609(a), SCRE because he erroneously believed the outdated moral turpitude standard applied.

Additionally, trial counsel failed to argue that the receiving stolen goods conviction was inadmissible because it did not involve dishonesty or false statement. See State v. Broadnax, 414 S.C. 468, 473, 779 S.E.2d 789, 791 (2015). In the motion to alter or amend judgment PCR counsel wrote, “However, in the Applicant’s case the Court did not determine that this

conviction involved a dishonest act or false statement because trial counsel failed to present any argument whatsoever regarding use of this prior conviction for impeachment purposes. Trial Counsel could have argued that a conviction for receiving stolen goods is not a crime which ‘involves some element of deceit, untruthfulness, or falsification bearing on the accused’s propensity to testify truthfully.’ State v. Broadnax, 414 S.C. 468 477 (2015).”

The PCR judge’s reliance on State v. Williams, 380 S.C. 336, 669 S.E.2d 640 (Ct. App. 2008), is misplaced because the Court in Williams did not find that receiving stolen goods was a crime of dishonesty. Instead, the Court, finding harmless any error in not allowing evidence of the CI’s prior convictions for armed robbery, larceny and housebreaking, wrote, “Further, the CI was already impeached with admission of his conviction of receiving stolen goods, a crime the CI acknowledged before the jury was a crime of dishonesty. The CI’s credibility was clearly called into question by this, along with his admission he had spent half of his life in the penitentiary and his refusal to characterize himself as honest.” 380 S.C. at 345, 669 S.E.2d at 645.

## **B. Prejudice**

The PCR judge did not address the prejudice prong because he did not find deficient performance. As discussed above, trial counsel was deficient. There is a reasonable probability that, but for counsel’s deficient performance, the result of the proceeding would have been different. In Green v. State, 338 S.C. 428, 434, 527 S.E.2d 98, 101 (2000), the South Carolina Supreme Court wrote, “In the instant case, evidence in the record supports the PCR court’s ruling that respondent was prejudiced by defense counsel’s failure to argue the prejudicial effect of the convictions outweighed their probative value. Respondent was impeached with evidence of two convictions for possession of cocaine that were four and five years old. His credibility was

critical, as the jury had to choose between his version of events and that of the SLED agents.” In the present case Petitioner was impeached with a recent prior conviction for receiving stolen goods. Petitioner’s credibility was critical. Petitioner was prejudiced by trial counsel’s failure to challenge admission of the prior conviction.

**3. The PCR judge erred in refusing to find trial counsel ineffective for failing to object to the Allen charge when the jury had not yet indicated that they were deadlocked.**

Petitioner’s trial started on June 27, 2011, and the jury began deliberations sometime<sup>3</sup> on June 28, 2011. (App. p. 79; p. 173). During deliberations the jury asked to see the home surveillance video tape, asked about the penalty for the offense, asked for a mug shot or profile picture of Petitioner and then, after a discussion about ordering dinner, the jury elected to stop deliberations for the day and return in the morning at 9:30 AM. (App. pp. 173-178). The next morning, after the jury was sent back to resume deliberations, the judge stated, “In the next hour and a half from now if they haven’t made a decision, perhaps we should consider the Allen charge. Let’s give them some time. We’ll be at ease.” (App. p. 179, line 24 – p. 180, lines 1-2). The jury then asked for the definition of burglary and the judge re-charged the jury on the law of burglary first degree. (App. p. 180, line 5 – p. 181, 182, 183, 184, lines 1-15). The jury continued to deliberate for some amount of time, presumably before a lunch break was needed, when the judge stated, “I have discussed this with the lawyers in Chambers, and the bottom line is I can give the Allen charge, so I will read the Allen Charge unless the lawyers object.” (App. p. 184, lines 18-21). There is no indication in the record that the jury had completed their

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<sup>3</sup> The trial transcript does not indicate what specific time deliberations began on June 28, 2011, but it was after lunch, closing arguments and the jury instructions. (App. p. 173, lines 13-16; pp. 159-178).

deliberations and no indication that they were unable to reach a unanimous verdict. The lawyers did not object and the judge gave the Allen charge. (App. pp. 184 – 191). The jury was provided lunch and then returned a verdict of guilty. (App. p. 192, lines 2-24).

In the amended application for post-conviction relief Petitioner alleged, “Ineffective assistance of counsel for failing to object to the Court’s Allen charge.” (App. p. 219). During the post-conviction relief hearing trial counsel did not recall the jury indicating that they were deadlocked. (App. p. 267, line 21 – p. 268, lines 1-6). Trial counsel testified, “And we may have discussed it in chambers. In fact, he says that: I have discussed this with the lawyers in chambers. I didn’t object to it, no. Perhaps I should have.” (App. p. 268, line 24 – p. 269, lines 1-2). On cross-examination, when asked again if the jury indicated it was deadlocked, trial counsel testified:

No. That puzzles me. You know, had I not been able to read over the transcript of the trial, I would have sworn that they had somehow communicated to the judge that they were unable to reach a unanimous verdict. But the transcript doesn’t reflect that, so I think the judge just felt that after sending out three different questions, that that indicated that there was some sort of problem that had surfaced in the jury room reaching a decision.

And again, I don’t know, other than we were in the second day of the jury’s deliberations, which isn’t a whole lot of time. But the transcript doesn’t reflect times of day, so when it was that the judge started thinking in terms of the Allen charge, what time of day it was –

(App. p. 292, line 14 – p. 293, lines 1-4). Trial counsel testified there was no particular reason he did not object to the Allen charge, and indicated he believed it was within the judge’s discretion. (App. p. 293, line 21 – p. 294, lines 1-3).

At the close of the PCR hearing PCR counsel argued, “In researching Allen charges in preparation for this, I couldn’t find any case law on this because all says when a jury says they’re deadlocked, then you do this. I don’t see any law that says what happens when they’re not, and

that's because a judge should not issue an Allen charge if the jury does not say they're deadlocked because that would be, per se, coercive." (App. p. 309, lines 15-22).

In the order of dismissal the PCR judge wrote:

Despite the apparent propriety of the Allen charge itself, Applicant argues the instruction was nonetheless impermissible because the jury did not state on the record that it was deadlocked or otherwise unable to reach a verdict. However, this argument is without merit, as there is not such requirement before the trial court can give an Allen instruction. See Darr, 262 S.C. at 587, 206 S.E.2d at 870 ("It is the duty of the trial judge to urge the jury to agree upon a verdict provided he does not coerce them."); Ayers, 284 S.C. at 269, 325 S.E.2d at 581 ("The trial judge has a duty to urge the jury to agree on a verdict, so long as his not coercive."). Therefore, this Court finds this allegation must be denied and dismissed with prejudice.

(App. p. 340). The PCR judge erred.

#### **A. Deficient Performance**

Trial counsel was ineffective in failing to object to the Allen charge when the jury had not indicated that they were deadlocked or had even completed deliberations. "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; deriving its name from the case of Allen v. United States, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896).' *Black's Law Dictionary*, 74 (6th ed.1990)." State v. Lee-Grigg, 374 S.C. 388, 418, 649 S.E.2d 41, 57, fn #1 (Ct. App. 2007). In the present case there is no evidence that the jury had completed their deliberations before the judge gave the Allen charge. There is no evidence that the jury was deadlocked. In this case, under these circumstances, the charge was coercive because it urged the jurors to hurry and make a decision before they had completed their deliberations.

The PCR judge's reliance on State v. Darr, 262 S.C. 585, 206 S.E.2d 870, (1974), in the order of dismissal is misplaced. In Darr the trial judge, with no indication from the jury that they

were deadlocked, simply instructed the jury upon the importance of reaching a verdict and there was no objection to the instruction. The instruction was not referred to in the opinion as an Allen charge. On direct appeal Darr challenged the judge's instruction on the importance of reaching a verdict. The Court wrote:

The case was submitted to the jury at 3:10 p.m. on September 13. At 5:42 p.m. the trial judge recalled the jury, which had not yet reached a verdict, and instructed it upon the importance of reaching a verdict. In response to a question from a juror, he charged further upon the law of self-defense. The jury retired, but defense counsel requested its immediate recall and a further clarification by the trial judge of his instructions as to the law of self-defense, which request was granted. Following this the jury retired again at 5:51 p.m. and returned a verdict of guilty at 6:23 p.m.

The appellant first contends that His Honor erred in urging the jury to reach an agreement. There is no merit in the contention. It is the duty of the trial judge to urge the jury to agree upon a verdict provided he does not coerce them. See numerous cases collected in West's South Carolina Digest, Criminal Law, 865. We find nothing whatever in the charge of the trial judge which was in any manner coercive of the jury.

State v. Darr, 262 S.C. 585, 587, 206 S.E.2d 870, 870 (1974). The simple instruction is Darr, on the importance of reaching a verdict, is distinguished from the longer full Allen charge given in the present case. The instruction in Darr was not challenged on the basis that the jury had not indicated it was deadlocked, as in the present case. Additionally, there was an intervening re-charge on the law of self-defense between the instruction on the importance of reaching a verdict and the actual verdict. In the present case the jury reached a verdict shortly after the judge gave the Allen charge.

In Workman v. State, 412 S.C. 128, 130–31, 771 S.E.2d 636, 638 (2015), the South Carolina Supreme Court found that trial counsel was ineffective in failing to object to an unconstitutionally coercive Allen and wrote:

Whether an Allen charge is unconstitutionally coercive must be judged in its "context and under all the circumstances." Tucker v. Catoe, 346 S.C. 483, 490–

91, 552 S.E.2d 712, 716 (2001). The four factors adopted by this Court in Tucker to determine whether an Allen charge is unconstitutionally coercive are:

- (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?

While the Court in Workman found the specific language used by the trial judge coercive, using the framework of analysis from Workman and Tucker, and judging the context and circumstances of the present case, the Allen charge given, without an indication that the jury completed deliberation or was deadlocked, was coercive.

The PCR judge's reliance on State v. Ayers, 284 S.C. 266, 325 S.E.2d 579 (Ct.App. 1985), is misplaced because in Ayers there was a clear indication from the jury that they were deadlocked. The jury in the present case did not indicate that they were deadlocked. The jury in the present case did not indicate they had completed their deliberations.

In the motion to alter or amend judgment PCR counsel wrote:

The order of the Court spends several pages defending the propriety of an Allen charge in general, which has not been contested by the Applicant in this matter. Rather, the Applicant argues the Court cannot and should not provide an Allen charge to the jury when the jury had not yet indicated that it is deadlocked. The Applicant contends that trial counsel should have objected to the use of an Allen charge under these circumstances. The Applicant argues that an Allen charge given to a still-deliberating jury is coercive in nature as it may cause an individual abandon their own opinion and bend to the will of the group or rush to judgement. Due to the fact that the jury reached a verdict very shortly after the Allen charge was given there is a reasonable likelihood that the charge affected the jury's deliberations. (See trial transcript pages 185-193)

(App. pp. 345-346).

## **B. Prejudice**

The PCR judge did not address the prejudice prong because he did not find deficient performance. As discussed above, trial counsel was deficient. There is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. The prejudice prong is supported by the fact that the jury reached a verdict shortly after the judge improperly gave the Allen charge, a factor discussed in Workman and Tucker in deciding if the language of the charge is coercive. Petitioner was prejudiced by trial counsel's failure to object to the Allen charge when the jury had not yet indicated that they were deadlocked or had completed deliberations.

### **4. The PCR judge erred in finding that Petitioner knowingly and intelligently waived his right to a direct appeal.**

On July 8, 2011, following Petitioner's conviction, trial counsel moved for a new trial. (App. p. 205). The motion was not ruled upon until March 24, 2016, over four years later. (App. p. 324). The motion was ruled upon without a hearing. (App. p. 302, line 14 – p. 303, lines 1-3). In the amended application for post-conviction relief Petitioner alleged, "Ineffective assistance of counsel for failing to file Notice of Appeal after the Motion to Reconsider was disposed of March 24, 2016." (App. p. 219). During the PCR hearing Petitioner testified that, following conviction at trial, he asked trial counsel to file an appeal. (App. p. 249, lines 11-25). Petitioner testified that when he did not hear anything after a few years he filed an application for post-conviction relief. "I kept writing him, didn't hear anything back. And then finally, after a few years went by, still haven't heard anything or got anywhere with the new trial motion, I had a family assistance, who is a public defender, he asked me to put in a PCR and ask for assistance because you have to do it in one year, and the PCR was denied because the motion for new trial

was still not heard.” (App. p. 250, lines 10-17). Petitioner testified that he expected a notice of appeal to be filed once the motion for new trial was ruled upon. (App. p. 251, lines 19-23).

When trial counsel was asked if Petitioner asked him to file an appeal, trial counsel answered, “He may have, but I opted instead to file a motion. And I can’t say for certain that he requested filing an appeal. But I know I sent him a copy of the motion. He knew it was pending. He knew because I explained it to him either in a letter or by meeting with him. But, anyway, I explained to him that the time for filing an appeal began to run after the motion was ruled upon.” (App. p. 294, lines 6-14). Trial counsel admitted that he knew Petitioner wished to challenge the conviction. (App. p. 294, line 15 – p. 295, line 1). Trial counsel left the public defender office before the judge ruled on the new trial motion. (App. p. 295, lines 2-4).

Jason Kirincich, another attorney from the Kershaw Public Defender Office, who represented Corbin Bailey, the co-defendant who testified against Petitioner at trial, testified at the PCR hearing that he attempted to schedule a hearing on the motion for new trial after trial counsel left the office. (App. p. 302, lines 19-25). Mr. Kirincich testified that he did not consider filing a notice of intent to appeal because once he learned the motion for new trial had been denied, Petitioner had filed a second PCR application. (App. p. 303, lines 1-22). The judge signed the order denying the motion for new trial on March 24, 2016. Petitioner filed the second application for post-conviction relief over seven months later on November 4, 2016. Mr. Kirincich admitted that once he learned of the pending motion for new trial he never contacted Petitioner. (App. p. 305, lines 9-19). He also testified, “I think it would have been appropriate for our office to contact Mr. Hinson and let him know and then he can make whatever decision he wants to make.” (App. p. 307, lines 5-8). No attorney consulted with Petitioner about an

appeal once the judge denied the motion for new trial. (App. p. 252, lines 2-7; p. 307, lines 5-10).

In the order of dismissal the PCR judge wrote, “In the present case, this Court finds Applicant made a knowing and intelligent decision to forego a direct appeal and proceed directly to post-conviction relief remedies. Once his motion to reconsider his sentence was denied, Applicant proceeded forward with filing a second post-conviction relief application and did not request his counsel file a direct appeal on his behalf. This Court finds Applicant has failed to meet his burden of proof and denies this allegation.” (App. p. 341). The PCR judge erred.

In the motion to alter or amend judgment PCR counsel wrote:

The Court’s Order dismisses this ground on the basis that the “Applicant made a knowing and intelligent decision to forego a direct appeal and proceed directly to post-conviction relief remedies.” The Applicant would argue that this finding does not reflect the testimony and evidence offered at the evidentiary hearing.

The testimony reflects that the Applicant unequivocally requested that notice of appeal be filed, and after the five year delay trial counsel Riley was no longer overseeing the Applicant’s case and had not left instructions with anyone in his office regarding the Applicant’s wishes. Further, Attorney Kirincich never consulted with the Applicant to determine if he wanted a notice of appeal filed on his behalf or if he wanted to waive that right.

(App. p. 346).

In Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010), the South Carolina Supreme Court wrote:

Following a trial, counsel must make certain the defendant is made fully aware of the right to appeal. Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008) (citation omitted) (Turner I); see also Turner v. State, 384 S.C. 451, 456, 682 S.E.2d 792, 794 (2009) (finding counsel must inform criminal defendant found guilty of a crime after a trial about the possibility of an appeal) (Turner II). “In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).” Turner, 380 S.C. at 224, 670 S.E.2d at 374 (citation omitted)(footnote omitted).

“To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal.” Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004) (citation omitted). When the motion for new trial was finally ruled upon, trial counsel was no longer with the public defender office. No attorney from the public defender office advised Petitioner of his right to appeal following the denial of the new trial motion. The *pro se* filing of the second post-conviction relief application should not serve as an intelligent waiver of the right to direct appeal when Petitioner was not advised of the right to a direct appeal following the denial of the motion. Petitioner is entitled to a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

**5. The PCR judge erred in refusing to find trial counsel ineffective in failing to obtain a plea agreement that would allow concurrent sentences for the burglary charge and a probation revocation.**

In May of 2011, the State offered to allow Petitioner to plead guilty and be sentenced under the Youthful Offender Act [YOA]. (App. p. 316). In a letter dated May 2, 2011, the assistant solicitor wrote that the offer was rejected and was now revoked. (App. p. 316). The assistant solicitor, however, had not yet provided defense counsel with a copy of the surveillance video from the home on the night of the incident. as evidenced by an e-mail dated May 2, 2011, requesting the video from law enforcement. (App. p. 320). At the time negotiations were taking place on the Kershaw County burglary charge, Petitioner was on probation in Lancaster County. In October of 2010, a few months before the January 2011, arrest in the present case, Petitioner

received, in Lancaster County, a suspended YOA sentence with probation to be terminated upon the payment of restitution.<sup>4</sup> (App. p. 238, lines 1-25).

In the amended application for post-conviction relief Petitioner alleged, “Ineffective assistance of counsel for failure to disclose and explain plea offers to Applicant and failure to accurately and fully explain the consequences of refusing plea offers and proceeding to trial.” (App. p. 219). Petitioner testified at the PCR hearing that he was concerned that his Lancaster probationary sentence would be revoked as a result of any kind of plea in Kershaw County. (App. pp. 240-245). Petitioner testified that trial counsel did not explain that as part of a plea agreement the probation revocation could be run concurrently. (App. p. 240, line 23 – p. 241, lines 1-2). Petitioner testified that trial counsel told him that he would talk with the solicitor to see what could be worked out. Petitioner testified that he did not actually reject the plea offer but was waiting to see what his lawyer could work out for him. (App. p. 241, lines 2-16).

Trial counsel admitted that he did not try to resolve the Lancaster County probation violation to run concurrently to any plea agreement reached with regard to the Kershaw County burglary. (App. p. 283, lines 4-23). Petitioner testified that he did not want to go to trial and testified, “The trial just really popped up because Ron Moak, I guess he was irritated that I didn’t take the first two plea deals. I mean – I mean, I wasn’t – that wasn’t the plan to go to trial or anything like that, I was just trying to postpone and the probation paid for.” (App. p. 244, line 21 – p. 245, line 1). At the end of the PCR hearing counsel for Petitioner argued:

I would argue that Mr. Riley [trial counsel], he never even bothered to resolve the probation violation situation or give Mr. Hinson actual real options in that regard. And Mr. Hinson testified that that was his concern all along. That may have been a somewhat unreasonable concern, but he was 17 and didn’t know that. I put that on his lawyer to fully explain to him what his options are and what the possible

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<sup>4</sup> One of the charges resulting in the YOA sentence is the receiving stolen goods charge discussed in issue two.

consequences are for not making an affirmative decision. I think it's clear Mr. Riley did not make that clear to Mr. Hinson. It shouldn't have gone to trial.

(App. p. 308, lines 13-24).

In the order of dismissal the PCR judge wrote:

Here, the uncontroverted testimony establishes that counsel advised Applicant of favorable plea offers from the State and advised him that it was in Applicant's best interest to accept these plea offers due to the strong case the State would present at trial, but that Applicant never accepted any of these offers due to his own hesitance and unwillingness to make a decision on whether to proceed to trial versus plea guilty. Notably, trial counsel testified at length regarding the difficulties he had with getting Applicant to understand the consequences of rejecting plea offers, as well as the fact that the charges would not simply disappear as Applicant wanted. This Court finds counsel's performance was reasonable, as he properly conveyed the State's plea offer to Applicant and advised him to seriously consider accepting the State's offers based on the strength of the State's case. Therefore, this allegation is denied and dismissed.

(App. pp. 33-334). The PCR judge erred.

In the motion to alter or amend judgement PCR counsel argued that trial counsel's advice to Petitioner to accept the State's plea offer for YOA sentencing was unreasonable in light of the fact that Petitioner was already serving a suspended YOA sentence. (App. pp. 343 -344). PCR counsel also argued:

The Applicant asks that this Court reconsider the totality of the evidence proving that trial counsel was not reasonable in the advice he gave to the Applicant. Applicant believes that counsel's improper and insufficient legal advice regarding the possible consequences of the plea offers and their terms of expiration, coupled with counsel's failure to investigate the Applicant's probation matter show that his representation was below professional norms in this instance. The Applicant was prejudiced because all reasonable plea offers were revoked before the Applicant had an opportunity to make a knowing and intelligent acceptance or rejection, and as a result was forced to go through with trial for an offense which carried a mandatory minimum fifteen year sentence.

(App. p. 344). Trial counsel was ineffective in failing to explain concurrent sentencing and failing to obtain a plea agreement that would allow concurrent sentencing for both the burglary charge and the probation revocation.

In Lafler v. Cooper, 566 U.S. 156, 165, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012),

(internal quotations omitted) (emphasis added), the United States Supreme Court wrote:

The Sixth Amendment requires effective assistance of counsel at critical stages of a criminal proceeding. Its protections are not designed simply to protect the trial, even though counsel's absence in these stages may derogate from the accused's right to a fair trial. The constitutional guarantee applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which *defendants cannot be presumed to make critical decisions without counsel's advice.*

“Even if the trial itself is free from constitutional flaw, the defendant who goes to trial instead of taking a more favorable plea may be prejudiced from either a conviction on more serious counts or the imposition of a more severe sentence.” *Id.* at 166, 132 S.Ct. 1376. As with other claims of ineffective assistance of counsel, courts examine constitutional flaws in the plea bargaining process under the two-prong test set forth in Strickland v. Washington, 466 U.S. 668, 687–88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See id.* at 162–63, 132 S.Ct. 1376.

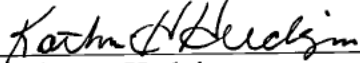
In Steele v. United States, 321 F. Supp. 3d 584, 592 (D. Md. 2018), the Maryland District Court wrote:

Quite simply, when a criminal defendant asks his or her attorney to obtain a plea offer, and the attorney fails to do so when acquiring one was reasonably practicable, then that attorney has “made [an] error[ ] so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Strickland, 466 U.S. at 689, 104 S.Ct. 2052; cf. Lafler, 566 U.S. at 165–66, 132 S.Ct. 1376.

Trial counsel was ineffective in failing to obtain a plea agreement that would allow concurrent sentencing for both the burglary charge and the probation revocation. Petitioner was prejudiced by the deficient performance that deprived him of the benefit of a lesser sentence for both charges. (See. App. p. 322).

**CONCLUSION**

Based on the arguments presented in issues one, two, three and five, this Court should reverse the finding of the PCR court, grant relief and remand for a new trial. Based on the argument presented in issue four, this Court should grant the petition for writ of certiorari, find that Petitioner did not waive his right to direct appeal and order briefing pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

  
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Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of April, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Kershaw County

Honorable G. Thomas Cooper, Circuit Court Judge

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MITCHELL LOGAN HINSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

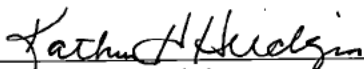
RESPONDENT

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CERTIFICATE OF SERVICE

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The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Samuel Key, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Mitchell Logan Hinson, #346676, at Chester County Prison, 123 Dawson Drive, Chester, SC 29706, this 26th day of April, 2019.

  
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Kathrine H. Hudgins  
Appellate Defender

SUBSCRIBED AND SWORN TO before me    ATTORNEY FOR PETITIONER  
this 26th day of April, 2019.

  
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(L.S)  
Notary Public for South Carolina  
My Commission Expires: July 5, 2027.