

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Fairfield County  
Clifton Newman, Circuit Court Judge

S.C. Supreme Court

DARRYL COOK,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2014-000950

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JOHNSON PETITION FOR WRIT OF CERTIORARI  
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**ISSUE PRESENTED**

Whether the PCR court erred in finding that trial counsel provided effective assistance of counsel where trial counsel failed to preserve for appellate review an objection to the Trial Court's unconstitutionally coercive Allen<sup>1</sup> charge?

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

## STATEMENT

### **Indictments**

On January 9, 2006, Petitioner Darryl Cook was indicted by the Fairfield County Grand Jury for (1) murder; (2) armed robbery; and (3) grand larceny. App. 1308-1309; 1313-1314; 1319-1320.

### **Trial and Guilty Verdict**

Petitioner proceeded to trial before the Honorable Kenneth G. Goode and a jury on October 15, 2007. App. 1. Petitioner was represented by Jack B. Swerling, and the State was represented by Solicitor Douglas A. Barfield, Jr. App. 1. The jury found Petitioner guilty on all three counts, and Judge Goode sentenced Petitioner to forty-five years for murder, twenty-five years for armed robbery, and five years for grand larceny, with the sentences ordered to run concurrent. App. 1055, ll. 1-8; 1075, ll. 9-13; 1312; 1317; 1323.

### **Direct Appeal**

Petitioner appealed his convictions and sentences to the South Carolina Court of Appeals. Chief Appellate Defender Robert M. Dudek filed an appellant's brief pursuant to Anders v. California, 386 U.S. 738 (1967). The Court of Appeals dismissed Petitioner's appeal on January 25, 2010. App. 1078-1079.

### **Application for Post-Conviction Relief, Evidentiary Hearing, and Order of Dismissal**

Petitioner filed his application for post-conviction relief ("PCR") on November 8, 2010. App. 1080- 1086. The State filed its Return on or about July 15, 2011. App. 1087-1092. Petitioner filed an amended PCR application on July 15, 2013 alleging in part that trial counsel failed to subpoena witnesses on his behalf and failed to object to comments and

instructions made by the trial judge to the jury when the jury returned to the courtroom indicating they were deadlocked. App. 1093.

An evidentiary hearing was held before the Honorable Clifton Newman on August 7, 2013. App. 1095-1189. Petitioner was represented by Glenn E. Bowens, and the State was represented by Assistant Attorney General Suzanne H. White. App. 1095. Testifying at the hearing were the following: (1) Hughley Gratic, Chief of the Ridgeway Police Department at the time of crimes for which Petitioner was charged; (2) Jerlean Cook, the mother of Petitioner; (3) Darryl E. Cook, the father of Petitioner; (4) Marjorie Cook, the grandmother of Petitioner; (5) Petitioner; and (6) Jack Swerling, trial counsel. App. 1100-1181.

Following the evidentiary hearing, the deposition of juror Charles Walker was taken, submitted as evidence, and considered by Judge Newman in his Order of Dismissal. App. 1265-1294.

Judge Newman filed his Order of Dismissal on April 14, 2014 denying Petitioner's PCR application. App. 1294-1307. Judge Newman rejected Petitioner's assertions that his trial counsel was ineffective in failing to subpoena Hughley Gratic as a witness at trial and in failing to object to comments and instructions given by the trial judge to the deadlocked jury. Id.

## ARGUMENT

**The PCR court erred in finding that trial counsel provided effective assistance of counsel where trial counsel failed to preserve for appellate review an objection to the Trial Court's unconstitutionally coercive Allen charge.**

To establish ineffective assistance of counsel, Petitioner must satisfy the two-prong test set forth in Strickland v. Washington, 466 U.S. 668 (1984). "First, a defendant must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (internal citations omitted). "The second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The defendant is required to overcome the presumption that counsel was effective in order to receive relief." Id. at 117-18, 386 S.E.2d at 625 (internal citations omitted).

### **Relevant facts of trial**

The decedent's daughter testified that on November 23, 2001, she drove by the decedent's gas station at about 5:30 p.m. The gas station closed at 6:00 p.m. When the decedent did not appear at home, she tried telephoning the gas station at 6:30 p.m. When there was no answer she went by the station again, and she noticed the lights were still on which was very unusual. App. 114, ll. 12-13; 115, ll. 8-10; 117, ll. 3-12; 126, ll. 17-19; 128, l. 10 – 129, l. 15; 130, l. 22 – 136, l. 10.

When she went inside the unlocked door, she found the decedent lying on the floor, and he said: "Susan, I've been shot." App. 141, l. 6 - 142, l. 21. The decedent referred to

the person who shot him as “that boy.” App. 149, ll. 12-23. The decedent was paralyzed by a gunshot to the back of his neck. App. 152, ll. 6-8; 255, ll. 21-23. The decedent died almost a year later on October 26, 2002 of complications from the paralysis suffered by the gunshot wound. App. 161, l. 23 – 162, l. 4; 259, ll. 9-16; 271, ll. 1-20.

Lieutenant Brice Guinyard of the Fairfield County Sheriff’s Department responded to the shooting and testified that the decedent had told him that he knew the person who shot him but could not think of his name: “You know the guy, but I don’t know his name. I can’t think of his name right off. He has been in here before, and he had been in here earlier. But I can’t think of his name right off.” App. 163, l. 21 – 164, l. 5; 173, ll. 8-15.

In the very early stages on the investigation, law enforcement fixated on Petitioner to the exclusion of any other possible suspects. Chris Hill of the Fairfield County Sheriff’s Department, who was moonlighting for a bank on the night of November 23, 2001, observed a black male near the decedent’s gas station around 6:13 that evening. App. 770, l. 3 – 771, l. 25; 772, l. 10 – 789, l. 19. Chris Hill gave Chief Deputy Keith Lewis of the Fairfield County Sheriff’s Department a description of the person he observed. App. 734, ll. 13-17. A forensic artist sketched a composite drawing of the person Chris Hill described. App. 735, l. 11 – 736, l. 13. When Chief Deputy Lewis saw the drawing, he believed the drawing resembled Petitioner Darryl Cook. App. 739, l. 21 – 740, l. 4.

SLED prepared a photo lineup which included Petitioner’s picture. App. 741, l. 2 – 742, l. 19. From the photo lineup, Chris Hill identified Petitioner as the person he saw leaving the decedent’s gas station on the evening of November 23, 2001. App. 750, l. 15 – 751, l. 4.

With Petitioner as a suspect, law enforcement picked up and spoke to Petitioner's acquaintances, Robert McDuffie and Anthony Green. McDuffie claimed Petitioner told him on the night of November 23, 2001 that he had shot the decedent earlier in the evening and stole money from him. App. 537, l. 11 – 539, l. 8. McDuffie, however, admitted that he was very drunk and high the night of that alleged conversation with Petitioner, to the point of passing out. App. 548, ll. 9-11; 550, l. 18 – 551, l. 14; 560, l. 17 – 561, l. 9. When police later questioned McDuffie, they threatened to arrest him and yelled at him before he gave a statement implicating Petitioner. App. 561, l. 16 – 563, l. 21.

Anthony Green insisted Petitioner told him he shot the decedent in the neck, back, and chest, which did not match the forensic evidence. App. 595, l. 2 – 598, l. 9; 610, ll. 10-19. Green also claimed Petitioner told him he burned the VCR surveillance tape from the gas station after the robbery which also was not true as officers had already determined the VCR was not set afire or burned in any way. App. 388, ll. 12-15; 596, ll. 12-17; 610, l. 23 – 611, l. 10.

There was no physical evidence linking Petitioner to the crime. A fingerprint found on the cash drawer in decedent's gas station did not match Petitioner. App. 361, l. 17 – 362, l. 16; 382, ll. 20-25. There was no evidence that Petitioner had been in the decedent's truck that was stolen in the robbery. App. 385, ll. 16-19.

**Relevant facts of the PCR hearing**

Hughley Gratic testified that he was chief of the Ridgeway Police Department on November 23, 2001. He believed he was the first to respond to the scene of the decedent's shooting. On the incident reports, Gratic marked that the suspect was unknown and

unidentified. The decedent did not tell Gratic that Petitioner was the one who shot him. App. 1100, l. 22 – 1103, l. 23.

Jerlean Cook, Petitioner's mother, testified next. She said that the decedent knew who Petitioner was because Petitioner had worked for the decedent after school and on the weekends for a little while. App. 1110, l. 1 – 14. Jerlean Cook testified there was no doubt in her mind that the decedent would have recognized Petitioner. App. 1112, ll. 14-16.

Jerlean Cook further testified that during the trial, the jury came back in and informed the trial judge that they were deadlocked. App. 1113, ll. 16-19. This occurrence was not, however, transcribed in the trial transcript. Jerlean Cook asserted the trial judge told the jury that there had already been a mistrial and that the jury needed to go back and reach a verdict. Jerlean Cook testified the jury came back a second time and said they were still deadlocked. App. 1120, ll. 2-13. This was also not included in the trial transcript. She said this time the trial judge told the jury that there was not going to be another mistrial, the jury needed to reach a verdict, the jurors' checks had been cut, and the jurors would get their checks when they reached a verdict. App. 1120, ll. 14-21. Jerlean Cook did not recall Petitioner's trial counsel objecting to the trial judge's comments. App. 1121, l. 17 – 1122, l. 5.

Darryl E. Cook, Petitioner's father, testified that he attended each day of Petitioner's trial. App. 1127, ll. 1 – 19. He also recalled the jury returning and informing the trial judge that they were deadlocked seven to five. App. 1128, ll. 12-14. He further recalled the trial judge instructing the jury that their checks were already cut and they needed to reach a verdict. App. 1128, l. 15 – 1129, l. 5. He said the trial judge also made remarks to the jury

such as there would not be another mistrial. App. 1129, ll. 8-10. Darryl E. Cook testified that Petitioner's trial counsel did not object to these remarks. App. 1129, l. 22 – 1130, l. 7.

Marjorie Cook, Petitioner's grandmother, likewise testified that the jury initially returned deadlocked, seven to five, and was informed by the trial judge to deliberate further. The jury again returned to the courtroom deadlocked and was told by the trial judge there would be no mistrial and that the checks were already made. App. 1133, ll. 7-25. She recalled no objections. App. 1134, ll. 12-14.

Petitioner testified at the evidentiary hearing. He recalled the jury initially returning from deliberations and announcing they were deadlocked. Petitioner testified the jury returned a second time indicating they were still deadlocked, and the trial judge told the jury, "We had two mistrials, we are not going to have a third one so y'all have got to go back there and come up with a verdict. We will be here until you come back with a verdict whether it takes all night or not. And y'all checks have been cut, the Clerk of Court, Betty Jo Beckham, is waiting to go get them when you walk out the door so y'all comeback." Twenty or twenty-five minutes later the jury returned with a guilty verdict. App. 1138, ll. 4-25. Petitioner's trial counsel made no objections to these comments. App. 1139, ll. 1-7.

Jack Swerling, Petitioner's trial counsel, testified that he discussed the possibility of using Chief Gratic as a witness at trial with Petitioner but that they both agreed not to call him because of inconsistencies in Gratic's statements. App. 1162, l. 25 – 1164, l. 9.

Trial counsel could not independently recall whether the jury returned from their deliberations to inform the trial judge that they were deadlocked, but his notes from the trial corroborated the testimony of Jerlean Cook, Darryl E. Cook, Marjorie Cook, and Petitioner.

His notes indicated that at 5:30 p.m. there was an Allen charge and the vote was five to seven. App. 1168, l. 21 – 1169, l. 5.

Charles Walker, a juror in Petitioner's trial, was deposed and his deposition was submitted and considered by the PCR court. App. 1266-1294. He remembered the jury being deadlocked seven to five but being informed by the trial judge that the jury was not going to leave until there was a verdict, that there was not going to be a hung jury, and that the checks were cut and the jurors would receive the checks after a verdict was reached. App. 1271-1272. Walker felt pressured to reach a verdict that night and said the trial judge never informed the jury that they could have as much time as they needed to reach a verdict. He said the jury returned with a guilty verdict about twenty minutes after being sent back to deliberate. Walker had been one of the jurors voting not guilty initially, and had he not felt pressed for time, he testified he would not have changed his vote to guilty. App. 1272-1273.

### **Deficient Performance and Prejudice**

In its Order of Dismissal, the PCR court rejected Petitioner's PCR allegation that trial counsel rendered ineffective assistance of counsel where trial counsel failed to preserve for appellate review an objection to the Trial Court's unconstitutionally coercive Allen charge. The PCR court disbelieved Petitioner and the witnesses he presented in support of his PCR claim even though their testimony was uncontradicted and corroborated by trial counsel's notes that the jury had returned deadlocked, seven to five. App. 1300-1305.

The testimony of Petitioner and his witnesses, which was corroborated by trial counsel, establishes that trial counsel was ineffective in failing to object to the remarks made

by the trial judge after the jury returned indicating it was deadlocked. The Allen charge given by the trial judge was unconstitutionally coercive and entitled Petitioner to a new trial.

“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, 552 S.E.2d 712, 716 (2001) (quoting Lowenfield v. Phelps, 484 U.S. 231, 237 (1988)). This Court has explained:

In South Carolina state courts, an Allen charge cannot be directed to the minority voters on the jury panel. Instead, an Allen charge should be even-handed, directing both the majority and the minority to consider the other's views. A trial judge has a duty to urge, but not coerce, a jury to reach a verdict. It is not coercion to charge every juror has a right to his own opinion and need not give up the opinion merely to reach a verdict.

Green v. State, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002) (internal citations omitted).

In Tucker, this Court adopted the standard set by the United States Supreme Court in Lowenfield to determine whether an Allen charge is unconstitutionally coercive. In Lowenfield, this Court considered, among other things, the following factors:

- (1) the charge did not speak specifically to the minority juror(s);
- (2) the judge did not include in his charge any language such as “You have got to reach a decision in this case;” [and]
- (3) there was no inquiry into the jury's numerical division, which is generally coercive.

Tucker, 346 S.C. at 492, 552 S.E.2d at 716 (citing Lowenfield, 484 U.S. at 237).

Applying the above factors, this Court found the Allen charge given in Tucker was unconstitutionally coercive. Specifically, the court concluded (1) viewed as a whole, the jury charge was directed to the minority juror where the trial court knew there was only one holdout juror; (2) while the trial court did not use mandatory language such as

“You must return a verdict,” Tucker's jury was told of the importance of a unanimous verdict; (3) even though the jury informed the trial judge of their numerical split, the judge failed to instruct the jurors not to disclose their division in the future; and (4) Tucker's jury returned a verdict approximately an hour and a half after receiving the Allen charge. Tucker, 346 S.C. at 492-94, 552 S.E.2d at 717-18.

The Allen charge given by the Trial Court in Petitioner's case was similarly coercive. According to Petitioner and his witnesses, the trial judge used unconstitutional mandatory language which instructed the jury that they had to reach a verdict. The trial judge commanded the jury (1) that they had to reach a verdict and could not leave until they reached a verdict, whether it took all night or not; (2) that there would not be another mistrial; and (3) the jury would receive the checks that had already been cut once they reached a verdict. Charles Walker confirmed in his deposition that he and the other jurors felt very pressured to reach a verdict and that they did so within about twenty minutes after resuming deliberations.

In addition, while it is not clear whether the jury volunteered its numerical division and alignment on guilt to the Trial Court or whether the Trial Court requested that information, there is no indication that the Trial Court instructed the jury not to state its division in the future should it be deadlocked again. Dawson v. State, 352 S.C. 15, 20, 572 S.E.2d 445, 447 (2002).

The Allen charge given by the Trial Court was unconstitutionally coercive and should have been objected to by Petitioner's trial counsel. Tucker at 494, 552 S.E.2d at 718. Where Petitioner's trial counsel failed to object to such egregious remarks by the Trial Court, Petitioner is entitled to a new trial.

CONCLUSION

For the reasons set forth herein, Petitioner Darryl Cook requests this Court to grant his Petition for Writ of Certiorari with the ultimate relief of a new trial.

Respectfully submitted,

by *Lamalba*

Carmen V. Ganjehsani  
Appellate Defender

ATTORNEY FOR PETITIONER

This 2<sup>nd</sup> day of January, 2015.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO FAIRFIELD COUNTY  
CLIFTON NEWMAN, CIRCUIT COURT JUDGE

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DARRYL COOK,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2014-000950

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PETITION TO BE RELIEVED AS COUNSEL

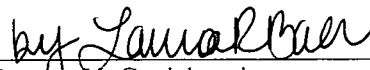
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Counsel for Darryl Cook states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on August 7, 2013. In her opinion seeking certiorari from the order of dismissal is without merit.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Darryl Cook.

Respectfully submitted,



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Carmen V. Ganjehsani  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 2<sup>nd</sup> day of January, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Fairfield County  
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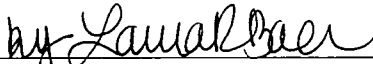
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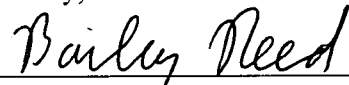
CERTIFICATE OF SERVICE

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I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on J. Croom Hunter, Esquire at Rembert Dennis Building, 1000 Assembly Steet, Room 519, Columbia, SC, 29201, and Darryl Cook, #267867, at 4460 Broad River Road, Columbia, SC, 29210, this 2<sup>nd</sup> day of January, 2015.

  
Carmen V. Ganjehsani  
Appellate Defender  
ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 2<sup>nd</sup> day of  
January, 2015.

 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: July 3, 2023.