

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Sumter County  
Ralph F. Cothran, Circuit Court Judge

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S.C. Supreme Court

RAHIM FAREED CARTER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000623

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PETITION FOR WRIT OF CERTIORARI

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

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ISSUE PRESENTED

Did the PCR court err by failing to find trial counsel ineffective for not objecting to the trial judge giving the jury an Allen<sup>1</sup> charge which coerced the jury into reaching a verdict which was prejudicial to petitioner?

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<sup>1</sup> Allen v. United States, 164 U.S. 492 (1896).

## STATEMENT

In May 2008, the Sumter County Grand Jury indicted Rahim Fareed Carter on the charges of murder and possession of a firearm during the commission of a violent crime. On August 5-6, 2009, Carter proceeded to trial before the Honorable W. Jeffrey Young and a jury. Carter was represented by Charles T. Brooks, and the state was represented by Catherine Fant. The jury returned verdicts of guilty as indicted on both charges. Judge Young sentenced Carter to life imprisonment on the murder charge and five years on the gun charge to run concurrently. App. 385, ll. 20 – App. 386, ll. 9; App. 401, ll. 9 – App. 402, ll. 23. An appeal was perfected by the Division of Appellate Defense with the filing of a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed Carter's appeal on January 25, 2011. State v. Carter, Op. No. 2011-UP-020 (Ct. App. filed January 25, 2011).

On October 4, 2011, Carter filed an application for post-conviction relief (PCR). The state filed a return on January 18, 2012. An evidentiary hearing was held on December 13, 2012 before the Honorable R. Ferrell Cothran, Jr. On February 14, 2013, Judge Cothran issued an order denying Carter's PCR application and dismissing it with prejudice. App. 474 – App.482. Carter's attorney filed a notice of appeal. This petition follows.

## ARGUMENT

The PCR court erred by failing to find trial counsel ineffective for not objecting to the trial judge giving the jury an Allen<sup>2</sup> charge which coerced the jury into reaching a verdict which was prejudicial to petitioner.

On October 2, 2007, Rahim Carter allegedly shot his close friend, Matthew Horace, which paralyzed Horace immediately. Horace died a week later in the hospital. App. 57, ll. 1 – 25. The two young men had been as close as brothers, but division occurred when the question of loyalty developed over the people each was hanging out with. App. 57, ll. 22 – App. 58, ll. 4.

On the day of this incident, Horace was visiting friends at a house near Carter. Carter went to the friend's house and confronted Horace. Carter allegedly said he was not there to talk, and pulled a gun and started shooting hitting Horace. App. 58, ll. 5 – 16.

Detective William Lyons testified that Petitioner Carter and Horace were best friends until they chose different groups to join. Altercations and disagreements began between the two groups a couple of months before this shooting incident. Allegedly Horace was involved in an assault on a member of Carter's group a few days before this shooting. App. 79, ll. 13 – App. 80, ll. 25.

During jury deliberations, the jury sent the judge their first question asking for the statement of one of the witnesses. The judge responded that the statement was not in evidence as the witness testified. App. 374, ll. 1 – App. 375, ll. 18. After approximately three hours of deliberating, the jury informed the judge: "We can't come to a united decision." The judge told the parties that he was going to go ahead and give the Allen charge. Defense counsel did not object. The charge was given at 2:43 p.m. App. 375, ll. 20 – App. 376, ll. 13. The judge told the jury to consult with one another and listen to the opinions of others. App. 377, ll. 1 – 21. Then the judge told the jury:

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<sup>2</sup> Allen v. United States, 164 U.S. 492 (1896).

And 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, either I or another judge will try this case with some other jury sitting where you are sitting now. The same participants will come. And the same lawyers will ask basically the same questions. And get basically the same answers. And we go through this whole process again. You were selected in the same manner, and from the same source as any future jury will be. And although there is no reason for me to suppose that the case would ever be submitted to 12 more intelligent, impartial, conscientious and competent jurors than you are, and or that more clearer evidence will be produced to you from one side or the other, I don't think anything will change.

App. 377, ll. 21 – App. 378, ll. 14.

At his PCR hearing, Petitioner Carter testified that he had no confidence in his trial counsel's preparation. App. 424, ll. 15 –App. 425, ll. 25. His trial counsel did not make the appropriate objections during his trial . App. 426, ll. 1 – 11. Carter believed that the jury was coerced into reaching a verdict. He explained that he had a mistrial on his first trial, and the jury in this second trial was deadlocked because they could not reach a verdict. Then the judge read them the Allen charge.<sup>3</sup> The jury came out again with questions before they reached a verdict. App. 427, ll. 1 – 25.

Trial counsel testified at the PCR hearing that the trial judge gave the Allen charge to the jury regarding the jury having trouble reaching a unanimous decision in this second trial. He could not remember if he made a motion regarding the Allen charge. He said he would have to defer to the record. If the record reflected that he did not object, it would be safe to assume he believed the charge was proper. App. 460, ll. 23 – App. 461, ll. 25.

The PCR order reflected that trial counsel testified that neither he nor the state objected to the Allen charge. Trial counsel did not object because he felt the charge was not improper. App. 479.

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<sup>3</sup> The PCR transcript uses the words "*Anders* brief" but it is clear that Carter meant Allen.

The PCR judge ruled that Carter failed to prove that trial counsel was ineffective in his representation for not properly preserving motions for review. The judge wrote that trial counsel was not deficient as his performance did not fall below “professional norms.” App. 481. The judge also ruled that Carter did not show he suffered any prejudice from this alleged deficiency. App. 482. The PCR judge found trial counsel’s testimony to be credible while he found Carter’s testimony to not be credible. App. 480.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, *supra*; Butler v. State, *supra*.

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel’s performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989).

In State v. Williams, 386 S.C. 503, 690 S.E.2d 62 (2010), the Supreme Court ruled that whether an Allen charge was unconstitutionally coercive must be judged in its context and under all the circumstances. In State v. Williams, *Id.*, the Supreme Court explained the Allen charge as the typical judicial mechanism for encouraging an indecisive jury in which jurors are instructed on, among other things, their duties to approach the evidence with an open mind and consider the opinions of their fellow jurors.

In Tucker v. Catoe, 346 S.C. 483, 552 S.E.2d 712 (2001), the Supreme Court cited as one of the factors that could violate the defendant's right to due process when an Allen charge was given was the period of time the jury deliberated after receiving the charge. It is the duty of the trial judge to urge the jury to agree upon a verdict provided he does not coerce them. State v. Darr, 262 S.C. 585, 587, 206 S.E.2d 870 (1974).

In Carter's case, the jury deliberated for two hours and forty minutes before the Allen charge from 11:45 a.m. to 2:28 when they told the court they could not agree. App. 373, ll. 23 – 24. After the Allen charge, the jury deliberated from 2:43 when the charge was given to 3:13 when they asked to listen to a witness's testimony again. App. 376, ll. 10 – 13; App. 379, ll. 20-22. The jury was brought out and listened to the testimony of Quinten Ball. App. 383, ll. 1 – 24. The jury then returned to the jury room and reached a verdict at 3:54 p.m. App. 384, ll. 1 – 12.

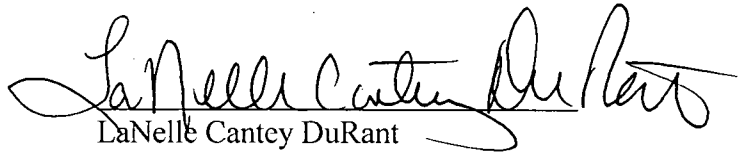
The period of time for deliberating after the charge was less than one hour. Trial counsel was ineffective in Carter's case for not objecting to the Allen charge. One trial had already ended in a mistrial. There was a reasonable probability that this second jury would also continue to deadlock especially in view of the questions they had and the replaying of testimony.

The judge's remarks went too far when he explained at great length that the same trial would be held again with everything being the same. The judge did not know if any thing would change. The insinuation to the jury was that they were just wasting everyone's time if they did not reach a verdict. This was prejudicial to Carter as it removed neutrality from the jurors' deliberations.

CONCLUSION

Based on the above, certiorari should be granted, and the convictions and sentences reversed, and the case remanded for a new trial.

Respectfully submitted,

A handwritten signature in cursive script, reading "LaNelle Cantey DuRant". The signature is written in black ink and is positioned above the printed name and title.

LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of November, 2013.

STATE OF SOUTH CAROLINA

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RAHIM FAREED CARTER,

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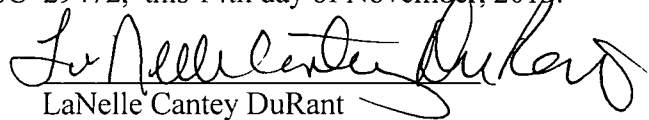
RESPONDENT

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CERTIFICATE OF SERVICE

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I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Rahim Carter, #290290, Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 14th day of November, 2013.

  
LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 14th day  
of November, 2013.

Laurel P. Wood (L.S.)

Notary Public for South Carolina

My Commission Expires: July 3, 2023.