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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Fairfield County

Clifton Newman, Circuit Court Judge

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S.C. Supreme Court

DARRYL COOK,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014- 000950

APPENDIX

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1 not much hair on the head. That's who Chris Hill saw.
2 That's who he identified. That's who he picked out of
3 that lineup.

4 Continue with the chronology. Just sort of
5 incidental but there's testimony, Karen Ruff comes to the
6 station running a little bit late, doesn't know whether to
7 leave Eddie with Jackie McGuirt or not. She sees the
8 blinds down. Also said the blinds have never been down.
9 She is headed on to check on her husband and then plans to
10 go to the McGuirt's house later that night.

11 What happens next? 6:20 to 6:30 or so, approaching
12 the 6:30 hour, Antoine Ford who has been an employee of
13 Jackie McGuirt's and is very familiar with the truck of
14 Jackie McGuirt and knows Arthur Robertson very well is at
15 the Shell Station and sees Jackie McGuirt's truck drive by
16 the Shell Station through the cut toward 34.

17 Coincidence? No. Darryl Cook is in that truck
18 getting away from McGuirt's Shell -- McGuirt's Tire
19 driving by the Shell Station on his way to ditch it down
20 34, and Antoine Ford saw the truck.

21 Antoine Ford did not see who was driving it because
22 it was dark. He thought Arthur Robertson might be in it,
23 might be headed to his house so Antoine called his mom to
24 make sure Arthur wasn't over at the house.

25 What else happened at 6:20, that is documented. It's

1 documented in the phone records, State's Exhibit
2 Number 20. Darryl Cook called Bryson Oliver's cell phone
3 number. That is Bryson Oliver's cell phone number.

4 Brian Hare told you it was, although Bryson Oliver
5 couldn't remember it. Darryl Cook called Bryson Oliver's
6 cell phone number at 6:20 p.m. by the record from the
7 phone company and said, "Come pick me up. Come pick me
8 up."

9 "Where?"

10 "Down 34." So what happens? I'll come back to that
11 in a minute.

12 By 6:30, Susan calls the store looking for her dad
13 and gets no answer. Her dad, I submit to you, is lying in
14 the floor paralyzed and was trying to get a broom to get
15 that phone off the hook so he could answer it, but he
16 couldn't.

17 Sometime shortly after 6:20 p.m., I think you could
18 infer 6:30 or so p.m., Bryson Oliver and Brian Hare pick
19 up Darryl Cook. Where do they pick up Darryl Cook? They
20 picked Darryl Cook up down 34 East past Longleaf near the
21 church that you now know is Immanuel Baptist Church.

22 6:20 or after in the evening, Darryl Cook is walking
23 along the highway, no transportation, on foot, walking in
24 the rain. Where is he walking? He is walking toward
25 Ridgeway, which means if he is picked up here and he's

1 walking toward Ridgeway, he is walking away from the area
2 where the truck was found abandoned the next day.

3 He is picked up, ladies and gentlemen, less than a
4 half a mile from where the truck was. What in the world
5 is he doing out there in the rain walking back to Ridgeway
6 down Highway 34 when he lives over here on 21 if he didn't
7 drive that truck down there and leave it? That's exactly
8 what he was doing.

9 6:40, Susan McGuirt find her daddy at the store.
10 Bruce Ginyard arrives shortly thereafter. 6:58, the
11 testimony from Tracy Connors is that's when E.M.S. arrived
12 and started treating Jackie McGuirt.

13 The crime is done. Darryl Cook has gotten rid of
14 everything he needs to get rid of except the money. He's
15 got the money with him. He did something with the tape, I
16 submit, and it's time now to get back into the alibi mode.

17 He has already talked to Monica Simpson and arranged
18 to get together that night, first tells her to call him at
19 six, but I submit to you change that because he's going to
20 do a robbery before they go out.

21 So at 7:52 p.m., Darryl Cook called Monica Simpson to
22 pick him up. He called at that Great Falls number,
23 482-2006, which is her grandmother's house where she was
24 living and says, "Come get me in 30 minutes or so."

25 Darryl Cook in his own statement said, "7:30 to

1 eight p.m. Monica Simpson came and picked me up. 7:30 or
2 eight p.m. my girl, Monica, picked me up."

3 So he is now continuing with his alibi, but he's not
4 covered it for the interim. Why not? What did Joyce
5 Miller tell you? Joyce Miller is his aunt. Nothing on
6 there about it, but Joyce Miller said sometime after
7 six p.m. she saw Darryl Cook at Cricket's house, the
8 grandfather. That's all she could tell you, sometime
9 after six p.m.

10 Well, we know, we know that Darryl Cook ended up back
11 at his house, his mama's house which is next door to his
12 granddaddy's house, sometime, I submit to you, shortly
13 after 6:20 p.m. because Bryson Oliver and Brian Hare
14 picked him up after that phone call got made at 6:20, and
15 the testimony was took him straight to his mama's house.

16 So Darryl Cook is back sometime after six p.m., as
17 Joyce Miller said. I submit to you it's closer to seven,
18 probably; closer to 6:30, probably, because it took a few
19 minutes to get him to his house once he got picked up down
20 34.

21 So Joyce Miller doesn't really alibi Darryl Cook for
22 the time that this robbery was occurring. Crystal Cook,
23 Darryl's sister, she is just wrong about things. What did
24 Crystal Cook tell you? She said Darryl was home sometime
25 between six and 6:30 p.m.

1 Well, that doesn't alibi Darryl for the time this
2 crime was committed, because again, I submit to you Darryl
3 was back home by 6:30 or so after he had been picked up
4 down 34. That's not an alibi at all.

5 She is also wrong about some things because she told
6 you that while Darryl was there, at some point, Qurbitt
7 Jones drove Darryl to the store late that afternoon.
8 That's not what happened because Darryl told you in his
9 own statement that you'll get to read after a while that
10 he and Rod walked to the store -- or went to the store,
11 and Darryl said he walked home.

12 Crystal just doesn't know what was going on with her
13 brother that day. She also told you that he worked at
14 Bose. Nobody said anything about Darryl being employed at
15 Bose other than Crystal. She didn't know what was going
16 on with her brother.

17 She doesn't alibi him at all. Instead of an alibi
18 for Darryl Cook between the times of 5:30 and 6:30, what
19 we have is Bryson Oliver and Brian Hare putting him right
20 in the middle of this crime.

21 We don't have an alibi. We have witnesses who put
22 him right in the middle of this crime because they picked
23 him up coming away, within four-tenths of a mile or so,
24 from where the truck was dumped, within a matter of
25 minutes after this crime occurred.

1 The alibi just absolutely and completely fails. What
2 happens after all of that? Well, you know that Darryl
3 Cook gets up with Monica Simpson, and you know at some
4 point they end up back at the Shell Station.

5 Monica picks him up. She said that she took him and
6 Rod to the Shell Station. How do we know that occurred?
7 Because Patrick Oliver was at the Shell Station that
8 evening and he saw Darryl Cook in a dark colored Ford
9 Focus which Monica Simpson told you she owned, a black
10 Ford Focus, and Monica said that Rod was with them and Rod
11 got out and Patrick Oliver saw Darryl and talked to Darryl
12 at the Shell Station before they headed off to Blythewood.

13 At some point that night while Darryl Cook and Monica
14 Simpson are getting together, Robert McDuffy communicates
15 with Darryl. Phone records again, State's Exhibit
16 Number 20, Robert McDuffy called Darryl from Shana Brown's
17 number, that number right there 337-4064, and talked to
18 him.

19 At some point that night, Anthony Green says Darryl
20 Cook called him that evening, and they all talked about
21 later on getting together and going to Amps.

22 Now, what happened during the evening hours when
23 Simpson and Cook were together? Let's look at Cook's
24 financial situation and his employment status for just a
25 little bit.

1 I submit to you that Cook did not -- Darryl Cook did
2 not have a job on November 23, 2001. How do you know
3 that? Monica Simpson said, "I don't think he was employed
4 then at Belk Distribution Center where he had been
5 working."

6 How else do we know Cook wasn't employed on November
7 23rd, 2001? His aunt, Betty Miller, had taken him that
8 day for a job interview. You don't go to a job interview
9 if you have a job unless you're trying to change jobs.

10 I submit to you that there was no employment by
11 Darryl Cook during that timeframe. Darryl had money on
12 him that night. How do we know he had money on him?
13 First of all, he got \$6,000, I submit to you, from Jackie
14 McGuirt.

15 Antoine Ford testified, saw Cook at Amps late that
16 night, way after the robbery, way after Cook came back
17 from Columbia with Simpson. What did Darryl say? "Let's
18 go out and have a good time." He's ready to party. He's
19 got money in his pocket.

20 Monica Simpson, they're little shopping trip. Think
21 about the little shopping trip. Darryl Cook, I submit
22 unemployed, takes Monica Simpson to Columbia Mall, to
23 Goody's, to the movies, pays for everything himself
24 starting with gas in Blythewood, clothes, shoes, stuff
25 like that in the mall, an outfit for Simpson at Goody's,

1 movie tickets, pays for it all. You have got the
2 receipts. They're numbered State's Exhibits. You'll have
3 them in the jury room.

4 I submit to you that the receipts total up to
5 \$294.47. If you look on those receipts, you will see that
6 every purchase made was with cash. No credit cards, no
7 debit cards, no checks. The receipts themselves say cash,
8 big cash. Monica Simpson told you starting at Blythewood
9 when Darryl Cook buys gas, he pulls out a wad of bills.
10 She says a lot of money, a lot of money.

11 Where is he getting a lot of money other than Jackie
12 McGuirt's money out of that Bank of Ridgeway bag? How
13 else do we know Darryl Cook had money? Anthony Green and
14 Pee Wee McDuffy. They told you that Cook bragged in how
15 he described the amount.

16 Anthony Green in particular said Cook described the
17 amount as "six double-o" -- no, "six triple-o," \$6,000.
18 McDuffy said \$6,000. Cook had money.

19 Now, what did Cook say he did with the money? By the
20 time he told Green and McDuffy about it, he had split the
21 money up and gotten rid of it somehow.

22 The testimony, I believe, was he gave Rod, his
23 brother, money and the gun. He's not carrying all of that
24 money around with him then. He's got it in a safe place,
25 but he has plans for it.

1 They told you, Green and McDuffy told you Cook said
2 what he was going to do with it, including buying a
3 Cadillac. Now, how else do we know that Darryl Cook got
4 money when he robbed Jackie McGuirt?

5 You have got as exhibits in this case bank records.
6 You know and heard testimony that Jackie McGuirt cashed
7 checks for folks on Fridays. Friday was a check cashing
8 day. This case, incident, occurred on Friday.

9 You have the bank record which shows you that on
10 November 23rd of 2001 on page three, the second entry,
11 Jackie McGuirt deposited \$8,810.76 to his Bank of Ridgeway
12 account that Friday morning. There's the original deposit
13 ticket in Jackie McGuirt's hand.

14 You also have on this bank record evidence that
15 Jackie McGuirt cashed check number 9916 in the amount of
16 \$8,810.76 on November 23rd, 2001. There's the original
17 canceled check in Jackie McGuirt's hand.

18 He went to the bank, put money in so that he could
19 cash a check to have cash in the station to keep in the
20 Bank of Ridgeway money bag to cash checks for loggers.
21 That's the money that got stolen. Whatever amount of it
22 was left, and I submit to you you only know the amount
23 because Darryl Cook said it was \$6,000.

24 How else do we know Darryl Cook did this? There's
25 evidence in this case that Darryl Cook in 1996 had been

1 in -- or that Darryl Cook, in 1996, had been in the store,
2 had taken money and had been caught on videotape.

3 You have got the videotape. I'm not arguing to you
4 whether or not Darryl Cook stole money in 1996. Again, it
5 is not particularly relevant at all, really, to this case
6 whether he actually stole money. The fact that he stole
7 money then has nothing to do with whether he robbed and
8 shot Jackie McGuirt on November 23, '01.

9 The point is it's him on the tape because that's how
10 he was identified. How do we know it is Darryl Cook? You
11 can look at the tape. Mr. Swerling invited you to do
12 that. I certainly invite you to do it.

13 Mr. Swerling argued to you that certainly Darryl Cook
14 didn't steal anything in 1996 because Jackie McGuirt went
15 into the cash drawer after the alleged incident and made
16 change to sell Darryl Cook a drink.

17 Well, you look at that tape. If you want to look at
18 it, look at it, but I submit to you the tape shows Darryl
19 Cook in the cash drawer and up under the desk or below the
20 cash register.

21 You heard testimony that periodically he would take
22 cash out of the register and put it in the money bag which
23 he kept in a drawer in the desk. You see -- I submit, you
24 see Darryl Cook looking into the cash drawer but going
25 into a drawer under the desk. I submit that's where he

1 got whatever he took out of that station from.

2 The point is there is a videotape made on
3 September 23rd, I think, of 1996 which in my hand, State's
4 Exhibit Number ten, which shows Darryl Cook on it.

5 How do you know that's Darryl Cook? Arthur Robertson
6 said, "I saw the tape. That's Darryl Cook." Rob Evans,
7 then with Ridgeway P.D. said, "I saw the tape. That's
8 Darryl Cook."

9 How else do you know it's Darryl Cook? Geraldine
10 Cook, his mom, testified in this trial, "I saw the tape.
11 That's Darryl Cook."

12 The significance of that is that enabled Jackie
13 McGuirt to identify the person who shot him and robbed
14 him. What else do we have? We have evidence that Darryl
15 Cook had been in the store two weeks prior to the robbery.
16 Arthur Robertson told you that.

17 Arthur Robertson told you that he told Jackie
18 McGuirt, that's who it was. Arthur Robertson said a week
19 before this incident Darryl Cook was at the store again,
20 and that Arthur Robertson told Jackie McGuirt that that's
21 who it was.

22 We have Tyrone Woodard who says that day in the
23 afternoon Darryl Cook came in and bought a soda from
24 Jackie McGuirt. Jackie McGuirt would know who it was,
25 would be able in some fashion to tell folks who it was.

1 That's exactly what happened.

2 How do we know that? Jackie McGuirt told Bruce
3 Ginyard that the guy who did it to him had been in some
4 time earlier to buy a soda.

5 Now, Bruce Ginyard couldn't say that day, but I
6 submit to you that's when it was, because that's when the
7 evidence shows that Darryl Cook was in there buying a
8 soda, that day, even though Bruce Ginyard can't tell you
9 that Jackie McGuirt said that.

10 And finally, Jackie McGuirt told Joan McGuirt there
11 at the station that the person who did that to him was the
12 boy who stole from him before on video. Darryl Cook is
13 the boy who stole from Jackie McGuirt before on video.
14 You have got the picture.

15 Mr. Swerling told you that 90 percent of this case is
16 Chris Hill's identification. I submit to you, ladies and
17 gentlemen, that's just part of it. That's just a little
18 part of it. You have got Chris Hill, and you have got all
19 of this other evidence that tells you that it was Darryl
20 Cook. It's not just Chris Hill.

21 I submit to you that when Darryl Cook went in that
22 store to do these crimes, he intended to kill Jackie
23 McGuirt. The judge is going to charge you about murder,
24 going to tell you what malice is, going to define malice.
25 I'm going to talk very briefly about that, but lots of

1 ways for malice to exist in a case like this.

2 I submit to you, first of all, the use of a deadly
3 weapon can allow you folks to infer that Darryl Cook acted
4 with malice when he shot Jackie McGuirt, and he, in fact,
5 used a deadly weapon, which we know turned out to be
6 deadly, although several months later.

7 When he went in that store, he knew, number one, he
8 had been in there in '96 and got caught on the tape. He
9 knew that he had been in there two weeks prior. He knew
10 that he had been in there a week prior, and he knew that
11 he had been in there that afternoon to buy a soda. I
12 submit checking it out, see who was there, see what things
13 looked like, see who is around, see if tonight is a good
14 night to do this.

15 He knew that Jackie McGuirt could recognize and
16 identify him, and because he knew that, for him to escape
17 with this crime, he would have to kill Jackie McGuirt. He
18 knew that.

19 What tells us that he was going to kill Jackie
20 McGuirt other just the mere fact of shooting? He goes in
21 there, nothing on his face, no mask, no bandanna, nothing
22 pulled down over his eyes, no ball cap, just lets himself
23 be seen. He never intended for Jackie McGuirt to ever
24 identify him to anybody.

25 He could have just taken the money and left, but he

1 would have left a witness, and he didn't do that. He shot
2 Jackie McGuirt in the neck thinking, thinking, that he had
3 killed him, and Jackie McGuirt perpetuated that false
4 thought or hope that Darryl Cook might have because he
5 played dead when Darryl came back in and kicked him to see
6 if he moved. He intended to kill him.

7 Forensics. Mr. Swerling talks about forensics. I'm
8 going to talk about it, too. What do we have in this case
9 by way of forensics? We have Mike Squire of S.L.E.D. who
10 came up. The crime actually occurred in one place but
11 carried over down 34 into the woods.

12 S.L.E.D. processed the crime scene. They're looking
13 for fingerprints. They're looking for trace evidence,
14 things that can be taken back to the lab and something
15 done with. They were taking photographs. They're looking
16 to pick up evidence that is around the scene, and that's
17 exactly what they do.

18 Only one print. They dust. They put down what they
19 have to put down, only have one latent print meaning
20 something you can't see until you manipulate it. They had
21 Darryl Cook's prints. It wasn't his print. They run that
22 print through the A.F.I.S., Automated Fingerprint
23 Identification System to see if it would match with any
24 other known prints that were on file. It didn't match
25 anybody's.

1 I don't have a fingerprint. Why don't we have a
2 fingerprint? Darryl Cook is wearing gloves. Jackie
3 McGuirt told Joan he had on gloves. Darryl Cook told
4 Anthony Green he had on gloves.

5 The footwear impression on the couch. First of all,
6 there were some footwear impressions in blood that E.M.S.
7 shoes matched up to. S.L.E.D. eliminated them by looking
8 at the bottom of the feet, taken pictures of all of that.
9 We know whose those are. We don't need to worry about
10 them.

11 One footwear impression on the couch, when Darryl, I
12 submit to you, steps up on that couch to let those blinds
13 down. They get a search warrant for Darryl's house.

14 They know what the shoe -- they know what the
15 footwear impression looks like, so they're looking for
16 shoes that look like that footwear impression and there
17 simply aren't any. Why not? Because Darryl Cook wasn't
18 going to leave anything lying around for somebody to find.
19 He has gotten rid of all of that stuff. They looked
20 thoroughly and did not find it.

21 We've got five fired cartridge cases found at the
22 store by Mike Squire plus one found by Greg Boney a couple
23 of days later inside that box that had been closed, that
24 file type box.

25 We have got six fired cartridge cases. Mike Squire

1 found five fired bullets or jacket fragments in the store.
2 Keith Lewis found this one or got this one from the
3 hospital, State's Exhibit Number 102, with Jackie
4 McGuirt's clothes.

5 So we have got five shell casings. We have got --
6 excuse me, six shell casings and six bullets. Ira Parnell
7 told you what he did with all of that stuff.

8 Ira Parnell told you that the shell casings, the
9 cartridge casings, were all fired by the same gun. He
10 told you that the cartridge casings were marked Remington
11 .380 auto ammunition, all of them shot by the same gun.

12 Ira Parnell told you he took the six bullets and
13 examined them, the fired bullets or the jackets or the
14 jacket fragments and examined them, and he could conclude
15 that the six of them were all fired by the same gun based
16 on the characteristics and the individual markings that
17 that gun would have left on those bullets.

18 So now we've got six cartridge cases fired by a gun,
19 six bullets fired by a gun. He told you that the bullets
20 were consistent with .380 auto. The fired bullets were
21 also .380 auto caliber, just like the cartridge cases.

22 He told you that based on the lands and the grooves,
23 the way the barrel of the gun is manufactured and the
24 markings it leaves on the bullets, that it was most
25 consistent with a High Point .380 automatic firearm.

1 He also told you that, "Without a gun, I can't tell
2 you that those jacket fragments that those bullets and
3 those cartridge cases all got fired by the same gun"
4 because you have to have the gun to do that test.

5 So what we have is somebody who is shooting up the
6 store. One of those bullets hits Jackie McGuirt. The
7 rest of them went all over that store, primarily to get
8 the V.C.R. out. It all matches up. The jacket -- the
9 cartridge cases match each other. The bullets match each
10 other. That's what Darryl Cook left in that store.

11 What about the gun? Greg Boney, in April of 2007,
12 gets information about the gun, about a gun which might
13 have something to do with this case, and the information
14 is Qurbitt Jones might know about it.

15 He looks for Qurbitt Jones. Qurbitt Jones is not in
16 any hurry to come in here and cooperate with Greg Boney
17 because Greg Boney had to look for him for two months to
18 be able to get him in.

19 Greg Boney got a warrant after this information was
20 received for the arrest of Qurbitt Jones and looked for
21 him for two months. Ended up taking him into custody, I
22 believe on June 19th, taking a statement from him on
23 June 20th -- excuse me, took him into custody June 19th of
24 '07, which when he was taken into custody, served the
25 warrant on him on June 20th of 2007, and Qurbitt Jones got

1 bonded out the same day, June 20th, 2007.

2 Now, the defense, Mr. Swerling, would have you think
3 that Qurbitt Jones came in here and ratted out or gave all
4 of this information about this gun simply because he's mad
5 at Crystal, Darryl's sister for having him locked up for
6 child support.

7 Well, the chronology doesn't fit. Qurbitt Jones was
8 talked to by Greg Boney in June. He didn't go to jail on
9 the child support case until August of '07. That's not a
10 motive.

11 The other issue with that is Crystal Cook also told
12 you she didn't have anything at all to do with Qurbitt
13 Jones going to jail for child support. It was a D.S.S.
14 case, and the Family Court sent for him for not paying his
15 child support. The child support issue is irrelevant. It
16 doesn't have anything to do with Qurbitt Jones telling you
17 about that gun.

18 What did Qurbitt Jones tell you? He said that he got
19 a call from Crystal Cook. As a result of that call, he
20 went to the place where Geraldine Cook's house was right
21 there and Cricket Miller's house is right there side by
22 side.

23 He got that gun out from under the seat of a gray
24 Nissan parked in the yard between those houses, and he
25 couldn't describe the gun. All he could tell you was it

1 was a semiautomatic and it had a clip, which I submit to
2 you is consistent with what Ira Parnell told you.

3 What did he do with it? Well, at some point the gun
4 got handed over to Jasper Sanders. Certainly, there's a
5 discrepancy about where that occurred, but I submit to you
6 it's clear that Jasper Sanders ended up with that gun.

7 How did Jasper Sanders get the gun? He saw it under
8 the seat of Qurbitt Jones's car and asked him if he could
9 borrow it and in fact, was allowed to borrow the gun. We
10 know that Qurbitt Jones never got it back.

11 We heard Jasper Sanders describe the gun as a .380.
12 He said, "That was printed on the barrel, a .380." The
13 gun eventually got stolen from Jasper Sander's mom's shed
14 when he was living in Columbia.

15 So you have some explanation for that gun which is
16 consistent with the forensic evidence that was found at
17 the scene by the S.L.E.D. folks and tested by the S.L.E.D.
18 folks.

19 That night, sometime late, the phone records show
20 11:38 Pee Wee McDuffy called Darryl Cook from Takeshia,
21 Peaches, Ford's phone number. There's the number.
22 There's several calls between 11:38 and 11:54.

23 The testimony was Darryl Cook was already at Amps,
24 and Darryl Cook told you in his statement, which you'll
25 have, that at 11:45 or so, Monica dropped him off at Amps.

1 McDuffy is talking to Cook on one call and then keeps
2 calling Cook's number so that he can talk to his
3 girlfriend, who is also out there where Darryl lives. We
4 know by that time Cook is at Amps.

5 Sometime later Anthony Green and Robert McDuffy end
6 up at Amps. Sometime that night Anthony Ford ends up at
7 Amps. Sometime into the wee hours they all close down
8 Amps. They end up heading to Sensations, which is a strip
9 club in Columbia. They end up at the Ramada to spend the
10 night, but the night is pretty much over with by that
11 time.

12 During those events, Darryl Cook tells Anthony Green
13 and Robert McDuffy what he has done. He, at some point,
14 decides I'm going to brag about this, and essentially,
15 that's what he did.

16 There's already talk about what happened to Jackie
17 McGuirt, and it comes up while those three are together at
18 some point, and Darryl Cook says he did it. He shot and
19 robbed Jackie McGuirt. He stole \$6,000.

20 Specifically, what did Anthony Green tell you he told
21 him? Anthony Green said he took the V.C.R. and the tapes.
22 He said he burned the V.C.R. and the tapes. Well, you
23 know he didn't burn anything. There's nothing burned in
24 that box of exhibits over there, but he destroyed it and
25 removed it, the tape at least, so that it wouldn't be able

1 to be recovered.

2 Anthony Green told you Darryl Cook took the truck and
3 drove it through the cut. Antoine Ford tells you yeah, he
4 did because I saw the truck about the time all of this was
5 going on.

6 Anthony Green told you that Darryl said he gave the
7 money and the gun to Rod, his brother, and that he was
8 going to buy a Cadillac with the money.

9 Pee Wee McDuffy told you basically the same thing.
10 He said, "He robbed and shot McGuirt as McGuirt was coming
11 from the back room. They struggled over the gun. He
12 robbed and shot McGuirt one time in the neck. He got
13 \$6,000. He shot the V.C.R. to get the tape out. He got
14 rid of the tape," and again, "gave Rod money and gun."
15 He's confessed.

16 He has basically gone as long as he can go after
17 having done this horrible thing and not being able to
18 stand somebody not knowing what a big thing he did, so out
19 there after his partying night at Amps and after his
20 partying wee hours of the morning at Sensations or
21 sometime during all of that when they're all out having a
22 good time doing who knows what, he's just finally busting
23 at the brim.

24 He has got to tell somebody, and he tells his
25 buddies. He tells his buddies what's he's done. They

1 know what's happened. They just don't know he did it
2 until he starts telling them he did it.

3 Again, there's evidence that supports all of this
4 that Darryl Cook did it. It's not just Chris Hill's
5 identification. It's not just Green and McDuffy saying he
6 confessed to it. It's not just Bryson Oliver and Brian
7 Hare saying, "We picked him up." All of it tells him that
8 Darryl Cook did it.

9 I told you at the beginning of this case, again, that
10 Darryl Cook did this. I told you that you didn't know he
11 did it; that you couldn't know he did it, but I'm telling
12 you now that you do know he did it.

13 He made some mistakes. He made some mistakes that
14 got him caught. The mistakes were, number one, he didn't
15 create an alibi. He tried to. He had people around him
16 before. He had people around him after, but he left
17 himself enough time between 5:30 and 6:30 on November 23,
18 '01 for this crime to have occurred. Nobody can tell you
19 where Darryl Cook was during that hour or so other than
20 Jackie McGuirt. There is no alibi for the times when this
21 crime occurred.

22 The next mistake, he didn't kill Jackie McGuirt. He
23 killed him. He killed him 11 months later, but he didn't
24 kill him on November 23, 2001. He thought he did, maybe.
25 He hoped he did, maybe.

1 He went in to kick him to see if he had done it and
2 probably left there thinking, "Yeah, this is done. Nobody
3 is going to know I did this," but he didn't kill him.

4 Jackie McGuirt lived, and Jackie McGuirt was able to
5 provide information. Specifically, it was the boy who
6 stole from me before on tape. Darryl Cook's goose is
7 cooked at that point. That's his next mistake.

8 What's his next mistake? He allowed himself to be
9 seen. He left himself high and dry, after having
10 committed this crime, with no transportation and now a
11 V.C.R. he has got to do something with in downtown
12 Ridgeway. He's high and dry.

13 He has got to take the truck, so from leaving the
14 station front door to go to the truck, he has the
15 misfortune of running into Chris Hill who identified him.
16 He allowed himself to be seen leaving the scene of the
17 crime.

18 What's his next mistake? He bragged about it to his
19 buddies. He partied all night, partied all into the wee
20 hours of the morning. He went to the motel, and at some
21 point after that couldn't stand it anymore and had to brag
22 about it.

23 He told a couple of guys that he probably figured
24 would keep his secret to their graves but they didn't.
25 They told.

1 Law enforcement found out where he had been, who he
2 had been with, went to those folks, Green and McDuffy,
3 talked to them and got that information. He confessed to
4 them, so here he sits.

5 You have got a lot of stuff to talk about. You have
6 got a lot of stuff to look at. You have got a lot of
7 talking back and forth among yourselves in the jury room.

8 Common sense. Common sense is probably the best tool
9 you have got. Figure out what makes sense to you. I
10 submit to you this is what makes sense to you.

11 Darryl Cook gets home from Columbia late afternoon,
12 goes to the Shell Station, was there at 5:30, walks up to
13 Jackie McGuirt's, commits these horrible crimes, leaves
14 there in the truck, got to get away somehow, got to get
15 back to town.

16 He's way away from his house, calls his buddy to pick
17 him up, walking back toward Ridgeway in the rain on
18 Highway 34, a long way from his house and a long way from
19 anywhere, away from where the truck is ditched back toward
20 town, gets taken to his house, goes out and parties all
21 night, spends a bunch of money which he has no reason to
22 have because he ain't working and brags to his buddies
23 about it. That's kind of it in a nutshell.

24 Ladies and gentlemen, when you go back there, think
25 about all of these things, and I submit to you that when

1 you do that, the only verdict you can reach in this case,
2 the only verdicts you can reach on these charges are
3 guilty, guilty to the murder, guilty to the armed robbery,
4 and guilty to the larceny of the truck. I ask you return
5 those verdicts.

6 Thank you.

7 THE COURT: Thank you, Mr. Solicitor. We've all been
8 in a chair for a while now, if you'd like to stand up and
9 stretch, I'll charge you on the law. This will take a few
10 minutes, and then we'll let you go deliberate.

11 After I charge you on the law, then the deliberations
12 would begin. If you'd like to stand up for a moment, you
13 don't have to, but it makes me feel better.

14 MR. SWERLING: Judge, could we...

15 (Pause).

16 THE COURT: Let's go ahead and take about a
17 five-minute break, a very brief one. With the coffee and
18 the morning's beverages, I think we'll take about a
19 five-minute break. I'll charge you on the law and let you
20 begin your deliberations.

21 Thank you.

22 (WHEREUPON, the jury left open court at approximately
23 12:43 p.m.)

24 Court will be at ease for about five minutes.

25 (WHEREUPON, a short break was taken.)

1 THE COURT: Anything from the State before we bring
2 the jury?

3 MR. BARFIELD: No, sir, but Mr. Swerling is not back
4 in.

5 (Pause).

6 THE COURT: Anything from the defense before we bring
7 the jury?

8 MR. SWERLING: No, Your Honor.

9 THE COURT: Bring the jury, please, ma'am.

10 (WHEREUPON, the jury came into open court at
11 approximately 1:02 p.m.)

12 JURY CHARGE:

13 THE COURT: Please let the record reflect that the
14 trial jury and alternate are present in the courtroom.

15 Mr. Foreman, ladies and gentlemen of the jury, you
16 have now heard all of the evidence in the case. Now, it
17 is time for me to instruct you on the law of this case. I
18 want you to pay close attention because this is the
19 framework for you to reach your verdict in these cases.

20 Under our constitution and laws, only you the jury
21 can make the findings of fact in this case. I am the
22 finder of the law. You are the finders of the facts.

23 I am not permitted to indicate to you how I may feel
24 about the testimony and evidence which has been presented,
25 and throughout this trial I have intended to be fair and

1 impartial.

2 If you have any notion that I feel a certain way
3 about any of the parties, lawyers, evidence, or testimony,
4 rid yourselves of that notion now and do not consider it
5 in your deliberations.

6 To determine the facts in this case, you'll have to
7 evaluate the credibility, which means the believability of
8 each witness and each piece of evidence.

9 You can believe as much or as little of each
10 witness's testimony as you think proper. You may believe
11 the testimony of a single witness against that of many
12 witnesses or just the opposite.

13 You may look at a piece of evidence and find it
14 unreliable or find it completely reliable. It is your
15 determination that matters.

16 Of course, you do not determine the truth merely by
17 counting the number of witnesses presented by each side or
18 the amount of material offered into evidence. Throughout
19 this process you have but one objective, to seek the truth
20 regardless of its source.

21 The same constitution and laws which designate and
22 make you the finders of the facts, as I just explained,
23 make me the instructor of the law.

24 You must accept the law as I give it to you. If I am
25 wrong, there is another place and time that that error --

1 for that error to be corrected, but today for this case
2 you must apply the law as I give it to you. This means
3 that you should not be concerned with what the law should
4 be but only with what the law is.

5 Always be mindful that you took an oath to apply the
6 law as I give it to you, and even if you think the law is
7 wrong, you must apply it.

8 As I told you at the beginning of the trial, the fact
9 that the defendant was arrested, charged, and indicted in
10 this case is not evidence in this case and cannot be
11 considered by you during your deliberations. It is not
12 evidence of guilt, nor does it create any presumption or
13 inference of guilt.

14 This documentation is merely the formal written
15 instrument which contains the charges made against the
16 defendant. The defendant has pled not guilty to these
17 indictments, and that plea puts the burden on the State to
18 prove the defendant guilty.

19 A person charged with committing a criminal offense
20 in South Carolina is never required to prove himself
21 innocent.

22 I charge you that it is an important rule of the law
23 that the defendant in a criminal trial, no matter what the
24 seriousness of the charge may be, will always be presumed
25 to be innocent of the crime for which the indictment was

1 issued unless guilt has been proven by evidence satisfying
2 you of that guilt beyond a reasonable doubt.

3 This presumption of innocence does not end when you
4 begin your deliberation. It accompanies the defendant
5 throughout the trial until you reach a verdict of guilty
6 based on the evidence satisfying you of that guilt beyond
7 a reasonable doubt.

8 The presumption of innocence is like a robe of
9 righteousness placed about the shoulders of the defendant
10 which remains with the defendant until it has been
11 stripped from the defendant by evidence satisfying you of
12 the defendant's guilt beyond a reasonable doubt.

13 The presumption of innocence is not mere legal
14 theory. It is not just a legal phrase. It is a
15 substantial right to which every defendant is entitled
16 unless you the jury are satisfied from the evidence of the
17 defendant's guilt beyond a reasonable doubt.

18 The defendant did not testify in this case. He has a
19 right not to testify. I instruct you and emphasize that
20 the fact that the defendant did not testify is not a
21 factor to be considered by you in any way in your
22 deliberations and in your consideration of the question of
23 the guilt or the innocence of the defendant.

24 It must not be considered by you in any manner
25 whatsoever. I repeat, under your oath you are to draw no

1 conclusion whatsoever from the fact that the defendant in
2 this case did not testify.

3 The fact that this defendant did not testify should
4 not even be discussed in the jury room. The burden of
5 proof, as I have stated to you, is on the State. The
6 defendant is not required to prove his innocence. The
7 burden of proof remains on the State to prove guilt beyond
8 a reasonable doubt.

9 What is a reasonable doubt in the law? A reasonable
10 doubt is the kind of doubt that would cause a reasonable
11 person to hesitate to act. The State has the burden of
12 proving the defendant guilty beyond a reasonable doubt.

13 Some of you may have served as jurors in civil cases
14 where you were told that it was only necessary to prove
15 that a fact is more likely true than not true, such as by
16 the greater weight or preponderance of the evidence.

17 In criminal cases, the State's proof must be more
18 powerful than that. It must be beyond a reasonable doubt.
19 Proof beyond a reasonable doubt is proof that leaves you
20 firmly convinced of the defendant's guilt.

21 There are very few things in this world that we know
22 with absolute certainty, and in criminal cases the law
23 does not require proof that overcomes every possible
24 doubt.

25 If, based on your consideration of the evidence, you

1 are firmly convinced that the defendant is guilty of the
2 crime charged, you must find the defendant guilty.

3 If, on the other hand, you think there is a real
4 possibility that the defendant is not guilty, you must
5 give the defendant the benefit of the doubt and find him
6 not guilty.

7 There are two types of evidence which are generally
8 presented during a trial: Direct evidence and
9 circumstantial evidence.

10 Direct evidence is the testimony of a person who
11 claims to have actual knowledge of a fact such as an
12 eyewitness. It is evidence which immediately establishes
13 the main fact to be proved.

14 Circumstantial evidence is the proof of a chain of
15 facts and circumstances indicating the existence of a
16 fact. It is evidence which immediately establishes
17 collateral facts from which the main fact may be inferred.
18 Circumstantial evidence is based on inference and not on
19 personal knowledge or observation.

20 The law makes absolutely no distinction between the
21 weight or value to be given to either direct or
22 circumstantial evidence, nor is a greater degree of
23 certainty required of circumstantial evidence than of
24 direct evidence.

25 You should weigh all the evidence in the case. After

1 weighing all of the evidence if you are not convinced of
2 the guilt of the defendant beyond a reasonable doubt, you
3 must find the defendant not guilty.

4 Mr. Foreman and ladies and gentlemen of the jury,
5 under the constitution and the laws of South Carolina, you
6 are the finders of the facts in this case. I do not have
7 the right to pass upon the facts or even to express any
8 opinion I might have as to them, nor may I intimate in any
9 way that I may think -- what I may think about the guilt
10 or innocence of the defendant.

11 You are also the judges, and the sole judges, of the
12 credibility, the believability, of the witnesses who have
13 testified in this case.

14 In passing upon the credibility, you may take into
15 consideration many things such as the appearance and
16 manner of the witness on the witness stand, sometimes
17 referred to as demeanor of the witness. Was the witness
18 forthright or hesitant? Was the witness's testimony
19 consistent or did it contain discrepancies?

20 What was the ability of the witness to know the facts
21 about which he or she testified? Did the witness have a
22 cause or a reason to be biased or prejudiced in favor of
23 the testimony he or she gave? Was the testimony of a
24 witness corroborated or made stronger by other testimony
25 and evidence or was it made weaker or impeached by some

1 other testimony and evidence?

2 Dying declaration statements. Ladies and gentlemen
3 of the jury, this Court has admitted evidence of
4 statements allegedly made by the deceased victim after the
5 injury.

6 I have determined that these statements should be
7 admitted into evidence in this case. However, it is for
8 you to determine the believability of these statements.
9 In deciding this question, you may consider whether the
10 victim was dying and knew he was dying and whether the
11 victim had lost all hope of recovery at the time the
12 statements were made.

13 An issue in this case is the identification of the
14 defendant as the person who committed the crime charged.
15 The State has the burden of proving identity beyond a
16 reasonable doubt. You must be satisfied beyond a
17 reasonable doubt of the accuracy of the identification of
18 the defendant before you may convict the defendant.

19 Identification testimony is an expression or belief
20 or impression by a witness. You must determine the
21 accuracy of the identification of the defendant. You must
22 consider the believability of each identification witness
23 in the same way as any other witness.

24 You may consider whether the witness had an adequate
25 opportunity to observe the offender at the time of the

1 offense. This will be affected by things like how long or
2 how short a time was available, how far or how close the
3 witness was, the lighting conditions, and whether the
4 witness had the chance to see or know the person in the
5 past.

6 Once again, I instruct you the burden of proof is on
7 the State, and it extends to every element of the crime
8 charged. This specifically includes the burden of proving
9 beyond a reasonable doubt the identity of the defendant as
10 the person who committed the crime.

11 If after examining the testimony you have a
12 reasonable doubt as to the accuracy of the identification,
13 you must find the defendant not guilty.

14 The defendant has raised the defense of alibi. In
15 order to establish an alibi, it must be shown that the
16 defendant was at another specified place at the time the
17 crime was committed and that it was, therefore, impossible
18 for the defendant to have been at the scene of the crime.
19 Mere denial of presence at the scene of a crime does not
20 constitute an alibi.

21 There is no burden on the defendant to prove an
22 alibi. The burden is on the State to prove beyond a
23 reasonable doubt that the defendant was actually present
24 at the scene of the crime, actually participated in it and
25 was not somewhere else. The State has the burden of

1 disproving the defendant's alibi defense.

2 Intent. In order to establish criminal liability,
3 criminal intent is required. For example, the mental
4 state required to be proven by the State for a particular
5 crime must -- might be purpose, intent, knowledge,
6 recklessness, or criminal negligence.

7 Criminal intent must be proven by the State beyond a
8 reasonable doubt. Criminal intent is always a matter that
9 must be determined by the jury from the circumstances
10 surrounding the situation.

11 There is no way to prove intent to a mathematical
12 certainty. There is no way medical science can dissect a
13 person's brain and determine what the person had in mind,
14 so the law says that criminal intent may be inferred from
15 the circumstances shown to have existed.

16 This is how you make a determination of whether or
17 not the element requiring intent was present. It is not
18 necessary to establish intent by direct and positive
19 evidence, but intent may be established by inference in
20 the same way as any other fact by taking into
21 consideration the acts of the parties and all the facts
22 and circumstances of the case.

23 Criminal intent is a mental state, a conscious
24 wrongdoing. It is up to you to determine what the
25 defendant intended to do based on the circumstances shown

1 to have existed.

2 Criminal intent can arise from action or a failure to
3 act. It may arise from negligence, recklessness or an
4 indifference to the duty or to consequences that is
5 considered by the law to be the equivalent of criminal
6 intent.

7 Proximate cause. Where a person inflicts a fatal
8 injury on another person and that other person dies at a
9 later time, you must be convinced beyond a reasonable
10 doubt that the infliction of the first injury was the
11 proximate cause of the victim's death.

12 Proximate cause is the direct cause. It is the
13 immediate cause. It is the efficient cause. It is that
14 cause without which the death of the victim would not have
15 resulted.

16 There must be a chain of causation from the time of
17 the injury inflicted by the defendant until the time of
18 the victim's death.

19 Proximate cause does not necessarily mean that it
20 occurred immediately prior to death. There may be more
21 than one proximate cause. The actions of two or more
22 persons may combine together to be the proximate cause of
23 the death of the person.

24 The defendant's act may be regarded as the proximate
25 cause if it is a contributing cause to the death of the

1 victim. The fact that other causes also contribute to the
2 death of the victim does not relieve the defendant from
3 responsibility.

4 The defendant's act need not be the sole cause of the
5 death, but must be a proximate cause contributing to the
6 death of the victim.

7 It is not a defense to show that the victim might
8 have recovered had he or she been treated according to the
9 most approved surgical and medical standards or as a
10 reasonably prudent doctor would have treated the case or
11 even by showing that the treatment was negligent.

12 If, however, the death was caused not by the wound or
13 the injury that the victim had but was caused by gross,
14 erroneous, willful, deliberate treatment, the defendant
15 would not be liable.

16 In other words, negligence on the part of someone
17 else would not relieve the defendant from liability if the
18 injury was the proximate cause of the victim's death.

19 However, gross negligence or intentional activity on
20 the part of the practitioner would relieve the defendant
21 of liability. The propriety of the medical procedures is
22 an integral question in determining causation.

23 The indictments in this case allege three different
24 offenses against the defendant. The charges are
25 indictment 02-GS-20-546, murder; indictment 02-GS-20-82,

1 armed robbery; and indictment 02-GS-20-132, grand larceny
2 greater than \$1,000.

3 Each indictment charges a separate and distinct
4 offense. You must decide each indictment separately on
5 the evidence and the law applicable to it uninfluenced by
6 your decision as to any other indictment.

7 The defendant may be convicted or acquitted on any or
8 all of the offenses charged. You will be asked to write a
9 separate verdict of guilty or not guilty for each
10 indictment.

11 Charge one, murder. The defendant is charged with
12 murder. The State must prove beyond a reasonable doubt
13 that the defendant killed another person with malice
14 aforethought.

15 Malice is hatred, ill will, or hostility toward
16 another person. It is the intentional doing of a wrongful
17 act without just cause or excuse and with an intent to
18 inflict an injury or under circumstances that the law will
19 infer an evil intent.

20 Malice aforethought does not require that the malice
21 exist for any particular time before the act is committed,
22 but malice must exist in the mind of the defendant just
23 before and at the time of the act that is committed.
24 Therefore, there must be a combination of previous evil
25 intent and the act.

1 Malice aforethought may be expressed or inferred.
2 These terms, expressed and inferred, do not mean different
3 kinds of malice but merely the manner in which malice may
4 be shown to exist. That is either by direct evidence or
5 by inference from the facts and circumstances which are
6 proved.

7 Expressed malice is shown when a person speaks words
8 which express hatred or ill will for another or when the
9 person prepared beforehand to -- beforehand to do the act
10 which was later accomplished. For example, lying in wait
11 for a person or any other acts of preparation going to
12 show that the deed was within the defendant's mind would
13 be expressed malice.

14 Malice may be inferred from conduct showing a total
15 disregard for human life. Inferred malice may also arise
16 when the deed is done with a deadly weapon. A deadly
17 weapon is any article, instrument, or substance which is
18 likely to cause death or great bodily harm. Whether an
19 instrument has been used as a deadly weapon depends on the
20 facts and circumstances of each case.

21 The following are examples of instruments which may
22 be deadly weapons: A pistol, a shotgun, a rifle, a dirk,
23 a dagger, a knife, a slingshot, metal knuckles, razor,
24 gasoline, a fire bomb or Molotov cocktail and lighter
25 fluid. A gun may be a deadly weapon even if it is not

1 operating.

2 Armed robbery count, charge number two. The
3 defendant is charged with armed robbery. In order to
4 prove this offense, the State must first prove beyond a
5 reasonable doubt that the defendant took personal property
6 from the person or presence of another person.

7 Property is in the presence of a person if it is
8 within the person's reach, inspection, observation or
9 control so that the person could, if not overcome with
10 violence or prevented by fear, keep possession of the
11 property.

12 The State must also prove beyond a reasonable doubt
13 that the defendant carried the property away intending to
14 permanently deprive the owner of the property and to keep
15 the property for the defendant's own use.

16 The slightest removal of the property or the complete
17 possession of the property, even for an instant by the
18 defendant, is sufficient to show a taking and carrying
19 away of the property.

20 The taking and carrying away of the property must
21 have been done with violence or by putting the owner of
22 the property in fear of violence. Finally, the State must
23 prove beyond a reasonable doubt that the defendant was
24 armed with a deadly weapon during the robbery.

25 A deadly weapon is any article, instrument, or

1 substance which is likely to cause death or great bodily
2 harm. Whether an instrument has been used as a deadly
3 weapon depends on the facts and circumstances of each
4 case. I earlier read you a list of deadly weapons.

5 Grand larceny. The defendant is charged with grand
6 larceny. The State must prove beyond a reasonable doubt
7 that the defendant took and carried away the property of
8 another against the will or without the consent of the
9 other person.

10 The slightest removal of the property or the complete
11 possession of the property, even for an instant, by the
12 defendant is enough to show a taking and carrying away of
13 the property. The state must also prove beyond a
14 reasonable doubt that the defendant intended to
15 permanently deprive the owner of the property. Finally,
16 the State must prove that the value of the thing taken was
17 \$1,000 or more.

18 (A train went by).

19 We'll wait for the train.

20 (Pause).

21 You have been selected as fair and impartial jurors
22 sworn to impartially try and determine the facts of this
23 case, and when you comply with your oath to do so, then no
24 one will have a right to criticize your verdict, and you
25 will have fully discharged your duty as jurors.

1 You should not be influenced by opinions or
2 expressions of opinions, if any, which you may have heard
3 on the outside, but you are to decide the case according
4 to the testimony that you have heard from the lips of the
5 sworn witnesses along with other evidence introduced.

6 On each charge there are two verdicts which you may
7 find in each case. One is guilty, and the other is not
8 guilty. There is no significance whatsoever in the order
9 in which I state these two possible verdicts. It is
10 simply that one must be stated first.

11 Now, Mr. Foreman and ladies and gentlemen of the
12 jury, your verdict must be unanimous.

13 Mr. Foreman, when the jury agrees on each verdict,
14 you will write it on the back of each indictment and sign
15 and date here where it says "verdict" on the back.

16 I ask you now, please, to retire to your jury room
17 but do not begin deliberations until you're advised to by
18 the clerk or a bailiff to do so. There are some matters
19 which must be discussed with the attorneys before you
20 begin your deliberations.

21 Thank you.

22 (WHEREUPON, the jury left open court at approximately
23 1:33 p.m.)

24 THE COURT: Please let the record reflect that the
25 trial jury and alternate are absent from the courtroom.

1 Any objections or exceptions to the jury charge on
2 behalf of the State?

3 MR. BARFIELD: None from the State.

4 THE COURT: Defendant?

5 MR. SWERLING: Judge, just could you maybe just
6 elaborate a little bit that they have to find guilty or
7 not guilty as to each indictment irrespective of the other
8 one?

9 THE COURT: I covered that in detail.

10 MR. SWERLING: Well, I thought you did at the
11 beginning, and I was just wondering if at the end --
12 whether or not --

13 THE COURT: No. At the end I put that it would be
14 written on each one.

15 MR. SWERLING: Each one but I guess what I'm saying
16 is independent of the other charge.

17 THE COURT: I mean, I -- I...

18 MR. SWERLING: Okay. That's fine. I mean, I
19 remember it early in the charge, definitely but that's...

20 (Pause).

21 THE COURT: Toward the end I said it again, that they
22 should not consider the others.

23 MR. SWERLING: I do recall Your Honor talking about
24 at the beginning of the charge considering the charges
25 independently.

1 I was just talking to -- what I was referring to is
2 actually at the end when they were signing the verdict
3 forms. Your Honor did cover it at the beginning. I agree
4 with that.

5 THE COURT: On page 19, according to Hampton.

6 THE CLERK: The defendant may be convicted or
7 acquitted of any or all.

8 THE COURT: Yes. On page 19 when I talked about
9 multiple charges, "The defendant may be convicted or
10 acquitted on any or all the offenses charged. You will be
11 asked to write a separate verdict of guilty or not guilty
12 on each indictment."

13 MR. SWERLING: Okay. They just got together on that.
14 I heard that part, and then I just -- but I don't remember
15 the last. It may well be.

16 THE COURT: It was on page 19 out of 26 pages.

17 MR. SWERLING: Yes, sir. The only other issue I have
18 is that when you charged them about Mr. McGuirt's
19 statement, that it basically was in the form of whether or
20 not it was a dying declaration, how they consider it and
21 give it credibility.

22 It was my understanding that it was not admitted as a
23 dying declaration. It was admitted under the hearsay
24 rule, as an exception to the hearsay rule, the excited
25 utterance, res gestae, the 803(1), (2), (3).

1 I guess I just take exception to the fact that it was
2 -- they were charged as to what I consider or what I
3 understood to be a dying declaration charge as to the
4 weight to be given and the credibility to be given, and I
5 think that kind of enhances the credibility of it if they
6 find it to be a dying declaration charge.

7 THE COURT: I thought Judge Manning's order which
8 controls cited that as a dying declaration.

9 MR. BARFIELD: I think Judge Manning's order, and
10 I'll pull mine out if you don't have it handy. I think it
11 did -- it ruled inadmissible under res gestae and
12 basically said it didn't even reach the issue of whether
13 it was a dying declaration because it was under the res
14 gestae and excited utterance anyway.

15 MR. SWERLING: That's correct. Under hearsay 803(1),
16 (2) and (3), it did not address the dying declaration. It
17 never reached that because he felt it was inadmissible
18 under 803(1), (2) and (3).

19 THE COURT: All right. If we could have the jury
20 back in, please, ma'am.

21 Anything else, Mr. Swerling?

22 MR. SWERLING: No, sir. The Solicitor and I will
23 just check the evidence.

24 THE COURT: You can.

25

1 (WHEREUPON, the jury came into open court at
2 approximately 1:38 approximately).

3 THE COURT: During my charge on the law, I made
4 reference to comments of the victim, Mr. McGuirt, in this
5 to his wife as being a dying declaration.

6 A comment made by a person is found to be hearsay,
7 but that evidence would come in, but it would not come in
8 under the dying declaration exception to the hearsay rule.
9 It would come under Rule 803, an excited utterance, that
10 he was in such a -- it was a statement of such entitlement
11 that truthfulness attaches to it as an excited utterance.
12 So that would be the basis for allowing that hearsay of
13 Mr. McGuirt into evidence.

14 Is that satisfactory, Mr. Swerling?

15 MR. SWERLING: Can I approach?

16 (Whereupon, there was a bench conference.)

17 THE COURT: What I just explained to you was why it
18 was allowed into evidence. Now, what credibility, what
19 weight that you give to that evidence, is still your
20 province.

21 Mine was just a ruling on whether or not it should
22 come in. Yours is to decide the credibility and the
23 weight to be given to those statements.

24 Is that agreeable with the State?

25 MR. BARFIELD: Yes, sir.

1 MR. SWERLING: Yes, sir.

2 THE COURT: Thank you. You may retire to your jury
3 room.

4 (WHEREUPON, the jury left open court at approximately
5 1:41 p.m.)

6 THE COURT: And when the bailiff comes back, begin
7 your deliberations, and Mr. Alternate, if you would remain
8 with us, I would appreciate it.

9 (WHEREUPON, the jury, except the alternate, left open
10 court at approximately 1:41 p.m.)

11 THE COURT: You have been in -- please let the record
12 reflect that the trial jury is absent from the courtroom.
13 The alternate has remained.

14 Mr. Miles, we truly appreciate your attention and
15 your focus on this case. It's been apparent from the
16 start that you were really involved. As I've said, that's
17 good for everyone.

18 Fortunately, your assistance in deliberations will
19 not be necessary because no one else dropped off the trial
20 panel, but it concludes your jury service for last week
21 and for the next three years. The only thing left is that
22 you'll get a huge check from Fairfield County.

23 (Pause).

24 MR. SWERLING: Judge, frankly, I am a little
25 concerned about the comment to the jury that it comes in

1 for the truthfulness, because the exception to the hearsay
2 rules is because of the truthfulness.

3 I understand what Your Honor is trying to explain,
4 and a follow-up explanation telling them it was still
5 their province to go ahead and determine the credibility,
6 I am concerned about their being told that it comes in
7 because of the truthfulness. It basically is the
8 reliability of that statement. I'm not sure how you
9 correct it at this point or how you correct it.

10 THE COURT: I think the only correction can be the
11 one that I did.

12 MR. SWERLING: That's...

13 THE COURT: It comes in not for that reason but for
14 another reason, and it's still their job to decide the
15 weight and credibility.

16 MR. SWERLING: I understand. I'm just sitting here
17 thinking about the remedy. I understand your -- again, I
18 understand what Your Honor is saying.

19 I guess to protect the record, I need to move for a
20 mistrial based upon that comment to the jury about it
21 coming in for the truthfulness of it, because it's a
22 truthful statement.

23 I'll leave it to Your Honor's discretion.

24 THE COURT: And I find that my corrective charge is
25 sufficient, and -- does the State have any comments at

1 this point?

2 MR. BARFIELD: No. I don't have any. I agree with
3 what the Court has said.

4 I would inquire and certainly invite, if Mr. Swerling
5 has some language that he thinks would -- that he would
6 request as an additional curative instruction, I would
7 certainly ask the Court to entertain that. It might take
8 a minute to formulate something if he thinks he does.

9 MR. SWERLING: If the curative instruction is going
10 to cure it, then I think what Your Honor told them is the
11 right thing, okay.

12 I guess my question is, and I guess what my
13 reservation is I don't know that it's going to be cured.
14 That's why I'm making a motion for a mistrial. I can't
15 think of something else I would tell the court to tell the
16 jury.

17 THE COURT: Well, the motion for a mistrial is
18 denied.

19 MR. SWERLING: Yes, sir.

20 MR. BARFIELD: It's going to take us a couple of
21 minutes to count all of this stuff. Most of it is photos.
22 I don't know if Ms. Tracy has started putting them in
23 order or not.

24 (There was a short recess to go over the exhibits).

25 THE COURT: If we could have the jury back.

1 (WHEREUPON, the jury came into open court at
2 approximately 1:55 p.m.)

3 THE COURT: Please let the record reflect that the
4 trial jury is back in the courtroom. I just wanted to
5 reiterate some of my comments when you were in here last
6 time.

7 If I made any comment that you would perceive that
8 would add or take away from the credibility of any
9 statement, that is in your province, and if there was any
10 illusion that -- or any comment that I made that would
11 cause you to take from or add to the weight or credibility
12 of any comment, disregard it.

13 I was explaining to you only why that statement was
14 allowed into evidence, and that was the entire purpose of
15 my comments.

16 How much weight and credibility is solely within your
17 province and not mine. If I made any comment that would
18 cause you to think otherwise, disregard it.

19 Thank you. They'll have the exhibits back very
20 shortly.

21 (WHEREUPON, the jury left open court at approximately
22 1:57 p.m.)

23 THE CLERK: Are you ready for us to take the evidence
24 back there, the exhibits?

25 MR. BARFIELD: Yes, sir. I would ask them to take

1 care about the pushpins in State's 120. I guess they have
2 got the right to put them where they want.

3 THE COURT: The trial jury is absent. Any additional
4 objections or exceptions to the charge on behalf of the
5 State?

6 MR. BARFIELD: Nothing from the State.

7 MR. SWERLING: Nothing additionally. I just still
8 stand --

9 THE COURT: I understand.

10 MR. SWERLING: -- on the position I had.

11 THE COURT: I understand.

12 MR. SWERLING: I appreciate Your Honor's clarifying,
13 but I still take the position that I ask for a mistrial.

14 THE COURT: All right. The Court will be at ease
15 until we hear from the jury.

16 (WHEREUPON, the jury began their deliberations at
17 2:02 p.m. Lunch was brought in.)

18 MR. SWERLING: Three o'clock? Is that good, just
19 everybody be back at three?

20 THE COURT: Yes.

21 MR. BARFIELD: I'll explain that to them.

22 MR. SWERLING: Thank you.

23 (WHEREUPON, a short break was taken.)

24 (A note was sent out.)

25 MR. BARFIELD: Your Honor, from my perspective, it

1 was a few minutes before three. I anticipate my folks
2 would like to hear every word that's uttered in this
3 courtroom on the record. I don't want to delay. Should
4 we wait for a couple of minutes?

5 THE COURT: I think with these questions, I think --
6 I mean, I'll do whatever is the State's pleasure, but I
7 have got two questions.

8 MR. SWERLING: Judge, I just saw they were at the
9 restaurant. They just left.

10 MR. BARFIELD: And they're prompt. They're probably
11 coming in now. I don't want to delay things, but I also
12 don't want them to think that we're doing things without
13 them knowing about it when we told them not to worry about
14 it until three.

15 (Pause).

16 THE COURT: We're back on the record.

17 We have received two questions from the jury. One,
18 "Can we get a timeline chart used by the Solicitor?" And
19 of course, that was not admitted into evidence and they
20 can't see it.

21 MR. BARFIELD: The State agrees.

22 THE COURT: And "Did Mr. McGuirt I.D. the defendant
23 as the person that shot him?" Of course, I'll say they
24 have to rely on their collective memories to recall it.
25 We can't -- we can't answer that question. They'll have

1 to rely on their own memories.

2 MR. SWERLING: To recall whether he did or not?

3 MR. BARFIELD: I agree with that.

4 THE COURT: Okay. Can I have the jury, please,
5 ma'am?

6 (WHEREUPON, the jury came into open court at
7 approximately 3:08 p.m.)

8 THE COURT: Mr. Foreman, ladies and gentlemen of the
9 jury, we have received your two questions. The first
10 question: "Can we get a timeline chart used by the
11 Solicitor?"

12 That chart was not introduced into evidence, so the
13 answer to that is that you cannot.

14 The second question, "Did Mr. McGuirt I.D. the
15 defendant as the person that shot him?" On that question,
16 you'll have to use your own recall to decide whether he
17 did or he did not. You have to use your collective
18 memories.

19 Any objections to the response on behalf of the
20 State?

21 MR. BARFIELD: None on behalf of the State.

22 MR. SWERLING: None, Your Honor.

23 THE COURT: Thank you. You may continue your
24 deliberations. Thank you.

25

1 (WHEREUPON, the jury left open court at approximately
2 3:10 p.m.)

3 THE COURT: Stand at ease.

4 MR. BARFIELD: Yes, sir.

5 THE COURT: Court will be at ease.

6 (Pause).

7 Bring the jury.

8 MR. BARFIELD: We don't have Mr. Swerling yet.

9 THE DEPUTY: Yes, we do.

10 (WHEREUPON, the jury returned to open court with the
11 verdict at 8:10 p.m.)

12 VERDICT:

13 THE COURT: Mr. Foreman, I've been informed by the
14 bailiff that the jury has reached a unanimous verdict.

15 THE FOREMAN: Yes, Your Honor.

16 THE COURT: If you would please hand it to the clerk,
17 please.

18 I want to say before I read the verdict, even to
19 myself, when the verdict is read we're going to observe
20 absolute decorum in the courtroom. There's not going to
21 be any outbursts. There's not going to be any
22 inappropriate actions.

23 (Pause).

24 I find the verdict form to be in proper order.

25 Madam clerk, if you'd publish the verdicts.

1 THE CLERK: The State of South Carolina vs. Darryl
2 Termayne Cook, indictment for grand larceny more than
3 1,000 but less than 5,000, verdict guilty.

4 The State of South Carolina vs. Darryl Termayne Cook,
5 indicted for armed robbery, verdict guilty.

6 State of South Carolina vs. Darryl Termayne Cook,
7 indictment for murder, verdict guilty. Signed by the
8 foreman of the petit jury, 10/23/07.

9 Ladies and gentlemen, if this was -- is your verdict,
10 was your verdict, and is still now your verdict, please
11 signify by raising your right hand.

12 (All indicated in the affirmative.)

13 Let the record reflect all jurors raised their right
14 hand. The verdict stands as read.

15 MR. SWERLING: Judge, we request individual polling.

16 THE COURT: Sir?

17 MR. SWERLING: Individual polling, Madam Clerk.

18 THE CLERK: As I call your name, I'm going to ask you
19 was this your verdict, is it still your verdict.

20 Cynthia Ruff, was this your verdict and still now
21 your verdict?

22 JUROR: Yes.

23 THE CLERK: Ray Pearson, was this your verdict and
24 still now your verdict?

25 JUROR: Yes, ma'am.

1 THE CLERK: Wayne Floyd, was this your verdict and
2 still now your verdict?

3 JUROR: Yes, ma'am.

4 THE CLERK: Charles Walker, was this your verdict and
5 still now your verdict?

6 JUROR: Yes, ma'am.

7 THE CLERK: John Guthrie, was this your verdict and
8 still now your verdict?

9 JUROR: Yes, ma'am.

10 THE CLERK: Teresa Kennedy, was this your verdict and
11 still now your verdict?

12 JUROR: Yes, it is.

13 THE CLERK: Otis Ashford, was this your verdict and
14 still now your verdict?

15 JUROR: Yes, ma'am.

16 THE CLERK: Robert Morrison, was this your verdict
17 and still now your verdict?

18 JUROR: Yes, ma'am.

19 THE CLERK: Frank Martin, was this your verdict and
20 still now your verdict?

21 JUROR: Yes, ma'am.

22 THE CLERK: Stephen Chapman, was this your verdict
23 and still now your verdict?

24 JUROR: Yes, ma'am.

25 THE CLERK: Kathy Robinson, was this your verdict and

1 still now your verdict?

2 JUROR: Yes, ma'am.

3 THE CLERK: William Rake, was this your verdict and
4 still now your verdict?

5 JUROR: Yes, ma'am.

6 THE CLERK: Thank you.

7 THE COURT: If I could have the prisoner's dock,
8 please.

9 MR. SWERLING: Judge, we'd like the record to reflect
10 that we made a motion for a new trial based on all of the
11 evidence -- I'm sorry, based on all of the objections and
12 motions made during the course of the trial for the
13 reasons stated at that time, and all the pretrial matters
14 have been addressed and argued.

15 We would ask the Court to consider granting a new
16 trial on those issues.

17 THE COURT: I respectfully deny your motion.

18 If I could have the indictment, Madam Clerk.

19 MR. BARFIELD: Your Honor, do you intend to allow
20 some comments by family members prior to sentencing?

21 THE COURT: On behalf of the State or the Defendant
22 or both?

23 MR. BARFIELD: I'm sure people in the McGuirt family
24 would like to address the Court, and then I have some
25 information to give the Court after that.

1 THE COURT: Yes. I'll hear from both the McGuirt
2 family and/or individuals on behalf of Mr. Cook.

3 (Pause).

4 MR. BARFIELD: Would you like somebody -- do you
5 want -- would you like Donald to talk first?

6 THE WIFE: I'll go.

7 THE COURT: Any water, Ms. McGuirt?

8 THE CLERK: Mine is empty. Do y'all have some?

9 MR. BARFIELD: Yes, ma'am.

10 (Pause).

11 THE CLERK: Susan, do you want some, too?

12 (Pause).

13 THE COURT: I'll be happy to hear anything you would
14 like to share with the Court.

15 THE WIFE: All right.

16 MS. MCGUIRT: The loss of my husband due to Darryl
17 Cook's cruel actions has brought hardship, loneliness,
18 sadness, grief, and all other abnormal feelings that I
19 face daily.

20 To many, my husband was the very epitome of every
21 word in the dictionary that defines and stands for extreme
22 goodness.

23 He was a very multi-tasked, kind, good man in
24 everything he did. He was -- he started his life off as a
25 Boy Scout. He had the highest love for his country. He

1 served in the Air Force Guards 12 years, loved his
2 hometown of Ridgeway, was active in all community
3 functions.

4 He was a fireman for 43 years. He took the full
5 forward course of a fireman to be involved with helping
6 the other man-powered volunteer department.

7 He -- he was dedicated to his church and to his
8 community. He helped a lot -- several guys and counseled
9 them on drug use and then brought them to the Lord.

10 He was -- he was a wonderful, wonderful father to his
11 children and a wonderful husband. He was also involved in
12 all of the town activities. He was Clerk of Session,
13 Master Mason.

14 He loved to work in his yard and made beautiful,
15 beautiful, beautiful yards of flowers and did -- he just
16 was a very hardworking, kind man. He even mowed the --
17 the -- the next yard of a widow for 15 years.

18 His sincere kindness to many strangers and friends
19 are unbelievably (sic) tales and -- and then -- I could
20 never give you all -- all -- all of the count.

21 He brought the idea to our church to help Cricket
22 Miller, Darryl Cook's grandfather, rebuild his house after
23 there was an area, a big section of it, burned. He went
24 down there and worked on it in December of 2000.

25 And as -- as -- I don't know if I'm appropriately

1 saying this, but he told me he had a kid that was stealing
2 from him. He said, "I don't think we can afford it, but
3 I'm going to install a security system." Well, that
4 security system caught the person that he thought was
5 taking prior, before the system.

6 I have lost my best friend and my soulmate for life.
7 I see other couples, and I die a little more inside from
8 not having him here with me and our children, but I think
9 a greater loss is the effect on our autistic son. The
10 station was Eddie's only outlet. He loved to go with his
11 dad and see daily a lot of different people and friends.

12 Darryl Cook -- Cook, has caused us very much pain,
13 and I think of all -- the very, very hard thing was the
14 gunshot wound that caused him to be paralyzed.

15 All of the -- the problems that faced him day and
16 night were just unsurmountable. I could write you a book
17 about them.

18 He lived a very hard, hard 11 months from that cruel
19 gunshot wound, and I just want that to be known that I --
20 I just miss my husband.

21 THE COURT: Any of the other McGuirt family like to
22 address the Court?

23 (Pause).

24 VICTIM'S DAUGHTER: How does a daddy's girl begin to
25 describe witnessing the pain and the suffering her father

1 went through as the result of one person's selfish desires
2 and evil acts from the horror of first finding him on that
3 station floor to the heartache of realizing he'll never
4 walk again, to the agonizing weeks of watching him
5 struggle in therapy and the painful days and nights and
6 weeks of watching him suffer through infections, suffer
7 from the pain in his arms, to the point you couldn't even
8 touch him at times, to the extreme difficulty it took just
9 to do simple tasks anymore?

10 How does she describe the pain of watching him in his
11 final days as he ungracefully slipped into unconsciousness
12 and was placed on life support and to watch the hospital
13 staff turn off those machines and just wait?

14 How does a daddy's girl begin to describe how it --
15 how it feels not to have her daddy around anymore to share
16 all of those special times in her life liking walking her
17 down the aisle?

18 Every day I am reminded of the void, not only in my
19 life but in that of my mother and brother's life. Every
20 day I worry about the two of them because of the strong
21 dependence they had on him. Every day I hurt because I
22 know they're lonely without him.

23 My father was the kindest, gentlest, most patient,
24 caring, giving, unselfish, thoughtful, considerate person
25 I've ever known.

1 He spent many late nights or early mornings going out
2 to help others in need, whether through his work as a
3 volunteer fireman or through giving tires and gas to those
4 families stranded beside the road who couldn't afford it.
5 Not only was he devoted to his family, he was dedicated to
6 his church and community.

7 Our way of life as we knew it changed on
8 November 23rd, 2001. We have all suffered as a result of
9 an evil act that day. One person not only stole several
10 thousands in money for one night of pleasure, but he stole
11 a father. He stole a husband. He stole a brother and a
12 friend. Not only our family but the whole Ridgeway
13 community lost a very special person.

14 All like this, "tragic event", my dad said that he
15 did not hate because of this and to let the Judicial
16 System handle Darryl Cook.

17 We ask for you to fulfill his desires and help keep
18 our community safer for a long time to come.

19 THE COURT: Thank you, ma'am.

20 MR. BARFIELD: Mr. Donald, do you want to speak?

21 THE BROTHER: I do.

22 MR. BARFIELD: Donald McGuirt, Jackie's brother.

23 THE BROTHER: I want to thank the Court. I want to
24 thank everyone that was involved in this case that helped
25 this family.

1 I want to talk a little bit about Jackie McGuirt.
2 Jackie is my younger brother. My sister is sitting on the
3 third row with the red hair. She is my younger sister.
4 I'm the oldest of three children.

5 I'm not a public speaker. I don't speak up. I don't
6 speak well, and I don't speak up, and if you don't hear me
7 just let me know, and I'll try to do better.

8 I want to tell you a little bit about Jackie. You
9 have heard everything you need to hear, but I just feel an
10 obligation to say a few words here.

11 Jackie and Anna and I were moved to Ridgeway when
12 Jackie was two years old. We moved to Ridgeway. It was
13 1946 because our parents separated, and we were placed
14 with our grandparents.

15 We lived there until the three of us left home.
16 Those grandparents are very good and caring and provided
17 and environment for us that was loving and caring but
18 that -- and they were strict, and they taught us many
19 wholesome values. They taught us the difference between
20 right and wrong.

21 I can tell you that truthfulness, honesty, caring for
22 others, work before play, and supporting each other were
23 among the things that we learned.

24 Jackie McGuirt was one of the greatest people that
25 anyone would ever meet. He applied everything that he

1 learned and used them throughout his life.

2 He was always a good person. When we were little, he
3 was just with us. I always remember Jackie as just being
4 right here. Whenever I was, Jackie was right here.

5 We depended on each other in those days, and Jackie
6 and I had a bond that is unequal any other place.
7 Everything I did he wanted to do.

8 We looked out for each other. We were taught that
9 you looked out for each other, and if someone is not doing
10 something right, it's your responsibility to correct that.

11 If we were ever caught covering up for something, the
12 little mistakes that kids do, then we were just as guilty
13 as -- as that person was.

14 They taught us everything we needed to know to be
15 good people, and I love Jackie so much. He was always
16 with us. He was always watching us. He was always
17 helping us do our chores.

18 He would say to me, and I've heard this word a
19 million times, "Brother". He didn't -- he didn't call me
20 Donald. He call me "brother". He referred to me with
21 other people as "Donald", but if I called him on the
22 phone, it was "hello brother". He called Annette sister,
23 and he called her sis. She loved him so much, and I loved
24 him so much.

25 He would say to me, "What are you doing, Brother?"

1 That meant, "What are you going to do because I want to do
2 it also?"

3 We didn't have much T.V. We didn't have the things
4 kids have today. We played together. We were a lifelong
5 bond. It got to the point where people started calling us
6 the Three Musketeers, and -- and I cherish that. We never
7 lost that bond.

8 Jackie grew up in Ridgeway with the people of
9 Ridgeway and the kids of Ridgeway and playing with those
10 people, and he knew all of the families in Ridgeway. He
11 was welcome in all of those homes by the time he was ten
12 years old.

13 When Jackie McGuirt got grown and had his own
14 business, the elder people were calling him to help them
15 if they needed something, and they didn't call Mr. McGuirt
16 at McGuirt Tire. They called Jackie. He was like one of
17 their kids.

18 He -- he loved Ridgeway so much. It was beyond my
19 belief. They made a movie in Ridgeway a few years back,
20 and I don't remember the title. I think it was a Boy's
21 Life or something, and Jackie went to the movie. He came
22 back and we were talking, and he said, "Brother, the
23 opening scene in that movie was the main street of
24 Ridgeway, and it was beautiful." He just loved the town.
25 He loved the people. He loved his church. Ridgeway was

1 not his hometown. Ridgeway was his home.

2 Annette and I moved on. Butch, he never went
3 anyplace. That's the place he wanted to live. He wanted
4 to raise his family. He wanted to teach them the things
5 that he had learned. He wanted them to experience life as
6 he had.

7 I truly believe Jackie had the ability to take what
8 he saw in life, examples, and apply it to himself, and he
9 used it to become a person. He wanted to be, not the
10 person that life just made him to be. He had an idea of
11 what was good and what was best, and that's what he
12 wanted.

13 Through the years, as you have heard, Jackie became a
14 ruling elder of his church. He gave 43 years to the Fire
15 Department. He was Fire Chief for a period of time.
16 Jacksy is a member of the South Carolina Firefighters Hall
17 of Fame. That wasn't mentioned here.

18 Jackie was in the Air Guards for five years. I went
19 to the Air Force. Jackie went to the Air Guard. He was
20 dedicated. He loved people.

21 You didn't have to know him for him to help you.
22 There was an occasion, and I worked in Blythewood the last
23 21 years, and often I would try to get up in the afternoon
24 and sit around the station with Butch while he closed. He
25 would -- we would catch up on things. I would go home,

1 and he would go home. We had families, and we were busy.

2 There was an occasion where a family drove up to his
3 station, and the father got out and he came in. He said,
4 "I have been trying to make a living in Florida, and I
5 have my wife and two kids in the car." He said, "It
6 didn't work out, and I'm trying to get back up to Michigan
7 or Wisconsin to my family." He said, "I am out of money,
8 and I am out of gas."

9 Jackie went out and looked in the car. He said there
10 were two little kids in the backseat, and they were crying
11 and their face was dirty. He knew they were hungry.
12 Jackie and some of the community, Dan Ruff, got together,
13 church people, and they got some money and gave to these
14 people. Jackie fed them out of the station. He filled
15 their car up with gas.

16 He put them back on the road, but before he left, and
17 he told me before he left, they left, he took the mother
18 aside and gave her money out of his pocket, and he said to
19 her, "You keep this money. This money is only for feeding
20 the children. That's not for gas."

21 I could tell that his heart hurt for those children.
22 He loved kids. He loved my grandkids. They loved him so
23 much that they were as excited to see him as they were me,
24 just the type of person that he was, and we don't find
25 those people today.

1 On November 23rd, 2001 at 5:30 p.m., I'm going to
2 read the rest of this. It's not long.

3 Jackie McGuirt was probably one of the happiest
4 people that you would have ever met. He was living his
5 life with friends and family, had a business he owned and
6 was respected by everyone that knew him. That's at 5:30
7 on November 23rd, 2001. By six p.m. his life had
8 completely changed.

9 Darryl Cook, in a matter of minutes, had changed his
10 life forever, the lives of his family, the lives of his
11 siblings and all that knew Jackie.

12 Not only had he robbed Jackie of his daily work, he
13 had robbed Jackie of all that he loved. He robbed the
14 community of Jackie, and in truth, horrified us with his
15 action and left a void in our life, both individual, as
16 individuals and community, that cannot be replaced. You
17 don't replace Jackie McGuirt easily, if you can replace
18 him at all.

19 No one has the right to the barbaric selfish actions
20 taken by this man. He did not have to take the life of
21 Jackie McGuirt. Jackie offered him his money, but Darryl
22 Cook's plan was to leave no witness, and human life had no
23 meaning to Darryl Cook.

24 Darryl Cook could not walk if Jackie could not talk.
25 Jackie lived for 11 months after being shot. He lived in

1 great pain, struggled to survive each day, not being able
2 to live the life he had so carefully built, which was
3 helpfulness to those that needed it, helping his community
4 and church, not being able to provide for his family and
5 not being able to visit and share times with his siblings
6 and their families.

7 Then we lost him. He was gone. His pain had
8 stopped. Our pain grew larger. We had no way of sharing
9 with him the rest of our lives. We could not be -- he
10 could not be with us as we shared in the joy of Susan's
11 wedding.

12 He wasn't here to share with me the birthday of my
13 last grandchild. Annette and I can't talk to him about
14 our lives, joys, and concerns. He isn't here to enjoy
15 vacations with our families and we used to take them all
16 together, but most of all, he isn't here to provide for
17 and love his family to be with Joan, Eddie, and Susan to
18 enjoy all that he had worked for and live the older golden
19 years he had planned to share with each of us.

20 Darryl Cook took all of these things away from us.
21 He took them for his own selfish reason and illustrated
22 his disrespect for human life and for the people of the
23 community he lived in.

24 On several occasions Jackie and I discussed this
25 issue, and I -- I hope I can say this. The law protects

1 people, and the law should protect people. I believe in
2 this system. I spent 22 years in the military. I got 94
3 missions to Vietnam supporting this mission, and what I
4 saw in this courtroom today instills my faith in what I
5 have always believed and what I hope I always will
6 believe. I've seen the other side.

7 I don't -- you don't have to tell me it's bad. If
8 Darryl Cook had been other places, he -- he never would
9 have got this trial. He wouldn't have lived 48 hours.
10 The right person would have -- any person that was
11 considered the right person that accused him, they would
12 have taken him out and punished him their way, and that's
13 what we're about. That's what our people are fighting to
14 protect our system, and we will lose this system if we
15 don't exercise it properly here, and that's what we're
16 doing.

17 Jackie and I discussed this. His feeling was that
18 the law, the law, the Justice System, needed to deal with
19 Darryl Cook; that Darryl was answerable to the law, and
20 someday Mr. Cook will be answerable to his Maker.

21 We feel that Darryl Cook deserves a maximum sentence
22 for his coldhearted action. We are only here, not out of
23 vengeance, not out of the hate, we are only here because
24 we loved Jackie McGuirt, and we're looking for justice.

25 That's all I have to say. Thank you.

1 THE WIFE: Thank you.

2 MR. BARFIELD: Your Honor, on behalf of the State,
3 the system has, in fact, dealt with Mr. Cook in the past.
4 He was adjudicated delinquent as a juvenile on March 5th,
5 1999 for the offenses of armed robbery and pointing and
6 presenting a firearm.

7 My understanding is he was indeterminately committed
8 to the Department of Juvenile Justice, and sometime not
9 too very long before this incident occurred, was
10 apparently paroled.

11 Beyond that, Your Honor, on behalf of the State of
12 South Carolina and the McGuirt family, I would ask you to
13 impose the maximum sentence that the law provides for
14 these offenses.

15 THE BROTHER: I'm sorry. May I say one more thing?

16 THE COURT: Certainly.

17 THE BROTHER: I hope that Mr. Cook will remember what
18 was said about meeting his Maker. When you meet your
19 Maker, you don't have a defense lawyer. You don't have a
20 prosecutor. You don't have a judge. You have the book of
21 your life, and there are no appeals.

22 There are no discussions about acceptable evidence,
23 but Mr. Cook is the only person that can be ready for that
24 day. If he ever makes that day and walks the streets, he
25 will run into Jackie McGuirt, and Jackie McGuirt will say

1 to him, "I'm glad you made it."

2 Thank you.

3 THE COURT: Mr. Cook, if you will please remove your
4 hands from your pockets. Thank you.

5 Mr. Swerling?

6 MR. SWERLING: If the Court please, Mr. McGuirt
7 sounds very special, like a special person. My heart, as
8 I said in closing statements and even now, goes out to
9 this family. I hope they'll accept that.

10 Right now you have Mr. Cook's fate in your hand, and
11 I'm certainly not here to tell you what -- what I think an
12 appropriate sentence is. That's in your discretion, and
13 we will accept that, but I ask you to show some leniency
14 to Mr. Cook.

15 There is a wide discretion in the amount of time that
16 you can give him as to these charges. For the murder,
17 it's 30 to life. The other sentences are less than that,
18 but they can be run concurrent.

19 I just ask Your Honor to consider the different
20 options in the matter. There's not a lot that I can go
21 into as far as the background Mr. Cook has because he's a
22 very young man.

23 As the Solicitor pointed out, he did have a prior
24 adjudication. He did serve two-and-a-half years in the
25 juvenile -- the Department of Juvenile Justice.

1 He went through the ninth grade in public school.
2 While he was in D.J.J., he did complete his education and
3 got a G.E.D. He lived with his family, as you know, in
4 Ridgeway. You heard about his family through his sister
5 and through his aunts, who that family is.

6 Standing next to me on my left is his mom and dad.
7 Mrs. Cook has worked for six years with the Board of
8 Disability. She is an instructor, and she works with the
9 disabled people. She is a very caring individual. She
10 has been to my office on a number of occasions. She
11 stands by Darryl then, and she stands by him now.

12 His dad, to her left, works at Lexington C.M.C.
13 Recycling. He's been there for three years. It's a good
14 family. He comes from a good family.

15 Your Honor, I'd ask you to take those matters into
16 consideration when you impose sentence. It's a very
17 difficult, difficult case, and I understand that. We
18 accept the verdict of the Court as far as the sentence is
19 concerned.

20 I don't know if Darryl wants to say anything. I
21 asked Mrs. Cook, and she did not.

22 Mr. Cook, certainly you have the right to say
23 something, if you like to, and so does Darryl. I'd ask
24 that you give them the opportunity, if they'd like to do
25 so.

1 THE FATHER: I want to say to the Court that I agree
2 with the McGuirt family, and as to my son, I think that
3 he -- he is still innocent. I would like the jury to know
4 that, and I would like the Sheriff's Department to know
5 that.

6 Until I leave this world, I still think my son is
7 innocent, and they need to get the right person.

8 THE COURT: Thank you, Mr. Cook.

9 Mr. Darryl Cook, is there anything you would like to
10 share with the Court?

11 THE DEFENDANT: Your Honor, in life I've made bad
12 decisions, bad choices, and -- but all of that happened
13 when I was at a younger age, and I've had six years to
14 think about all of this that has took place as far as
15 what's been going on, what went on.

16 You know, there's -- there's really nothing I can say
17 as far as how the police are doing their investigation or
18 whatever the case may be, and I have to -- I have to
19 accept the -- what's been dealt to me and hope and pray
20 that you and this -- and the Justice System and the Court
21 of Fairfield County will show, like my lawyer said, some
22 leniency on me as far as however you feel is necessary.

23 I mean, that's all. I mean, that's it. Thank you,
24 sir.

25 THE COURT: Anything additionally from the State?

1 MR. BARFIELD: No, sir. We'll have sentence sheets
2 momentarily.

3 THE COURT: Sir?

4 MR. BARFIELD: I'll have sentence sheets for you
5 momentarily.

6 THE COURT: Mr. Swerling?

7 MR. SWERLING: Nothing further, Your Honor.

8 SENTENCING:

9 THE COURT: All sentences are to run concurrent.

10 As to the grand larceny, the sentence of the Court is
11 five years. As to the armed robbery, the sentence of the
12 Court is 25 years, and as to the murder, the sentence of
13 the Court is 45 years.

14 Good luck.

15 MR. SWERLING: Thank you, Your Honor.

16 THE COURT: And as I stated earlier, all to run
17 concurrent.

18 MR. SWERLING: Yes, sir.

19 THE DEFENDANT: Pop, Pop, take care of Mama. Take
20 care of Mama.

21 THE COURT: Credit for time served.

22 MR. SWERLING: Credit since November 26th, 2001.

23 THE COURT: 2001. And to the jury, you had a
24 horrifically difficult task facing...

25 Your resolve is apparent and the difficulty that you

1 demonstrated that you had in deciding what to do, and on
2 behalf of the State of South Carolina, I thank you, each,
3 and every one, very much.

4 This will conclude your jury service for this term
5 and for the next three years, and I thank all very much.
6 The Clerk has a huge check for each one of you.

7 (WHEREUPON, the jury left open court at approximately
8 8:51 p.m.)

9 THE COURT: Court will be at ease until 10:00 a.m.

10 (Whereupon, the proceedings were concluded.)
11
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CERTIFICATE OF REPORTER:

STATE OF SOUTH CAROLINA)
)
COUNTY OF FAIRFIELD)

I, Karen Tracy, Official Court Reporter for the 5th
Judicial Circuit of the State of South Carolina, do hereby
certify that the foregoing is a true, accurate and partial
Transcript of Record of the proceedings had and evidence
introduced in the trial of the captioned case, relative to
appeal, in the Court of General Sessions for Fairfield
County, South Carolina, on the 22, 23 day of October,
2007.

February 26, 2008

Karen Tracy

Karen Tracy, Court Reporter

My Commission Expires: 04/01/14

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State,

Respondent,

v.

Darryl T. Cook,

Appellant.

Appeal From Fairfield County
Kenneth G. Goode, Circuit Court Judge

Unpublished Opinion No. 2010-UP-023
Submitted January 4, 2010 – Filed January 25, 2010

APPEAL DISMISSED

Acting Chief Appellate Defender Robert M. Dudek,
of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief
Deputy Attorney General John W. McIntosh,
Assistant Deputy Attorney General Donald J.

Zelenka, all of Columbia; and Solicitor Douglas A. Barfield, Jr., of Lancaster, for Respondent.

PER CURIAM: Darryl T. Cook appeals his conviction and sentence for murder, armed robbery, and grand larceny, arguing the trial court erred in admitting evidence he stole money in 1996 from the gas station where the murder occurred in 2001. After thoroughly reviewing the record and briefs pursuant to Anders v. California, 386 U.S. 738 (1967), and State v. Williams, 305 S.C. 116, 406 S.E.2d 357 (1991), we dismiss¹ Cook's appeal and grant counsel's petition to be relieved.

APPEAL DISMISSED.

HUFF, A.C.J., GEATHERS, J., and CURETON, A.J., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA)

In the Court of Common Pleas

County of Fairfield)Darryl T. Cook 267867)

Full name and prison number, if any, of applicant.)

v.)

State of South Carolina)

Name of Respondent)

APPLICATION FOR

POST-CONVICTION RELIEF

2010 NOV - 8 P 2:59
FAIRFIELD COUNTY
CLERK OF COURT
BETTY J. BUCKHAMINSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly, handwritten, or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make it clear to which question any such continued answer refers.

Since every application must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicant should, therefore, exercise care to assure that all answers are true and correct.

If the applicant is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which applicant was convicted.

1. Place of detention Lee County Correctional Institution
990 Wisoaky Highway, Bishopville, SC 29010
2. Name and location of Court which imposed sentence Fairfield County Judicial
Court, P.O. Box Drawer 299, Winnsboro, SC 29180
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
 - (a) 02-GS-20-546
 - (b) 02-GS-20-82
 - (c) 02-GS-20-132
4. The date upon which sentence was imposed and the terms of the sentence:
 - (a) Oct. 23, 2007 45 years
 - (b) Oct. 23, 2007 25 years. To run concurrent with the 45 yrs.
 - (c) Oct. 23, 2005 5 years, to run concurrent with the 45 yrs.

ATTORNEY GENERAL 1081 WE

RECEIVED NOV 10 2010

ADMINISTRATIVE INSTRUCTIONS

SW

☒ FILE ☒ OPEN ☐ FILE
☐ HAVE ☐ COMES MADE
☐ POINT TO
☐ OR
☐ REVENUE CAUS, CLERK TO, CAUS
☐ OTHER

5. Check whether a finding of guilty was made

(a) after a plea of guilty _____

(b) after a plea of not guilty ✓

(c) after a plea of nolo contendere _____

6. Did you appeal from the judgment of conviction or the imposition of sentence? Yes

7. If you answered "yes" to (6), list

(a) the name of each Court to which you appealed:

i. The State of South Carolina Court of Appeals

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. Appeal Dismissed

ii. _____

iii. _____

(c) the date of each such result:

i. January 25, 2010

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. Unpublished Opinion No. 2010-UP-023

ii. _____

iii. _____

8. If you answered "no" to (6), state your reasons for not so appealing:

(a) _____

(b) _____

(c) _____

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Ineffective Assistance of Counsel

(b) Insufficient Evidence to Support the Murder

(c) Exclusion of Relevant Evidence

10. State concisely and in the same order the facts which support each of the grounds set out in (9)

- (a) Counsel refused to subpoena witness on my behalf. Counsel refused to asked questions I wanted him to.
- (b) The trial judge allowed evidence that didn't pertain to the actually crime to be used as evidence to gain a conviction
- (c) The presiding trial judge refused to let certain statements that could have been extremely creditable on my behalf for a new trial.

11. Prior to this application have you filed with respect to this conviction

(a) any petition in a State Court under South Carolina Law ?

Direct Appeal

(b) any petitions in State or Federal Courts for habeas corpus or post-conviction relief?

N/A

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7) N/A

(d) any other petitions, motions or applications in this or any other Court?

N/A

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. Direct Appeal

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. Fairfield County Judicial Court P.O Box Drawer 299, Winnsboro, SC 29180

ii. State of South Carolina of Appeals Court.

iii. _____

iv. _____

(c) the disposition thereof:

i. Dismissed

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

- i. January 25, 2010
- ii. _____
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. Unpublished Opinion No. 2010-UP.023
- ii. _____
- iii. _____
- iv. _____

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? Direct Appeal - YES

14. If you answered "yes" to (13), identify:

(a) which grounds have been presented:

- i. trial judge allowed tainted evidence to be used during trial.
- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. Direct Appeal
- ii. _____
- iii. _____

15. If any ground set forth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented:

- (a) _____
- (b) _____
- (c) _____

16. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? NO
- (b) your trial, if any? Yes
- (c) your sentencing? Yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence?
Yes
- (e) preparation, presentation or consideration of any petitions, motions, or application with respect to this conviction, which you filed? Yes

17. If you answered "yes" to one or more parts of (16), list:

(a) the name and address of each attorney who represented you

- i. Jack B. Swerling, 1720 Main Street, Suite 301 Columbia, SC 29201
- ii. "Same above."
- iii. Robert M. Dudek, 1330 Lady Street, Suite 401 Columbia, SC 29201-3332

(b) the proceedings at which each such attorney represented you:

- i. Trial
- ii. Sentencing
- iii. Appeal

18. State clearly the relief you seek in filing this application.

Conviction vacated or set aside

19. Are you now under sentence from any other court that you have not challenged?

NO

STATE OF SOUTH CAROLINA)
)
 COUNTY OF 1)

VERIFICATION

I, Darryl T. Cook #267867, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Darryl T. Cook
Darryl T. Cook

Sworn to and subscribed before me

This 4 day of Nov, 2010

J. Bracey Dennis

Notary Public for South Carolina

My Commission Expires 5-16-12

APPLICATION TO PROCEED WITHOUT PREPAYMENT
 OF COSTS AND AFFIDAVIT
 IN SUPPORT THEREOF

I, Darryl T. Cook #267867, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of proceeding or give security therefor.

Darryl T. Cook
Darryl T. Cook
 Applicant

Sworn to and subscribed before me

This 4 day of Nov, 2010

J. Bracey Dennis

Notary Public for South Carolina

My Commission Expires: 5-16-12

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SIXTH JUDICIAL CIRCUIT
COUNTY OF FAIRFIELD	)	
	)	
Darryl T. Cook, #267867	)	2010-CP-20-0453
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

The Respondent, making its Return to the Application for Post-Conviction Relief filed November 8, 2010, would respectfully show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Fairfield County Clerk of Court's orders of commitment. The Fairfield County Grand Jury indicted the Applicant at the November 2010 term of General Sessions for murder (2002-GS-20-0546), armed robbery (2002-GS-20-0082), and grand larceny - more than \$1,000 but less than \$5,000 (2002-GS-20-0132). Jack B. Swerling, Esquire, represented the Applicant. On October 23, 2007, the Applicant was convicted of these charges by a jury. The Honorable Kenneth G. Goode, sentenced the Applicant to confinement for forty-five (45) years for murder, twenty-five (25) years for armed robbery, and five (5) years for grand larceny, all running concurrently.

A timely Notice of Appeal and subsequent Anders brief were filed on Applicant's behalf. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Cook, Op No. 2010-UP-0023 (filed January 25, 2010). The Remittitur was returned on February 10, 2010.

Attached herewith and incorporated herein by reference are the records of the Fairfield County Clerk of Court regarding the subject conviction(s), the Applicant's records from the Department of Corrections, the Applicant's trial transcript, and the Applicant's appellate records.

II.

In his Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

- 1) Ineffective assistance of Counsel, in that;
 - a) Counsel refused to subpoena witnesses on Applicant's behalf,
 - b) Counsel refused to ask questions the way Applicant wanted.
- 2) Insufficient evidence to support the murder, in that;
 - a) Trial judge allowed evidence that did not pertain to the actual crime to be used as evidence to gain a conviction,
- 3) Exclusion of relevant evidence, in that;
 - a) Presiding trial judge refused to let certain statements that could have been extremely credible on Applicant's behalf for a new trial.

III.

The Respondent contends that the Applicant's trial counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief proceeding, the Applicant bears the burden of proving the allegations in their application. Id. 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, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 80 L.Ed.2d 674. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

The Respondent submits that the second and third allegations for Post-Conviction Relief should be summarily dismissed for failure to state a claim cognizable under the Post-Conviction Procedure Act, S.C. Code Ann. § 17-27-10 to -160 (2003). An Applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;

2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy.... S.C. Code Ann. § 17-27-20 (1976).

Even if the facts alleged by the Applicant are true, these facts do not support a cognizable claim for post-conviction relief under any of the statutory grounds. Furthermore, the allegations presented by Applicant raise direct appeal issues that are procedurally barred by S.C. Code Ann. § 17-27-20(b) (1985). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). The Applicant could have raised these issues at trial or on appeal. Therefore, the Court should summarily dismiss these allegations for post-conviction relief.

V.

Each and every allegation contained within the application not hereinbefore expressly admitted, qualified or explained is hereby denied.

VI.

WHEREFORE, having made its Return, the Respondent requests that an evidentiary hearing be held.

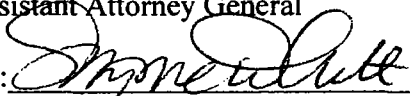
Respectfully,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

SUZANNE H. WHITE
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

July 15, 2011

STATE OF SOUTH CAROLINA
COUNTY OF FAIRFIELD

)
)

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT

Darryl T. Cook,

)
)

2010-CP-20-0453

Applicant,

)
)

v.

)
)

CERTIFICATE OF SERVICE BY MAIL

State of South Carolina,

)
)

Respondent.

)
)

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Respondent's Return in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

Shannon L. Felder, Esquire
Felder Law Firm, LLC
P.O. Box 1065
Winnsboro, South Carolina 29180


Anne A. Mueller
Legal Assistant for the Respondent

DATED this 15th day of July, 2011.

STATE OF SOUTH CAROLINA
COUNTY OF FAIRFIELD

Darryl T. Cook

v.

State of South Carolina

Defendant

In The Court of Common Pleas
Sixth Judicial Circuit
Civil Action # 2010-CP-20-453

Amended PCR Application (¶10)

2013 JUL 15 P
FAIRFIELD COUNTY
CLERK OF COURT
BETTY JO BECKHAM

The Plaintiff, by and through Counsel, submits the following amended paragraph 10 to his Application for Post Conviction Relief:

10. State concisely and in the same order the facts which support each of the grounds set out in (9)
 - (a) Counsel refused to subpoena witnesses on my behalf.
 - (b) Counsel did not object to comments and instructions given by the trial judge to the jury when the jury came back indicating they were deadlocked.
 - (c) Counsel did not object to the trial judge sending the jury back to deliberate after the jury indicated they were deadlocked a second time.
 - (d) Counsel did not assert as a defense that Mr. McGuirt's death, which occurred over a year after the shooting, was due to the negligent medical care he received.


Glenn E. Bowens, Esq.
P.O. Box 424
Winnsboro, S.C. 29180
Attorney for the Plaintiff
Winnsboro, S.C.

July 15, 2013

STATE OF SOUTH CAROLINA
COUNTY OF FAIRFIELD

Darryl T. Cook, # 267867,

v.

State of South Carolina

2013 JUL 15 P 3:41 PM
FAIRFIELD COUNTY
CLERK OF COURT
BETTY JO BECKHAM

In the Court of Common Pleas
Sixth Judicial Circuit
2010-CP-20-0453

CERTIFICATE OF SERVICE

Respondent.

I, Glenn Bowens, attorney for the Applicant, Darryl T. Cook # 267867, do hereby certify that I have this day served a copy of the foregoing Amended Post Conviction Relief Application (paragraph 10) in connection with the above referenced case by placing a copy of the same in the United States Mail, postage prepaid, to the following Address:

Office of the Attorney General
ATTN: Suzanne H. White, Esq.
PO Box 11549
Columbia, SC 29211-1549

This the 15th Day of July 2013



Glenn Bowens

1 STATE OF SOUTH CAROLINA
2 COURT OF COMMON PLEAS
3 COUNTY OF FAIRFIELD
4 2010-20-20-00453
5

6 Darryl Cook

7 vs.

8 State of South Carolina
9
10

11 Lancaster, South Carolina

12 August 7, 2013

13 Before the Honorable Clifton Newman
14

15 APPEARANCES

16 For the State: Suzanne white

17 For the Petitioner: Glenn Bowens
18

19 Reported by: Michael C. Watkins

20 Official Court Reporter
21
22
23
24
25

1	Hughley Gratic:	6
2	Jerlean Cook:	16
3	Darryl E. Cook:	33
4	Marjorie Cook:	37
5	Darryl Cook:	41
6	Jack Swerling:	63
7	Certificate:	96

8 PETITIONER'S EXHIBITS

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1 THE COURT: This is the post conviction matter of
2 Darryl T. Cook. You may proceed.

3 MR. BOWENS: Yes, Your Honor. This is the case of
4 Darryl Cook versus the State, it's case number
5 2010-CP-20-0453. He's represented today by Mr. Glenn
6 Bowens. He was represented at trial by Jack Swerling. He
7 was indicted January of '02, which the indictment was then
8 amended I think in January of '06 and ultimately charged
9 with murder, armed robbery and grand larceny over 5,000. He
10 proceeded to trial October 23rd, 2007, at which time he was
11 convicted of all charges, received a sentence of 45 years
12 for murder, 25 for armed robbery and five for grand larceny
13 all run concurrent. There was an appeal and the conviction
14 and sentences were affirmed. He has filed this application
15 alleging ineffective assistance of counsel. There was an
16 amendment recently that clarified that counsel refused to
17 subpoena witnesses on his behalf, counsel failed to object
18 to comments and instructions given by the trial judge to the
19 jury when the jury came back indicating they were
20 deadlocked. Counsel did not object to the judge sending the
21 jury back to deliberate after they indicated they were
22 deadlocked a second time, and did not assert as a defense
23 that the victim's death, which occurred over a year after
24 the shooting, was due to the negligent medical care he
25 received. And at this time I can turn it over to Mr. Glenn

1 Bowens.

2 THE COURT: Yes, sir, Mr. Bowens?

3 MR. BOWENS: Thank you, Your Honor. May it please the
4 Court. We did file the amended PCR application that
5 Ms. White just read to the Court. I would just advise the
6 Court that the last one about the negligent medical care is
7 withdrawn, we're not going to assert that as a basis for PCR
8 relief. Mr. Cook is claiming that his trial attorney was
9 ineffective for failing to call Hughley Gratic who was the
10 chief of police for the Ridgeway Police Department at the
11 time that this incident occurred. Mr. Gratic's testimony at
12 trial would have been crucial and he should have been called
13 for several reasons, the first of which the victim, Jackie
14 McGuirt, knew Darryl Cook and they had known each other for
15 a long time, it was really no dispute that they knew one
16 another. Jackie McGuirt at the time that Chief Gratic
17 arrived at the scene was awake, conscious, he was coherent
18 and able to communicate. The record at trial was replete
19 with references to things that Mr. McGuirt had talked about
20 with his daughter, with Chief Gratic. So the point I'm
21 trying to make here is given those situations if Darryl Cook
22 had been the person who had shot him he could have easily
23 told him, "Darryl Cook shot me." And a number of Chief
24 Gratic's police reports, I think he did four or five police
25 reports, incident reports, all say the subject was unknown

1 and unidentified. What makes this even more important is at
2 the trial after the jury was sent out to deliberate they
3 came back with a question which was, "Did Jackie McGuirt
4 ever identify the defendant, Darryl Cook, as the person that
5 shot him?" And that shows that the information was crucial
6 to their deliberations. And the fact that they knew each
7 other, that he was awake and coherent and could communicate
8 and did not identify as the person who shot him, then Chief
9 Gratic should have been brought out by having Chief Gratic
10 come to the trial, he was the chief of police, and testify
11 about that. So for that reason we believe that Mr. Swerling
12 was ineffective for not calling Chief Gratic as a witness at
13 the criminal trial. The second piece of our case is that
14 Mr. Swerling was ineffective in that he did not object to
15 comments made by the trial judge and did not object to the
16 trial judge sending the jury back out a second time to
17 deliberate after they were deadlocked. The evidence that
18 we'll present today will show that they were sent out to
19 deliberate, came back with this question I discussed
20 previously, and then went back to deliberate, came out again
21 and announced they were deadlocked seven to five and could
22 not reach a unanimous verdict. The trial judge made some
23 comments which we believe were wholly inappropriate, did not
24 comply with the approved Allen Charge. It was a coercive
25 charge, that they had to deliberate, they had to come to a

1 decision, they were not going to leave until they had a
2 decision, that the checks were already cut, they would get
3 them when they left. There was a number of comments made
4 like that that were coercive. So they went back to
5 deliberate, which the Judge has the -- the trial judge can
6 send them back to deliberate again when they announce a
7 deadlock, but they came back a second time and announced
8 they were deadlocked. And at that point unless the jury
9 consents and believes they can deliberate further and reach
10 a verdict the judge cannot send them back to deliberate
11 without their consent, and the evidence is they did not
12 consent, he just ordered them back to deliberate some more
13 and they weren't going to leave until they come to a
14 verdict, and for that reason we think that he violated state
15 law by making it look like a second time. And with these
16 coercive comments made by the trial Judge and for having not
17 objected to both of those, the comments and the second
18 deliberations, we think that Mr. Sterling was ineffective.
19 So that will be the bulk of our case today.

20 THE COURT: You may proceed.

21 MR. BOWENS: We'll call Hughley Gratic, please.

22 The witness, HUGHLEY GRATIC, was first duly
23 sworn and testified as follows:

24 DIRECT EXAMINATION

25 BY MR. BOWENS:

Testimony of Hughley Gratic

- 1 Q. Good morning. Give us your full name, please.
- 2 A. My full name is Hughley James Gratic.
- 3 Q. And where were you employed in November of 2001?
- 4 A. Up at Ridgeway at the Ridgeway Police Department.
- 5 Q. What was your title at the police department?
- 6 A. Chief.
- 7 Q. Do you recall the shooting incident involving Jackie
- 8 McGuirt that occurred at his store?
- 9 A. Well, I remember it vaguely but I do remember some.
- 10 Q. Did you respond to that incident?
- 11 A. Yes, I did.
- 12 Q. And were you the first law enforcement officer on the
- 13 scene?
- 14 A. I think so.
- 15 Q. Were you able to speak with Mr. McGuirt, Jackie
- 16 McGuirt, before the EMS medical people arrived?
- 17 A. Yes, I did.
- 18 Q. Was that the only time you spoke to him?
- 19 A. One time after that, it was a couple of months like I
- 20 said, no other conversation with him.
- 21 Q. Then EMS transported him to the hospital in Columbia;
- 22 is that right?
- 23 A. That's right.
- 24 Q. I'm going to show you some exhibits here in a second
- 25 and ask you to identify them. Mr. Gratic, I'm going to hand

Testimony of Hughley Gratic

1 you 2, 3, 4 and 5. And I'll ask you to take a look at
2 those, then I'll have some questions for you.

3 (Break in proceedings.)

4 Q. Mr. Gratic, do you recognize those documents?

5 A. Yes, I do.

6 Q. Can you identify them to the Court, please? What are
7 they?

8 A. These were the incident reports with the charges.

9 Q. Did you prepare those?

10 A. I prepared all of those except the one that was typed.

11 Q. And that's your handwriting on Exhibits 2, 3 and 4?

12 A. One of them was typed but I did sign the typed one.

13 Q. But that's your handwriting on 2, 3 and 4?

14 A. Yes, sir.

15 Q. And I notice that Exhibits 2 and 3 were not signed.

16 Were those preliminary or drafts reports?

17 A. Yeah. These are draft because the one where they
18 crossed the X out.

19 Q. Is the information contained in those true and accurate
20 to the best of your knowledge?

21 A. Yes, same thing. But for some reason doing them and I
22 didn't -- we didn't want to throw anything away that I had
23 put down so we skipped these and entered these ones.

24 Q. And Exhibits 4 and 5 are signed by you, and that's your
25 signature at the bottom of the page?

Testimony of Hughley Gratic

1 A. Yes, sir.

2 Q. And were these reports based on your personal knowledge
3 gained from your investigation of this incident?

4 A. Yes. This is what happened when -- this incident here
5 occurred when I first went into the station. But there
6 should have been one more but I don't see it, it's the one
7 where the statement that -- where I wrote what Mr. McGuirt
8 told me at the time that I was there with him.

9 Q. Now, on these reports, Exhibits 2, 3, 4 and 5, you have
10 indicated that the subject was unknown.

11 A. That's right, that's correct.

12 Q. And you also checked the box that says subject is
13 unidentified.

14 A. Correct.

15 Q. And that the subject had not been located.

16 A. Correct.

17 Q. And that was true at the time that you made these
18 reports.

19 A. Yes.

20 Q. At the time you were there at the station and talking
21 to Jackie McGuirt, he did not tell that you Darryl Cook was
22 the person that shot him.

23 A. No, he didn't.

24 Q. Now, after you got there and kind of assessed the
25 situation, did you call for extra help?

Testimony of Hughley Gratic

1 A. Yes, I did.

2 Q. And who did you call?

3 A. I first called -- central dispatch had already had done
4 called me and said there had been a shooting incident at
5 McGuirt's Station, so evidently they knew about it because
6 they dispatched to Ridgeway, and I knew that they was on
7 their way so that's when I called and especially asked for
8 an investigator. Because you change shifts at the time and
9 everybody knew there had been a shooting so I'm assuming
10 that they was on the way because they got there very
11 shortly.

12 Q. And did the Fairfield County Sheriff's Office respond?

13 A. Yes.

14 Q. Do you know Greg Boney?

15 A. Yes, sir.

16 Q. Did he become the lead investigator in the case?

17 A. Well, at that time he was the first one on scene, he
18 was the first investigator, he was the sheriff's
19 investigator from Fairfield that got there. But where the
20 seriousness of incident that happened and by me being the
21 chief I had made the call myself to call SLED also.

22 Q. Did SLED, the South Carolina Law Enforcement Division,
23 and Fairfield County Sheriff's Office, did they take over
24 the investigation?

25 A. Yes, sir. When they got there it was court and

Testimony of Hughley Gratic

1 everything primarily went to SLED because they were the
2 chief investigator station unit for South Carolina so they
3 had full authority to handle it the way they saw fit.

4 Q. So when they got there and you pretty much stepped back
5 that was the end of your role in this matter.

6 A. That's right.

7 Q. If you had been called as a witness during Darryl
8 Cook's criminal trial, would you have testified similar to
9 what you have testified just now?

10 A. I wouldn't have had no choice, I would have just been
11 doing my job.

12 MR. BOWENS: Your Honor, at this time I would like to
13 offer Exhibits 2, 3, 4 and 5 into evidence.

14 MS. WHITE: No objection, Your Honor.

15 THE COURT: They are admitted without objection.

16 (The reports were received as State's 2, 3 and
17 5.)

18 MR. BOWENS: Your Honor, that's all of the questions I
19 have for --

20 A. I have one more thing. Just like I say, there was one
21 more statement that should have been with these documents
22 but I don't see it.

23 MR. BOWENS: Ms. White may have some questions for you.

24 CROSS EXAMINATION

25 BY MS. WHITE:

Testimony of Hughley Gratic

1 Q. Good morning.

2 A. Good morning, ma'am.

3 Q. Did you talk with Mr. Cook's attorney, Mr. Swerling, at
4 any time prior to the trial?

5 A. Did I do what?

6 Q. Do you recall if Mr. Swerling or someone from his
7 office contacted you to talk with you prior to the trial at
8 any time?

9 A. No, ma'am. I don't remember anything coming from Jack
10 because I've been knowing him.

11 Q. Okay. So you don't recall if you had any interaction
12 discussing whether or not you were going to testify or what
13 you --

14 A. Not to my knowledge.

15 Q. The indication obviously is that the subject was
16 unknown at the time of the incident reports. Were you at
17 the trial?

18 A. No, ma'am.

19 Q. Have you heard anything from the trial as to whether or
20 not anyone testified that Mr. Cook had been identified by --

21 A. I heard a lot of street talk but I don't believe
22 everything I hear, but I did get some negative vibes about
23 me, I heard some of that, only street talk. Because like I
24 said, I've been knowing Mr. Swerling a long time but the
25 things that I heard might not be irrelevant to the Court.

Testimony of Hughley Gratic

1 It was kind of irrelevant to me for what I heard.

2 Q. Let me rephrase my question. Had you -- were you under
3 the impression or had any knowledge that Mr. McGuirt had at
4 any time named Darryl Cook as the person who did this?

5 A. No, ma'am.

6 Q. And to your understanding he didn't name Darryl Cook to
7 anyone?

8 A. I don't know about anyone but I know about to me.

9 Q. Okay. All right.

10 MS. WHITE: I think that's all I have. Hold one
11 second, Your Honor.

12 (Break in proceedings.)

13 BY MS. WHITE:

14 Q. You testified that there was another statement that you
15 had that's not included in these documents about what the
16 victim told you that night.

17 A. That's right.

18 Q. Was he able to tell you anything -- did he tell you
19 that he knew who it was even though he couldn't give you the
20 name?

21 A. No, he didn't tell me who it was. He said he couldn't
22 remember the name.

23 Q. He couldn't remember the name.

24 A. That's right.

25 Q. But was that indication to you that he knew who he

Testimony of Hughley Gratic

1 was --

2 A. It's a possibility that he could.

3 Q. -- he just didn't know the name.

4 A. He didn't know the name. He couldn't call the name at
5 the time, that's what he told me now.

6 Q. Did he indicate to you that he had seen the suspect any
7 time earlier in the day?

8 A. Yes, he did.

9 Q. Okay.

10 A. Let me clarify that. In an uttering voice, not just
11 like we're talking about now, he just kind of spurt it out.
12 We didn't have a casual conversation, he just spurted it
13 out.

14 Q. So he was -- obviously because he had been shot at that
15 point and was paralyzed.

16 A. That's right.

17 Q. And had not been seen by any EMS at that time.

18 A. That's right.

19 Q. Okay. So your testimony is that in your conversation
20 with the victim he indicated and told you that he knew who
21 this was but could not remember or recall the name?

22 A. No, he did not say that. That wasn't in the report
23 that I wrote, but where it is I don't know.

24 Q. But you indicated that he did indicate that he knew who
25 it was.

Testimony of Hughley Gratic

1 A. No. He indicated -- what he told me it possibly could
2 have been him and possibly not could have been him in the
3 condition that he was in. Because I don't know, pain takes
4 over, adrenaline, I'm assuming he was in pain so -- but what
5 he told me, you had asked me what he told me.

6 Q. Right. And you had said at one point he said he just
7 couldn't recall the name at that time, is that accurate,
8 what you said previously?

9 A. Yes. That's what he said, he couldn't recall the name
10 but that's not what he told me.

11 Q. Okay. So that didn't indicate to you that he knew him
12 but just couldn't recall the name?

13 A. It just indicated that he might have known him. He had
14 indicated he knew him because he's --

15 Q. All right.

16 MS. WHITE: Thank you, Your Honor. That's all.

17 MR. BOWENS: Nothing further.

18 THE COURT: Mr. Bowens, do you have an interest in me
19 seeing the exhibits that you introduced?

20 MR. BOWENS: Yes, Your Honor.

21 THE COURT: Hand them up and let me see them. Next
22 witness.

23 The witness, JERLEAN COOK, was first duly

24 sworn and testified as follows:

25 DIRECT EXAMINATION

Testimony of Jerlean Cook

1 BY MR. BOWENS:

2 Q. Give us your full name, please.

3 A. Jerlean miller Cook.

4 Q. Are you related to Darryl Cook, the plaintiff in this
5 case?

6 A. Yes, I'm his mother.

7 Q. Do you know Jackie McGuirt?

8 A. I knew him, yes.

9 Q. Did Darryl and Jackie McGuirt know each other?

10 A. I would think so.

11 Q. Describe for the Court how you think they would know
12 each other.

13 A. Darryl had worked for him like after school and on the
14 weekends for a little while.

15 Q. Was there any other incidents between Darryl and Jackie
16 McGuirt prior to the matter that was tried in 2000, I guess,
17 six?

18 A. He had been accused of taking some money from him, I
19 can't remember the year or whatever, but --

20 Q. Who accused Darryl?

21 A. Mr. McGuirt did.

22 Q. And how did that matter get resolved?

23 A. I paid it back to him.

24 Q. Did you go and see Mr. McGuirt?

25 A. Yes, I did.

Testimony of Jerlean Cook

1 Q. Describe what happened there as you going to see him.

2 Did anyone go with you, or who all was present?

3 A. It was myself, Darryl, I can't remember the officer's
4 name, it was the local officer at that time, I can't
5 remember his name.

6 Q. Police officer?

7 A. Yes. And Mr. McGuirt was there.

8 Q. Was that meeting recorded on videotape?

9 A. I found out later it was but I didn't know at the time
10 that it was.

11 Q. Was that tape shown at trial?

12 A. I don't know.

13 Q. You don't know?

14 A. I can't remember. Are you talking about the meeting
15 itself?

16 Q. Yeah. The meeting between you and the police officer
17 and Darryl and Mr. McGuirt, was there a video of that shown
18 at the trial?

19 A. I want to say so I am not sure.

20 Q. Did Darryl ever admit to taking any money on that
21 occasion?

22 A. Are you talking about when he --

23 Q. When he was accused.

24 A. What I had repaid?

25 Q. Right.

Testimony of Jerlean Cook

1 A. No.

2 Q. Why did you want to repay the money if Darryl didn't
3 admit to taking it?

4 A. Because it's a small rural community and even then you
5 just want to just like get things over with and just
6 basically just let it be and that's what I was kind of
7 doing, I just want it to go away, not trying to cover up for
8 him. If he had done it he never said he did it and so I
9 just paid him up the money. And Mr. McGuirt continued to
10 let him work there so to me it was all well and done.

11 Q. So Mr. McGuirt continued to employ Darryl even after
12 this happened.

13 A. Yes, he did.

14 Q. Is there any doubt in your mind that Mr. McGuirt could
15 recognize Darryl if he saw him?

16 A. I would think that he could have.

17 Q. How many times was your son tried based on the McGuirt
18 shooting?

19 A. Three. Well, what you say, tried?

20 Q. How many trials were there.

21 A. There was two mistrials, I would say three.

22 Q. Has Darryl always maintained to you that he was
23 innocent in having shot Mr. McGuirt?

24 A. Yes, sir.

25 Q. Did you attend the trial that he was convicted at every

Testimony of Jerlean Cook

1 day?

2 A. Yes, I did.

3 Q. Were you present in the courtroom when the jury was
4 excused for deliberations?

5 A. Yes, I was.

6 Q. Tell the Court what happened after the jury left and
7 was dismissed to go deliberate the very first time.

8 A. They went out. They might have been out for about -- I
9 would say a few, but it might have been like 45 minutes to
10 an hour or so, and it came back and they had some questions
11 that they wanted to ask of the Court.

12 Q. Do you remember what the questions were?

13 A. Something to do with the identity of the victim and
14 something with the timeline or something like that, I'm not
15 exactly sure. It was -- I know it was two questions.

16 Q. What happened after that was over with and they had the
17 questions answered, what happened next?

18 A. They came back in and told the judge that they were
19 deadlocked.

20 Q. What did the trial judge say in response to that?

21 A. He said that --

22 MS. WHITE: Your Honor, I'm going to object to anything
23 that's said by the trial judge, this is hearsay.

24 MR. BOWENS: Your Honor, I don't think it's hearsay.

25 It's an in-court statement made by the trial judge, it's not

Testimony of Jerlean Cook

1 hearsay. It's not an out-of-court statement, it's an
2 in-court statement that the trial Judge made to the jury's
3 announcement that they were deadlocked and I think it's not
4 hearsay.

5 THE COURT: Response, Ms. White?

6 MS. WHITE: Your Honor, in this case I believe we have
7 a record of the court proceedings, and in this case the best
8 evidence would be the record to review. The statements are
9 not in the record.

10 MR. BOWENS: Not necessarily the best evidence. I
11 don't know what happened, I've tried to investigate and find
12 out why this section is not in the record. I have an
13 affidavit from a juror and I have three witnesses that were
14 present in court when this transpired, and their testimony
15 that it did happen I think is relevant but it's not hearsay.
16 Hearsay is an out-of-court statement offered for its truth,
17 this is an in-court statement that was being offered.

18 THE COURT: Well, I've been provided a copy of the
19 transcript of the record and the record on appeal, by the
20 official court reporter, Karen Tracy. Well, it says partial
21 transcript of record. What more should I have?

22 MS. WHITE: Your Honor, there were -- there was a
23 record on appeal one and two, and then there was the third
24 section which is Karen Tracy's October 22nd and 23.

25 THE COURT: So this is the entire transcript --

Testimony of Jerlean Cook

1 MS. WHITE: Yes, Your Honor.

2 THE COURT: And everything that occurred in court.

3 MS. WHITE: Yes, Your Honor.

4 THE COURT: Everything that occurred in court on the
5 record.

6 MR. BOWENS: Well, we would take a slight exception to
7 that, this portion about the jury being deadlocked is not in
8 there. I've spoken with the court reporter who --

9 THE COURT: Now you're testifying.

10 MR. BOWENS: Well, that's right. I don't know what
11 happened to that that it's not in there, but there may be a
12 number of possibilities. But nonetheless this is not a --
13 you don't have to rely upon the transcript for all that was
14 said in court, it's an in-court statement. Why it's not in
15 there in the transcript I don't know, but --

16 THE COURT: You said I don't have to rely upon the
17 transcript as to what was stated in the court?

18 MR. BOWENS: Not solely. You can rely upon it but not
19 solely. If you have witnesses who say that things
20 transpired that aren't on the record you can consider it,
21 it's not hearsay. It's an in-court statement, not an
22 out-of-court statement.

23 THE COURT: Anything further?

24 MS. WHITE: Your Honor, we would just argue that
25 obviously we stand on the record. And I think it's a pretty

Testimony of Jerlean Cook

1 clear record, everything else is included, the jury come in
2 with questions is included. And we would rely on the record
3 as the best evidence of what occurred at the trial.

4 THE COURT: Anything further?

5 MR. BOWENS: I just think we can add to that the
6 testimony of the witnesses who were in the courtroom and saw
7 and heard that.

8 THE COURT: To supplement the record?

9 MR. BOWENS: Well, if you want to call it that I
10 suppose, but --

11 THE COURT: That's why I'm asking you a question, I
12 don't want to call it anything.

13 MR. BOWENS: I would call it supplementing the record,
14 it's not there. There could have been a mechanical failure
15 with the recording equipment, I just don't know what
16 happened to it. I know the definition of hearsay is an
17 out-of-court statement offered for the truth of the matter
18 asserted. This is not an out-of-the court statement, it's
19 an in-court statement by the trial judge on the bench
20 responding to the jury, I don't see how that's possibility
21 hearsay. Just because it's not recorded in the record it's
22 still an in-court statement. There was a time when we
23 didn't have these types of mechanical means of recording and
24 it still wasn't hearsay, things were still said in court and
25 they come up afterward so I don't think it meets the

Testimony of Jerlean Cook

1 definition of hearsay by any stretch. I mean, there's no
2 exception that -- it's not hearsay -- it's hearsay if it's
3 not in the record. That's not -- I have never heard of that
4 being part of the rule. It's either an in-court statement
5 or an out-of-court statement, this is an in-court statement.

6 THE COURT: Well, whether or not it's hearsay is not
7 the deciding test, it's irrelevant whether or not it's
8 hearsay. The question is whether or not you can rely on the
9 record or not.

10 MR. BOWENS: Well, I think you can certainly rely upon
11 the record, but you can also rely upon the sworn testimony
12 of the witnesses who present when things happened that is
13 not contained in the record.

14 THE COURT: In weighing the credibility of the record
15 and also the credibility of the witnesses in regard to the
16 validity of the record.

17 MR. BOWENS: We're not challenging that the record is
18 not valid, the things that are in there is what happened,
19 there's just a portion that's not there that's missing. So
20 we're not contradicting that -- we're not saying the court
21 reporter transcribed this and that's not true, there's just
22 a gap in the proceedings that's not there. The tape may
23 have been lost, I don't have any idea why --

24 THE COURT: Do you plan to point that out to me at some
25 point in time today as to what is missing from the record?

Testimony of Jerlean Cook

1 MR. BOWENS: Yes, sir, we will do that.

2 THE COURT: And do you want to refer me to the page now
3 in this testimony?

4 MS. WHITE: It's page 328 on that third non-record on
5 appeal document.

6 THE COURT: Page 328.

7 MR. BOWENS: I have an exhibit here, I've made an
8 exert, and it starts with 325 where the jury has a question
9 and then it continues over to 328.

10 THE COURT: Page 325 line what?

11 MR. BOWENS: It starts at line 14 and the Court was
12 saying we'll be at ease until we hear from the jury, and
13 they go to lunch and come back with questions.

14 THE COURT: Okay. Page 325 line 16, what about it?

15 MR. BOWENS: This shows where the jury began their
16 deliberations at 2:02 p.m.

17 THE COURT: And you're speaking from the record now.
18 Speak louder so the court reporter can hear you.

19 MR. BOWENS: Page 325, line 16, the jury began their
20 deliberations at 2:02 p.m. lunch was brought in. Then the
21 rest of that page is really not that important. Page 326
22 line five, the Court speaking, "I think with these
23 questions, I think, I mean I'll do whatever is the State's
24 pleasure but I've got two questions." And then on line 16
25 on page 326, the Court speaking, "We're back on the record.

Testimony of Jerlean Cook

1 We have received two questions from the jury. One, 'Can we
2 get a timeline chart used by the Solicitor?' And, of course,
3 that was not admitted into evidence and they can't see it.
4 Mr. Barfield: The State agrees. The Court: 'And did
5 Mr. McGuirt ID the defendant as the person that shot him?'
6 Of course I will say they have to rely on their collective
7 memories to recall it." And that's page 326. Page 327
8 beginning at line four the Court speaking, "Okay. Can I
9 have the jury, please?" Line six, "Whereupon the jury came
10 into open court at approximately 3:08 p.m." And the rest of
11 page is the Court answering the jury's questions. And then
12 page 328 line one, "Whereupon the jury left open court at
13 approximately 3:28 p.m. The Court stating, 'Stand at ease.'
14 Line five, the Court, "Court will be at ease," and line six
15 says pause. And then it says on line seven, "Bring the
16 jury," and then on line ten and 11, "Whereupon the jury
17 returned to open court with the verdict at 8:10 p.m." So
18 it's the portion between 3:10 and 8:10 that's missing from
19 the record.

20 THE COURT: All right. I'll allow the testimony. You
21 may proceed.

22 BY MR. BOWENS:

23 Q. Ms. Cook, we were talking earlier that the jury came in
24 and announced that they were deadlocked and I asked you what
25 the Judge's response was. What did the trial judge say at

Testimony of Jerlean Cook

1 that point?

2 A. The first time he said, as I can recall, that this has
3 already been a mistrial, that we need to go back and get the
4 verdict right, get the verdict, and they went back and they
5 came back again.

6 Q. A second time?

7 A. A second time.

8 Q. What happened then?

9 A. And he told them basically the same thing, that --

10 Q. Let me ask you, what did the jury say when they came
11 back a second time?

12 A. They came back a second time and said they were still
13 deadlocked.

14 Q. Did they announce what their vote was?

15 A. They probably did, I can't remember.

16 Q. Okay. Go ahead.

17 A. And so he told them that again, that it had been a
18 mistrial and it wasn't going to be another mistrial. We
19 needed to go on and get the verdict, and their checks had
20 been cut and that they need -- they will get their checks
21 when they get the verdict and come back.

22 Q. Did the trial judge ask whether they thought any more
23 deliberations would be helpful?

24 A. I didn't hear it.

25 Q. Did he force them to go back and deliberate a second

Testimony of Jerlean Cook

1 time? Did he give them any choice in the matter in other
2 words?

3 A. I don't know. It was just basically what I said, that,
4 "Okay. This is what y'all need to go do, you need to go on
5 and get the verdict right and you just need to come back
6 with the verdict. The checks have been cut and you'll get
7 them when you come back with a verdict," and that was it as
8 I can recall.

9 Q. Did the trial Judge give the jury the option to go home
10 judge the night and come back the next morning and start
11 fresh? This was later in the evening it looks like.

12 A. The only thing I heard -- can remember about that was
13 that he told them that we would be here all night. It
14 wasn't an option of going and coming back, he said that we
15 would be here all night because he wanted this trial to be
16 resolved or something to that effect.

17 Q. Both during the first time when the jury came back and
18 said they were deadlocked, did either the solicitor or the
19 defense attorney for your son object to the comments that
20 the Judge made?

21 A. Not that I can recall.

22 Q. During the second time that they came back and said
23 they were deadlocked, did either the solicitor or the
24 defense attorney, Mr. Swerling, make any objections to the
25 comments the judge made?

Testimony of Jerlean Cook

1 A. No, sir, not that I can remember.

2 Q. Did either attorney, either the solicitor or Mr.

3 Swerling, object to the jury being sent back a second time
4 to deliberate?

5 A. Not that I can remember.

6 MR. BOWENS: That's all of the questions I have of her,
7 Your Honor.

8 MS. WHITE: Just briefly, Your Honor.

9 CROSS EXAMINATION

10 BY MS. WHITE:

11 Q. In regards to the video of your son and the meeting tat
12 involved the prior incident, Mr. Swerling objected to the
13 introduction of anything regarding the earlier allegation of
14 theft; is that right?

15 A. Yes, I think he did.

16 Q. And he tried to argue that that was -- he was a
17 juvenile, it wasn't ever proven, there wasn't any conviction
18 so that shouldn't be brought in; is that right?

19 A. He did. He did do that.

20 Q. And the judge denied that and allowed the testimony.

21 A. Yeah. The judge allowed it.

22 Q. Okay. And are you aware at all of the appellate
23 decision on direct appeal that they addressed that issue as
24 well on appeal?

25 A. I didn't even know that he had been before the

Testimony of Jerlean Cook

1 appellate court.

2 Q. All right. In regards to just a couple of questions.

3 We've got a time period that you say during 3:10 and 8:10

4 the jury came back twice and said they were deadlocked.

5 A. I'm not sure about the time, I just know that they came

6 back twice. I'm not sure about what time.

7 Q. So you don't know what intervals they came back or what

8 time in the afternoons they came back?

9 A. No.

10 Q. Now, did you mention anything about your concern about

11 that to Mr. Swerling after the trial?

12 A. After the trial the police basically escorted everybody

13 out of the court into their vehicles, well, the McGuirt

14 family mainly. But Mr. Swerling and my family, we all

15 walked out and he said he would talk to us later.

16 Q. And did you talk with him about your concern over this,

17 the --

18 A. I don't think I talked to him again. I might not be

19 sure, but I don't think I talked to him again personally.

20 Q. So you didn't at the time think that it was concerning

21 enough to give him a call and ask if there was anything

22 y'all could do afterwards?

23 A. Well, I did think it was a concern enough, but I just

24 think for me personally it was probably overwhelming.

25 Q. Just take your time.

Testimony of Jerlean Cook

1 (Break in proceedings.)

2 A. That it probably was overwhelming for me as well as
3 anybody that was in that circumstance as well the McGuirt
4 family, it was an overwhelming process for everybody. And
5 if I didn't get back with Mr. Swerling it wasn't because I
6 wasn't concerned, it was like I say, it was just
7 overwhelming for me.

8 Q. Okay. And did you ever talk with your son about it,
9 about that particular issue, I guess, the jury deadlock?

10 A. I think we may have talked about it somewhat. But I
11 tried not to be focusing on -- I tried to just talk to
12 him -- when I was able to see him I tried to talk to him, I
13 didn't try to talk about the case, I just didn't want to
14 dwell on it.

15 Q. Sure. Okay. And just one other question. Mr.
16 Swerling throughout the trial, do you recall he made
17 numerous objections, do you recall, to testimony being
18 presented?

19 A. Uh-huh.

20 Q. And, in fact, he objected to the testimony of what the
21 victim said to the folks when they first saw him as he was
22 waiting on the EMS, do you recall that?

23 A. Would you repeat that, please?

24 Q. I was going to say that might have been kind of a long
25 question. He objected to numerous things. We've already

Testimony of Jerlean Cook

1 talked about he objected to the video and the testimony
2 about your son as a younger person involved with Mr.
3 McGuirt.

4 A. Correct.

5 Q. Also there were objections to Mr. McGuirt's statements
6 to people, that of his daughter and the policeman and the
7 EMS, do you recall that?

8 A. Uh-huh.

9 Q. And he objected to numerous things throughout the
10 trial, even up until the end where he at one point requested
11 a mistrial based on an objection, do you recall?

12 A. I do remember him asking about a mistrial but I can't
13 remember on what basis it was.

14 Q. But you would agree that throughout the trial Mr.
15 Swerling objected to a majority -- a lot of the things the
16 State tried to present, testimony and witnesses.

17 A. I would say so.

18 Q. Okay. All right.

19 MS. WHITE: Thank you. That's all I have.

20 THE COURT: Anything further?

21 MR. BOWENS: Just a couple of questions, Your Honor.

22 REDIRECT EXAMINATION

23 BY MR. BOWENS:

24 Q. Ms. Cook, you were asked about Mr. Swerling objecting
25 about a mistrial. When the issue with the jury being

Testimony of Jerlean Cook

1 deadlocked came up and the Judge's comments, did he ask for
2 a mistrial on that?

3 A. I can't recall if it was for that. I do recall him
4 asking for a mistrial but I can't remember if it was for
5 that reason.

6 Q. You don't recall him objecting to what the judge was
7 saying during the course of his comments to the jury.

8 A. I can't remember, I don't remember. If he did I don't
9 remember him objecting to that.

10 Q. When the jury went out the second time to deliberate
11 after they came back in and were deadlocked and the judge
12 sent them out, they came back a second time, the judge sent
13 them back out to deliberate.

14 A. Uh-huh.

15 Q. How long did it take for the jury to come back with
16 their verdict?

17 A. It seemed like it took 30 to 40 minutes, it might not
18 have been that long. Because we had walked out on the
19 balcony of the courthouse and was standing out there
20 talking, and it seemed like in no time they were saying for
21 us to come back in. It just didn't seem like it was long.

22 MR. BOWENS: Thank you. That's all of the questions I
23 have.

24 THE COURT: Anything further?

25 MS. WHITE: Nothing further, Your Honor.

Testimony of Darryl E. Cook

1 The witness, DARRYL E. COOK, was first duly
2 sworn and testified as follows:

3 DIRECT EXAMINATION

4 BY MR. BOWENS:

5 Q. Mr. Cook, give us your full name for the record,
6 please.

7 A. My name is Darryl E. Cook.

8 Q. And how are you related to Darryl Cook, the plaintiff
9 in this case?

10 A. I'm his father.

11 Q. To your recollection did Jackie McGuirt -- do you know
12 Jackie McGuirt?

13 A. Yes, I do.

14 Q. To your recollection did Jackie McGuirt and your son
15 Darryl know each other?

16 A. When Darryl was 13 Darryl used to work up there after
17 school and on Saturday.

18 Q. Now, did you attend the trial of your son every day?

19 A. Yes, I did.

20 Q. Were you present in the courtroom when the jury was
21 excused to go to deliberate?

22 A. Yes, I was.

23 Q. Tell the Court what happened after the jury was excused
24 for deliberations.

25 A. That day the jury went back and they came back out, and

Testimony of Darryl E. Cook

1 I think at that time they said it was like seven-five or
2 something like that. And they came back -- they went back
3 in -- they sent the jury back in, then they came back with
4 two questions they wanted to ask. And two of the questions
5 was what was the time limit and did Mr. McGuirt identify the
6 defendant.

7 Q. Now, was the questions that they had, did they come
8 back with those first or was it later in the process?

9 A. They came back on the second time.

10 Q. With the questions?

11 A. With the questions.

12 Q. When they came back and said they were deadlocked, what
13 did -- the deadlock was seven to five you said?

14 A. It was seven to five.

15 Q. What did the trial judge say in response to that?

16 A. He sent them back in there and told them they had to
17 come up with a verdict. Because the second time when they
18 came out there it was seven-five, and he sent them back in
19 there and that make the third time, he told them, said the
20 check was already made out and so they needed to come to a
21 verdict the third time.

22 Q. Did the judge give them any option to deliberate -- to
23 come back the next day and deliberate fresh?

24 A. Let me go back. The second time, that's when he told
25 them they had to go back in there and they got to come up

Testimony of Darryl E. Cook

1 with a verdict because their checks was already made out.

2 Q. That's what I'm -- during that same process he didn't
3 give them an opportunity to come back tomorrow and start
4 fresh?

5 A. No, he did not.

6 Q. Did he indicate they were going to be there until they
7 had reached a verdict?

8 A. He said it wasn't going to be another mistrial and they
9 would have to stay there all night, so they went back in
10 there. And from my knowledge, like I said, it was less than
11 20 minutes they came to a verdict.

12 Q. On the second time when they came back in and announced
13 they were still deadlocked, did the trial judge ask if they
14 wanted to go back and deliberate more?

15 A. No, sir, he did not.

16 Q. Did he give them any option as to whether they wanted
17 to continue or not?

18 A. No, sir, he did not.

19 Q. Did he order them back in to deliberate?

20 A. To my -- the way that he said it it was they demand --
21 he demanded them to go back there and come back, you know.

22 Q. During these two times when the jury came back and said
23 they were deadlocked and the judge made the comments you're
24 describing, did either the solicitor or Mr. Swerling object
25 to the comments that the judge made?

Testimony of Darryl E. Cook

1 A. No, he did not.

2 Q. On the second time the jury came back and the judge
3 said, "Go back and you have to deliberate until you get a
4 verdict," did either the solicitor or Mr. Swerling object to
5 the judge making the jury go back a second time to
6 deliberate?

7 A. No, he did not.

8 MR. BOWENS: That's all of the questions I have, Your
9 Honor.

10 THE COURT: By the State?

11 CROSS EXAMINATION

12 BY MS. WHITE:

13 Q. Mr. Cook, just quickly. I know you said -- you
14 testified they came back with two questions and then they
15 came back twice saying that they were deadlocked?

16 A. Correct.

17 Q. And did you talk with your son's attorney at all at
18 your trial about your concern about that?

19 A. I talked to Mr. Swerling several times before the trial
20 even started, I talked to him during the first trial and the
21 second trial and we always talked, talked, talked, talked,
22 but some things that I wanted him to present in court it
23 never did come up.

24 Q. Okay. But specifically about this jury deadlock issue
25 and about whether or not maybe there could have been

Testimony of Darryl E. Cook

1 anything that y'all could have pursued or anything that Mr.
2 Swerling could have done as your son's attorney after the
3 fact, did you ever talk with him about that?

4 A. Oh, yes, I did. I talked to him several times.

5 Q. And this was after the third trial.

6 A. And after -- I went down there and I asked for the
7 transcript. I did as much as I can to talk with Mr.
8 Swerling before the trial and after the trial and during the
9 trial. And some questions that I asked him about, some
10 things that he should have brung up in the trial, why not --
11 he didn't call the first police officer on the scene and I
12 kept asking him why he don't call no one that -- the first
13 officer on scene, and to his word that he wasn't going to
14 call him.

15 MS. WHITE: All right. I think that's all I have.
16 Thank you, Mr. Cook.

17 THE COURT: Anything further? Thank you, sir. Your
18 next witness.

19 MR. BOWENS: Marjorie Cook.

20 The witness, MARJORIE COOK, was first duly
21 sworn and testified as follows:

22 DIRECT EXAMINATION

23 BY MR. BOWENS:

24 Q. Give us your full name for the record.

25 A. My full name is Marjorie B. Cook.

Testimony of Marjorie Cook

- 1 Q. And are you related to the plaintiff, Darryl Cook?
- 2 A. Yes.
- 3 Q. How are you related?
- 4 A. Grandmother.
- 5 Q. Do you know Jackie McGuirt?
- 6 A. Yes.
- 7 Q. To your knowledge did Jackie McGuirt know your
- 8 grandson, Darryl?
- 9 A. Yes.
- 10 Q. How did he know him, what was the relationship?
- 11 A. You mean Jackie and --
- 12 Q. And Darryl?
- 13 A. Darryl worked there.
- 14 Q. At his tire station?
- 15 A. Yes.
- 16 Q. Were you -- did you attend the trial of your grandson
- 17 every day?
- 18 A. Yes.
- 19 Q. Were you present in the courtroom at the end of the
- 20 trial when the jury was excused to go to begin their
- 21 deliberations?
- 22 A. Yes.
- 23 Q. I want you to take a moment, please, and describe for
- 24 the Court what happened after the jury went out to begin
- 25 deliberations.

Testimony of Marjorie Cook

- 1 A. When the jury went out to deliberate they came back
2 with some questions.
- 3 Q. Do you remember what the questions were?
- 4 A. I think identification and time -- the time.
- 5 Q. The time?
- 6 A. Yes.
- 7 Q. After they went back to deliberate after having the
8 questions answered, what happened next?
- 9 A. They came back and said that it was deadlocked.
- 10 Q. Did they announce what their vote was?
- 11 A. Seven-five.
- 12 Q. What did the trial judge say in response to that?
- 13 A. He sent them back in to deliberate some more.
- 14 Q. And what happened next?
- 15 A. They came back again deadlocked.
- 16 Q. What did the trial judge say at that point?
- 17 A. This time the judge told the jury that they would go
18 back and deliberate, he wanted a verdict and there was going
19 to be no hung jury or mistrial. If they had to be there all
20 night he wanted that verdict and said that the checks was
21 already made.
- 22 Q. Did the trial judge on the second time they came back
23 being deadlocked, did he give them any option to leave and
24 come back tomorrow and begin deliberations again fresh?
- 25 A. No.

Testimony of Marjorie Cook

1 Q. Did he ask them if any further deliberations would be
2 useful or beneficial toward reaching a verdict?

3 A. No.

4 Q. Did the trial judge give the jury any option about
5 continuing to deliberate more or stopping at that time?

6 A. No.

7 Q. During the time that the judge was making these
8 comments and sending the jury back out a second time after
9 they were deadlocked, did either the solicitor or Mr.
10 Swerling object to the comments?

11 A. No.

12 Q. Did either the solicitor or Mr. Swerling object to the
13 jury being sent back out a second time?

14 A. No.

15 Q. After the jury was sent back the second time to
16 deliberate, how long was it between being sent back and them
17 coming back with a verdict?

18 A. I don't recall the exact timing.

19 Q. Was it a very long time or very short time, or do you
20 recall that?

21 A. Not a very long time, I'll say a short time.

22 MR. BOWENS: Thank you. That's all of the questions I
23 have, Your Honor.

24 MS. WHITE: I don't think I have any questions for this
25 witness, Your Honor.

Testimony of Darryl Cook

1 THE COURT: Okay. Thank you.

2 MR. BOWENS: We call Darryl Cook to the stand.

3 The witness, DARRYL COOK, was first duly sworn

4 and testified as follows:

5 DIRECT EXAMINATION

6 BY MR. BOWENS:

7 Q. Give us your full name, please, for the record.

8 A. Darryl Jermaine Cook.

9 Q. You have made several allegations that your trial
10 attorney, Mr. Jack Swerling, was ineffective as your counsel
11 at your criminal trial.

12 A. Yes, sir.

13 Q. The first allegation was that he did not subpoena
14 witnesses on your behalf.

15 A. Yes, sir.

16 Q. And we're talking about Chief Hughley Gratic.

17 A. Yes, sir.

18 Q. Explain to the Court why you wanted him to be called as
19 a witness, Hughley Gratic, and what transpired?

20 A. For the purpose of being he was the first officer on
21 the scene of the crime, and him being the first officer that
22 would automatically make him the person that should be the
23 first person that the State hears from. Because he said
24 something totally different from what was in all of my
25 paperwork and he said something totally different than what

Testimony of Darryl Cook

1 anyone else had said. I asked Mr. Swerling why wasn't he
2 called to testify and he was like he didn't want to bring
3 him in front of the Court not knowing what he might say and
4 he might change his statement so he didn't want him being in
5 front of the jury and not knowing what he was going to say,
6 so I was trying to get him to go and talk with Mr. Gratic
7 for a whole six years. Well, he was my attorney for the
8 four years that I had him and he never took the time to go
9 back and sit down and talk to him. He always said he
10 couldn't reach him or he couldn't do this or couldn't do
11 that, so I was just working with what I had at the moment,
12 which is Mr. Swerling.

13 Q. You said when you got your paperwork you found out what
14 Mr. Gratic had said that was different with about what the
15 other police were saying versus what Mr. Gratic was saying.

16 A. The other police was at the scene of the crime and he
17 had told his daughter and his wife and mister -- the deputy
18 chief, Mr. Lewis, that he knew who it was at the scene of
19 the crime. But for the first officer to be at the scene of
20 the crime he was saying something totally different from
21 what everybody else was saying, so that's why Mr. Swerling
22 was saying he wasn't going to call him.

23 Q. What did you expect Mr. Gratic to testify about at his
24 criminal trial if he would have been called?

25 A. His statement, his supplemental record and his incident

Testimony of Darryl Cook

1 report.

2 Q. Those were introduced earlier, Exhibits 3, 4 and 5?

3 A. Yes, sir.

4 Q. Was it marked subject as being unknown and
5 unidentified?

6 A. Yes, sir.

7 Q. You have also alleged that counsel of -- your trial
8 counsel did not object to comments made by the trial judge
9 when the jury was deadlocked and didn't object to them being
10 sent back a second time. Describe for the Court -- we have
11 heard several witnesses, you heard what they've testified to
12 what the jury said and the trial judge said, explain to the
13 Court why you think Mr. Swerling was ineffective in that
14 regard.

15 A. Well, at the moment I didn't know that it could be an
16 objection to what the judge was telling the jury, you know
17 what I'm saying? I didn't know that until years later after
18 I've been doing this time that he could even object to what
19 the judge was telling me -- what the judge was telling the
20 jury, so that's really why I didn't say nothing to him about
21 the issue because I didn't know at the time.

22 Q. We've heard testimony today about the jury coming in
23 and asking questions. Do you recall that?

24 A. Yes, sir.

25 Q. What I want to focus on with you, the first and second

Testimony of Darryl Cook

1 time that the jury came in and announced they were
2 deadlocked.

3 A. Uh-huh.

4 Q. Tell the Judge what you recall the jury saying the
5 first time they came in and --

6 A. The first time they said they were deadlocked the judge
7 said they had the right to go back and deliberate some more
8 and sit down and talk to one another and try to come up with
9 a verdict, and that was around like 6:00 from my
10 recollection, that was my recollection, 6:00 or 7:00. And
11 they came back like an hour or two later, or hour and a half
12 later came back and they were still hung.

13 Q. What did the trial judge say at that point when they
14 came back a second time when they were still deadlocked?

15 A. The second time they were deadlocked, that's when he
16 told them that -- not verbatim, just word for word, this is
17 what was said, but he was like, "We had two mistrials, we
18 are not going to have a third one so y'all have got to go
19 back there and come up with a verdict. We will be here
20 until you come back with a verdict whether it take all night
21 or not. And y'all checks have been cut, the Clerk of Court,
22 Betty Jo Beckham, is waiting to go get them when you walk
23 out the door so y'all come back." And I say maybe 20 or 25
24 minutes later is when they came back, gave the verdict and
25 it was over with.

Testimony of Darryl Cook

1 Q. During the time that the jury made these, did the trial
2 counsel, Jack Swerling, or the solicitor object to the
3 comments being made?

4 A. No, sir.

5 Q. Did either the solicitor or Mr. Swerling object the
6 second time to the comments made by the trial judge?

7 A. No, sir.

8 Q. And you said that you didn't know that your attorney
9 could object to those things.

10 A. No. At the moment -- at the time I didn't know a lot
11 about the law. But over the course of the years I have
12 learned that he could have said something but he didn't.
13 But it was plenty -- several incidents where me and Mr.
14 Swerling just kept bumping heads about things I wanted to do
15 and things he wanted to do. So I guess that was one thing
16 that I knew he should have done but he didn't do for the
17 sake of whatever it is, he didn't do it.

18 Q. If he would have called Chief Gratic as a witness from
19 your perspective do you think the trial would have had a
20 different result?

21 A. I think so. That's because one of the questions that
22 the jury wanted to know was did Mr. McGuirt positively
23 identify me at any time. And if he would have testified
24 he -- by him being an officer of the law and his statement
25 was saying that Mr. McGuirt never positively identified me

Testimony of Darryl Cook

1 and that right there would have answered the jury's
2 questioning of whether proving my guilt or my innocence.

3 MR. BOWENS: All right. Thank you. That's all of the
4 questions I have, Your Honor.

5 THE COURT: By the State?

6 CROSS EXAMINATION

7 BY MS. WHITE:

8 Q. Mr. Cook, about Mr. Gratic, Chief Gratic. You said
9 that you asked your attorney to subpoena him and he
10 indicated that he didn't want to risk putting him up on the
11 stand at trial?

12 A. Yes, ma'am.

13 Q. Did he indicate to you that he had had conversations
14 with him that maybe he felt unsure of how his testimony
15 would be presented?

16 A. Yes, ma'am, he did at one point in time.

17 Q. So you're aware that at least Mr. Swerling had had the
18 opportunity to talk with Chief Gratic prior to trial?

19 A. That was prior to my first two trials, that wasn't even
20 in my third trial. He never spoke to him in my third trial,
21 that was my first two trials.

22 Q. So your understanding is that he spoke to Chief Gratic
23 and did not want to call him prior to the first two trials,
24 but you don't know if he had any further communication with
25 him prior to the third.

Testimony of Darryl Cook

1 A. If he did he didn't tell me about it.

2 Q. Okay. And his incident reports indicate that the
3 subject was unknown as we've said. Isn't it true that no
4 one in the trial ever said that Mr. McGuirt ever said that
5 Darryl Cook did this?

6 A. They had an in-camera meeting about -- they discussed
7 whether they could say that or not. But it came out to be
8 that they weren't going to use Mr. McGuirt's statement
9 because he said himself that he looked like Darryl Cook but
10 he never used the statement in trial because he wasn't
11 alive, or they said something about it was a dying
12 declaration so they wasn't going to allow his statement to
13 be entered as evidence.

14 Q. Okay. His daughter testified that her dad said it was
15 that boy -- "That boy had come in twice again, he wanted her
16 to lock the doors." That's the only identification she
17 testified to; is that right?

18 A. Yes, ma'am.

19 Q. Okay. And then Officer, is it Guinyard, he's the other
20 that said that he -- Mr. McGuirt told him that he knew who
21 it was, couldn't think of the name but he'd been in earlier
22 to buy a soda; is that right?

23 A. Yes, ma'am.

24 Q. Okay. So that testimony -- the fact that the person
25 was unnamed, that was presented throughout the trial.

Testimony of Darryl Cook

1 A. No, ma'am. Because another guy testified during the
2 trial saying that Mr. McGuirt knew my name earlier that day
3 because I was supposed to have come into his store but the
4 time frames didn't add up. So I didn't know -- me and Mr.
5 Swerling had talked about that also and he didn't want to
6 use that either.

7 Q. And, in fact, that was the issue -- was that not the
8 issue of one of the -- where your attorney objected to some
9 hearsay because this was someone who worked there who had
10 overheard about this prior theft incident, and your attorney
11 objected to the testimony coming in at all about his prior
12 knowledge of you from that incident?

13 A. Yes, ma'am.

14 Q. Okay. So the video involving the prior theft incident
15 several years prior was objected to but the Court allowed it
16 in.

17 A. Yeah, for identification purposes.

18 Q. And the testimony from that gentleman who worked there
19 saying, "Oh yeah, I had heard that Darryl Cook was the one
20 who was involved," that came in over your attorney's
21 objection as well.

22 A. Repeat that question again.

23 Q. The testimony where one of the employees said the
24 gentleman who had been in earlier to buy a soda, he knew
25 that was the guy that was involved in the previous theft,

Testimony of Darryl Cook

1 that came in over your attorney's objection.

2 A. Yes, ma'am.

3 Q. In regards to the deadlocked jury issue. You have
4 indicated that you weren't aware that he could object to
5 things that the judge told the jury. You were present,
6 though, when your attorney objected to part of the jury
7 charge and asked for a mistrial at that point, weren't you?

8 A. He asked for a mistrial after I was found guilty.

9 Q. Okay. And maybe there is -- prior to when the jury has
10 gone out for deliberations in the transcript it indicates
11 that your attorney has asked for a mistrial --

12 MS. WHITE: And I'm referencing 322, Your Honor.

13 Q. Mr. Swerling: "I understand, I'm sitting here thinking
14 about the remedy. I understand what Your Honor is saying,
15 to protect the record I need to move about the mistrial
16 based upon comment to the jury about statement coming in for
17 the truthfulness of it because of it being a truthful
18 statement." Do you recall that?

19 A. Yeah, he did. But that wasn't about the deadlock.

20 Q. That was much prior, that was --

21 A. That was prior to them coming back on the deadlock.

22 Q. Right. That's right when the jury had gone out to
23 deliberate.

24 A. Yeah.

25 Q. So you did know that your attorney had objected to

Testimony of Darryl Cook

1 something the judge had told the jury and asked for a
2 mistrial based on that, right?

3 A. That wasn't -- like in my prior knowledge before I knew
4 what I know now there wasn't -- I didn't know that you
5 considered the same thing that the judge said to them,
6 that's the coercion as far as them coming up with a verdict,
7 that was -- in my eyes at the time that wasn't the same as
8 what he was doing. I thought he was waiting doing it,
9 sounded like what he should have been doing.

10 Q. Now, you had a direct appeal in this case and your
11 appellate attorney filed an Anders brief.

12 A. Yes, ma'am.

13 Q. And they indicated to you that you had a chance to file
14 a pro se brief; is that right?

15 A. Yes, ma'am.

16 Q. And you filed one in this case.

17 A. Uh-huh.

18 Q. You didn't mention the fact that there was a missing
19 part of the transcript or that the jury had come back and
20 been sent back and that the statements had been made by the
21 judge, inappropriate statements, you didn't mention that in
22 your issues on appeal.

23 A. I didn't have the whole entire transcript when I was
24 able to file my pro se brief. And I wrote Mr. Swerling
25 several letters, and maybe he should have copies of them,

Testimony of Darryl Cook

1 asking why I didn't have my entire transcript, and he told
2 me I had to get with my appellate attorney, Mr. Duda, to do
3 that because he was no longer my attorney.

4 Q. Okay. But you were there at the trial so you obviously
5 recall these deadlock issues and the jury coming back and
6 the statements that you said the judge made.

7 A. Yeah, I do, I was there.

8 Q. And if you recall those at this point would you not
9 have recalled those back at the time that you filed this
10 brief?

11 A. Like I just told you, yeah, I did recall. And me not
12 knowing the law at the time I didn't know if -- if it's not
13 in my transcript I didn't know if I could bring it up or
14 not, that's why I didn't bring it up. But as I continued to
15 do this time I learned the law more and more, I knew that
16 something was missing and that's when I wrote him several
17 letters, had my father go see him and could never get in
18 contact with him, he never wrote me back. The only time he
19 wrote me back was when he wrote me a letter telling me he
20 was going to send my transcript to whoever I asked him to
21 send it to.

22 Q. Okay. You did argue that the testimony of Robert
23 McDuffie and Anthony Green should have been stricken from
24 the record, that your attorney neglected to cross examine an
25 expert witness, and that the trial judge erred by allowing

Testimony of Darryl Cook

1 the videotape to have been played; is that right?

2 A. Yes, ma'am.

3 Q. And you filed this application November 8th, 2010 about
4 two and a half years ago; is that correct?

5 A. Yes, ma'am.

6 Q. And in the issues you raised at that point, "Counsel
7 refused to subpoena a witness on your behalf and asked the
8 questions I wanted. Trial judge allowed evidence that did
9 not pertain to the crime to be used," I assume that's the
10 videotape perhaps. "And the presiding trial judge refused
11 to let certain statements that you thought were credible on
12 your behalf for a new trial. So again, it wasn't raised
13 back in November 2010. In fact, it was just raised in an
14 amended application July 15th of this year; is that right?

15 A. Yes, ma'am.

16 Q. Okay. So that's the first mention at any time that
17 there was an issue not only with pieces of the transcript
18 missing but also with the jury being deadlocked multiple
19 times.

20 A. That was the first time I was able to sit down with my
21 lawyer. Previous to this lawyer, Mr. Bowens, I had three
22 lawyers prior to him but all of them had acquaintances, had
23 ties with the victim so I was never able to sit down with a
24 lawyer to even discuss this since for the past three years
25 because I never had a lawyer that was on my case longer than

Testimony of Darryl Cook

1 two or three months.

2 Q. And Mr. Bowens has been on your case for a couple of
3 years now, hasn't he?

4 A. Maybe almost a year and a half.

5 Q. Okay.

6 MS. WHITE: Court's indulgence.

7 (Break in proceedings.)

8 MS. WHITE: Thank you, Your Honor. That's all of the
9 questions I have at this time.

10 THE COURT: Anything further?

11 MR. BOWENS: Nothing further, Your Honor.

12 THE COURT: Thank you, sir. Next witness?

13 MR. BOWENS: Your Honor, the other witness we had was
14 Charles Walker. As we discussed earlier he has not shown up
15 yet, he was under subpoena to be here today. We had
16 discussed with the attorney general that we may need to hold
17 the record open to get his testimony to find out what
18 happened to him so I would ask the Court's permission to do
19 that. But I also had a -- we had a --

20 THE COURT: Let's discuss that issue. What's the
21 State's position?

22 MS. WHITE: Your Honor, I think the testimony has been
23 presented that this witness was going to present, I think it
24 would be just purely cumulative at this stage. He has been
25 subpoenaed, he had been -- I think he had been communicated

1 with as late as yesterday. I think that it's clear that
2 perhaps he is not appearing of his own volition and I think
3 that we can continue the case and proceed without him in
4 this situation.

5 MR. BOWENS: I'm not sure we can assume what happened
6 with any degree of certainty as to why he's not here, I
7 don't know why he was not here. He was under subpoena. I
8 do have an affidavit from him as to what he said -- this
9 witness was a juror on the case. And his affidavit -- we
10 can give the Court a copy if you would like -- reiterates
11 many of the same points and some additional points that have
12 been brought out today. This was Mr. Cook's family who
13 testified today and this is the juror, so I think he has a
14 unique position on what transpired. So I would ask that
15 either the Court consider his affidavit or we can have him
16 give his testimony at a later date and find out what
17 happened. I do have the subpoenas here and copies of
18 everything, he was under subpoena to be here and he has an
19 obligation to be here and we have a right to call him. I
20 think him being a juror on the matter is particularly
21 important for the Court to consider his testimony.

22 THE COURT: Ms. White?

23 MS. WHITE: We would have no problem if he wanted to
24 try to get somebody to go out to his home where he was
25 subpoenaed to try to see what the problem was or why he has

1 not appeared to see if we can secure his presence here
2 today. We would object to any affidavit coming in without
3 any way to authenticate it and without the chance to cross
4 examine him. I don't think that that would be -- obviously
5 it would be prejudicial to the State.

6 THE COURT: The Court will not allow an affidavit, he
7 cannot be cross examined.

8 MR. BOWENS: I assumed that would be the Court's
9 ruling. But what I was going to offer was to see what he
10 was going to say to show that he was important as a witness
11 so you could decide to allow us time to continue this to get
12 him to the courtroom. Winnsboro is about an hour away, I'm
13 not sure if we would be able to secure him here today,
14 that's kind of the problem I was addressing with the
15 attorney general this morning, whether we wanted to go
16 forward or just continue the whole matter until we could get
17 him here.

18 THE COURT: When is the last time you tried to find
19 him?

20 MR. BOWENS: Well, just earlier when you told me to go
21 out and call him again, so just before we started.

22 THE COURT: About an hour and a half ago?

23 MR. BOWENS: Yes, sir.

24 THE COURT: Do you want to see if you can call him now
25 or find him now?

1 MR. BOWENS: Would the Court give me that time?

2 THE COURT: We will wait right here while you go out
3 and try to call him.

4 (Break was taken.)

5 MR. BOWENS: If I may approach. I have as Court's
6 Exhibit Number 1 a copy of the subpoena and a copy of his
7 mileage check. I was not able to locate him by telephone
8 just now. I have discussed it a little further with the
9 attorney general, and one possibly is we just leave it open
10 and the next time you're doing PCR cases we bring it back in
11 front of you then, let him give you his evidence at that
12 point which is agreeable to our side.

13 THE COURT: I notice the place of testimony says 3888
14 Chester Highway, Lancaster.

15 MR. BOWENS: That was the address that was in the desk
16 book for the courthouse. I didn't realize it was not this
17 building's address. He had my phone number to call if he
18 had any problems and I instructed him to call me if it came
19 up -- if he ran into any difficulties and I haven't heard
20 from him. I'm not sure what happened to him.

21 THE COURT: Anything else, Ms. White?

22 MS. WHITE: Your Honor, obviously our preference would
23 be we think we should be able to continue without him, and
24 our preference would not be to hold the record open. I know
25 that I had said that had been something that we could do in

1 the past and we had done in the past, but I think at this
2 point if it's going to be the same testimony it's just going
3 to be cumulative and we should be able to continue.

4 THE COURT: All right. Well, we'll leave the record
5 open for how many days, sir?

6 MR. BOWENS: I need to find him, I'm not sure what
7 happened. I'm not sure when you're doing PCR's again.

8 THE COURT: Well, the record will be open for you to
9 depose him, not for me to come back to Lancaster or
10 Winnsboro or whatever.

11 MR. BOWENS: And then submit the deposition transcript
12 to you?

13 THE COURT: Yes.

14 MR. BOWENS: I don't know how many days it will take to
15 set that up with the attorney general's schedule. Is 30
16 days agreeable?

17 MS. WHITE: I do. I'm trying to think of the date. I
18 have a term in Spartanburg the week of September 30th and a
19 term in Horry County August 25th and 26th, so I don't know
20 if 60 days might be a better option.

21 THE COURT: Okay. We'll leave the record open for 60
22 days for you to submit this person's deposition. The name
23 is Charles Walker. All right.

24 MR. BOWENS: Your Honor, I know you have a copy of the
25 record but there were several parts of the record that we

1 wanted to highlight to the Court for your consideration.
2 One of the witnesses at the trial was Rob Evans, and his
3 testimony begins -- the relevant part of it begins on page
4 228 to 230. And essentially he testified that he was the
5 police officer who went to Mr. McGuirt's tire station with
6 Mrs. Cook and Darryl Cook to resolve this issue of the \$200
7 that was missing from the cash register, and also his
8 testimony is referenced in the videotape that was shown at
9 the trial. And the point of that testimony being
10 highlighted is that -- is to show that Mr. McGuirt knew who
11 Darryl Cook is, that he worked for him and there was this
12 videotape where they were shown resolving this matter --

13 THE COURT: Are you making argument now?

14 MR. BOWENS: No. I was just trying to highlight the
15 testimony for the Court to consider.

16 THE COURT: Now, if you wanted me to see something I
17 will be happy to see it but if you want to make an argument,
18 arguments will be made after all of the testimony.

19 MR. BOWENS: I mark this as Exhibit Number 6 which is
20 testimony that we would like for you to consider.

21 THE COURT: I read what you just handed to me. Any
22 other witnesses or any other evidence?

23 MR. BOWENS: Yes, Your Honor. I hand up to the Court
24 Exhibit Numbers 7 and 10 which is the testimony from Susan
25 McGuirt-Wilson and Bruce Guinyard. If the Court please I

1 would just like to go back and read the Court a couple of
2 key experts from that testimony. From Susan
3 McGuirt-Wilson's, her direct examination begins on page 141
4 on line 13. "I just said dad. Did you get a response?
5 Yes, I did." And then on line 23 he said, "Sue." Page 142,
6 line eight. "He said with a weak voice, I couldn't hardly
7 hear him, Susan, I've been shot." Line 21 he said, "Susan,
8 I've been shot." Page 146, line 15. The question was
9 asked, "Was he able to talk to you?" And the answer was,
10 "Yes." And then on line 23, "His wallet was laying beside
11 him and the picture part had been taken out." Line 25, "Was
12 the picture part there?" On page 147, line one, "Yes. How
13 close to the wallet? Right beside it. How close was the
14 wallet to him? Right beside his leg." Then on line 20 of
15 page 147 the answer was, "He said call 911." And page 149,
16 "And I went back to him and he told me to get the keys and
17 go lock the door." Line 14, "He told me to go lock the
18 front door because that boy had been back in twice and he
19 was scared that he might come back again and shoot me too.
20 I'm going to jump ahead and go ahead and ask you, get this
21 out of the way. At any point did he ever refer to anybody
22 who had done this to him in any other words other than 'that
23 boy' when you were talking to him?" Answer, "It was just
24 that word." On page 150, line nine, "I told him I couldn't
25 find them and he told me to go check in his truck." Let me

1 back up for a moment. On line six, "What did you say to
2 your dad when you told him -- when you couldn't find the
3 keys, what did you say? I told him I couldn't find them and
4 he said go check in his truck." And on line 19, page 150,
5 "And I can't remember that word, he just said that he'd
6 kicked him at one point and he had to play dead because if
7 he thought if he realized that he was still alive that he
8 would shoot him again, and that at some point he placed the
9 gun down beside him and he had thought about trying to grab
10 it but he didn't because he couldn't move his arm enough."
11 Page 150, line three, "He at some point told me that he
12 could not feel his legs anymore so he thought he was
13 paralyzed." On line 18, "Up to that point what were you
14 telling us right now, were you and your dad the only two
15 people in the station? Yes." Page 152, line one, "Well, at
16 some point Chris came in and I told him to watch the front
17 door because dad had said the boy had been back twice and he
18 was scared he was going to come back again, to watch the
19 door for us." Line ten, "Did your dad make any suggestion
20 to you about securing the station?" Answer, "He told me to
21 call Arthur Robertson. Why did he tell you call Arthur?
22 Because Arthur had a spare set of keys and he could come and
23 lock the station." Then on line 21 on page 152, "He asked
24 me to get him a drink of water because he was so thirsty."
25 Page 153 starting on line two, "Then what?" And the answer

1 was, "He was just telling me how he had a plan to get the
2 broom and try to drag himself over to the phone and knock it
3 off the wall and try to call 911 or something, and how he
4 had been praying for so long for God to stop his bleeding so
5 that he could send somebody to find him before he died so he
6 could tell us he loved us before he died. He kept telling
7 me that he was sorry that I had to be the one that found him
8 but that God had sent his angel." Page 154, line one, "Who
9 was the first law enforcement officer that got there?"
10 Answer, "Chief Gratic." Question, "Hughley Gratic? Yes.
11 When you say chief, was he the Ridgeway PD chief at that
12 time? Yes, he was." That's Susan McGuirt's testimony and
13 she was the daughter of Jackie McGuirt, the victim in the
14 case. There was also some testimony that we thought was
15 particularly important from Bruce Guinyard who was one of
16 the Fairfield County sheriff's officers to investigate the
17 case.

18 MS. WHITE: I was just going to make a suggestion, Your
19 Honor, that maybe just page and line instead of reading the
20 testimony since Your Honor would have that before him.

21 MR. BOWENS: This next part is only a couple of lines.
22 On page 182, starting at line 12, "Now, you've testified
23 that Mr. McGuirt said that, 'you know the guy', and that
24 he'd been in and bought a soda. Is that what you said?"
25 Answer, "Yes, sir." Then on page 185. This is Mr. Swerling

1 asking questions about prior hearings and what Mr. Guinyard
2 testified at the prior hearing, I'm repeating that testimony
3 beginning in line 13, "And then your testimony down below at
4 line 16 is he never gave you a name, correct? See line 16."
5 And the answer was, "Yes, sir." And then on line 17, "Okay.
6 Then the question was asked by Mr. Barfield did he give you
7 any information about having originally seen the guy?"
8 Answer, "No, not at this time -- or no, not at that time."
9 And the answer is, "that's correct." So that is from
10 Mr. Guinyard's trial testimony. And I would also on page
11 350 of the trial transcript, we've heard some testimony
12 about the checks being ready earlier. This is the trial
13 judge speaking, page 350, line four, "This will conclude
14 your jury service for this term and for the next three years
15 and I thank you all very much. The clerk has a huge check
16 for each one of you." And that's the testimony from the
17 trial Judge. That that's all that we have other than --
18 THE COURT: He said the same thing to the alternates as
19 well.
20 MR. BOWENS: And that's all we have for today other
21 than Charles Walker, getting his testimony and get that to
22 Your Honor.
23 THE COURT: All right. Thank you. By the State?
24 MS. WHITE: Thank you, Your Honor. We would call Jack
25 Swerling to the stand.

Testimony of Jack Swerling

1 The witness, JACK SWERLING, was first sworn and
2 testified as follows:

3 DIRECT EXAMINATION

4 BY MS. WHITE:

5 Q. If you could state your name for the record.

6 A. Jack Swerling.

7 Q. Mr. Swerling, can you tell me how you became involved
8 in the Darryl Cook case?

9 A. I was trying to think back. But I was -- I know I was
10 appointed to represent Mr. Cook at some point. The State
11 had noticed the death penalty, they reached down to Richland
12 County and asked me if I would do it but I don't remember
13 the sequence of events, if I got appointed first and they
14 did the notice. But I was appointed to represent Mr. Cook.

15 Q. Just from some background information, how long have
16 you been practicing law?

17 A. Since 1973.

18 Q. Has most of that been in criminal law?

19 A. Yes.

20 Q. And in particular with criminal defense and serious
21 charges such as murder, what has your experience been in
22 that?

23 A. Well, I have tried dozens of murder cases as well as
24 dozens of other kind of felony and misdemeanor cases in
25 state and federal court. And I have also handled 50

Testimony of Jack Swerling

1 appeals, somewhere in that neighborhood.

2 Q. And I know you made mention of a death penalty notice.

3 Are you qualified and death penalty certified?

4 A. According to those -- apparently I was on the list at
5 that time. There was a list, I'm not sure if that list
6 still exists, but yes, I was qualified. I had tried a
7 number of death penalty cases.

8 Q. And in your -- I guess once you're appointed what is
9 your standard practice for starting off a case? Do you meet
10 with a client first? Do you go through discovery?

11 A. Well, I met -- obviously met with Mr. Cook. He was in
12 jail, I met with him on a number of occasions. I met with
13 his family on a number of occasions. I met with Mister --
14 well, the solicitor I think at one time, Christine Sloan,
15 was the one handling the case and it might have reached back
16 when John Justice was still alive. But I would have been in
17 touch with the solicitor's office and would have gotten the
18 discovery. And then I had an investigator. Of course, I
19 was -- this was an indigent defense case so I was authorized
20 to go ahead and get investigators and I had Carlisle McNair
21 on part of the case, I used Tommy Davis, who was a former
22 FBI agent, did some work on that video. Carl McNair
23 predominantly was the one who interviewed the witnesses.
24 And what we normally do is I used these to-do lists and
25 checklists and cast of characters of kind of the call them,

Testimony of Jack Swerling

1 that's what I denoted over the years. But basically
2 everybody from the State and everybody from the defense, all
3 of the leads that we get and my practice is to tell my
4 investigator to talk to all of them he can except for the
5 victims in this case. I would not have -- I do not believe
6 I talked to the McGuirts.

7 Q. In particular Mr. Gratic that was here earlier, Chief
8 Gratic, do you recall if your investigator had a chance to
9 speak to him?

10 A. Well, I spoke with him. And I -- the issue came up --
11 obviously I spoke with him, and as Mr. Cook said, I spoke
12 with him prior to the third trial. There were three trials
13 in this case. The first time was a mistrial, I can't
14 remember why the second time was a mistrial because there
15 had been some notes apparently that Mr. McGuirt had made
16 turned over to law enforcement that I had not received and
17 Judge Manning went ahead and granted a mistrial to allow me
18 to have the opportunity to review those notes before I cross
19 examined Ms. McGuirt. And then the third time in front of
20 Judge Goode.

21 Q. And so did you have a chance to speak with him prior to
22 the first one?

23 A. Yes, I did. I spoke with him on a couple of occasions
24 in May of 2006, and I can just go to my notes.

25 Q. And just for a point of reference this trial was held

Testimony of Jack Swerling

1 on --

2 A. October of '07.

3 Q. October of '07?

4 A. Right. Anyway, I did have the incident reports, the
5 ones that have been presented in court. He had also spoke
6 with Christine Sloan who was the assistant solicitor, and
7 Doug Barfield had sent me the notes that she had made about
8 the interview and judge -- I will go to the relevant parts.
9 He again said that he could not -- that the victim did not
10 say anything, he reiterated what was in the police report at
11 that point. He said he was not there when the victim said
12 who did it, and then he told me he had gotten fired by the
13 mayor for political reasons. On May 12th of '06 he told me
14 he was real close to the McGuirts. He had gotten a
15 report -- he had gotten Sloan's notes and also Mr.
16 Guinyard's notes from Barfield, Mr. Barfield -- I'm just
17 reading what -- he did not hear any gunshots. The truck was
18 there at 5:50, there was another officer there -- or he was
19 the first officer there. The daughter said the victim said
20 the black male hanging around the store all day, workers
21 know the boy. Guinyard came. Witness says that the victim
22 knew the fellow but could not remember his name and he had a
23 soda that day. That's what Mr. Gratic told me. He told me
24 he had made a file. He admits looking at notes from
25 Christine Sloan. He knows the victim, he said a black male

Testimony of Jack Swerling

1 was there all day but no specifics. The victim did not say
2 he was dying, because there was an issue about a dying
3 declaration at some point. And I also made some other notes
4 again on May 12th. I think what we did -- the notes
5 indicate that there was a three-way phone conversation with
6 Chief Gratic and Doug Barfield. He was the chief for two
7 years and six months, he'd been working for several years
8 and had worked for the sheriff's department. He did not
9 know Mr. Cook but he knew his people. He and Mr. McGuirt
10 were real close, like an uncle, saw him everyday. And Doug
11 sent him a report and notes of interview by Sloan with
12 Gratic and Guinyard. As I will explain later, I think that
13 became a problem because he was mixing his notes along with
14 the notes from Mr. Guinyard who was also on the scene. He
15 said he'd gotten a call, he could see the victim's place
16 from his office. He also talked about Chris Hall, and Chris
17 Hall became a crucial witness in the case because Chris Hall
18 had identified Darryl Cook as running from the store with a
19 VCR under his arm, so he was an ID witness, a law
20 enforcement officer. He said Hill left about 6:00. He got
21 the call a few minutes later. The call was from a lady that
22 the victim had been shot. He remembers not seeing the car,
23 which usually -- and usually can from where he sits. He
24 knows the truck was there at 5:50. When he arrives victim
25 was on the floor, he was the first officer on the scene.

Testimony of Jack Swerling

1 Daughter maybe was there with the fiance'. And this was
2 sort of started up doing some -- witness asked daughter if
3 he had said anything and she said he said a black male.
4 Witness who did it, the victim -- this is what he was
5 telling me he said now, the witness, "Who did it? Victim,
6 "The black fellow did it, young fellow hanging around store
7 all day, the workers know the boy, started gasping." So
8 this is what he said Mr. McGuirt told him on that occasion
9 on May 12th of 2006. Then Guinyard arrived, told Guinyard
10 to stay with him, he called Fairfield. Some workers had
11 said that Cook had been there all day, but the time that the
12 defendant was there was not specific. He worked on his
13 report with Mr. Guinyard. We read him the report -- I read
14 him the report on the phone. He again reiterated, "The
15 witnesses said the victim said he knew the fellow but could
16 not remember his name. He was hanging around, had a soda.
17 The victim said he can't feel his legs." I did not quote
18 JBS, "Where are you getting this from?" Witness, "I made a
19 file. I make notes as I recall things, notes and files are
20 gone. Current chief says he gave them to Mr. Boney.
21 Witness, "I looked at Sloan's notes regarding the
22 interviews. Witness -- and witness being him, witness,
23 "Victim said something about black boy there all day but no
24 specifics. Witness could see he was shot, could not move
25 legs, but he did not say he was dying." So needles to say

Testimony of Jack Swerling

1 Mr. Gratic deeply concerned me. He was pretty hostile about
2 getting called as a witness in the case. He didn't even,
3 really even -- if I recall did not really want to be
4 interviewed, but he did. I discussed this with Darryl, that
5 what I thought was happening was that Chief Gratic was
6 mixing his -- what he had said first in the police report
7 with what he'd later seen from what Ms. Sloan had written
8 down about what he said, and also Mr. Guinyard's statements
9 because he'd been sent all that, and he was again
10 contradicting himself about what Mr. McGuirt said or did not
11 say. And I spoke with Darryl and I -- on May 15th of 2006.
12 He signed an acknowledgment and the acknowledgment says
13 this, "I reviewed Chief Gratic's situation with the
14 defendant as well as Dr. Bowman in Atlanta," the was another
15 potential witness. The defendant agrees we did not need to
16 call either in light of Gratic's version of events, and we
17 don't need the detailed testimony from the doctor. I,
18 Darryl Cook, after having Mr. Swerling explain the situation
19 with Chief Gratic and Dr. Bowman agree they should not be
20 called as witnesses, and we can stipulate to Dr. Bowman's
21 report." So not only did I interview Mr. Gratic, which he
22 said I did not, I interviewed him with the solicitor on the
23 phone and I was concerned about him being a witness in the
24 case because he was all over the place. And I explained
25 that to Darryl and Darryl agreed with me that we should not

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1 call him.

2 Q. And that was May of 2006. Was there any indication
3 prior to this trial, October of '07, that anything had
4 changed with Mr. Gratic or what you felt his testimony might
5 be?

6 A. As far as I was concerned he was no longer going to be
7 a witness in the case because he had given inconsistent
8 reports, and he was actually not worth anything as a witness
9 anymore for us.

10 Q. And just to finalize that --

11 A. Let me just say this. For me to call him, what would
12 have happened was if I would have called him I would be
13 impeaching him about different reports that he had made, and
14 his position at that time was that the later things he had
15 said were the truth about what the victim told him. And I
16 just thought that that was just not a good option for me,
17 particularly in light of the fact that other people were
18 saying that the victim, Mr. McGuirt, knew the boy but never
19 mentioned his name. So there was no reason as far as I was
20 concerned to go ahead and put Mr. Gratic up there and just
21 confuse the issue any further, or add to the State's case.

22 Q. And as you indicated, no one ever identified Darryl
23 Cook by name as the person.

24 A. No.

25 Q. And, in fact, the testimony continued to be that he

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1 knew him, could not remember his name, referenced that boy
2 that was in here as someone who bought a soda.

3 A. Yeah. There was, again, this incident several years
4 before when Mr. Cook was a juvenile as Ms. Cook testified
5 to, we objected strenuously to that even coming in, but it
6 was several years before. And there was some mention, some
7 witnesses testified about him being in the store that day to
8 get a soda, the day of the incident, and as Ms. Cook said
9 that there were -- we talked to some people trying to get
10 them to find out whether or not he actually worked there.
11 Most people said that -- in fact, the State called witnesses
12 that Darryl Cook never worked there. So that was a point in
13 controversy that at least two of the guys, I think, had
14 worked at the store said that Mr. Cook had not worked there.
15 Q. And a brief kind of review of the evidence. Obviously
16 no actual name identification, but was there evidence to
17 support the State's accusations of Mr. Cook in this
18 situation, direct maybe evidence? There weren't any
19 fingerprints.

20 A. No. There were no fingerprints, there was no DNA.
21 Strongest testimony was from Chris Hill who was a police
22 officer or a deputy up in that area, who said he -- and what
23 happened was that Chris Hill got together with Roy Pascal
24 from SLED, they did a composite of who he described as the
25 person leaving the store with the VCR, and the VCR was

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1 missing from the store and the tape that would have been
2 made was missing from the store. And based on that Keith
3 Lewis, who was the chief down in Fairfield County, thought
4 he recognized that person as being Darryl Cook. He went
5 ahead and ordered a picture lineup to be shown to Chris Hill
6 and Chris Hill picked Darryl Cook out of the lineup. He did
7 not know Darryl Cook. Then there was testimony from two --
8 one of them at least was his cousin and maybe another friend
9 that they had spent that night together at a motel, and that
10 Darryl had admitted doing the robbery. His girlfriend at
11 that time and as well as these couple guys that he stayed
12 with at the motel and had been to a club said that Darryl
13 was flashing a lot of money that night, and I believe there
14 was several thousands dollars taken from the store. Darryl
15 called -- I can't remember which person it was at this time,
16 but asked him to come pick him up on Highway 34 somewhere
17 around the time of the incident. And Darryl was walking
18 down the highway which is in proximity to the store -- I
19 mean, not right there, there's apparently a cut that they
20 call they talked about, but somewhere he went through the
21 cut and went down Highway 34, they picked Darryl up and took
22 Darryl either home -- yeah. I think they said they took
23 Darryl home. Two guys testified about picking Darryl up on
24 Highway 34.

25 Q. And, in fact, wasn't the truck of the victim found

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1 crashed in that kind of vicinity area off Highway 34?

2 A. Yeah. I think -- if I'm not -- I think -- the truck
3 was found, the VCR was found a few feet away from it. I
4 can't remember if the truck was found in the cut or some
5 other location near 34.

6 Q. But it was all circumstantial but substantial, they had
7 a good number of things to present.

8 A. It was a circumstantial evidence case, that's correct.

9 Q. And you objected strenuously to testimony coming in
10 about the prior incident, the videotape, any of the
11 statements made by the victim?

12 A. That's correct.

13 Q. And leading up until the jury deliberation you even
14 objected to and asked for a mistrial after the jury charge.

15 A. Yeah. The judge asked if there were any exceptions to
16 the charge and I think the record will reflect that I took
17 exception to some comment about the truthfulness of the
18 statement. And initially I moved for a mistrial because I
19 didn't think it was curable, but the judge overruled that
20 and he actually called -- as I recall he called the jury
21 back in and instructed them and basically instructed them
22 what I asked him to instruct when he asked me about a
23 curative charge. So that's my recollection. I mean, the
24 record would actually speak for itself on that. But the
25 mistrial was made prior to the jury -- before the jury was

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1 authorized to go deliberate because we had not yet gotten
2 through the evidence to make sure Mr. Barfield and I checked
3 things off. So I don't think the jury was actually told to
4 go ahead and deliberate at that time.

5 Q. Do you recall the jury coming back with questions?

6 A. There were two questions. One was about a timeline,
7 they wanted to know if they could get the timeline. And
8 there was also a question about whether or not Mr. McGuirt
9 had actually identified Darryl Cook, and the judge told the
10 jury that they could not add anything to the record at that
11 point, or nothing could be added to the record and they had
12 to rely on what their recollection was of the testimony and
13 the evidence in the case, and then they were -- and that
14 question was answered and they went back. There was no
15 indication at that point that they were deadlocked.

16 Q. And, in fact, I think the record indicates that was
17 prior to -- that was around 2:00 p.m. or so prior to the
18 3:10 time that they actually went back to begin
19 deliberating.

20 A. That's correct.

21 Q. Now, the question has been raised about whether or not
22 the jury came back stating that they were deadlocked. Do
23 you recall a situation where the jury came back at all?

24 A. Well, let me be honest, I cannot independently recall
25 the jury coming back in and saying they were deadlocked.

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1 But I went through my notes, my trial notes on the last page
2 of the notes, I will tell you what's there. I wrote down at
3 5:30 there was an Allen charge, and apparently -- I don't
4 know where I got it from, if this was announced in court or
5 not, but the vote was five to seven. And I discussed -- and
6 my note indicates here that I discussed with Darryl what an
7 Allen charge was. And I made a note -- I'll read it
8 verbatim. "5:30, Allen charge. Defendant and I agree we
9 need to push for a verdict, the case won't get any better
10 than it is right now." So that's what's there. But do I
11 have an independent recollection of that? I do not.

12 Q. Okay. And the testimony has been that they came back
13 and were sent back twice after saying they were deadlocked.
14 Do you have any indication, recollection or any indication
15 in your notes that they actually came back and were sent
16 back a second time?

17 A. There is nothing in my notes to indicate that they came
18 back after 5:30, that one time when there was an Allen
19 charge. And, you know, sometimes you just -- defense wants
20 to push for a verdict as well, especially if it's split and
21 you don't think your case is going to get any better, so
22 there have been occasions when I encouraged an Allen charge
23 and sometimes it's worked to my advantage. But I did
24 discuss it with Mr. Cook and he agreed with my strategy to
25 go ahead and try to get a verdict. Now, that being said, I

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1 do not recall the jury coming back a second time and saying
2 they were deadlocked. But I can say this, that had they
3 come back a second time and said they were deadlocked I --
4 based upon my experience I would have objected to the jury
5 going back out again unless they said that further
6 deliberations could result -- possibly result in a verdict.
7 I mean, at that point I know what the rule is and I would
8 have objected to them going out a third time. I will also
9 say this, I've known Judge Goode a long time and I have
10 tried a number of cases in front of Judge Goode, had he made
11 the comments that the witnesses said about -- first of all,
12 there's no judge that I know of that would say that there's
13 been two mistrials in this case, that's just not going to
14 happen -- but Judge Goode, had he made those comments I
15 would have objected to those comments as being
16 inappropriate. And obviously the record -- there's
17 something wrong here with the record, it's not complete
18 because I have an indication that there was an Allen charge
19 given at 5:30, but those remarks would have been objected to
20 and a mistrial would have been asked had those comments been
21 made.

22 Q. And did you ever have any other indication following
23 the trial from Mr. Cook or his family that they believed
24 that there had been a second situation of deadlock or any
25 concern expressed to you about the situation that occurred

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1 during the jury deliberations?

2 A. No. And actually the first time I ever heard that was
3 when the amended petition, you sent it to me maybe what, a
4 minute ago or ten days ago or something like that, that was
5 the first time I ever heard that. As a matter of fact I
6 didn't even know that the transcript seems to be incomplete
7 until I looked at it in the last couple of days because I
8 didn't do the appeal.

9 Q. And based on your prior history, have you ever had any
10 experience where you've had a deadlocked jury?

11 A. Yeah, several times.

12 Q. And you've asked for an Allen charge?

13 A. Sometimes I have objected to the Allen charge and there
14 have been some times where I didn't object to the Allen
15 charge. It depends upon -- it's a gut reaction sometimes on
16 your experience, whether or not you think they've
17 deliberated long enough, whether or not the case is going to
18 get any better if you've got a mistrial, sometimes they just
19 don't. So I have done it various ways regarding the Allen
20 charge. But I do know what an appropriate Allen charge is
21 and if it had exceeded -- which I can't tell you because
22 there is no record of -- if it had exceeded the proper
23 boundaries of the Allen charge the judge would have heard
24 from me.

25 Q. And again, based on the record with the objections made

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1 if there had been a questionable comment made you would have
2 objected.

3 A. Yes, I would have.

4 MS. WHITE: Thank you. That's all I have at this time,
5 Your Honor.

6 CROSS EXAMINATION

7 BY MR. BOWENS:

8 Q. Mr. Swerling, you would agree that in a criminal case
9 whether or not the victim identified the person who in this
10 case shot him would be important and relevant evidence.

11 A. Of course.

12 Q. And in particular it's even more relevant, I guess, if
13 the victim and perpetrator actually knew one another.

14 A. That would be important too.

15 Q. Now, you testified a good bit on your direct about your
16 reasons for not calling Chief Gratic as a witness, and I
17 think you mentioned that he had some inconsistent statements
18 or reports or something.

19 A. Right. He was what I would consider a dangerous
20 witness to call, and I discussed that with Mr. Cook and he
21 agreed.

22 Q. We introduced Exhibits 2, 3, 4 and 5 which are the
23 reports that Mr. Gratic handwrote and one that was
24 typewritten, two of which he signed. Those reports were not
25 inconsistent amongst themselves, were they?

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1 A. No. The reports, I received those in discovery. It
2 was not until we actually had interviews with him that he
3 started talking about what Mr. Guinyard said and things that
4 were in Mr. Guinyard's notes and basically changed his
5 position about what the victim had said, so that was the
6 problem.

7 Q. You were in court this morning when I examined Mr.
8 Gratic this morning.

9 A. Yes.

10 Q. And I asked him, "These are your reports. Are they
11 accurate, you wrote them and signed them?"

12 A. Right.

13 Q. And they don't identify Mr. Cook as the person who did
14 this. You could have called him at trial and done just that
15 very same or something similar to what I did this morning.

16 A. Well, I'm not going to call a witness that I think is
17 going to hurt my case.

18 Q. But you could have asked him the same questions I did
19 or something similar to that to verify that --

20 A. Except that at that point, sir, he was taking the
21 position, and I think I read it to you, that -- let me just
22 be exact -- witness, "Victim, knows victim. Said something
23 about the black boy there all day but no specifics." So
24 that's basically -- that's a little different than what he
25 had said before and where he said he didn't say anything

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- 1 about the person. So that would concern me. Plus I
2 didn't -- I thought he was hostile, and other people had
3 testified that -- nobody had actually ever testified that
4 Darryl Cook did it, it was just an acknowledgment that
5 Mr. McGuirt knew the person and he was a black boy is what
6 everybody referred to.
- 7 Q. Mr. Gratic at trial -- and he testified to this morning
8 that he would have said this -- that he was the first one
9 there, correct?
- 10 A. Yeah. He also said he never talked to me.
- 11 Q. Well, Mr. Gratic was the first one to arrive on the
12 scene first of all.
- 13 A. That's correct.
- 14 Q. And he spoke with Mr. McGuirt. And during that
15 conversation the first person to come -- the victim did not
16 identify Darryl Cook as the one who shot him.
- 17 A. That's what he says in his report but that's not what
18 he was saying later.
- 19 Q. I understand. But you could have examined him -- or
20 cross examined him or examined him on the report.
- 21 A. I've tried many, many cases over my career. I am not
22 going to put up a witness who is contradicting himself --
23 I'm not going to put him up, let the State put him up -- who
24 is contradicting himself and part of what he's saying would
25 hurt my client. Plus his attitude, he was hostile, and I

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1 don't see that I would talk to him or call him as a witness.
2 And my notes reflect I discussed it with Darryl, I didn't
3 make that decision myself, I discussed it with him and we
4 decided it was not in his interest to call Chief Gratic at
5 that time.

6 Q. Well, let me ask you this, one final question on this
7 point. You agree that Exhibits 2, 3, 4 and 5, those reports
8 that Chief Gratic filled out, it was consistent throughout
9 those that the subject was unknown and unidentified.

10 A. That's what it says.

11 Q. That point stayed consistent.

12 A. That's what it says, right.

13 Q. And that would have answered the jury's question that
14 they came back with, did Mr. McGuirt ever identify Darryl
15 Cook as the one who shot him.

16 A. But then we would have gotten into what Mr. Gratic said
17 on the phone conversation with me and Mr. Barfield, which
18 was not helpful.

19 Q. But you agree that would have answered that question.

20 A. Well, I didn't know the jury's -- that question the
21 jury was going to ask a couple of days later.

22 Q. Right. I understand you didn't know it at the time,
23 that they were going to ask that during the trial, but that
24 would have answered the question.

25 A. Well, I don't know if it would have or not because

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1 nobody said that Mr. McGuirt identified Darryl Cook. That
2 was the question, "Did Mr. McGuirt ever identify Darryl
3 Cook?" And the answer to that question is no, no one did.

4 Q. Let me ask you this --

5 A. No one testified he said this.

6 Q. -- this incident occurred November 23rd of 2001, is
7 that right -- November 23rd I'm sure is the right date.

8 A. Uh-huh.

9 Q. And isn't it true that Darryl Cook -- or Mr. McGuirt
10 did not die until almost a year later. He was --

11 A. Eleven months.

12 Q. Eleven months later he died. During that time there
13 was never any effort by anyone to see if Mr. McGuirt could
14 identify Darryl Cook either in a lineup, a photo lineup or
15 anything like that to get him to try to identify --

16 A. Well, he made statements that came in at trial, I
17 think, Keith Lewis testified about.

18 Q. I mean Mr. McGuirt was never given a lineup and able to
19 identify --

20 A. As far as I know he was never shown a lineup. Do you
21 think I should have shown the lineup?

22 Q. I'm just saying that was never done.

23 A. No. And it wouldn't have been done by me.

24 Q. Well, I'm not suggesting that necessarily that you
25 should have, but the police did not do that.

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1 A. No, they did not as far as I know.

2 Q. All right. Now, I want to talk to you on something
3 that I think we may be agreeing upon and that's this
4 transcript. You had it in your notes that there was a 5:30
5 Allen charge.

6 A. Yeah.

7 Q. And that's not in the transcript.

8 A. No. That's true, it's not.

9 Q. So we agree there's some part of the transcript that's
10 missing.

11 A. It appears based upon my note. Now, my honest answer
12 is I have no recollection of the jury coming back and saying
13 they were deadlocked independent of my note so I have to
14 just rely on my note. That's the only note that I have
15 about deliberations, was at 5:30 they were deadlocked and
16 there was a discussion about the Allen charge, and as I
17 always do I discuss that with my client and I get my
18 client's concurrence about issues like that.

19 Q. So we would move to the rule of past recollection
20 recorded for your note, you don't have your current memory
21 but you have a recorded recollection from your notes.

22 A. Yeah, that's what my notes say. I'm not hiding the
23 notes.

24 Q. But you don't have any recollection presently as to
25 comments the judge did make or didn't make?

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1 A. Well, if the judge had made some of the comments that
2 were testified to I would have been jumping up on my feet to
3 object to it, particularly for example that there's been two
4 mistrials before and I'm not going to allow another
5 mistrial, that just never was said, never would have been
6 said by any judge. And if it had been said to let the jury
7 know there had been two mistrials before I would have
8 objected to that.

9 Q. Some of the testimony today involved what you just said
10 and also that their checks were cut and they were going to
11 be there until they got a verdict, they weren't going home
12 until they got a verdict. Assuming --

13 A. That's just not true.

14 Q. Well, assuming those statements were made, just assume
15 for this question that the judge did say that, that would
16 have been an improper instruction to the jury.

17 A. I would have objected to that.

18 Q. It would have been improper.

19 A. Yes. I would have objected to that, yes, absolutely.
20 Telling the jury their checks are ready and they're not
21 going home until they get a verdict would be something that
22 I could have or would have objected to.

23 Q. You testified that you had talked with Darryl Cook
24 about not calling, was it Dr. Bowman?

25 A. Yes.

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1 Q. And Chief Gratic and he agreed and he signed a -- did
2 he sign a form to that affect?

3 A. He just signed it, we handwrote it, and I do that
4 because of situations just like this. Sometimes a client
5 and the defense lawyer have a different recollection years
6 later about what was said and by not calling two witnesses I
7 thought it would be best to have Mr. Cook acknowledge that
8 we discussed that and we explored it and that he agreed with
9 me, just like I wrote down a note about the Allen charge.

10 Q. Did it have Dr. Bowman and Mr. Gratic's name on that?

11 A. Yes. You can see the note. I think the yellow
12 highlight was on there when I found that.

13 Q. Now, the date on this 5/11/06; is that right?

14 A. That's correct.

15 Q. And this is before the first trial or before the third
16 trial?

17 A. It was before -- the first trial was in May of '06, it
18 was before that. It was the end of May, correct.

19 Q. So this was before the first trial?

20 A. Yes.

21 MR. BOWENS: I would like to get a copy of this made
22 and have it introduced into the record.

23 THE WITNESS: I may have another copy of it.

24 MS. WHITE: No objection, Your Honor.

25 THE COURT: Introduced without objection.

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1 (The note was received as Plaintiff's 12.)

2 MR. BOWENS: I think that's all of the questions I have
3 for you at this time. Thank you.

4 THE COURT: Anything further?

5 MS. WHITE: Just briefly, Your Honor.

6 REDIRECT EXAMINATION

7 BY MS. WHITE:

8 Q. Mr. Swerling, to follow-up on -- you said you had no
9 independent recollection of what occurred with an Allen
10 charge. But based on your prior experience and your
11 knowledge and experience representing everything from
12 magistrate level to felony and death penalty, the indication
13 from other witnesses are things -- are they things that you
14 feel are inappropriate and would have been objectionable to?

15 A. I'm sorry, can you --

16 Q. And that was kind of a long drawn out question, I'll
17 strike that. I just want to clarify, if the judge would
18 have made a comment about there being two prior mistrials,
19 you testified that you would have objected to that.

20 A. Well sure, absolutely.

21 Q. If the judge had made a comment about your check is
22 cut, you've got to get a verdict, though, before you get it,
23 would you have objected to that?

24 A. Absolutely.

25 Q. If the comment had been made, "You're going to stay all

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1 night until you get a verdict," would you have objected to
2 that?

3 A. Absolutely.

4 Q. And if they would have come back a second time
5 deadlocked and been informed without their consent that they
6 had to go back and come up with a verdict, would you have
7 objected?

8 A. At that point I would have. Because there's a
9 different criteria established to sending them out after the
10 second time and we would have just had to take a mistrial
11 and do it a fourth time if that's what they were going to
12 do. But there's certain things that, you know -- there's
13 certain things I know I would do just by instinct and by
14 experience. But I can tell you that those remarks were just
15 never made, they could not have been made without an
16 objection.

17 MS. WHITE: I think that's all I have, Your Honor.

18 THE COURT: You may step down. Next witness?

19 MS. WHITE: Your Honor, the State has no other
20 witnesses.

21 THE COURT: Anything further by the applicant?

22 MR. BOWENS: Other than the Charles Walker issue we
23 have already talked about, no, sir.

24 THE COURT: All right. Any final statements?

25 MR. BOWENS: Yes, Your Honor. Mr. McGuirt certainly

1 knew who Mr. Cook was, we've heard testimony from three
2 witnesses that Mr. Cook worked for him. And this whole
3 issue with the prior alleged theft, that's the kind of
4 incident that sticks in your mind and you're going to know
5 who the person was. They knew each other. I think it's
6 telling that in the entire almost year, 11 months that
7 transpired in the shooting until Mr. McGuirt died that the
8 police made no effort to show him a lineup or a photo lineup
9 to have him positively identify that Darryl Cook is the one
10 that shot him. The first thing that you're going to tell
11 somebody is who shot you if you know, and it's undisputed
12 that that never happened. Chief Gratic had four or five
13 police reports, Exhibits 2 through 5, which were consistent
14 throughout that Mr. McGuirt never identified who the subject
15 was that shot him, unknown subject, unidentified and not
16 located. He was the chief of police which gives him a good
17 deal of credibility as a witness. The jury, we know, had
18 that very question, it was very important to them, "Did
19 Mr. McGuirt ever identify Darryl Cook as the person who shot
20 him?" And the answer was no, and that could have been
21 provided by Chief Gratic and it would have been -- some
22 other witnesses were other officers who were investigating
23 it, but here is the chief of police who would have carried
24 significant weight and credibility with the jury, and if
25 they would have heard that from him then they would have

1 known the answer, no, Mr. McGuirt never identified Darryl
2 Cook as the person who shot him. The failure of the trial
3 counsel to call him as a witness and just go through the
4 same examination I did this morning was ineffective and we
5 would -- I believe would have resulted in a different result
6 at trial, either another hung jury or a not guilty verdict.
7 We've also heard today every witness, including Mr.
8 Swerling, this transcript is not complete, there's a section
9 missing between 3:10 and 8:10, I think that's now
10 undisputed. Mr. Swerling does not have a present
11 recollection of what was said by the judge or the jury other
12 than that it was five to seven was the vote. Mr. Walker,
13 who will have his depositions taken, I have an affidavit
14 from him, he's going to testify similar to what we've heard
15 today -- the judge gave a coercive Allen charge -- gave a
16 coercive charge to the jury and violated state law having
17 sent them back out a second time without having a third
18 consent to do so. There was -- you have to consider since
19 the record is incomplete what did transpire, and the only
20 positive evidence that you have is Mr. Cook, his father,
21 grandmother and mother and then eventually what Charles
22 Walker will testify to, that these were the comments made.
23 Mr. Swerling disputes that but he has no present
24 recollection of what was said.

25 THE COURT: But he has an absolute recollection that no

1 judge would ever tell a jury that. Whether there might be
2 some conversation outside the presence of the jury, maybe
3 yes, maybe no, maybe the judge may have been discussing
4 matters before bringing a jury out. That allegation is so
5 extreme it's beyond the pale of what's even imaginable in
6 any court in this country.

7 MR. BOWENS: I understand your comments there, Your
8 Honor, but people say a lot of things sometimes and the
9 books are replete with examples where people say things that
10 they shouldn't say. But there's three witnesses --

11 THE COURT: That's one thing that would be so extreme
12 that it would be -- that would make NBC evening news, 60
13 minutes and all. But go ahead.

14 MR. BOWENS: Anyhow, I think it's clear that the record
15 is not complete and that should raise some concerns in the
16 Court's mind as to why the record is not --

17 THE COURT: Well, you don't get a PCR granted because
18 of a problem with the record. Isn't that some other
19 appellate issue you have to address?

20 MR. BOWENS: Well, apparently nobody at the time back
21 when this was going on caught that it was missing.

22 THE COURT: How is that a PCR issue?

23 MR. BOWENS: Well, it goes back to what was said, what
24 was said to the jury, what the judge said and what happened,
25 it has not been recorded. And if what our witnesses have

1 said -- they have gotten a good amount of evidence of what
2 was said from their testimony and based on the issue of Mr.
3 Gratic and this issue with the deadlocked jury, I think a
4 new trial would be warranted for Mr. Cook so we can get an
5 accurate record and have the proper witnesses called. I
6 think those two issues show that it was not catching and the
7 fact that the record was not complete and Mr. Swerling or
8 the appellate counsel both should have brought that up and
9 caught that. So I think a new trial would be in order to
10 remedy this problem with not calling Mr. Gratic and the
11 issue with a hung jury and the incomplete record.

12 THE COURT: Do you have any authority where any court
13 in this state has ever granted a PCR based on a problem with
14 the record?

15 MR. BOWENS: No, Your Honor. I can send you a memo on
16 that and do some research.

17 THE COURT: Well, please if you would, sir.

18 MR. BOWENS: We'll submit that with the testimony and
19 the deposition of Mr. Walker. But PCR has been granted
20 based on ineffective assistance of counsel --

21 THE COURT: Oh absolutely, that's what the hearing is
22 about, that's done consistently, PCR hearings, that's why I
23 have been here all week. But the question I pose to you is
24 whether it has ever been granted on the basis of the record
25 that's supposed to be the basis of the Court's review,

1 whether a PCR has ever been granted on that basis because
2 the -- all appellate courts or any court reviewing something
3 that has happened in some earlier time, I mean, in this
4 instance years ago now, would have to be able to rely on the
5 record.

6 MR. BOWENS: I will do some research and prepare a memo
7 and submit that with our deposition transcript from Mr.
8 Walker. But I think, in conclusion, Mr. Swerling could be
9 found ineffective for not having called Mr. Gratic as I've
10 outlined and for not having objected to the deadlocked jury
11 issue, and not having caught the issue with the transcript,
12 that could have been caught and addressed years ago instead
13 of having been caught and addressed now. So I would leave
14 open Mr. Walker's testimony, and that's all that we have
15 from the plaintiff, Your Honor.

16 THE COURT: All right. Yes, ma'am?

17 MS. WHITE: Thank you, Your Honor. The State would
18 obviously note that it's the applicant's burden of proof in
19 this case to prove that not only did counsel perform
20 deficiently but that the deficient conduct lead to some kind
21 of prejudice in this situation. As to the first issue with
22 Chief Gratic, I think it's clear counsel's testimony was
23 credible. He interviewed him, he had substantial notes as
24 to the interview, the contradictory statements that he had
25 received and the hostility he felt, that was valid trial

1 strategy to discuss that with his client, to choose not to
2 bring him in as a witness. Although applicant has argued
3 that he could have asked him about these consistent incident
4 reports, they failed to acknowledge that had he been on
5 cross examination it's very likely that the contradictory
6 statements would have come out at that point, and I think
7 that in this situation there's clearly no deficient conduct
8 and therefore no prejudice. In regards to the deadlocked
9 jury, I think based on the almost 40 years of experience Mr.
10 Swerling has, his prior experience and his standard
11 procedure, his testimony again is credible. He does have a
12 note at 5:30 in his trial notes that there was an Allen
13 charge, that was approximately two hours after the jury had
14 gone back after the note. There's no other notes in his
15 trial notes about another jury deadlock issue or the jury
16 coming back in with any other questions, and then the
17 verdict was read two and a half hours later almost, so I
18 think at this point it's mere speculation to guess at what
19 may or may not be missing from the record. The first
20 mention of this and the recollection, this has been for six
21 years and I think that this situation, there is speculation
22 as to what might have been in the record, but I think the
23 testimony is credible and clear that had a second deadlock
24 come in that it would have been objected to, a motion for
25 mistrial, had the judge made any improper comments, in

1 particular to the ones that were referenced here today,
2 based on the record and based on the statements of counsel
3 today it's clear that he would have objected to those as
4 well. So we would ask that you deny the application.

5 THE COURT: It's rather elementary that for any trial
6 counsel where a jury comes back twice saying that they're
7 deadlocked, the Court cannot send them back to continue
8 deliberating. They can only continue to deliberate if
9 that's what they want to do and it cannot be done by the
10 Court, and the appellate courts have addressed that issue
11 pretty clearly, so anyone in the courtroom would probably be
12 jumping and screaming if that were to have occurred and that
13 would have certainly been a basis for an appeal, wouldn't
14 you think, Counselor?

15 MR. BOWENS: Well, it certainly would be a basis for
16 appeal and I don't know why the appellate counsel didn't do
17 that. This part of the record is missing. Mr. Swerling's
18 note that at 5:30 an Allen charge was given, that's not in
19 the record either, and we all agree that the record is
20 incomplete, something is missing, a section of that record
21 is missing. Maybe that explains why it didn't get appealed.

22 THE COURT: Well, if the jury came out and the judge
23 gave an Allen charge and the Allen charge -- and all of that
24 is not in the record, it certainly should be in the record,
25 but counsel would have no basis to object to that, he has a

1 note of it. But if the jury came back a second time and
2 said we're still deadlocked and then the judge went into
3 everything that the witnesses have testified to, that
4 certainly would be extremely troubling. You have additional
5 information on another deposition that you plan on taking on
6 that issue as well. I'm just raising questions, I'm not
7 rendering any judgment in it since the record will still be
8 open. Anything else?

9 MR. BOWENS: Not from the plaintiff.

10 MS. WHITE: Your Honor, I would just note that if the
11 plaintiff is going to submit a memo on whether or not PCR is
12 going to be granted, we would like to have an opportunity to
13 do so on its behalf.

14 THE COURT: Serve the State. And you're going to do
15 that within how many days did you say?

16 MR. BOWENS: We'll do it within 60 days of the
17 deposition.

18 THE COURT: Well, you'll need to do that within 60 days
19 if the record is going to be open for 60 days and serve it
20 on the State in time enough so that they can respond.

21 MR. BOWENS: Yes, sir.

22 THE COURT: Well then, the matter will be taken under
23 advisement.

24 (End of the hearing.)

25

1 I, the undersigned, Michael C. Watkins, Official Court
2 Reporter for the Sixth Judicial Circuit of the State of South
3 Carolina, do hereby certify that the foregoing is a true,
4 accurate and complete transcript of the proceedings had and
5 evidence introduced in the trial of the captioned case
6 relative to appeal, in Court of Common Pleas for Lancaster
7 County, South Carolina, on the 7th day of August, 2013.

8 I do further certify that I am neither of kin, counsel,
9 nor interest to any party hereto.

10

11

July 28, 2014

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Michael C. Watkins
Court Reporter

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RIDGEWAY POLICE DEPARTMENT INCIDENT REPORT

AGENCY I.D.
SCO 0200200

1191
CASE NUMBER

0120030

NCR
PID. ENID.

EVENT	INCIDENT TYPE					COMPLETED		FORCED ENTRY		PREMISE TYPE		UNITS ENTERED		TYPE VICTIM																				
	1. Assault & Battery with intent to kill 2. Armed Robbery 3. Grand Larceny of motor vehicle					YES ☐ NO ☐		YES ☐ NO ☐		Business		1		☐ Individual ☐ Business ☐ Financial Inst. ☐ Government ☐ Relig. Orgn. ☐ Soc. Public ☐ Other ☐ Unknown ☐ Police																				
INCIDENT LOCATION (SUBDIVISION, APARTMENT AND NUMBER, STREET NAME AND NUMBER)														ZIP CODE		WEAPON TYPE																		
200 South Dogwood Ave Ridgeway SC														29130		Hand Gun																		
INCIDENT DATE		24 HR. CLOCK		TCU		DATE		24 HR. CLOCK		DISPATCH DATE		DISPATCH TIME		TIME ARRIVED		DEPART. TIME		LOCATION NO																
11-23-01		1800				11-23-01		2010		11-23-01		1840		1841		0200		E-1																
COMPLAINANT'S NAME (LAST, FIRST, MIDDLE)					RELATIONSHIP TO SUBJECT			RESIDENT		RACE		SEX		AGE		E.M.		DAYTIME PHONE		EVENING PHONE														
McGunt Susan					S+R			O S O U		W F				30				337-2378																
ADDRESS					CITY			STATE		ZIP CODE		LOCATION NO																						
190 Peach Rd					Ridgeway			SC		29130		E-1																						
VICTIM NO. 1	VICTIM'S NAME (LAST, FIRST, MIDDLE)					RELATIONSHIP TO SUBJECT			RESIDENT		RACE		SEX		AGE		E.M.		DAYTIME PHONE		EVENING PHONE													
	McGunt Jessie E					S+R			O S O U		W M				57				337-2238															
	HEIGHT					WEIGHT		HAIR		EYES		FACIAL HAIR, SCARS, TATOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.																						
	5'6"					155		Brn		Brn																								
ADDRESS					CITY			STATE		ZIP CODE		LOCATION NO																						
190 Peach & Street					Ridgeway			SC		29130		E-1																						
VISIBLE INJURY (VICT. 1) YES ☒ NO ☐					EXPLAIN - GUNSHOT TO BACK					COMPLAINT OF ANY NON VISIBLE INJURIES: YES ☐ NO ☒																								
VICTIM (NO. 1) USING: ALCOHOL ☐ YES ☒ NO ☐ UNK ☐					DRUGS: YES ☐ NO ☒ UNK ☐					TYPE:																								
TWO-MAN VEH. ☐					ONE-MAN VEH. ☒					DETECTIVE/SPL. ASMT. ☐					OTHER ☐					ALONE ☐					ASSISTED ☒					J - This Jurisdiction S - State O - Out of State U - Unknown				
SUSPECT NO. 1	NAME (LAST, FIRST, MIDDLE)					RACE		SEX		AGE		E.M.		DATE OF BIRTH		HEIGHT		WEIGHT		HAIR		EYES												
	Unknown																																	
	FACIAL HAIR, SCARS, TATOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.																																	
	ADDRESS					CITY			STATE		ZIP CODE		LOCATION NO																					
JAIL					SUBJECT (NO. 1) USING: ALCOHOL: YES ☐ NO ☒ UNK ☐					ARRESTED NEAR OFFENSE SCENE: YES ☒ NO ☐					DATE/TIME OF OFFENSE					DATE/TIME OF ARREST														
SUMMONS					DRUGS: YES ☐ NO ☒ UNK ☐					TOTAL # ARRESTED					11-23-01/1800																			
NARRATIVE	On the above date and time, Chief H. Blatter Received a call from Central Dispatch concerning a shooting incident at a McGunt store on 200 South Dogwood Ave upon arrival I went inside, there I found Mr McGunt (Vict) lying on his back. He appeared to have been shot. At that time, I call 9-1-1, call the Sheriff Department for assistance, also I led was call. At that time the scene was secured.																																	
JURISDICTION OF THEFT LAW ENFORCEMENT AGENCY										JURISDICTION OF RECOVERY LAW ENFORCEMENT AGENCY																								
PROPERTY EST.	TYPE (GROUP)																																	
	STOLEN																																	
	DAMAGED																																	
	BURNED																																	
RECOVERED																																		
ENTERED																																		
ADMINISTRATIVE	SUBJECT IDENTIFIED					SUBJECT LOCATED					ACTIVE ☐ ADM. CLOSED ☐					ARRESTED UNDER 18 ☐					EX-CLEAR UNDER 18 ☐													
	YES ☐ NO ☐					YES ☐ NO ☐					UNFOUNDED ☐					ARRESTED 18 AND OVER ☐					EX-CLEAR 18 AND OVER ☐													
	REASON FOR EXCEPTIONAL CLEARANCE: 1. OFFENDER DEATH. 2. NO PROSECUTION 3. EXTRADITION DENIED. 4. VICTIM DECLINES COOPERATION. 5. JUVENILE - NO CUSTODY																																	
	REPORTING OFFICER(S)					DATE					UNIT NUMBER					APPROVING OFFICER					DATE					UNIT NUMBER								
FOLLOW-UP INVESTIGATION										OFFICER																								
YES ☐ NO ☐																																		

**PLAINTIFF'S
EXHIBIT
2**

RIDGEWAY POLICE DEPARTMENT
INCIDENT REPORT

AGENCY I.D.
SCO 0200200

CASE NUMBER:

4510

IND.	ENTR

010030

INCIDENT TYPE										COMPLETED		FORCED ENTRY		PREMISE TYPE		UNITS ENTERED		TYPE VICTIM																					
1. ASSAULT + BATTERY W/ INTENT TO KILL										YES ☒ NO ☐		YES ☒ NO ☐		BUSINESS		1		☐ Individual ☒ Business ☐ Financial Inst. ☐ Government ☐ Relig. Orgn. ☐ Soc./Public ☐ Other ☐ Unknown ☐ Police/Civil																					
2. ARMED ROBBERY										YES ☐ NO ☐		YES ☐ NO ☐																											
3. GRAVE ROBBERY OF MOTOR VEHICLE										YES ☐ NO ☐		YES ☐ NO ☐																											
INCIDENT LOCATION (SUBDIVISION, APARTMENT AND NUMBER, STREET NAME AND NUMBER)										ZIP CODE		WEAPON TYPE																											
200 South Dogwood AVE. Ridgeway SC										29130		HAND GUN																											
INCIDENT DATE		24 HR. CLOCK		TO		DATE		24 HR. CLOCK		DISP. DATE		UP. DATE		DATE/TIME 24 HR. CLOCK		TIME ARRIVED		DEPART. TIME		LOCATION NO.																			
11-23-01		1800				11-23-01		1810		11-23-01		1840		1841		0200				E-1																			
COMPLAINANT'S NAME (LAST, FIRST, MIDDLE)										RELATIONSHIP TO SUBJECT		RESIDENT		RACE		SEX		AGE		ETH.		DAYTIME PHONE		EVENING PHONE															
MCGUIRT SUSAN										Daughter		YES ☒ NO ☐		W		F		30		X		337-2378		SAME															
ADDRESS										CITY		STATE		ZIP CODE		LOCATION NO.																							
190 Peach Rd										Ridgeway		SC		29130				E-1																					
VICTIM'S NAME (LAST, FIRST, MIDDLE)										RELATIONSHIP TO SUBJECT		RESIDENT		RACE		SEX		AGE		ETH.		DAYTIME PHONE		EVENING PHONE															
MCGUIRT JESSIE E										NONE		YES ☒ NO ☐		W		M		57		X		337-2378		SAME															
HEIGHT		WEIGHT		HAIR		EYES		FACIAL HAIR, SCARS, TATOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES ETC.																															
5'6"		158		BRN		BRN		STORE OWNER																															
ADDRESS										CITY		STATE		ZIP CODE		LOCATION NO.																							
190 Peach Rd										Ridgeway		SC		29130		E-1																							
VISIBLE INJURY (VICT. 1) YES ☒ NO ☐										EXPLAIN		GUNSHOT WOUND TO NECK																											
VICTIM (NO. 1) USING: ALCOHOL ☐ YES ☒ NO ☐										UNK ☐		DRUGS: ☐ YES ☒ NO ☐		UNK ☐		TYPE:		COMPLAINT OF ANY NON-VISIBLE INJURIES: YES ☒ NO ☐																					
TWO-MAN VEH. ☐										ONE-MAN VEH. ☒		DETECTIVE/SR. ASST. ☐		OTHER ☒		ALONE ☐		ASSISTED ☒		J.D. - This Jurisdiction		S - State		O - Out of State		U - Unknown													
SUSPECT		NAME (LAST, FIRST, MIDDLE)								RACE		SEX		AGE		ETH.		DATE OF BIRTH		HEIGHT		WEIGHT		HAIR		EYES													
RUNAWAY		UNKNOWN																																					
WAITED		FACIAL HAIR, SCARS, TATOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.																																					
WARRANT		ADDRESS								CITY		STATE		ZIP CODE		LOCATION NO.																							
ARREST																																							
JAIL		SUBJECT (NO. 1) USING: ALCOHOL: ☐ YES ☒ NO ☐								UNK ☐		ARRESTED NEAR OFFENSE SCENE ☐ YES ☒ NO ☐		DATE/TIME OF OFFENSE		DATE/TIME OF ARREST																							
SUMMONS		DRUGS: ☐ YES ☒ NO ☐								UNK ☐		TYPE:		TOTAL # ARRESTED		11-23-01 1800																							
NARRATIVE																																							
ON the above date and time, Chief H. Grati responded to a shooting incident at McGuirt Tire Station at 200 South Dogwood Ave in Ridgeway, SC upon arrival at the station, victim was found lying on floor bleeding from the neck. Fairfield County EMS was called. Victim transported to Richland Memorial Hospital in Columbia. Fairfield Sheriff Investigator 3 was call for assistance. Sled Crime Scene was call also. Incident still under investigation. By Ridgeway, P.D. along with Sheriff Department and SLED South Carolina Law Enforcement Division.																																							
JURISDICTION OF THEFT LAW ENFORCEMENT AGENCY										JURISDICTION OF RECOVERY LAW ENFORCEMENT AGENCY																													
PROPERTY EST.																																							
TYPE (GROUP)		TOTAL VALUE																																					
STOLEN																																							
DAMAGED																																							
BURNED																																							
RECOVERED																																							
SEIZED																																							
SUBJECT IDENTIFIED										SUBJECT LOCATED										TOTAL VALUE																			
YES ☐ NO ☐										YES ☐ NO ☐																													
REASON FOR EXCEPTIONAL CLEARANCE: 1. ☐ OFFENDER DEATH. 2. ☐ NO PROSECUTION. 3. ☐ EXTRADITION DENIED. 4. ☐ VICTIM DECLINES COOPERATION. 5. ☐ JUVENILE - NO CUSTODY										REPORTING OFFICER(S)										DATE										UNIT NUMBER									
FOLLOW-UP INVESTIGATION ☐ YES ☒ NO ☐										OFFICER										DATE										UNIT NUMBER									

AGENCY LD.
SCO 0200200

 RIDGEWAY POLICE DEPARTMENT
INCIDENT REPORT

CASE NUMBER

01-D.O.3.D.

NCC

INO. ENT.

EVENT	INCIDENT TYPE		COMPLETED	FORCED ENTRY	PREMISE TYPE	UNITS ENTERED	TYPE VICTIM
	1. Assault + Battery w/Intent To Kill		☒ YES ☐ NO	☐ YES ☒ NO	BUSINESS	1	☐ Individual ☐ Business ☐ Financial Inst. ☐ Government ☐ Relig. Orgn. ☐ Soc./Public ☐ Other ☐ Unknown ☐ Police Off.
2. Armed Robbery		☐ YES ☐ NO	☐ YES ☐ NO				
3. Grand Larceny of Motor Vehicle		☐ YES ☐ NO	☐ YES ☐ NO				
INCIDENT LOCATION (SUBDIVISION, APARTMENT AND NUMBER, STREET NAME AND NUMBER)					ZIP CODE	WEAPON TYPE	
200 South Dogwood Ave Ridgeway SC					29130	HAND GUN	
INCIDENT DATE		24 HR. CLOCK	TO	DATE	24 HR. CLOCK	DISPATCH DATE/TIME 24 HR. CLOCK	
11-23-01		1800	X	11-23-01	1810	11-23-01 1840 1841 0200 E-1	
COMPLAINANT'S NAME (LAST, FIRST, MIDDLE)		RELATIONSHIP TO SUBJECT		RESIDENT	RACE	SEX	AGE
McGUIRT SUSAN		Daughter		☒ YES ☐ NO	W	F	50
ADDRESS		CITY		STATE	ZIP CODE	LOCATION NO.	
190 Peach Rd		Ridgeway		SC	29130	F-1	
VICTIM'S NAME (LAST, FIRST, MIDDLE)		RELATIONSHIP TO SUBJECT		RESIDENT	RACE	SEX	AGE
McGUIRT JESSIE E				☒ YES ☐ NO	W	M	57
HEIGHT		WEIGHT	HAIR	EYES	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.		
5'6"		158	BRN	BRN	store owner		
ADDRESS		CITY		STATE	ZIP CODE	LOCATION NO.	
190 Peach Rd		Ridgeway		SC	29130	E-1	
VISIBLE INJURY (VICT. 1)		EXPLAIN -		COMPLAINT OF ANY NON-MODEL INJURIES			
☒ YES ☐ NO		Bleeding From the Neck		☒ YES ☐ NO			
VICTIM (NO. 1) USING: ALCOHOL		UNPL.		DRUGS: ☐ YES ☐ NO ☒ UNK		TYPE	
☐ YES ☐ NO		☐ YES ☐ NO		☐ YES ☐ NO		☐ YES ☐ NO	
TWO-MAN VEH. ☐		ONE-MAN VEH. ☐		DETECTIVE/PLASMIT ☒		OTHER ☐	
ALONE ☐		ASSISTED ☐		The Jurisdiction ☒		State ☐	
OUT OF STATE ☐		UNKNOWN ☐					
SUBJECT NO. 1	NAME (LAST, FIRST, MIDDLE)		FACE	SEX	AGE	ETH.	DATE OF BIRTH
	UNKNOWN						
	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.						
	ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.	
SUBJECT NO. 2	NAME (LAST, FIRST, MIDDLE)		FACE	SEX	AGE	ETH.	DATE OF BIRTH
	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.						
	ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.	
SUBJECT NO. 3	NAME (LAST, FIRST, MIDDLE)		FACE	SEX	AGE	ETH.	DATE OF BIRTH
	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.						
	ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.	
SUBJECT NO. 4	NAME (LAST, FIRST, MIDDLE)		FACE	SEX	AGE	ETH.	DATE OF BIRTH
	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.						
	ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.	
SUBJECT NO. 5	NAME (LAST, FIRST, MIDDLE)		FACE	SEX	AGE	ETH.	DATE OF BIRTH
	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.						
	ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.	
SUBJECT NO. 6	NAME (LAST, FIRST, MIDDLE)		FACE	SEX	AGE	ETH.	DATE OF BIRTH
	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.						
	ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.	
SUBJECT NO. 7	NAME (LAST, FIRST, MIDDLE)		FACE	SEX	AGE	ETH.	DATE OF BIRTH
	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.						
	ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.	
SUBJECT NO. 8	NAME (LAST, FIRST, MIDDLE)		FACE	SEX	AGE	ETH.	DATE OF BIRTH
	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.						
	ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.	
SUBJECT NO. 9	NAME (LAST, FIRST, MIDDLE)		FACE	SEX	AGE	ETH.	DATE OF BIRTH
	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.						
	ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.	
SUBJECT NO. 10	NAME (LAST, FIRST, MIDDLE)		FACE	SEX	AGE	ETH.	DATE OF BIRTH
	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.						
	ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.	
SUBJECT NO. 11	NAME (LAST, FIRST, MIDDLE)		FACE	SEX	AGE	ETH.	DATE OF BIRTH
	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.						
	ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.	
SUBJECT NO. 12	NAME (LAST, FIRST, MIDDLE)		FACE	SEX	AGE	ETH.	DATE OF BIRTH
	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.						
	ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.	
SUBJECT NO. 13	NAME (LAST, FIRST, MIDDLE)		FACE	SEX	AGE	ETH.	DATE OF BIRTH
	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.						
	ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.	
SUBJECT NO. 14	NAME (LAST, FIRST, MIDDLE)		FACE	SEX	AGE	ETH.	DATE OF BIRTH
	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.						
	ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.	
SUBJECT NO. 15	NAME (LAST, FIRST, MIDDLE)		FACE	SEX	AGE	ETH.	DATE OF BIRTH
	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.						
	ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.	
SUBJECT NO. 16	NAME (LAST, FIRST, MIDDLE)		FACE	SEX	AGE	ETH.	DATE OF BIRTH
	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.						
	ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.	
SUBJECT NO. 17	NAME (LAST, FIRST, MIDDLE)		FACE	SEX	AGE	ETH.	DATE OF BIRTH
	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.						
	ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.	
SUBJECT NO. 18	NAME (LAST, FIRST, MIDDLE)		FACE	SEX	AGE	ETH.	DATE OF BIRTH
	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.						
	ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.	
SUBJECT NO. 19	NAME (LAST, FIRST, MIDDLE)		FACE	SEX	AGE	ETH.	DATE OF BIRTH
	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.						
	ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.	
SUBJECT NO. 20	NAME (LAST, FIRST, MIDDLE)		FACE	SEX	AGE	ETH.	DATE OF BIRTH
	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.						
	ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.	
SUBJECT NO. 21	NAME (LAST, FIRST, MIDDLE)		FACE	SEX	AGE	ETH.	DATE OF BIRTH
	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.						
	ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.	
SUBJECT NO. 22	NAME (LAST, FIRST, MIDDLE)		FACE	SEX	AGE	ETH.	DATE OF BIRTH
	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.						
	ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.	
SUBJECT NO. 23	NAME (LAST, FIRST, MIDDLE)		FACE	SEX	AGE	ETH.	DATE OF BIRTH
	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.						
	ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.	
SUBJECT NO. 24	NAME (LAST, FIRST, MIDDLE)		FACE	SEX	AGE	ETH.	DATE OF BIRTH
	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.						
	ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.	
SUBJECT NO. 25	NAME (LAST, FIRST, MIDDLE)		FACE	SEX	AGE	ETH.	DATE OF BIRTH
	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.						
	ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.	
SUBJECT NO. 26	NAME (LAST, FIRST, MIDDLE)		FACE	SEX	AGE	ETH.	DATE OF BIRTH
	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.						
	ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.	
SUBJECT NO. 27	NAME (LAST, FIRST, MIDDLE)		FACE	SEX	AGE	ETH.	DATE OF BIRTH
	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.						
	ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.	
SUBJECT NO. 28	NAME (LAST, FIRST, MIDDLE)		FACE	SEX	AGE	ETH.	DATE OF BIRTH
	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.						
	ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.	
SUBJECT NO. 29	NAME (LAST, FIRST, MIDDLE)		FACE	SEX	AGE	ETH.	DATE OF BIRTH
	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.						
	ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.	
SUBJECT NO. 30	NAME (LAST, FIRST, MIDDLE)		FACE	SEX	AGE	ETH.	DATE OF BIRTH
	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.						
	ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.	
SUBJECT NO. 31	NAME (LAST, FIRST, MIDDLE)		FACE	SEX	AGE	ETH.	DATE OF BIRTH
	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.						
	ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.	
SUBJECT NO. 32	NAME (LAST, FIRST, MIDDLE)		FACE	SEX	AGE	ETH.	DATE OF BIRTH
	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.						
	ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.	
SUBJECT NO. 33	NAME (LAST, FIRST, MIDDLE)		FACE	SEX	AGE	ETH.	DATE OF BIRTH
	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.						
	ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.	
SUBJECT NO. 34	NAME (LAST, FIRST, MIDDLE)		FACE	SEX	AGE	ETH.	DATE OF BIRTH
	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.						
	ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.	
SUBJECT NO. 35	NAME (LAST, FIRST, MIDDLE)		FACE	SEX	AGE	ETH.	DATE OF BIRTH
	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.						
	ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.	
SUBJECT NO. 36	NAME (LAST, FIRST, MIDDLE)		FACE	SEX	AGE	ETH.	DATE OF BIRTH
	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.						
	ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.	
SUBJECT NO. 37	NAME (LAST, FIRST, MIDDLE)		FACE	SEX	AGE	ETH.	DATE OF BIRTH
	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.						
	ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.	
SUBJECT NO. 38	NAME (LAST, FIRST, MIDDLE)		FACE	SEX	AGE	ETH.	DATE OF BIRTH
	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.						
	ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.	
SUBJECT NO. 39	NAME (LAST, FIRST, MIDDLE)		FACE	SEX	AGE	ETH.	DATE OF BIRTH
	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.						
	ADDRESS</						

RIDGEWAY POLICE DEPARTMENT INCIDENT REPORT

AGENCY I.D.
SCO 0200200

CASE NUMBER

HCS

DATE, TIME

01-00-30

INCIDENT TYPE		COMPLETED	FORCED ENTRY	PREMISE TYPE	UNITS ENTERED	TYPE VICTIM
1. ASSAULT BATTERY (W/INTENT TO KILL)	☒ YES ☐ NO	☐ YES ☒ NO	BUSINESS	1	☐ Individual ☐ Business ☐ Fraternal Inst. ☐ Government ☐ Holy, Orgn. ☐ Soc. Polite ☐ Other ☐ Unknown ☐ Police	
2. ARMED ROBBERY	☐ YES ☐ NO	☐ YES ☐ NO				
3. GRAND LARCENY OF MOTOR VEHICLE	☐ YES ☐ NO	☐ YES ☐ NO				
INCIDENT LOCATION (SUBDIVISION, APARTMENT AND FLIGHT, STREET NAME AND NUMBER)		ZIP CODE		WEAPON TYPE		
0200 DOG SOUTH AVE RIDGEWAY S.C.		29130		HAND GUN		
REPORT DATE	REPORT TIME	DATE	TIME	DISPATCH DATE	DISPATCH TIME	REPORT TIME
11-20-01	1800	112301	1810	112301	1840	1841
COMPLAINANT'S NAME (LAST, FIRST, MIDDLE)	RELATIONSHIP TO SUBJECT	RESIDENT	RACE	SEX	AGE	ETH.
Mcguirt susan	datgr	☒ YES ☐ NO	W	F	30	X
ADDRESS	CITY	STATE	ZIP CODE	LOCATION NO.		
190 peach rd	ridgeway sc	SC	29130	E-1		
VICTIM'S NAME (LAST, FIRST, MIDDLE)	RELATIONSHIP TO SUBJECT	RESIDENT	RACE	SEX	AGE	ETH.
Mcguirt jessie e	dad	☒ YES ☐ NO	W	M	57	X
ADDRESS	CITY	STATE	ZIP CODE	LOCATION NO.		
190 peach rd.	ridgeway	SC	337 2378	B-1		
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Rob Evans - Direct

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1 MR. BARFIELD: Your Honor, that's all
2 the questions I have of Deputy Evans at this point.
3 I would -- I intend to publish the video. It's a
4 brief tape, and I intend to publish it in a moment.
5 We're getting a machine in. If Mr. Swerling wants
6 to go ahead and cross before I do that, it doesn't
7 matter to me.

8 MR. SWERLING: I'd prefer to wait.

9 MR. BARFIELD: All right. We'll have
10 it ready momentarily.

11 Q Deputy, I'm going to ask you to step down
12 so that you can view this as I show it in a moment.
13 I'm not going to ask you any questions while it's
14 playing. I just want you to see it so I can ask you
15 a couple of follow-up questions in a minute.

16 MR. BARFIELD: Your Honor, I think
17 from prior hearings on this matter, we all agree
18 that there's no audio on the tape. It's simply
19 video.

20 MR. SWERLING: That's correct.

21 (Whereupon, State's Exhibit
22 Number Ten, the videotape, was presented to the
23 jury.)

24 MR. BARFIELD: If you would, please

PLAINTIFF'S
EXHIBIT

6

Rob Evans - Direct

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1 resume your seat.

2 Q All right. Deputy Evans, do you have any
3 explanation for why the little piece with you, and
4 Mama, and Darryl Cook is in the middle of what is
5 delineated on the tape as September 23rd on both
6 ends of it?

7 A I don't know how we got to that point.

8 Q That's fine. You said you saw Darryl Cook
9 on the tape. Describe for the jury who on the tape
10 is who you identified as Darryl Cook.

11 A On the tape, Mr. Cook was a young black
12 male, short hair, wearing a striped shirt. I can't
13 tell the exact color of the shirt, but there were
14 stripes. And his shirt was outside his pants.

15 Q All right. Thank you, sir. Answer
16 anything Mr. Swerling has.

17 THE COURT: Mr. Swerling?

18 MR. SWERLING: Thank you.

19 CROSS-EXAMINATION

20 BY MR. SWERLING:

21 Q Mr. Evans, just a -- the part that shows
22 Ms. Cook and Darryl Cook is in between the events of
23 the day that Mr. Cook is there with the soda, is
24 that correct? For lack of better words, in other

Rob Evans - Cross

230

1 words, it shows that there's an event here. It
2 shows him walking around and then getting a soda, is
3 that correct?

4 A Yes.

5 Q All right. In between that is when
6 there's a slice of film from the next day with Ms.
7 Cook and Mr. Cook, correct?

8 A That is correct.

9 Q Okay. But the events that are on either
10 side of that particular piece of film, where Ms.
11 Cook and Mr. Cook were there, those all occurred on
12 the same day at the same time, correct?

13 A That is correct.

14 Q Okay. And what we're saying is we don't
15 know -- or you don't know -- how that particular
16 piece of film from the next day got in between the
17 two pieces of film from that one day?

18 A That's correct.

19 Q Okay. I just want to ask you something.
20 Mr. Barfield was asking you some questions about
21 whether or not Mr. Cook worked there or not. Do you
22 remember testifying in May of 2006?

23 A Yes, sir.

24 Q Okay. Do you remember being asked the
25 question, "Question: He may have been as far as you

Susa McGuirt Wilson - Direct

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1 Q Is State's Number Nine the same --

2 A Yes.

3 Q -- stuff, office, desk, cash register?

4 A Yes.

5 Q All right, I'm sorry to divert from things
6 for a minute. Let's get back. What did you do when
7 you pushed the door open?

8 A I just looked around, because I was scared
9 to go in.

10 Q Did you see anybody?

11 A No.

12 Q What did you do?

13 A I just said, "Dad?"

14 Q Did you get a response?

15 A Yes, I did.

16 Q Could you tell from where the sound of the
17 voice was coming?

18 A It was very funny sounding, but it sounded
19 like it was coming from the office or maybe the back
20 room.

21 Q And what was the response of your dad when
22 you called out "Dad"?

23 A He said, "Sue?"

24 Q Is that what he called you?

25 A Yes.



Susa McCuirt Wilson - Direct

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- 1 Q Did he say anything else at that point?
- 2 A No.
- 3 Q What did you do next?
- 4 A I called out again, "Dad?"
- 5 Q Did you get a response?
- 6 A Yes.
- 7 Q What was it?
- 8 A He said, with a weak voice -- I couldn't
- 9 hardly hear him -- "Susan, I've been shot."
- 10 Q Had you gotten to him by that point?
- 11 THE COURT: I'm sorry, Mr. Solicitor
- 12 --
- 13 MR. BARFIELD: Yes.
- 14 THE COURT: -- and Ms. Wilson, I'm
- 15 even more sorry for you. I could not understand
- 16 your answer. And if I couldn't, I feel that the
- 17 Court Reporter and others couldn't. If you could
- 18 repeat your answer, please, ma'am.
- 19 Q The second time you called out to your
- 20 dad, what was his response?
- 21 A He said, "Susan, I've been shot."
- 22 Q Were you to him by the point that he said
- 23 that?
- 24 A No, I was still at the door.
- 25 Q Did you go to him?

1 regular TV when you --

2 A It was just turned up really loud.

3 Q All right, let's go back to your dad.

4 Describe your dad's appearance. Just describe
5 physically his appearance.

6 A He was just very pale and lifeless
7 looking. He had -- his shirt was covered in blood,
8 and he blood on his face that had dried. And he
9 looked like he was purplish, and his hands were
10 purplish. He just looked like he was dead already.

11 Q Was he?

12 A No.

13 Q Were his eyes open?

14 A Yes.

15 Q Was he able to talk to you?

16 A Yes.

17 Q Could you tell where he was injured? Did
18 you see any wounds on his body?

19 A I did not, no.

20 Q What happened next? Let me ask you this.
21 Was there anything out of the ordinary around where
22 your dad was lying?

23 A His wallet was laying beside him, and the
24 picture part had been taken out.

25 Q Was the picture part there?

Susa McGuirt Wilson - Direct

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1 A Yes.

2 Q How close to the wallet?

3 A Right beside it.

4 Q How close was the wallet to him?

5 A Right beside his leg.

6 Q Was the wallet open or closed when you saw
7 it, if you recall? If you don't, that's fine.

8 A I believe it was open. I don't really
9 recall.

10 Q That's fine. What kind of wallet did your
11 daddy carry -- a regular billfold, a trifold, a
12 biker's wallet with a chain -- or do you recall?

13 A He always carried a trifold.

14 Q Okay. What happened next?

15 A I just started screaming, "Oh, my God,
16 Dad! Oh, my God! What do I do?"

17 Q Did he respond?

18 A Yes. he did.

19 Q What did he say.

20 A He said, "Call 911."

21 Q What did you do?

22 A I called 911.

23 Q From what phone?

24 A From the phone in the station, on the wall
25 right near him.

Susa McGuirt Wilson - Direct

148

- 1 Q In the office area?
- 2 A In the office area.
- 3 Q Did you talk to somebody?
- 4 A Yes, I did.
- 5 Q And do you know personally who you talked
- 6 to?
- 7 A No, I do not.
- 8 Q What did you tell the person that you
- 9 talked to?
- 10 A I just said to "Please send an ambulance
- 11 to McGuirt Tire Service quickly, because my dad, the
- 12 owner, has been shot."
- 13 Q What did you do next?
- 14 A I just kept -- I think I was on the phone
- 15 for a couple of minutes, and I just telling them,
- 16 "Please hurry, please hurry," because I thought he
- 17 was going to die.
- 18 Q Did you make any other calls from the
- 19 station on that same phone?
- 20 A I did.
- 21 Q Who did you call?
- 22 A I called my mom.
- 23 Q What did you tell your mom?
- 24 A All I said was, "Mom, get up here. Dad's
- 25 been shot."

Susie McGuirt Wilson - Direct

149

1 Q Did you and your mom engage in any lengthy
2 conversation?

3 A No, I got off.

4 Q What did you do after you got off the
5 phone?

6 A I went back down to him, and he told me to
7 get the keys and go lock the door.

8 Q What was the form that your dad had keys
9 in?

10 A He had a big old bunch of keys that he
11 clipped to his belt.

12 Q And did he tell you why he wanted you to
13 get the keys?

14 A He told me to go lock the front door,
15 because that boy had been back in twice, and he was
16 scared that he might come back again and shoot me,
17 too.

18 Q I'm going to jump ahead and go ahead and
19 get this out of the way. At any point, did he ever
20 refer to anybody who had done this to him in any
21 words other than "that boy" when you were talking to
22 him?

23 A Just that word.

24 Q Okay. Did you look for your dad's keys?

25 A I did.

Susie McGuirt Wilson - Direct

150

1 Q Did you find your dad's keys on his side?

2 A I did not find them.

3 Q Did you find your dad's keys anywhere in
4 the station that you might have looked?

5 A No, I couldn't.

6 Q What did you say to your dad when you told
7 him you -- when you couldn't find the keys, what did
8 you say?

9 A I told him I couldn't find them, and he
10 told me to go check in his truck.

11 Q And what did you tell him about his truck?

12 A I told him his truck wasn't out there.

13 Q Did he respond to that?

14 A He said, "Oh, he took my truck, too?"

15 Q Did your dad -- you said that your dad
16 said, "Lock the door because he's been back in
17 here." Did he give you any information about what
18 occurred when the boy came back in?

19 A And I can't remember what words. He just
20 said that he had kicked him at one point, and he had
21 to play dead, because he thought if he realized he
22 was still alive, he would shoot him again, and that
23 at some point, he had placed the gun down beside
24 him, and he had thought about trying to grab it, but
25 he didn't because he couldn't move his arm enough.

Susa McGuirt Wilson - Direct

151

1 Q Had you had any conversation with your dad
2 about his mobility up to that point?

3 A He at some point told me that he could not
4 feel his legs anymore, so he thought he was
5 paralyzed.

6 Q I'm going to jump ahead again. Was your
7 dad in fact paralyzed?

8 A He was.

9 Q Was that a permanent condition up until
10 the point of his death?

11 A It was.

12 Q This is a stupid question, but I must ask
13 it. Prior to you finding him on the floor in the
14 station on November 23, 2001, had your dad been
15 paralyzed?

16 A No, he had not.

17 Q Up to the point of what you're telling us
18 right now, were you and your dad the only two people
19 in the station?

20 A Yes.

21 Q Did anybody -- did other people eventually
22 come in the station?

23 A They did.

24 Q Who is the next person that came into the
25 station?

Susa McGuirt Wilson - Direct

152

1 A Well, at some point, Chris came in, and I
2 told him to watch the front door, because Dad had
3 said that the boy had been back in twice, and he was
4 scared he was going to come back again, to watch the
5 door for us.

6 Q All right. Now, did you and your dad talk
7 about keys any further after you told him his truck
8 wasn't there?

9 A No.

10 Q Did your dad make any suggestion to you
11 about securing the station?

12 A He told me to call Arthur Robertson.

13 Q And why did he tell you to call Arthur?

14 A Because Arthur had a spare set of keys,
15 and he could come lock the station.

16 Q Did you call Arthur?

17 A I called Arthur.

18 Q Did Arthur eventually come?

19 A Yes.

20 Q What happened after that?

21 A He asked me to get him a drink of water
22 because he was so thirsty.

23 Q And did you?

24 A I got a drink -- a bottled water out of
25 the water -- the drink machine, and I gave him a

Susa McGuirt Wilson - Direct

153

1 drink of water.

2 Q Then what?

3 A He was just telling me how he had a plan
4 to get a broom and try to drag himself over to the
5 phone and knock it off the wall and try to dial 911
6 or something and how he had been praying for so
7 long for God to stop his bleeding so that he could
8 send somebody to find him before he died so he could
9 tell us he loved us before he died. And he kept
10 telling me that he was sorry I had to be the one
11 that found him, but that God had sent him his angel.

12 Q Did law enforcement arrive?

13 A Yes, they did.

14 Q Do you need a minute?

15 THE COURT: Ms. Wilson, take as long
16 as you like.

17 Q Did EMS arrive?

18 A Yes, they did.

19 Q Law enforcement or EMS first?

20 A Law enforcement.

21 Q Did your mom arrive?

22 A Yes.

23 Q Before or after law enforcement?

24 A She arrived after the first law
25 enforcement.

C
Susa McGuire Wilson - Direct

154

1 Q Who was the first law enforcement officer
2 that got there?

3 A Chief Gratic.

4 Q Hughley Gratic?

5 A Yes.

6 Q When you say "Chief," was he the Ridgeway
7 PD Chief at that time?

8 A Yes, he was.

9 MR. BARFIELD: Beg the Court's
10 indulgence for one moment.

11 THE COURT: Yes, sir.

12 Q Ms. Wilson, are you okay?

13 A Yes.

14 Q Can you tell us what time it was that you
15 got to the station, you and Chris, about?

16 A I'd say about 6:40.

17 Q Say that again?

18 A Six-forty.

19 Q Inside the station, you described the
20 video box, you described his wallet on the floor.
21 Was there anything else out of place that you could
22 tell when you were in the station?

23 A No.

24 Q Thank you.

25 A I can't recall.

Bruce Guinyard - Direct

165

1 Q Was there any, first of all, civilians?

2 What civilians were there when you got there?

3 A Sue McGuirt and Joan Wilson.

4 Q Joan McGuirt?

5 A Joan McGuirt, yes.

6 Q Was Jackie McGuirt there?

7 A Yes, he was.

8 Q Were any other civilians there when you

9 first got there?

10 A No, sir.

11 Q Was any other law enforcement officer

12 there when you first got there?

13 A Yes.

14 Q Who?

15 A Hughley Gratic.

16 Q And who is Hughley Gratic?

17 A At the time, he was the Chief of Police

18 for Ridgeway.

19 Q Did any officer from Fairfield County

20 Sheriff's Office go, number one, with you in your

21 automobile?

22 A No.

23 Q Did anybody go at the same time as you in

24 a separate law enforcement automobile?

25 A Yes.

PLAINTIFF'S
EXHIBIT

10

Bruce Guinyard - Direct

166

1 Q Who was that?

2 A Sgt. White.

3 Q Okay. What did you do when you got there?

4 A When I first arrived on the scene, I
5 immediately went inside to see what had happened.

6 Q And who was -- who did you find in the
7 station when you went there?

8 A Chief Gratic, Joan McGuirt, Susan McGuirt,
9 and Jackie McGuirt lying on the floor.

10 Q Without quoting anybody at this point, did
11 you get some information about what had occurred?

12 A Yes, I did.

13 Q Now, have you been inside McGuirt's Tire
14 before?

15 A Yes, I have.

16 Q At the point you were first there, what
17 was your main concern? Well, let me withdraw that
18 question. Did you look around -- did you notice
19 anything amiss or unusual other than Jackie McGuirt
20 lying in the floor there at the station?

21 A I just noticed some stuff thrown around
22 inside the station.

23 Q Okay. Did you do any search yourself of
24 the station at the point that we're at right now in
25 your involvement in this case?

1 A No, sir, I did not.

2 Q Did you have conversations with Jackie
3 McGuirt?

4 A Yes, I did.

5 Q Now, before we get to that, where was
6 Jackie McGuirt?

7 A He was lying face-up on the floor about
8 ten feet away from the cash register.

9 Q Okay. And what -- describe his
10 appearance.

11 A He was conscious, kind of pale. I mean,
12 he was -- he had blood on his neck and shoulder.

13 Q Could you tell where the blood was coming
14 from?

15 A It was hard to tell at the time. He was
16 lying down. It was just around his neck and
17 shoulder area.

18 Q Okay. You didn't see any visible wounds
19 other than you saw blood on his body?

20 A That's correct.

21 Q Not about what happened, but did you and
22 Mr. McGuirt have any conversation about his injury,
23 how he felt?

24 A Yes.

25 Q What was that? Describe that.

Bruce Guinyard - Direct

168

1 A He said he did not have any feeling --

2 MR. SWERLING: Judge, just so the
3 record is clear, we reserve all objections
4 previously made.

5 THE COURT: Yes, sir.

6 Q All right, let's start that over. Did you
7 and Mr. McGuirt have a conversation about his
8 physical condition?

9 A Yes, we did.

10 Q What did he say about his physical
11 condition?

12 A He just stated that he couldn't feel
13 anything.

14 Q Okay. Did he tell you what part of his
15 body he didn't have feeling in?

16 A He didn't have any feeling in his legs.
17 He wasn't able to move at the time.

18 Q Did you know how bad he was hurt at that
19 point?

20 A No, sir, not at the moment, I did not.

21 Q Was any -- were any medical people on the
22 scene at that point, when you got there and were
23 having this conversation with Jackie McGuirt?

24 A No.

25 Q Did medical people come at some point?

Bruce Guinyard - Direct

169

1 A Yes.

2 Q After medical people got there, did you
3 have any further dealings with Jackie McGuirt?

4 A No, I did not.

5 Q I'm going to jump ahead, and then we'll
6 come back. Other than the people you described who
7 were there when you got there, did other people
8 start coming?

9 A Yes, sir.

10 Q All right. Now let's talk about law
11 enforcement first. Other than you and other than
12 Gratic and you and White, did other law enforcement
13 people come --

14 A Yes, sir.

15 Q -- from Fairfield County Sheriff's Office?

16 A Yes, sir.

17 Q Several?

18 A Yes.

19 Q I don't need names, but several?

20 A Yes, sir.

21 Q Did other law enforcement people come from
22 outside agencies?

23 A Yes, they did.

24 Q What agency was that?

25 A South Carolina Law Enforcement Division.

Bruce Guinyard - Direct

171

1 A Yes, sir.

2 Q All right. When you first got there, did
3 you know any detail about what had happened to
4 Jackie McGuirt?

5 A Had I --

6 Q When I first got there -- when you first
7 got there and saw Jackie McGuirt, before you talked
8 to people -- did you have any detail about what
9 happened? That's a "yes" or "no" at this point.

10 A Yes, sir.

11 Q Before you talked to anybody?

12 A Oh, no -- no, sir.

13 Q Okay. Did you and Mr. McGuirt have a
14 conversation about what had occurred?

15 A Yes, we did.

16 Q Who was -- all right. And just relate
17 that conversation, the best you can recall. What
18 was the conversation between you and Jackie McGuirt
19 about what had happened to him in that station?

20 A Okay, he was laying down on the floor, and
21 I walked up to him. And I asked him, "Who done this
22 to you?" And he proceeded to say that he didn't
23 have any feeling in his legs; he couldn't feel
24 anything. And I asked him, "Do you know who shot
25 you?" And he said --

Bruce Guinyard - Direct

172

1 Q Let me stop right there. Did you know --
2 at some point, did he or somebody tell you that he
3 had been shot?

4 A Yes, sir.

5 Q All right. How did you find out he had
6 been shot?

7 A By Chief Gratic.

8 Q All right, now, that's fine. So Mr.
9 McGuirt -- you asked Mr. McGuirt if he knew who had
10 shot him. Go on.

11 A Okay. And he said, "You know the guy, but
12 I don't know his name. I can't think of his name
13 right off. He has been in here before, and he had
14 been in here earlier. But I can't think of his name
15 right off."

16 Q All right, stop right there. He said he
17 had been here before and been in here earlier. Did
18 he say what he had done when he had been in here
19 earlier?

20 A He said he had purchased a soda.

21 Q Did he tell you today, yesterday, last
22 week? Did he give you a specific time frame when he
23 had been in there earlier?

24 A Earlier.

25 Q That's all he said?

Bruce Guinyard - Direct

173

1 A Yes.

2 Q Okay. Go ahead. Relate the conversation.

3 A Okay. And that was basically what he
4 said, that --

5 Q I'm sorry, what?

6 A And I asked him did he have a description
7 of the suspect as to what he looked like. And he
8 said he was a black male, medium build, dark skin
9 but not too dark.

10 Q Did he give you any kind of a description
11 of clothing or anything at that point?

12 A No, sir, he did not.

13 Q Did he tell you what transpired between
14 him and this young man or this male who had come in
15 the store?

16 A Well, he said he was in the back of the
17 store.

18 Q Said "he," who?

19 A I mean Mr. McGuirt said he was. And he
20 came out from back, and he surprised the suspect
21 with a handgun.

22 Q You've got to talk louder.

23 A He was out -- okay. He was in the back of
24 the store and came out front. And when he came, the
25 suspect was standing out front with a handgun,

Bruce Guinyard - Direct

174

1 demanded his money bag. And he gave him the money
2 bags to him.

3 Q All right. Did he say how many money
4 bags?

5 A Yes, sir.

6 Q How many?

7 A Two.

8 Q All right, go ahead.

9 A Okay, soon as he handed the money bags to
10 him, a shot went off, and he felt something hot hit
11 him, and he fell down to the floor.

12 Q Then what?

13 A He said he laid there for a few minutes
14 and pretended to be dead, and the suspect went
15 outside. And he thought he was gone. Then he came
16 back inside and shot a couple of times inside the
17 store.

18 Q Okay. Did you stay out that night to
19 continue to work in relation --

20 A Yes, I did.

21 Q -- with respect to this incident that had
22 occurred?

23 A That's correct.

24 Q And about how late that night or into the
25 next morning did you stay?

Bruce Guinyard - Direct

175

1 A It was around 3:00 the next morning, close
2 to 3:00 the next morning.

3 Q At some point after Friday night into
4 early Saturday morning, still during dark hours --
5 at some point after that, did you lay your eyes on
6 Jackie McGuirt's Chevrolet truck?

7 A Yes, I did.

8 Q All right. Now, don't quote anybody. But
9 did you talk to somebody Saturday morning about the
10 truck?

11 A Yes, I did.

12 Q And, again, don't quote anybody. Who did
13 you talk to?

14 A Arthur Robertson.

15 Q And did you know Arthur?

16 A Yes, I do.

17 Q And how did you know Arthur?

18 A Just a long relationship with him. I've
19 known him from working at McGuirt's Tire Station.

20 Q He works there --

21 A Not anymore.

22 Q -- or did?

23 A He had worked there.

24 Q Okay.

25 A But he wasn't at the present time.

Bruce Guinyard - Cross

181

1 there and then five of you, you said, at times, is
2 that right?

3 A Yes, sir.

4 Q And then a whole bunch of other people
5 came?

6 A Yes, sir. There were other officers there
7 also, but they would be on the outside.

8 Q But immediately around Mr. McGuirt was his
9 wife, his daughter, you, and Chief Gratic?

10 A Yes, sir, and Chief Gratic. He stepped
11 back and went outside.

12 Q He was there when you got there, correct?

13 A Yes, sir, he was.

14 Q And so he was actually the first officer
15 on the scene?

16 A Yes, sir, he was.

17 Q Okay. Now, is he chief currently?

18 A No, sir.

19 Q What is he doing now, do you know?

20 A I mean, he was chief at that time.

21 Q Do you know what he's doing now?

22 A I think he's a security guard somewhere.

23 Q But he's still in the area?

24 A As far as I know.

25 Q As far as you know, he's still in the

1 Winnsboro. He's just not the chief over at --

2 A That's correct.

3 Q -- Ridgeway, is that correct?

4 A Yes, sir.

5 Q And were you there at the scene with Ms.
6 McGuirt, and her daughter, and Chief Gratic until
7 the EMS personnel came and took Mr. McGuirt away?

8 A Yes, sir.

9 Q Did anybody else at that time have access
10 to Mr. McGuirt to talk with Mr. McGuirt?

11 A No, sir, not to my knowledge.

12 Q Now, you testified that Mr. McGuirt said
13 that "You know the guy," and that he had been in and
14 bought a soda. Is that what you said --

15 A Yes, sir.

16 Q -- your testimony is?

17 A Yes, sir.

18 Q And what was the rest of what you
19 testified to -- earlier?

20 A About knowing the guy?

21 Q No, about earlier. You said he had been
22 in earlier but did not identify when.

23 A Oh, he said he had been in earlier to
24 purchase a soda.

25 Q But as the Solicitor was asking you, there

Bruce Guinyard - Cross

183

1 was no time frame given as to what "earlier" meant,
2 what day that meant, is that correct?

3 A That's correct.

4 Q As a matter of fact, he never said when?

5 A Yes, sir, earlier.

6 Q Just earlier?

7 A Yes, sir.

8 Q Let me ask you this. You and Chief Gratic
9 did an incident report on November 23, 2001, did you
10 not?

11 A Yes, sir, we did.

12 Q That's pretty standard procedure to do an
13 incident report?

14 A Yes, sir, it is.

15 Q And in looking over that incident report -
16 - you've seen it before, have you not?

17 A Yes, sir.

18 Q Okay. In looking over that incident
19 report, am I -- I'm not misleading the jury at all
20 if I tell them or if I say to you that there's
21 nothing in there about him having been in earlier to
22 buy a soda. You didn't put that down there, did
23 you?

24 A Oh, no, sir, not in the report at the
25 time.

Bruce Guinyard - Cross

184

1 Q Okay. And the incident report is about a
2 three-page report, but it does not mention that.

3 A Oh, no, sir.

4 Q But it does mention what you said he told
5 you happened inside about being shot --

6 A Yes, sir.

7 Q -- and the money being taken, is that
8 correct?

9 A That's correct.

10 Q Okay. And do you remember testifying on
11 May 23, 2006, in a hearing that we had in connection
12 with this case?

13 A Can you ask the question again?

14 Q Pardon? It was a hearing that we had May
15 23rd.

16 A Yes, sir.

17 Q I'm just going to refer in a moment -- and
18 you can take a look at it if you want -- to page
19 129.

20 THE COURT: What is the Court exhibit
21 number, please, sir?

22 MR. SWERLING: This is Court's
23 Exhibit Number Five, Your Honor. It's the hearing
24 that I'm referring to where we had --

25 Q I'm just going to refer you to a couple of

Bruce Guinyard - Cross

185

1 lines and some questions and answers, okay?

2 A Okay.

3 Q Actually, the Solicitor was asking you the
4 questions at that time, was he not? Let's look at
5 the top of the page.

6 A Oh, yes, sir.

7 Q Okay. And you said at that time that he
8 said he knew the guy -- and this is on page 130, and
9 it's line five. He said he knew the guy, "But I
10 cannot think of his name at this point," correct?
11 You know what I'm talking about, correct?

12 A Yes, sir.

13 Q And then your testimony down below it,
14 line 16, is he never gave you a name, correct? See
15 line 16?

16 A Yes, sir.

17 Q Okay. Then the question was asked by Mr.
18 Barfield, "Did he give you any information about
19 having recently seen the guy?" Answer, "No, not at
20 this time," or "Not at that time?" --

21 A That's correct.

22 Q Is that correct?

23 A I mean, that was what I said.

24 Q Okay. And that was the truth?

25 A I mean, I didn't, you know.

Bruce Guinyard - Cross

188

1 Q And in this two or three pages that the
2 Solicitor is asking you questions, there's no
3 reference at all to him coming in and buying a soda,
4 isn't that true?

5 A Which two or three pages?

6 Q The ones from page 129 to page 132.

7 A I don't see it written out, yes.

8 Q Not the comment about anything earlier or
9 the comment about having bought a soda, you would
10 agree with that? That is not in your testimony from
11 May 23rd, isn't that true?

12 A It should have been, yes.

13 Q Well, it's right there. I'm not trying to
14 trick you. It's right there.

15 A Give me a minute.

16 Q Sure.

17 A I don't see that.

18 Q Yes, sir. And if you could also look at
19 page 132, line eight. The question wasn't asked
20 once. It was actually asked twice by Mr. Barfield,
21 where he said, "Question: All right. And, again,
22 I'm going to ask you this, and think before you
23 answer. Did he tell you whether or not he had
24 recently seen the guy or not?" Line 12, your
25 answer, "No, sir, he didn't tell me." Wasn't that

1 your answer?

2 A Not on this report.

3 Q Yes, sir. Thank you.

4 MR. SWERLING: No further questions.

5 MR. BARFIELD: A couple on redirect.

6 REDIRECT EXAMINATION

7 BY MR. BARFIELD:

8 Q Cpl. Ginyard, just a couple of others.

9 The first question is, did he tell you --

10 A Yes, sir.

11 Q -- in the store when you went in on

12 November 23rd that the guy had been in there

13 sometime before?

14 A Yes, sir.

15 Q Did you tell anybody in connection with
16 the prosecution of this case at some point that he
17 told you that?

18 A Yes, sir.

19 Q And who did you tell that, connected with
20 the prosecution of the case?

21 A Over the phone, Ms. Christine Sloan.

22 Q And who is Christine Sloan?

23 A At the time, she was the Assistant
24 Solicitor.

25 Q All right. And when you told her that,

1 was it before May of 2006 when this transcript got
2 made?

3 A Yes, sir.

4 Q Thank you, that's all.

5 THE COURT: Any recross, Mr.
6 Swerling?

7 MR. SWERLING: No.

8 THE COURT: Thank you. You may step
9 down, Cpl.

10 MR. BARFIELD: Tracy Connors.

11 THE COURT: Is this going to be very
12 brief. .I think the jury needs a break.

13 MR. BARFIELD: The Court's pleasure.

14 THE COURT: Yes, we'll take about a
15 ten-minute break. Do we have any smokers?

16 COURT REPORTER: Mr. Barfield, who
17 has the exhibits?

18 THE COURT: Do we have any smokers?
19 We'll take a one-cigarette break.

20 (Jury out for 4:19 p.m. for
21 break.)

22 THE COURT: Please let the record
23 reflect that the trial jury and the alternate are
24 absent from the courtroom. Anything from the State?

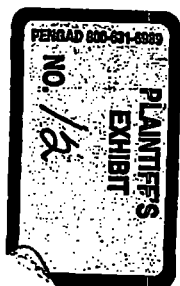
25 MR. BARFIELD: No, sir.

5/11/66 Darryl Cook

Reviewed Chief Graddock situation
with S, as well as Doctor
Berman in Atlanta. I agree
we do not need either in
light of Graddock's version of
events and we don't need
detailed testimony from Doctor

T Darryl Cook, after having
Mr Swearing explain the situation with
Chief Graddock and Dr. Berman, agree
that they should not be called as witnesses
and we can stick to Dr. Berman's
Report

Darryl T. Cook



STATE OF SOUTH CAROLINA

ISSUED BY THE COMMON PLEAS COURT IN THE COUNTY OF LANCASTER

Darryl T. Cook, Plaintiff

v.

SUBPOENA IN A CIVIL CASE

The State of South Carolina, Defendant

Case Number: 2010-CP-20-0453

Pending in FAIRFIELD County

TO: Charles Walker [REDACTED] Winnsboro, SC 29180

☒ YOU ARE COMMANDED to appear in the above named court at the place, and time specified below to testify in the above case.

PLACE OF TESTIMONY
Lancaster County Courthouse
3888 Chester Highway
Lancaster, SC 29721

COURTROOM TBD - Posted inside Courthouse

DATE AND TIME 8-7-13, 9:30 AM

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION

DATE AND TIME , AM

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents of objects:

PLACE

DATE AND TIME , 00 AM

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES

DATE AND TIME , AM

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS IS HEREBY DIRECTED TO RULE 30(b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1), AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.

Glenn Bowens
Attorney/Issuing Officer's Signature
Indicate if Attorney for Plaintiff or Defendant
Attorney's Address and Telephone Number :
PO Box 424 Winnsboro, SC 29180

8-1-13

Date

Glenn Bowens, Attorney for the Plaintiff

Print Name

803-714-7766

Clerk of Court/Issuing Officer's Signature
Pro Se Litigant's Name, Address and Telephone Number :

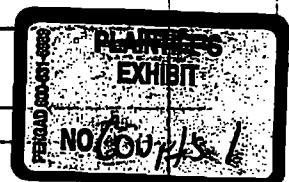
Date

Print Name

SCCA 254 (05/2011)

(See Rule 45, South Carolina Rules of Civil Procedure, Parts (c) & (d) on next page)

(d) Duties in Responding to Subpoena.



PROOF OF SERVICE

SERVED	DATE August 2, 2013	FEES AND MILEAGE TENDERED TO WITNESS ☒ YES ☐ NO AMOUNT \$ 51.00
	PLACE 181 Caution Street Winnsboro, SC 29180	
SERVED ON Mr. Walker, a person of suitable age and discretion in accordance with SCRCP 45(b)(1) and 4(d)(1).		MANNER OF SERVICE Personal
SERVED BY Perry E. Renwick		TITLE

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on August 2, 2013

Perry E. Renwick
SIGNATURE OF SERVER

204 Bratton Street Winnsboro, SC 29180
ADDRESS OF SERVER

FAIRFIELD COUNTY
CLERK OF COURT
BETTY JO BECKHAM

2013 AUG -2 P 1:57

Rule 45, South Carolina Rules of Civil Procedures, Parts (c) and (d):

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

- i. fails to allow reasonable time for compliance; or
- ii. requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or
- iii. requires disclosure of privileged or otherwise protected matter and no exception or waiver applies; or
- iv. subjects a person to undue burden.

(B) If a subpoena:

- i. requires disclosure of a trade secret or other confidential research, development, or commercial information, or
- ii. requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or
- iii. requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed or regularly transacts business in person,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

County of Fairfield
State of South Carolina
Subscribed and sworn to before me, in my presence,
this 2 day of AUGUST, 2003
by Henny R. Smith
[Signature] Notary Public
My commission expires 7-10-2023

THE BOWENS LAW FIRM, PC
PO BOX 424
WINN-DIXIE, SC 29150

Wachovia
Wachovia Bank, N.A.
wachovia.com

67-776/532
DATE

1246

AMOUNT
\$51.00

PAY
TO THE
ORDER
OF:

CHARLES WALKER
FIFTY ONE (\$51.00)

WITNESS FEE
MILAGE

LifeBrew

AUTHORIZED SIGNATURE

⑆0001 2457 ⑆053 207766⑆20000431 94479⑆

THE BOWENS LAW FIRM, PC

1246

Charles Walker
with Fee & Mileage
Daryl Cook Per Henry

STATE OF SOUTH CAROLINA
COUNTY OF FAIRFIELD

Darryl T. Cook

v.

State of South Carolina

2013 OCT 7 PM 12 52

Applicant
FAIRFIELD COUNTY
CLERK OF COURT
BETTY JO BECKHAM
Respondent

In The Court of Common Pleas
Sixth Judicial Circuit
Civil Action # 2010-CP-20-453

MEMORANDUM OF LAW
MISSING SECTION OF TRANSCRIPT

The issue presently before the Court is the application of Darryl T. Cook ("Cook") for post-conviction relief. Cook seeks a new trial on the grounds that he received the ineffective assistance of counsel during his criminal trial in that:

- (a) Counsel refused to subpoena witnesses on my behalf.
- (b) Counsel did not object to comments and instructions given by the trial judge to the jury when the jury came back indicating they were deadlocked.
- (c) Counsel did not object to the trial judge sending the jury back to deliberate after the jury indicated they were deadlocked a second time.¹

Based on the testimony of Cook, the witnesses who testified at the PCR hearing and the affidavit of juror Charles Walker², the trial judge gave a coercive Allen charge to the jury. A coercive Allen charge is grounds for a new trial.³ The South Carolina Supreme Court has held: "Whether an Allen charge is unconstitutionally coercive must be judged "in its context and under all the circumstances"."⁴

There are several criteria the courts consider in determining whether an Allen charge was coercive including: (1) did the charge speak specifically to minority jurors; (2) "you must return

¹ Amended application for post-conviction relief.

² Affidavit of Charles Walker is attached as Exhibit 1.

³ Tucker v. Catoe, 346 S.C. 483, 552 S.E.2d 712, (S.C. 2001)

⁴ Id.

a verdict" type language; (3) inquiry into the jury's numerical division; and (4) time of return of verdict.⁵

Applying these criteria, a reasonable interpretation of the comments made by the trial judge when he gave the Allen charge shows the charge was unconstitutionally coercive. First, the trial judge's comments were directed toward the jurors in the minority. There is no indication the trial judge informed the minority jurors that they need not change their view of the evidence or their vote for the sake of arriving at a unanimous verdict. The trial judge did not instruct the jury they could take as much time as they needed to reach a verdict. Charles Walker, who was in the minority of jurors who believed Cook was not guilty, testified in his affidavit that he felt coerced and pressured to reach a verdict that night.

Second, the trial judge used mandatory language that indicated the jury must return a verdict. For example, the trial judge told the jury: (1) they were not going to leave until they had reached a verdict; (2) that there was not going to be a hung jury; (3) the juror's checks had been cut and they would get them on the way out after they had reached a verdict; and (4) this is the last day, you need to reach a verdict before you can leave. The United States Supreme Court has condemned the use of mandatory language in an Allen charge. In response to comments by a trial judge that: "You have got to reach a decision in this case" the Supreme Court, in remanding for a new trial held:

Of course, if this Court should conclude that the judge's statement had the coercive effect attributed to it, the judgment should be reversed and the cause remanded for a new trial; the principle that jurors may not be coerced into surrendering views conscientiously held is so clear as to require no elaboration.⁶

⁵ Id., at 492.

⁶ Jenkins v. United States, 380 U.S. 445 (1965).

Third, the jury informed the court of their numerical division, which was 7 to 5. While the trial judge did not poll the jury as to their division, the trial judge did not act to prevent the jury from reporting their decisional split. The trial judge has an obligation to act to prevent the jury from reporting the status of their vote by instructing the jury to not report it.⁷ The trial court did not instruct the jury to not disclose the status of their vote. The South Carolina Supreme Court concluded that:

None-the-less, knowledge of the jury's numerical division combined with knowledge of its decisional disagreement, followed by an Allen charge directed, at least in part, to minority jurors, is impermissibly coercive.⁸

Fourth, a verdict after a short period of time following an Allen charge suggests coercion.⁹ After being given the Allen charge the jury returned with a unanimous verdict in about twenty (20) minutes. The South Carolina Supreme Court found that an hour and a half delay between the Allen charge and the jury's verdict was a "relatively short period of time" and was coercive.¹⁰ Moreover, Charles Walker indicated in his affidavit that he felt pressured to reach a verdict that night, that the judge wanted the trial over with that evening and that he would not let the jury go home before they reached a verdict.¹¹ In addition to the coercive Allen charge the trial court sent the jury out to continue deliberations a second time after the Allen charge was given in violation of. S.C. Code § 14-7-1330, which provides:

When a jury, after due and thorough deliberation upon any cause, returns into court without having agreed upon a verdict, the court may state anew the evidence or any part of it and explain to it anew the law applicable to the case and may send it out for further deliberation. But if it returns a second time without having agreed upon a verdict, it shall not be sent out again without its own consent unless it shall ask from the court some further explanation of the law.

⁷ Tucker, at 494.

⁸ Id.

⁹ Id. at 492.

¹⁰ Id. at 494.

¹¹ Affidavit of Charles Walker attached as **Exhibit 1**.

The testimony presented at the PCR hearing showed the trial judge sent the jury back to deliberate a second time in violation of the statute. There was no indication the jury asked a question about the law when they came back into court the second time and announced they were still deadlocked. Based on the testimony at the PCR hearing, there is every indication that the judge ordered the jury to deliberate until they had reached a verdict, there is no indication he gave the jury any choice in the matter or obtained the jury's consent to continue deliberations. Forcing the jury to continue to deliberate under these circumstances and in violation of the statute is coercive.

Incomplete Trial Transcript

A coercive Allen charge is grounds for a new trial.¹² The trial counsel's failure to object to a coercive Allen charge constitutes the ineffective assistance of counsel and is also grounds for a new trial.¹³ The portion of the trial when the trial judge gave the Allen charge is missing from the transcript. An incomplete transcript is also grounds for a new trial when the missing portion is prejudicial.¹⁴ Because a new trial is the proper remedy for a coercive Allen charge and the failure of the trial counsel to object, the absence of this portion of the trial transcript is clearly prejudicial to Cook.

It is undisputed that the trial transcript is incomplete as it is missing the part of the trial containing the Allen charge. There is no indication that the missing portion of the transcript was due to Cook's fault. According to the court reporter, the tape recording of the trial is no longer available.¹⁵ Cook is entitled to a complete transcript of his trial. Without the missing part of the transcript, the PCR court and the appellate courts cannot do an effective or meaningful review of

¹² Dawson v. State, 352 S.C. 15, 572 S.E.2d 445 (S.C. 2002); Jenkins at 446.

¹³ Id.

¹⁴ State v. Ladson, 373 S.C. 320, 644 S.E.2d 271 (S.C. 2007)

¹⁵ E-mail from Court Reporter Karen Ambroziak attached as **Exhibit 2**.

the Allen charge and the trial counsel's performance in response to the Allen charge. The following exchange occurred on page 328 lines 1-11 of the transcript:

(WHEREUPON, the jury left open court at approximately 3:10 p.m.)

THE COURT: Stand at ease.

MR. BARFIELD: Yes, sir.

THE COURT: Court will be at ease.

(Pause).

Bring the jury

MR. BARFIELD: We don't have Mr. Swerling yet.

THE DEPUTY: Yes, we do.

(WHEREUPON, the jury returned to open court with the verdict at 8:10 p.m.)

When portions of a transcript are missing, the proper procedure is to attempt to reconstruct the part of the record that is missing.¹⁶ When attempting to reconstruct the record, it is permissible to use affidavits.¹⁷ However, if the reconstructed record does not provide a reasonable basis for a meaningful review of the issues, the proper remedy is a new trial.¹⁸ The South Carolina Court of Appeals has held:

A new trial is therefore appropriate if the appellant establishes that the incomplete nature of the transcript prevents the appellate court from conducting a 'meaningful appellate review.'¹⁹

In this case, we essentially have a reconstructed record of the Allen charge portion of the transcript. Between the testimony of Cook and the other witnesses who testified at the PCR hearing regarding the facts and circumstances of the Allen charge and the affidavit of Charles

¹⁶ Ladson, at 321-323.

¹⁷ Id., at 324.

¹⁸ Id., at 321.

¹⁹ Id., at 325.

Walker, there is a fairly clear picture of what took place during the Allen charge and its effect on the jury. Mr. Cook subpoenaed Charles Walker for the PCR hearing but he did not appear.²⁰ However, Mr. Walker did provide an affidavit (**Exhibit 1**) that clearly shows the Allen charge was coercive. Under the circumstances it is permissible for the PCR Court to consider Mr. Walker's affidavit.²¹ There is no dispute that an Allen charge was given; Mr. Swerling, the only witness for the State, testified that an Allen charge was given to the jury.

Mr. Swerling did not appear to have any present recollection of the facts and circumstances surrounding the Allen charge beyond the fact that an Allen charge was given. However, Cook and the witnesses who testified at the PCR hearing, along with the affidavit by Charles Walker provided the facts and circumstances that Mr. Swerling did not recall.

If the Court finds the testimony from the PCR hearing and Charles Walker's affidavit is an adequate reconstruction of the Allen charge portion of the record, the only reasonable conclusion, based on the evidence before the Court, is that the trial judge gave an unconstitutionally coercive Allen charge and that trial counsel failed to object. Under the circumstances, the proper remedy for a coercive Allen charge and the ineffective assistance of counsel in not objecting to the Allen charge is a new trial on the merits. If the Court finds the PCR hearing testimony and Charles Walker's affidavit is **not** an adequate reconstruction of the Allen charge portion of the record, then a new trial on the merits is the proper remedy.

Conclusion

For the reasons set forth above, a new trial on the merits is clearly warranted in this case. This case presents a perfect storm of errors that warrants a new trial. First, a coercive Allen charge is grounds for a new trial. Second, the failure of Cook's trial counsel to object to a

²⁰ Subpoena attached as **Exhibit 3**.

²¹ Ladson, at 322, 324.

coercive Allen charge constitutes the ineffective assistance of counsel and warrants a new trial. Third, the trial court's violation of S.C. Code § 14-7-1330 in forcing the jury to continue deliberations warrants a new trial. Fifth, the portion of the transcript containing the Allen charge is missing, which is highly prejudicial as it is necessary to prove Cook's claims in his PCR application. The testimony from the PCR hearing and Charles Walker's affidavit clearly show the Allen charge was coercive and that a new trial is warranted.

Respectfully Submitted:



Glenn E. Bowens, Esq.
P.O. Box 424
Winnsboro, South Carolina 29180
(803) 714-7766
Attorney for the Applicant

October 7, 2013



ALAN WILSON
ATTORNEY GENERAL

October 15, 2013

The Honorable Clifton B. Newman
PCR Presiding Judge – 6th Circuit
PO Box 516
Kingstree, SC 29556-0516

RE: Darryl Cook v. State of South Carolina, 2010-CP-20-0453

Dear Judge Newman,

Please accept this letter as the State's return to the Applicant's Motion for Additional Time to take the deposition of Charles Walker. The State objects to any additional time and would ask that the record in this matter be closed at this time.

Mr. Walker has failed to appear for both the hearing and deposition, even while under subpoena. The State submits that his failure to appear while under subpoena indicates his lack of interest in appearing to testify in this matter. Further, the State, as noted at the deposition, objects to the entry into the record of the affidavit signed by Mr. Walker without the opportunity to cross-examine him as to his statements.

If you need a formal return or additional information, please let me know. As indicated at the hearing, I am now preparing a memorandum in response to the Applicant's recently submitted memorandum. Thank you for your time.

Sincerely,

Suzanne H. White
Assistant Deputy Attorney General

Cc: Glenn Bowens (via email)

STATE OF SOUTH CAROLINA
COUNTY OF FAIRFIELD

Darryl T. Campbell **OCT 16 PM 2 24**

v. FAIRFIELD COUNTY
CLERK OF COURT
BETTY JO BECKHAM

State of South Carolina

Applicant

Respondent

In The Court of Common Pleas
Sixth Judicial Circuit
Civil Action # 2010-CP-20-453

REPLY TO STATE'S RETURN
ON APPLICANT'S MOTION FOR
ADDITIONAL TIME TO TAKE CHARLES
WALKER'S DEPOSITION

The Applicant submits this Reply to the State's Return on Applicant's Motion for Additional Time to Take Charles Walker's Deposition.

The Applicant objects to the State's request that "the record in this matter be closed at this time." Closing the record at this time is not appropriate for several reasons. First, Mr. Walker was properly subpoenaed to attend the PCR hearing that was held on August 7, 2013,¹ when Mr. Walker failed to appear Your Honor granted an additional sixty days in which to take Mr. Walker's deposition. Second, Mr. Walker was properly subpoenaed to appear for his deposition on September 27, 2013.² Mr. Walker failed to appear for his deposition.

The Applicant followed the established procedure for obtaining the appearance of witnesses and is entitled to have the subpoena issued to Mr. Walker enforced. It is counsel's understanding that Mr. Walker has been on sick leave, which may account for why he did not appear at his deposition. Third, it is undisputed that the trial record is incomplete in that it is missing the portion related to the coercive Allen charge. Mr. Walker's testimony, whether live or by affidavit, is critical to reconstructing the record concerning the Allen charge. Fourth, the Applicant objects to the State's characterization that Mr. Walker's failure to appear "indicates his lack of interest in appearing to testify in this matter." If Mr. Walker were not interested he

¹ See Exhibit 3 to Applicant's Memorandum dated October 7, 2013.

² See Exhibit 2 to Applicant's Motion for Additional Time dated September 30, 2013.

would not have provided an affidavit in which he testified about the coercive Allen charge that was missing from the trial transcript.³

The State also objects to “the entry into the record” of Mr. Walker’s affidavit. Rule 40(i) of the South Carolina Rules of Civil Procedure addresses the procedure for obtaining a continuance when a witness does not appear. The Rule provides in part:

A party applying for such postponement on account of the absence of a witness shall set forth under oath in addition to the foregoing matters what fact or facts he believes the witness if present would testify to, and the grounds for such belief.

Rule 40(i) clearly requires the facts the witness would testify to if present to be presented under oath i.e. by affidavit. Mr. Walker’s affidavit sets forth the facts, under oath, that he would have testified to if present and may be considered by the Court in deciding to grant a continuance so that his testimony may be obtained on the record.

The missing portion of the trial transcript is a separate basis for the admission of Mr. Walker’s affidavit into the record. It is undisputed that the trial transcript is incomplete as it is missing the part of the trial containing the Allen charge. The Applicant is entitled to a complete transcript of his trial. Without the missing part of the transcript, the PCR court and the appellate courts cannot do an effective or meaningful review of the Allen charge and the trial counsel’s performance in response to the Allen charge. When portions of a transcript are missing, the proper procedure is to attempt to reconstruct the part of the record that is missing.⁴ When attempting to reconstruct the record, it is permissible to use affidavits.⁵ Both the Court of Appeals and the Supreme Court have held that affidavits are permissible when reconstructing a record. The Court of Appeals, quoting the Supreme Court has held:

³ See Exhibit 3 to Applicant’s Motion for Additional Time dated September 30, 2013.

⁴ Ladson, at 321-323.

⁵ Id., at 324.

In *China v. Parrott*, 251 S.C. 329, 334, 162 S.E.2d 276, 278 (1968), our supreme court held that where a portion of the court reporter's notes were lost, the trial judge properly considered affidavits from counsel and the court reporter in reconstructing the record. (emphasis added)⁶

In addition to considering the affidavits of counsel and the court reporter, the court also considered the affidavits of the victim, the crime scene investigator, the handwritten notes of the original court reporter and the handwritten notes of Ladson's attorney at trial as well as other items of physical evidence when attempting to reconstruct the record.⁷ Based on these holdings the Court can certainly consider the affidavit of Mr. Walker when reconstructing the record.

Conclusion

Based on the foregoing reasons, the Applicant requests:

1. The Court leave the record open at this time;
2. Allow the Applicant an additional sixty days to take Mr. Walker's deposition, thereby giving the State's attorney an opportunity to cross-examine Mr. Walker.
3. Enforce the subpoena issued to Mr. Walker;
4. Reconstruct the missing portion of the trial record concerning the Allen charge.

Respectfully Submitted:



 Glenn E. Bowens, Esq.
 P.O. Box 424
 Winnsboro, South Carolina 29180
 (803) 714-7766
 Attorney for the Applicant

October 16, 2013

⁶ Id.

⁷ Id. at 383.

STATE OF SOUTH CAROLINA
COUNTY OF FAIRFIELD

Darryl T. Cook,

Applicant,

v.

State of South Carolina

Respondent.

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT

2010-CP-20-0453

CERTIFICATE OF SERVICE

I, Glenn Bowens, attorney for the Applicant, Darryl T. Cook, do hereby certify that I have this day served a copy of the foregoing **Reply to the State's Return on Applicant's Motion for Additional Time to Take Charles Walker's Deposition** in connection with the above referenced case by placing a copy of the same in the United States Mail, postage prepaid, to the following Address:

Office of the Attorney General
ATTN: Suzanne H. White, Esq.
PO Box 11549
Columbia, SC 29211-1549

2013 OCT 16 PM 2 25
FAIRFIELD COUNTY
CLERK OF COURT
BETTY JO BECKHAM

This the 16th Day of October 2013 AD


Glenn Bowens

STATE OF SOUTH CAROLINA
COUNTY OF FAIRFIELD

2013 DEC 20 AM 10:54 IN THE COURT OF COMMON PLEAS
SOUTH JUDICIAL CIRCUIT

Darryl T. Cook, #267867

FAIRFIELD COUNTY
CLERK OF COURT
BETTY JO BECKHAM

2010-CP-20-0453

Applicant,

v.

State of South Carolina,

Respondent.

**RESPONSE TO APPLICANT'S
MEMORANDUM OF LAW**

The Respondent, making its Response to the Applicant's Memorandum of Law - Missing Section of Transcript filed October 7, 2013, would respectfully show this Court:

PROCEDURAL HISTORY

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Fairfield County Clerk of Court's orders of commitment. The Fairfield County Grand Jury indicted the Applicant at the November 2010 term of General Sessions for murder (2002-GS-20-0546), armed robbery (2002-GS-20-0082), and grand larceny - more than \$1,000 but less than \$5,000 (2002-GS-20-0132). Jack B. Swerling, Esquire, represented the Applicant. On October 23, 2007, the Applicant was convicted of these charges by a jury. The Honorable Kenneth G. Goode, sentenced the Applicant to confinement for forty-five (45) years for murder, twenty-five (25) years for armed robbery, and five (5) years for grand larceny, all running concurrently.

A timely Notice of Appeal and subsequent Anders brief were filed on Applicant's behalf. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Cook, Op No. 2010-UP-0023 (filed January 25, 2010). The Remittitur was returned on February 10, 2010.

In his application and subsequent amendment, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

- 1) Ineffective assistance of Counsel, in that;
 - a) Counsel refused to subpoena witnesses on Applicant's behalf,
 - b) Counsel refused to ask questions the way Applicant wanted;
 - c) Counsel did not object to comments and instructions given by the trial judge to the jury when they came indicating they were deadlocked,
 - d) Counsel did not object to sending the jury back to deliberate after the jury indicated they were deadlocked a second time,
 - e) Counsel did not assert as a defense that Mr. McGuirt's death, which occurred over a year after the shooting, was due to the negligent medical care he received.
- 2) Insufficient evidence to support the murder, in that;
 - a) Trial judge allowed evidence that did not pertain to the actual crime to be used as evidence to gain a conviction,
- 3) Exclusion of relevant evidence, in that;
 - a) Presiding trial judge refused to let certain statements that could have been extremely credible on Applicant's behalf for a new trial.

MEMORANDUM OF LAW

The Respondent contends that no new trial is required for this case because it would require this Court to speculate as to the alleged missing portion of the transcript, Applicant failed to demonstrate that he was prejudiced by the alleged incomplete trial transcript, and the credibility of the Applicant's witnesses is suspect.

Allen Charge

The Supreme Court of South Carolina has outlined how to evaluate an Allen charge in Tucker v. Catoe¹. In Tucker, the Supreme Court considered the following in upholding the constitutionality of the Allen charge:

¹ 346 S.C. 483, 552 S.E.2d 712 (2001).

- (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";
- (3) there was no inquiry into the jury's numerical division, which is generally coercive; and
- (4) while the jury returned a verdict shortly after the supplemental charge, which suggests a possibility of coercion, weighing against this is the fact that trial counsel did not object either to the inquiry into whether the jurors believed further deliberation would result in a verdict, nor to the supplemental charge.²

Applicant has provided no evidence under these four criteria that would warrant this court to find Applicant requires a new trial. Furthermore, the lack of a complete trial transcript is not prejudicial to Applicant because the appellate court made a "meaningful appellate review"³.

The testimony given at the PCR hearing was by Applicant's mother and aunt, both of whom would like to see the Applicant released from jail. Furthermore, when questioned as to why they failed to discuss their concern about the alleged statements made by the trial court after the trial with Mr. Jack Swerling, they could not give a reason. The testimony of both indicated that the hearing was the first time they had mentioned any concerns about jury deliberations to Applicant's trial attorney. As the transcript from the deposition indicates, the additional witness, Mr. Charles Walker, was contacted by the Applicant's father regarding testifying in this matter. Mr. Walker originally failed to appear for the hearing and a deposition, although subpoenaed for both. At the second scheduled deposition, he indicated that he had gotten to know the Applicant's father and family over the years since the trial and much of his affidavit was based on his memory of the trial six years prior, conversations with Applicant's father, and information heard through the community over the years.

² *Id.* at 492, 552 S.E.2d at 716.

³ *State v. Ladson*, 373 S.C. 320, 325, 644 S.E.2d 271, 273 (Ct. App. 2007).

Mr. Swerling has detailed notes from the trial, which appear to indicate that an Allen charge was given during deliberations. However, Mr. Swerling's detailed notes give no indication that the charge was coercive, nor does he have any independent recollection of the jury returning during deliberations. Mr. Swerling also testified that had the Allen charge been coercive or had the trial judge made the alleged improper comments to the jury, he would have immediately objected as he had throughout the trial at the appropriate times.

Testimony given by Applicant at the PCR hearing is suspect at best. The allegation was not presented in his initial PCR application filed in 2010, but rather, was added as an amendment a month prior to the hearing in 2013. Furthermore, the credibility of Applicant's testimony should be highly suspect since his only goal is to end his jail sentence. The testimony and affidavit provided by Applicant from Charles Walker also does not corroborate the testimony provided by the other witnesses at the PCR hearing. Mr. Walker states the trial judge only gave them an Allen charge on one occasion, not two as is being asserted by Applicant and his family members.

CONCLUSION

For the foregoing reasons, a new trial is neither necessary nor warranted in this case. There is not credible evidence that if an Allen charge were given, that it was coercive, and the only credible testimony, provided by Mr. Swerling, indicates the trial judge did not act inappropriately. Therefore, Respondent asks this court to deny the application.

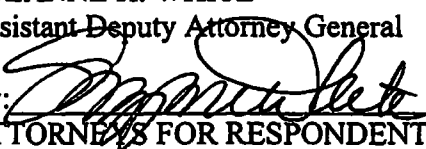
Respectfully,

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Dec. 16, 2013

STATE OF SOUTH CAROLINA
 COUNTY OF FAIRFIELD
 Darryl T. Cook
 v.
 State of South Carolina

2014 JAN 13 PM 2 07
 FAIRFIELD COUNTY
 CLERK OF COURT
 BETTY JO BECKHAM

Applicant

In The Court of Common Pleas
 Sixth Judicial Circuit
 Civil Action # 2010-CP-20-453

REPLY TO STATE'S RESPONSE
 ON APPLICANT'S MISSING
 TRANSCRIPT MEMORANDUM

Respondent

The Applicant, Darryl T. Cook ("Cook"), submits this Reply to the State's Response to Cook's Missing Transcript Memorandum. For the reasons set forth below, the State has not advanced any arguments or produced any evidence that would justify denying Cook's application for Post Conviction Relief.

The State argues the Court would be required to speculate as to the missing portion of the transcript. The State's position is completely untenable, the Court is not required to speculate. South Carolina has a clear, well-established procedure when a portion of the record is missing. The missing portion of the record is reconstructed; if the record cannot be reconstructed a new trial is required. State v. Ladson, 373 S.C. 320, 644 S.E.2d 271 (S.C. App. 2007).

There is no question that the trial judge gave an Allen charge to the jury and that the Allen charge is missing from the record. All of the witnesses testified that an Allen charge was given. According to the trial transcript (**Exhibit 1**), the jury began their deliberations at 2:02 p.m. The jury returned to the courtroom at approximately 3:08 p.m. with two questions. The trial judge answered the questions and the jury left the courtroom at 3:10 p.m. (for deliberations) and returned to the courtroom at 8:10 p.m. with the verdict. According to Mr. Jack Swerling (the State's sole witness), the Allen charge was given at 5:30 p.m. The portion of the transcript between 3:10 p.m. and 8:10 p.m., a five-hour period of time, is missing. The uncontradicted

evidence is that the Allen charge was given and that it is missing from the trial transcript. There is no reason or factual basis to conclude otherwise.

In Ladson, a case cited by the State in its Response, the record was reconstructed by using two affidavits of witnesses and the State's summary of the testimony of other witnesses. (See also China v. Parrott, 251 S.C. 329, 162, S.E.2d 276 (1968) where the Supreme Court held it was the trial Court's duty to determine what transpired and when doing so the trial court could properly consider affidavits in reconstructing the record). In addition to the affidavits, the reconstructed record also included handwritten notes from the court reporter, defense counsel and physical evidence. Ladson, at 322, 324, 330. The Court of Appeals ultimately found record was not sufficiently reconstructed; the Court found the State's summation of witness testimony was "largely conclusory" and remanded for a new trial. Id., at 321-322.

In the case at bar, there is live sworn testimony from six (6) witnesses, which was subject to cross-examination, as to the missing portion of the transcript containing the coercive Allen charge. These witnesses were present in the courtroom when the Allen charge was given and testified from their personal knowledge. Mr. Swerling, testified that an Allen charge was given to the jury but did not recall the trial judge's comments. The remaining five witnesses testified the Allen charge was given and also related the trial judge's comments when giving the charge.¹

The sworn testimony of witnesses with personal knowledge of the facts to which they testify is not considered to be speculation. Judges and juries rely on the sworn testimony of witness to decide cases every day, without resorting to speculation. The testimony of the five witnesses regarding the Allen charge was admitted into evidence during the PCR hearing without objection by the State that their testimony was speculation.

¹ The five witnesses are Darryl Cook, his father, mother, grandmother and juror Charles Walker.

The State's claim that the trial court would be required to speculate as to the missing portion of the transcript (even though the Court has the sworn testimony of six witnesses upon which to reconstruct the record) is contrary to years of precedent.² If the sworn testimony of the witnesses is not sufficient to reconstruct the missing portion of the transcript containing the Allen charge, then a new trial is required.

The State claims that Cook has produced no evidence of the four criteria the Supreme Court articulated in Tucker v. Catoe, 346 S.C. 483, 552 S.E. 2d 712 (2001) that would warrant a new trial based on a coercive Allen charge. All four criteria need not be present in order for an Allen charge to be coercive. Allen charges have been found to be coercive when only one of the four criteria is present: mandatory language was used; i.e. you must reach a verdict type language (Jenkins v. United States, 380 U.S. 445 (1965)); when the charge is not balanced, i.e. the jurors are not informed to consider both the majority and minority positions (United States v. Burgos, 55 F.3d 933 (4th Cir. 1995)); when cautionary language is not used, i.e. the minority jurors are not informed that they need not surrender a conscientiously held position for the sake of reaching a verdict (Smalls v. Batista, 191 F.3d 272 (2nd Cir 1999) quoted with approval in Tucker v. Catoe, 221 F.3d 600,610-611 (4th Cir. 2000); Burgos, at 939); and inquiry into the jury's numerical division (Brasfield v. United States, 272 U.S. 448 (1926)).

As more fully explained below, Cook has produced substantial evidence showing the trial judge's Allen charge comments were unconstitutionally coercive. On the other hand, the State called no witnesses (specifically no jurors were called) to testify they remembered the trial judge's Allen charge comments and that the comments were not coercive. The testimony of Cook's witnesses was uncontradicted.

² See Ladson and the plethora of cases cited by the Court of Appeals in its opinion.

Allen Charge Directed to Minority Jurors

The State claims "the charge did not speak specifically to the minority jurors." The trial court's Allen charge was most certainly directed toward the minority jurors. A coercive Allen charge must be analyzed from the perspective of the minority jurors. Tucker, 221 F.3d at 611. The Court cautioned that the minority jurors always know their minority status and if "fearfully inclined, may presumably suspect a disgruntled judge can find them out." Id.

The courts are clearly concerned about the potential coercive impact of the Allen charge on the minority jurors, whether the charge is specifically directed to the minority jurors or not. In this case, the trial judge told the jury "There was not going to be a hung jury."³ This comment could reasonably be interpreted by minority jurors as being directed to them because they were the jurors causing the jury to be hung. A minority juror could reasonably interpret this comment to mean he should abandon his conscientiously held belief and vote with the majority to avoid a hung jury. The Fourth Circuit also noted:

Here, the juror in the minority was not made aware of the possibility that, if he or she was not convinced by the views of the majority, he or she should hold on to his or her own conscientiously held beliefs. The absence of that option might lead minority jurors to believe that unless they are able to convince the majority, they should abandon their own conscientiously held position. Id. at 611.

The Fourth Circuit has also held:

The most egregious mistake that can be made in the context of an Allen charge is for a district court to suggest, in any way, that jurors surrender their conscientious convictions.⁴

The South Carolina Supreme Court has held:

An Allen charge cannot be directed to the minority votes on the jury panel, but must instead be even-handed, directing both the majority and minority to consider the other's views.⁵

³ See Affidavit of Charles Walker ¶6b and Walker Dep. p. 7, line 3 (attached as **Exhibit 2**)

⁴ Burgos, at 939.

In order for an Allen charge to be fair, neutral, balanced and not coercive, the charge must contain cautionary language that makes clear that no juror is required to vote against their conscientiously held beliefs for the sake of reaching a verdict. Tucker, 221 F.3d at 610 – 611.

Otherwise, the verdict becomes the verdict of the majority, not the verdict of each juror.

Based on the testimony of the witnesses, the Allen charge did not contain any of the required cautionary language, which would discourage minority jurors from surrendering their conscientiously held beliefs. Absent the cautionary language, an Allen charge is coercive as it does not make clear to the jury that both majority and minority positions are equally credible; the minority jurors may feel they must acquiesce to the majority's view. Id. The court also noted that the necessity for cautionary language was highlighted because the trial judge knew the jury's numerical division. Id.

Mandatory Language

The State claims there is no evidence the trial judge included language such as "You have got to reach a decision in this case." "The trial judge has a duty to urge, but not coerce a jury to reach a verdict." Dawson, at 447. The United States Supreme Court has long held that an Allen charge is coercive and requires a new trial if the charge uses mandatory language to the effect that a verdict must be reached.⁶ Telling jurors they must reach a verdict is coercive. Mandatory language in an Allen charge is prohibited because, as the Supreme Court noted, "the principle that jurors may not be coerced into surrendering views conscientiously held is so clear as to require no further elaboration."⁷

⁵ Dawson v. South Carolina, 352 S.C. 15, 572 S.E.2d 445 (S.C. 2002).

⁶ Jenkins, at 446.

⁷ Id., quoting from the Solicitor General's brief.

Contrary to the State's claim, there is substantial evidence the trial judge used mandatory language. Each of the five witnesses called by Cook testified to the trial judges' use of mandatory language to the effect that a verdict must be reached. Mr. Charles Walker, one of the minority jurors, testified the trial judge told the jury that: (1) a verdict had to be reached before the jury could leave; (2) there was not going to be a hung jury; (3) this was the last day of the trial and the jury needed to reach a verdict.⁸ Charles Walker also testified, "The judge was clear that a verdict had to be reached that evening."⁹

Jury's Numerical Division

The State claims there is no evidence the trial court inquired into the jury's numerical division. The Court in Tucker noted that one of the relevant considerations in reviewing an Allen charge for coerciveness was "indications that the trial court **knew** the numerical division of the jury."¹⁰ The United States Supreme Court has condemned trial court's knowledge of the jury's vote and noted:

Cases may easily be imagined where a practice of this kind might lead to improper influences, and for this reason it ought not to obtain.¹¹

It is not just the inquiry by the judge into the jury's numerical division that is coercive but also the fact that the trial judge knows the numerical division and the jury knows that the judge knows their numerical division, which is then followed by an Allen charge. The South Carolina Supreme Court noted in Tucker, that while the trial judge did not poll the jury as to its division

⁸ See Charles Walker affidavit ¶6 - ¶7; Walker dep. p. 7, lines 3 - 19.

⁹ Id.

¹⁰ Tucker, 221 F.3d at 611.

¹¹ See Burton v. United States, 196 U.S. 283, 307-08 (1905); Brasfield v. United States, 272 U.S. 448, 449-50 (1926).

he also “did not act to prevent the jury’s self-reporting.”¹² The Fourth Circuit was also critical of the trial judge’s failure to advise the jury not to reveal its vote.¹³

Clearly it is the trial court’s knowledge of the numerical division that is central to the coercive effect on minority jurors. Compounding matters was the failure of the trial judge to include cautionary language in the Allen charge, which was given after the trial judge knew the jury’s numerical division. In the case at bar, the trial judge knew the jury’s numerical division and did not include any cautionary language in his Allen charge.

Charles Walker, one of the minority jurors who changed his vote because of the Allen charge, testified that he was coerced to reach a verdict that night. He also testified the trial judge knew the jury’s numerical division was 7 to 5, that the jury had taken two votes and that the trial judge did not inform the jury that no juror was required to vote against his or her conscience just for the sake of reaching a verdict. He also testified the trial judge did not give them any specific instructions on how the jury should approach or resolve their inability to reach a unanimous verdict, i.e. that jurors in both the majority and minority should consider the views of the other jurors. The failure to include cautionary language is reversible error as it violates the Fourth Circuit’s “mandate” and renders the charge unconstitutionally coercive. *Tucker*, 55 F.3d at 941. The coercion is only magnified when the trial judge both fails to include cautionary language and also knows the jury’s numerical division before the Allen charge is given.

Another consideration identified by the *Tucker* Court was “suggestions or threats that the jury would be kept until unanimity is reached.” *Id.*, at 611. The five witnesses produced by Cook all testified the trial judge made repeated comments / threats that the jury would not be released until a unanimous verdict had been reached. Specifically, Mr. Walker testified the trial judge

¹² *Tucker*, 346 S.C. at 494.

¹³ *Tucker*, 221 F.3d at 611.

told the jury: (1) "We are not going to leave until we had a verdict and that a verdict had to be reached before we could leave." (2) "There was not going to be a hung jury." (3) "This is the last day, you need to reach a verdict before you can leave." Mr. Walker also testified, "The judge never told the jury that we could take as much time as we needed to reach a verdict. The judge was clear that a verdict must be reached that evening. I felt the judge wanted the trial to be over with that evening and that he would not let us go home before we reached a verdict"¹⁴

Mr. Walker also testified the trial judge told the jury that the juror's checks were cut and they would get them on the way out **after they had reached a verdict.**¹⁵ The trial judge's comment improperly implied the jurors would not receive their check unless they reached a verdict. A minority juror could reasonably interpret this comment to mean that he must change his vote and reach a verdict or he would not be paid for his jury service. Jurors are entitled to compensation for their service regardless of whether they reached a verdict. This comment was an improper and coercive financial incentive to reach a verdict that night.

Length of Deliberations Following the Allen Charge and Verdict

The State claims there is no evidence of a short period of time between the giving of the Allen charge and the jury returning with a verdict. Both the South Carolina Supreme Court and the Fourth Circuit Court of Appeals hold that one of the relevant considerations in reviewing an Allen Charge is the amount of time the jury deliberated between the time the Allen charge was given and the jury's returning with a verdict.¹⁶ A short period of time between the charge and verdict is evidence the jury was coerced.¹⁷ Both the South Carolina Supreme Court and the

¹⁴ Charles Walker Affidavit, ¶ 4 - ¶8; Walker dep. p. 6, line 23 – p. 7, line 19.

¹⁵ Id., at ¶6c.

¹⁶ Tucker, 221 F.3d at 611; Tucker, 346 S.C. at 494.

¹⁷ Burgos, at 943.

Fourth Circuit found that one and a half hours of deliberation following the Allen charge was a "relatively short period of time" that weighed in favor of a finding of coercion.¹⁸

In the case at bar, the time between the Allen charge and the jury returning with a verdict was approximately twenty-(20)-minutes.¹⁹ Within the space of just twenty minutes the five minority jurors, who had been deliberating since 2:02 p.m. in the afternoon, more than six hours, changed their minds. No meaningful deliberation could have taken place in twenty minutes when the jury was split 7 to 5. Charles Walker testified, "If there had been no time pressure from the judge to reach a verdict that night I would likely have voted not guilty."²⁰ Clearly, the Allen charge had a coercive impact on the minority jurors.

In addition to the coercive Allen charge the trial judge sent the jury out to continue deliberations a second time after the Allen charge was given in violation of S.C. Code § 14-7-1330, which provides:

When a jury, after due and thorough deliberation upon any cause, returns into court without having agreed upon a verdict, the court may state anew the evidence or any part of it and explain to it anew the law applicable to the case and may send it out for further deliberation. But if it returns a second time without having agreed upon a verdict, it shall not be sent out again without its own consent unless it shall ask from the court some further explanation of the law.

The testimony at the PCR hearing showed the trial judge sent the jury back to deliberate a second time in violation of the statute. There was no indication the jury asked a question about the law when they came back into court the second time and announced they were still deadlocked. Based on the testimony at the PCR hearing, there is every indication that the judge ordered the jury to deliberate until they had reached a verdict, there is no indication he gave the jury any

¹⁸ Tucker, 221 F.3d at 612; Tucker, 346 S.C. at 494.

¹⁹ Charles Walker Affidavit, ¶ 7.

²⁰ Charles Walker affidavit ¶10; Walker dep. p. 8, lines 2 – 4.

choice in the matter or obtained the jury's consent to continue deliberations. Forcing the jury to continue to deliberate under these circumstances is coercive.

The State next argues that Cook was not prejudiced by the missing portion of the transcript. Contrary to the State's position, Cook was highly prejudiced. Without question, a coercive Allen charge is prejudicial and is grounds for a new trial. Cook was obviously prejudiced when the jury was pressured by unlawful and unreasonable time constraints, imposed by the trial judge, to reach a verdict before the jury could leave the courthouse and which caused jurors to change their vote from not guilty to guilty.

Cook was also prejudiced by the ineffective assistance of counsel, which is a ground for a new trial. Mr. Swerling was ineffective in that he failed to object at trial to the Allen charge on the basis that it was unconstitutionally coercive.²¹ Moreover, Mr. Swerling was also ineffective in that he did not review the transcript and failed to identify that the Allen charge was missing from the transcript. Mr. Swerling failed to raise this issue to the attention of the trial judge, the court reporter, Cook's appointed appellate counsel and failed to take steps to reconstruct the record, which prevented appellate review of the issue.

Cook was also prejudiced in that he was not able to pursue reversal of his conviction and a new trial on the basis of the coercive Allen charge and the ineffective assistance of counsel on appeal due to the missing portion of the transcript. Cook's appointed appellate attorney did not have the ability to address the issue of the coercive Allen charge or ineffective assistance of trial counsel because of the missing portion of the transcript. The appellate court could not review these issues since they were not contained in the transcript and were not briefed by the appointed appellate attorney for the same reason.

²¹ Dawson, at 447 - 448.

The State's position that Cook was not prejudiced by the lack of a complete trial transcript because the appellate court made a meaningful review is unreasonable. First, it is impossible for the appellate court to conduct a meaningful review of a coercive Allen charge and determine if Cook received the ineffective assistance of counsel when the portion of the transcript containing the Allen charge was missing. There was no appellate review of the Allen charge because of the missing portion of the transcript and the ineffectiveness of Mr. Swerling in not identifying the issue of the missing portion of the transcript.

The State next argues that a new trial is not warranted because Cook's witnesses were not credible. The most credible witness in a coercive Allen charge claim must be a member of the jury, in this case Charles Walker. The juror knows whether he was coerced to change his vote by the trial judge's comments in connection with the Allen charge. The State did not challenge Mr. Walker's credibility other than to ask him if he knew Cook's family prior to the trial.²² The State also noted that Mr. Walker did not appear at the PCR hearing or his first scheduled deposition, implying that he did not want to testify. Mr. Walker testified that he did not appear because he was on sick leave.²³ Clearly, if Mr. Walker did not want to provide testimony he would not have provided the affidavit on August 1, 2013, which was prior to the PCR hearing.

The State is also critical of the fact that most of the witnesses on this matter were family members. The coercive Allen charge occurred later in the day on the last day of the trial – the potential witnesses who would likely be in the courtroom at that time and witnessed the Allen charge would be family members. The State claims that Cook's application for PCR should be denied because his only goal is to end his jail sentence. Based on the State's rational there

²² Walker Dep. p. 13, lines 2 – 20.

²³ Walker Dep. p. 10, line 5 – p.11, line 5.

should never be any post conviction relief as every person who applies for post conviction relief is seeking to end their jail sentences.

The State did not produce any witnesses who actually contradicted the testimony of Cook's witnesses. Mr. Swerling was the only witness called by the State and the most he could say was that he did not remember what was said during the Allen charge, which actually supports Cook's claim that Mr. Swerling was ineffective. Mr. Swerling did not object to the Allen charge and did not review the trial transcript to discover the Allen charge, which he admits occurred, was missing from the transcript.

The State erroneously claims that Charles Walker's testimony did not corroborate the testimony from the other witnesses. Mr. Walker's testimony regarding the comments made by the trial judge in connection with the Allen charge corroborated the testimony by the other witnesses. The first time the jury returned to the courtroom (which was included in the trial transcript) was to ask two questions. The jury did not announce they were deadlocked on this occasion. The second time the jury returned to the courtroom they announced they were deadlocked. The third time the jury returned to the courtroom they announced (for the second time) they were deadlocked.²⁴ The only detail that Mr. Walker did not specifically corroborate was whether the jury returned to the courtroom a third time and announced they were still deadlocked. Mr. Walker did not contradict the other witnesses; he testified that he just could not remember whether the jury came back and announced they were deadlocked a second time.²⁵

No witness directly contradicted the testimony of the witnesses regarding the comments made by the trial judge during the Allen charge. Mr. Walker was clear that he did not believe Cook committed the murder. Mr. Walker was also clear in his testimony that he was coerced by

²⁴ See **Exhibit 1**, trial transcript

²⁵ Walker dep. p. 15, lines 9 – p. 16, line 3.

the trial judge to reach a verdict that night and that had there been no time constraints he would likely have voted not guilty.²⁶

The State implies that because Mr. Walker was contacted by Cook's father about testifying in this matter his testimony is somehow less credible. The person who contacted Mr. Walker about testifying has absolutely no impact on Mr. Walker's credibility. Someone had to contact Mr. Walker, no doubt the State would have the same complaint no matter who contacted him.

The State's characterization of the source of Mr. Walker's information contained in his affidavit is misleading. The State claims "much" of his affidavit "was based on his memory of the trial six years prior, conversations with Applicant's father, and information heard through the community over the years." As a preliminary matter, that Mr. Walker's affidavit was based on his memory from the trial is not a basis for criticism – witnesses are required to testify from their personal knowledge / memory. The State has mischaracterized Mr. Walker's testimony and affidavit. Mr. Walker's affidavit contained ten paragraphs, nine of which concerned the coercive Allen charge. Only one paragraph, consisting of three sentences, related to his belief that Cook did not commit the murder and that there was not enough evidence to prove Cook did it, which is the only subject that Mr. Walker may have heard conversations about in the community.

Mr. Walker's deposition testimony was that he was not familiar with the Cooks or Darryl Cook's arrest prior to the trial.²⁷ Mr. Walker was living in Great Falls, SC at the time of the shooting not in Ridgeway, SC, where the incident occurred.²⁸ Moreover, other than hearing when the incident occurred, Mr. Walker did not indicate he had any other information gained

²⁶ See Affidavit of Charles Walker and Walker Dep. p. 6, line 23 – p. 8, line 4.

²⁷ Walker dep. p. 13, lines 7 – 20.

²⁸ Walker dep. p. 13, lines 14 – 20.

from conversations in the community prior to the trial. The conversations he heard through the community was **after** the trial and concerned the merits of the case – not the Allen charge.²⁹

Whatever Mr. Walker heard in the community had nothing to do with the Allen charge.

Moreover, Mr. Walker stated that the information he heard “kind of enlighten me more of how I felt that night.”³⁰ Clearly, whatever Mr. Walker heard in the community only served to confirm what he felt the night of the trial, i.e. that Cook did not commit the murder. Mr. Walker’s affidavit was not repeating what he heard in the community or from Cook’s father. Mr. Walker was clear in his belief that “...some of the evidence that to me wasn’t solid evidence to say that he done it...”³¹

The State claimed in its Response that:

Mr. Swerling has detailed notes from the trial, which appear to indicate that an Allen charge was given during deliberations. However, Mr. Swerling’s detailed notes give no indication that the charge was coercive, nor does he have any independent recollection of the jury returning during deliberations.

Cook would submit that Mr. Swerling’s notes were not “detailed” concerning the Allen charge. If Mr. Swerling had detailed notes of the Allen charge the notes would surely have contained some description of the trial judge’s comments when giving the Allen charge. Mr. Swerling’s notes concerning the Allen charge were limited to (1) the fact that an Allen charge was given; (2) the time the Allen charge was given; and (3) the jury’s vote. Mr. Swerling’s notes contained no information about the language of the Allen charge or trial judge’s comments. As a matter of law, the limited information contained in Mr. Swerling’s notes, combined with his testimony that he did not recall the comments made by the trial judge, is insufficient to refute the testimony of the other witnesses.

²⁹ Walker dep. p. 14, lines 6 – 12.

³⁰ Walker dep. p. 13, lines 12 – 17.

³¹ Walker dep. p. 13, lines 23 – 25.

Conclusion

There is no question the Allen charge was given to the jury and that it is missing from the transcript. The parties have sufficiently reconstructed the record, through the testimony of witnesses, to allow the Court to review the constitutionality of the Allen charge. Based on the witnesses' testimony, the Allen charge given to the jury in this case was unconstitutionally coercive. Mr. Walker's affidavit and testimony clearly prove he was coerced, along with the other minority jurors, into changing their vote to guilty within twenty minutes of receiving the Allen charge.

The Allen charge failed to instruct jurors in both the minority and majority to consider the views of the other jurors and failed to instruct the jury that no juror was required to surrender a conscientiously held belief for the sake of reaching a verdict. The trial judge used mandatory language to the effect that the jury had to reach a verdict that night and threatened to not let the jury leave until a verdict was reached. The trial court also used an improper financial incentive to coerce the jury to reach a verdict that night by stating that the juror's checks had been cut and would be handed out after they reached a verdict. The trial judge also ordered the jury to continue deliberations after they jury announced they were deadlocked a second time in violation of SC Code §14-7-1330, which prohibits the jury from being compelled to continue deliberations without their consent after they announce a deadlock a second time.

Cook received the ineffective assistance of counsel from Mr. Swerling when he failed to: (1) object to the Allen charge; (2) object to the jury being sent back to deliberate after the jury announced a second time that they were deadlocked; (3) review the trial transcript and identify that the Allen charge, which he admits was given, was missing from the transcript; (4) notify the trial judge, court reporter and appellate counsel that the Allen charge was missing from the

transcript; (5) take steps to reconstruct the missing portion of the record. As a result, the appellate court was unable to review the Allen charge on direct appeal.

Under the circumstance of this case, the Allen charge was unconstitutionally coercive. Without the coercive Allen charge and Mr. Swerling's ineffective representation, the result at trial would have been different. A new trial is clearly warranted.

Respectfully Submitted:



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January 13, 2013

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**DEPOSITION OF:
CHARLES WALKER**

NOVEMBER 21, 2013

DARRYL T. COOK

VS.

STATE OF SOUTH CAROLINA

2010-CP-20-0453

REPORTER: PATRICIA G. BACHAND

ATTORNEY GENERAL'S OFFICE

RECEIVED 12/13/2013

ADMINISTRATIVE INSTRUCTIONS

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FILE RECORDS _____ CLERK RECORDS _____

OTHER: *Noted - ngn*

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF FAIRFIELD) CASE NO.: 2010-CP-20-0453

Darryl T. Cook,)
Plaintiff,) DEPOSITION OF
vs.) CHARLES WALKER
State of South Carolina,) NOVEMBER 21, 2013
Defendants.)

Deposition on oral examination of CHARLES WALKER,
reported by Patricia G. Bachand, Court Reporter and Notary
Public in and for the State of South Carolina; pursuant to
Rule 30 of the South Carolina Rules of Civil Procedure;
said deposition was taken at the Fairfield County, Clerk's
Office, 101 S. Congress Street, Winnsboro, South Carolina,
on Thursday, the 21st day of November, 2013, scheduled for
one o'clock p.m. and commencing at the hour of 1:13 o'clock
p.m.

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21	Court Reporter's Legend:	
22	dashes [--]	Intentional or purposeful interruption
23	...	Indicates trailing off
24	[ph]	Denotes phonetically written
25	[sic]	Written as said

CHARLES WALKER

Page 4

1 This deposition is taken in accordance with the
2 South Carolina Rules of Civil Procedure.

3 It is agreed and stipulated by the deponent and
4 respective counsel that the reading and signing of the
5 deposition by the deponent is expressly waived.

6 WHEREUPON:

7 CHARLES WALKER, being duly sworn and cautioned to
8 speak the truth, the whole truth and nothing but the truth,
9 testifies as follows:

10 EXAMINATION BY MR. BOWENS:

11 Q. Mr. Walker, my name is Glenn Bowens. We've met
12 previously on a couple of occasions --

13 A. Right.

14 Q. -- and talked about your role in the trial of
15 Darryt Walker -- of Darryl Cook.

16 A. Darryl Cook.

17 Q. Before we get started into the substance of this,
18 I'm going to show you what we've marked as Exhibit No. 2 to
19 your deposition.

20 (PLAINTIFF'S EXHIBIT NO. 2 (3 PAGES) -

21 NOTICE OF DEPOSITION)

22 Q. This is just a notice of the deposition and a
23 copy of the -- of the subpoena to be here.

24 MR. BOWENS: Okay. And there's a copy for
25 you.

1 MS. WHITE: Thank you.

2 (PLAINTIFF'S EXHIBIT NO. 3 (1 PAGE) -

3 AFFIDAVIT OF SERVICE)

4 BY MR. BOWENS:

5 Q. And then No. 3 is the affidavit of service by the
6 sheriff's office, where they served you, so you're here
7 because of the subpoena.

8 A. Right.

9 Q. You're required to be here.

10 A. Uh-huh.

11 (PLAINTIFF'S EXHIBIT NO. 1 (2 PAGES) -

12 AFFIDAVIT OF CHARLES WALKER)

13 Q. All right. Now, Exhibit No. 1 is an affidavit
14 that you previously provided; is that correct?

15 A. Uh-huh.

16 Q. If you would, let's just take a couple minutes
17 and read out loud your affidavit. Just go through it, then
18 we'll talk about it, okay?

19 A. Which line?

20 Q. Just start with Line 1 and go through to the end.

21 A. (As read) "My name is Charles Walker, I am --
22 have personal knowledge of the matter set forth of the
23 affidavit. I reside at [REDACTED] Winnsboro, South
24 Carolina 29180 zip code.

25 "I was a juror in the case of the South Carolina

1 versus Darryl Cook. Judge Goode was the --

2 COURT REPORTER: I'm going to ask you to
3 speak up and a little bit slower, please.

4 THE WITNESS: Okay.

5 A. -- Judge Goode was the presenting [sic] judge.
6 And the trial held on October the 15th-18th, 2007."

7 Line 3: "After the judge [sic] was dismiss for --
8 what is that: "demonstration" [sic]? -- we came back in
9 the courtroom in order for the judge to answer two
10 questions. The judge [sic] then return the jury room for
11 the judge -- the delinquent [sic]."

12 Line 4: "The jury came back into the courtroom a
13 second time. The judge [sic] informed information -- the
14 judge foreman informed the judge that the jury was
15 deadlocked at 7 to 5. We took two votes before informing
16 the judge that we were deadlocked."

17 No. 5: "The judge did not give any specific
18 instructions on how we should approach or resolve the --
19 our inability to reach a anonymous [sic] verdict. The
20 judge did not inform the jury that no juror was required to
21 vote against hi or her consent [sic] just for the sake of
22 reaching a verdict."

23 Six: "The judge took the jury back -- told the
24 jury that:

25 "We are not going to leave until we have a

1 verdict and a verdict had to be reached before we could
2 leave."

3 "(b) There was not going to be a hung jury."

4 "The checks were cut and the jurors would have
5 get then on the way out after we reached a verdict."

6 "This is the last day, you need to reach a
7 verdict before you can leave."

8 "The judge never told the jury that we could take
9 as much time as we needed to reach the verdict. The judge
10 was clear that the verdict must be reached that evening.
11 The judge [sic] went back in -- back to the jury room and
12 returned with a guilty -- a guilty verdict in about twenty
13 minutes."

14 "I felt that the judge comments were -- what is
15 that: Cor-vance [ph]? -- and I felt pressured and reached a
16 verdict that night. I felt that the judge wanted the trial
17 to be over that evening and that he wanted not to let it go
18 home -- we were not to go home -- let us go home before we
19 reached a verdict."

20 "I personally never thought that Darryl Cook
21 committed the murder. I did [sic] believe that there was
22 enough evidence to prove that he did it. And I felt that
23 Darryl Cook was taking the fall or taking the blame for
24 someone.

25 "The combination of the pressure to reach the

1 verdict and feeling that Darryl knew who did commit the
2 murder led me to change my vote to guilty. I felt that it
3 been no time pressure from the judge to reach the verdict
4 that night I would have likely voted not guilty."

5 Q. And is that your signature right below "Further
6 Affiant Saith Not"?

7 A. Yes.

8 Q. Is this true and correct to the best of your
9 knowledge and ability from the best you can remember?

10 A. To the best I can remember, it is.

11 Q. Is there anything you want to add or change about
12 this affidavit?

13 A. Just trying to put together exactly, like, about
14 that last verdict, what we all discussed and what -- what
15 made us go into the verdict.

16 MS. WHITE: And I just want to go ahead and
17 put an objection on the record, if we can't -- that I would
18 object to going into any of the jury deliberations, based
19 on the case law and rules.

20 MR. BOWENS: Okay.

21 BY MR. BOWENS:

22 Q. Well, yeah, let's don't talk about what everybody
23 else discussed. Let's mainly focus on what you perceived
24 and what you felt from what the judge said to you as a
25 juror, and to the jury group. Is that -- is that okay?

1 A. Okay.

2 Q. But you recall the judge telling you those things
3 that are in Paragraph 6, Nos. A, B, C, and D?

4 A. Now, on (a) he did say that we need to reach a
5 jury -- a verdict before we leave. He never said guilty or
6 non-guilty, that it was up to the jurors. And like I said,
7 once we went back to the -- went back to the chamber to
8 discuss it, that's what we looked at the evidence that
9 after I -- the ones that said "non-guilty," after I looked
10 at the evidence that was presented to us, that's when I
11 come up with the verdict of guilty.

12 Q. But I think you said over here, that if you had
13 not had the time pressure to get one that night, you would
14 have likely voted "not guilty."

15 A. Yeah, I would have still --

16 Q. If you had, had as much --

17 A. I would have had --

18 Q. -- time as you wanted.

19 A. -- more time -- more time that I wanted.

20 Q. And you felt that the judge -- the judge's
21 comments were coercive and then you felt pressured to reach
22 a verdict that night.

23 A. Yeah. I mean, it's just -- I just felt that we
24 needed more time -- that I needed more time to make that
25 verdict. Like I said, it was -- we had evidence, but it's

1 still -- I was like still at fault like --

2 Q. You felt like he did not commit the murder, but
3 he knew who did.

4 A. He knew who did -- who else had did it.

5 Q. Let me just ask you a couple of other quick
6 things before I forget to. We had previously scheduled
7 your deposition in September, I believe -- I believe it
8 was. Yeah. And you didn't --

9 MS. WHITE: Yeah, the hearing was in August.

10 Q. -- you didn't show up for it. I have been told
11 that you had been sick. Is that why you weren't able to be
12 here? Were you --

13 A. Yes.

14 Q. -- out sick?

15 A. Uh-huh.

16 MR. BOWENS: Okay. Okay. That's all that I
17 have for you. Ms. White may have some questions.

18 EXAMINATION BY MS. WHITE:

19 Q. Thank you. On that same kind of line of
20 questioning, what was the reason you were not able to
21 appear when you were subpoenaed for the actual hearing in
22 August?

23 A. Well, I was out with high blood pressure from
24 work -- at work. I didn't return back to work, probably
25 about another month. I got Dr. McElmurray was my doctor.

1 Q. And that was in August?

2 A. That was in August, yeah.

3 Q. And then also in September?

4 A. Now, in September that was -- it went into --
5 yeah, I went back in October, yeah.

6 Q. Okay. When did you first mention that you felt
7 you had been coerced into reaching a verdict?

8 A. Basically, I mean --

9 Q. To anyone.

10 A. To -- with me working at Walmart, from me talking
11 to his father coming in there quite a few times, that's
12 where that come from.

13 Q. And this is obviously 2013, the trial was in
14 2006.

15 A. Uh-huh.

16 Q. '7? Sorry, 2007. It was six years ago.

17 A. Right.

18 Q. You're testifying today, or stating that you
19 remember quotes from the judge six years ago, as to --

20 A. No, I --

21 Q. -- what --

22 A. Not a hundred percent as in that. I mean, it's
23 still -- I mean, if I had to -- if I had to say I
24 remembered everything that night, no, I'm -- I'm not going
25 to say that, because I can't.

1 Q. Okay. You told -- in the affidavit, you state
2 that the jury came back for questions.

3 A. Uh-huh.

4 Q. Returned to the jury room and came back a second
5 time, stating that you were deadlocked.

6 A. Uh-huh.

7 Q. Was that the only time that the jury came back
8 after the questions, stating that they were deadlocked?

9 A. (The witness pauses.)

10 Q. Do you recall?

11 A. Wait a minute. Let me think. I remember going
12 out once and coming back.

13 Q. And was that for the questions?

14 A. That was for the question. And I think, if I can
15 remember, they sent a note out after we voted again; that
16 it was a deadlock again; and we were -- on those rules, we
17 asked to come back or we got -- we had to go out and see
18 the judge to ask -- what happened? I remember we giving
19 them the count on a sheet of paper, sending it out that it
20 was at deadlock again. 'Cause we voted twice. But I don't
21 remember that we go out and see the judge and -- I can't
22 remember did we go out and see the judge, or not, that
23 time.

24 Q. Okay. So you only recall going back out, saying
25 you were deadlocked, one time.

1 A. One time. I can recall that.

2 Q. Okay. You said that you talked to the
3 defendant's father over the last six years since you've
4 worked at Walmart. Have you lived in Winnsboro all your
5 life?

6 A. Yes.

7 Q. Were you familiar with the Cooks before the
8 trial?

9 A. No.

10 Q. You didn't know -- did you know anything about
11 the Cooks or Darryl's arrest or anything before?

12 A. I know -- I mean, I really don't know Darryl was
13 the one that was pending on that trial. I mean, I heard
14 when it happened. But like I said, when that happened in
15 Ridgeway, me living in Great Falls, I mean, I -- all I just
16 knew that McMaster had --

17 Q. Right.

18 A. I mean, I think that's what his name, whatever is
19 -- whatever the tire man in Ridgeway had -- was -- had been
20 robbed. I didn't even know the man had died.

21 Q. Okay. And to -- who asked you to do this
22 affidavit?

23 A. His father had mentioned something to me, that he
24 had talked to a lawyer about it, which -- this gentleman
25 here, and that's -- that's when we met and gave this one.

1 Q. Okay. So you did not pursue Mr. Bowens on your
2 own --

3 A. No.

4 Q. -- to tell him that you wanted to say this.

5 A. No.

6 Q. Okay. And just one final question. The
7 affidavit, you said that you believed -- you didn't believe
8 there was enough evidence to prove that Darryl Cook
9 committed the murder, but felt he was taking the fall or
10 blame for someone. Was that based on the evidence
11 presented, or what you've heard in the town since?

12 A. Basically, in the town since. No -- I mean, I
13 guess when you hear that he had a hoodie on his head. But
14 also, too, the -- after speaking with his father, you know,
15 that kind of enlighten me more of how I felt that night.
16 And I guess when me talk -- from hearing the jurors, you
17 know, saying that they said he was -- he --

18 Q. And I don't -- I was going to say, I don't want
19 to -- we don't want to get into the actual -- what y'all
20 discussed --

21 A. Yeah.

22 Q. -- in the jury room, so --

23 A. But some of the evidence that to me wasn't solid
24 evidence to say that he done it, you know.

25 Q. So that was a combination of --

1 A. Yeah.

2 Q. -- over the years.

3 A. Yeah.

4 Q. Okay. And ultimately, you did vote "guilty."

5 A. Yes, I did.

6 MS. WHITE: Okay. That's all I have, I
7 think.

8 RE-EXAMINATION BY MR. BOWENS:

9 Q. Let me ask you one, quick follow-up. You were
10 asked about did you come back a second time when you
11 deadlocked.

12 A. Uh-huh.

13 Q. You came back once for questions, another time
14 for being deadlocked, and then was there a second time --
15 three times total that you came out. Is it possible, if
16 there was a third time, you'd come out and you just don't
17 recall it? Or are you sure there wasn't a third time y'all
18 came out?

19 A. I'm not going to say it was, 'cause I can't
20 remember that we went out a third time.

21 Q. But you remember these first two, the question
22 one --

23 A. I remember. Yeah, I remember the first two.

24 Q. Okay.

25 A. Now, that third time, that I can't -- I cannot

1 recall that.

2 Q. You're not saying that it didn't happen --

3 A. I'm not saying that it didn't, but I'm not sure.

4 Q. Okay. You were also asked a couple of questions
5 about the comments that the judge made, in Paragraph 6(a)
6 through (d).

7 A. Uh-huh.

8 Q. Is this as close to you can remember, as
9 possible, to what he said without it being a verbatim,
10 direct quote?

11 A. Right. Yeah, that's the closest I can remember.

12 Q. And that's the gist of what he said --

13 A. Yeah.

14 Q. -- that was the message he was conveying.

15 A. Right.

16 MR. BOWENS: That's all the questions I
17 have. Thank you.

18 RE-EXAMINATION BY MS. WHITE

19 Q. I have one -- one follow-up. Did you prepare or
20 type up this affidavit?

21 A. No.

22 Q. So this affidavit was presented to you already
23 typed up, and you signed it?

24 A. No, it was some questions asked and it was typed.

25 Q. Okay. So you met with Mr. Bowens.

1 A. Yes. Before this was typed.

2 Q. And discussed things, and then he typed it up --

3 A. Yes.

4 Q. -- and provided a signed copy.

5 A. Uh-huh.

6 MS. WHITE: Okay. Thank you.

7 RE-EXAMINATION BY MR. BOWENS:

8 Q. You had an opportunity to review this before you
9 signed it?

10 A. Yes, that -- yeah.

11 Q. And so you were -- you were satisfied this was
12 accurate, from what we had discussed?

13 A. Yeah. From what we discussed, that I can
14 remember, yes.

15 MR. BOWENS: All right. Thank you.

16 MS. WHITE: I think that's it.

17 Further deponent sayeth not.

18 (There being no further questions, the deposition
19 concluded at 1:30 p.m.)
20
21
22
23
24
25

CHARLES WALKER

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1 CERTIFICATE OF REPORTER

2 I, PATRICIA G. BACHAND, COURT REPORTER AND NOTARY
3 PUBLIC IN AND FOR THE STATE OF SOUTH CAROLINA AT LARGE,
4 HEREBY CERTIFY THAT I REPORTED THE DEPOSITION OF CHARLES
5 WALKER, ON THURSDAY, THE 21ST DAY OF NOVEMBER, 2013, THAT
6 THE WITNESS WAS FIRST DULY SWORN BY ME AND THAT THE
7 FOREGOING 17 PAGES CONSTITUTE A TRUE AND CORRECT
8 TRANSCRIPTION OF MY STENOMASK REPORT OF SAID DEPOSITION.

9 I FURTHER CERTIFY THAT I AM NEITHER ATTORNEY NOR
10 COUNSEL FOR, NOR RELATED TO OR EMPLOYED BY ANY OF THE
11 PARTIES CONNECTED WITH THIS ACTION, NOR AM I FINANCIALLY
12 INTERESTED IN SAID CAUSE.

13 I FURTHER CERTIFY THAT THE ORIGINAL OF SAID TRANSCRIPT
14 WAS THEREAFTER SEALED BY ME AND DELIVERED TO GLENN BOWENS,
15 ESQ., POST OFFICE BOX 424, WINNSBORO, SOUTH CAROLINA, WHO
16 WILL RETAIN THIS SEALED ORIGINAL TRANSCRIPT AND SHALL BE
17 RESPONSIBLE FOR FILING SAME WITH THE COURT PRIOR TO TRIAL
18 OR ANY HEARING WHICH MIGHT RESULT IN A FINAL ORDER ON ANY
19 ISSUE.

20 IN WITNESS WHEREOF, I HAVE SET MY HAND AND SEAL THIS
21 26TH DAY OF NOVEMBER 2013.

22 

23 PATRICIA G. BACHAND, COURT REPORTER

24 MY COMMISSION EXPIRES APRIL 9, 2017
25

A ability 8:9 able 10:11,20 accurate 17:12 ACTION 18:11 actual 10:21 14:19 add 8:11 Affiant 8:6 affidavit 3:16,20 5:3,5,12,13,17,23 8:12 12:1 13:22 14:7 16:20,22 ago 11:16,19 agreed 4:3 ahead 8:16 anonymous 6:19 answer 6:9 appear 10:21 APPEARANCES 2:1 approach 6:18 APRIL 18:24 arrest 13:11 asked 12:17 13:21 15:10 16:4,24 attached 3:14 Attorney 2:11 18:9 August 10:9,22 11:1,2	bit 6:3 blame 7:23 14:10 blood 10:23 Bowens 2:4 3:6,8 3:10 4:10,11,24 5:4 8:20,21 10:16 14:1 15:8 16:16 16:25 17:7,15 18:14 Box 2:5,12 18:15 C C 9:3 Carolina 1:1,7,14 1:15,17 2:6,11,13 4:2 5:24,25 18:3 18:15 case 1:2 5:25 8:19 cause 12:20 15:19 18:12 Caution 5:23 cautioned 4:7 CERTIFICATE 18:1 Certification 3:11 CERTIFY 18:4,9 18:13 chamber 9:7 change 8:2,11 Charles 1:6,12 3:2 3:16 4:7 5:12,21 18:4 checks 7:4 Civil 1:15 4:2 clear 7:10 Clerk's 1:16 close 16:8 closest 16:11 code 5:24 coerced 11:7 coercive 9:21 Columbia 2:13 combination 7:25 14:25 come 9:11 11:12	12:17 15:10,16 coming 11:11 12:12 commencing 1:19 comments 7:14 9:21 16:5 COMMISSION 18:24 commit 8:1 10:2 committed 7:21 14:9 COMMON 1:1 concluded 17:19 Congress 1:17 CONNECTED 18:11 consent 6:21 CONSTITUTE 18:7 CONTENTS 3:1 conveying 16:14 Cook 1:4 4:15,16 6:1 7:20,23 14:8 Cooks 13:7,11 Copies 3:14 copy 4:23,24 17:4 correct 5:14 8:8 18:7 Cor-vance 7:15 counsel 4:4 18:10 count 12:19 County 1:2,16 couple 4:12 5:16 10:5 16:4 Court 1:1,13 3:21 6:2 18:2,17,23 courtroom 6:9,12 cut 7:4 D d 9:3 16:6 Darryl 1:4 4:15,16 6:1 7:20,23 8:1 13:12 14:8 Darryl's 13:11 Darryt 4:15	dashes 3:22 day 1:18 7:6 18:5 18:21 deadlock 12:16,20 deadlocked 6:15,16 12:5,8,25 15:11 15:14 Defendant 2:9 Defendants 1:9 defendant's 13:3 deliberations 8:18 delinquent 6:11 DELIVERED 18:14 demonstration 6:8 Denotes 3:24 deponent 4:3,5 17:17 deposition 1:5,12 1:16 3:2,18 4:1,5 4:19,21,22 10:7 17:18 18:4,8 died 13:20 direct 16:10 discuss 9:8 discussed 8:14,23 14:20 17:2,12,13 dismiss 6:7 doctor 10:25 Dr 10:25 Drive 5:23 duly 4:7 18:6 E EMPLOYED 18:10 enlighten 14:15 ESQ 2:4,10 18:15 evening 7:10,17 everybody 8:22 evidence 7:22 9:8 9:10,25 14:8,10 14:23,24 exactly 8:13 examination 1:12	3:6,7 4:10 10:18 Exhibit 3:4,13,15 3:17,19 4:18,20 5:2,11,13 exhibits 3:14 EXPIRES 18:24 expressly 4:5 F Fairfield 1:2,16 fall 7:23 14:9 Falls 13:15 familiar 13:7 father 11:11 13:3 13:23 14:14 fault 10:1 feeling 8:1 felt 7:14,15,16,22 8:2,24 9:20,21,23 10:2 11:6 14:9,15 FILING 18:17 final 14:6 18:18 FINANCIALLY 18:11 first 11:6 15:21,23 18:6 focus 8:23 follows 4:9 follow-up 15:9 16:19 FOREGOING 18:7 foreman 6:14 forget 10:6 forth 5:22 further 8:5 17:17 17:18 18:9,13
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7 6:15 11:16

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9 18:24

STATE OF SOUTH CAROLINA

DARRYL T. COOK

Plaintiff,

v.

THE STATE OF SOUTH CAROLINA

Defendant

IN THE COURT OF COMMON PLEAS
Civil Action # 2010-CP-20-453AFFIDAVIT
CHARLES WALKER

PERSONALLY APPEARED BEFORE ME, Charles Walker, who after being sworn deposes
and says:

1. My name is Charles Walker, I am of the age of majority and have personal knowledge of the matters set forth in this affidavit. I reside at 181 Canton Dr. Wrens, SC 29180 CW
2. I was a juror in the case of the State of South Carolina v. Darryl T. Cook. Judge Goode was the presiding judge. The trial was held October 15-18, 2007.
3. After the jury was dismissed for deliberations we came back into the courtroom in order for the judge to answer two questions. The jury then returned to the jury room to deliberate.
4. The jury came back into the courtroom a second time and the jury foreman informed the judge that the jury was deadlocked 7 to 5. We took two votes before informing the judge that we were deadlocked.
5. The judge did not give any specific instructions on how we should approach or resolve our inability to reach a unanimous verdict. The judge did not inform the jury that no juror was required to vote against his or her conscience just for the sake of reaching a verdict.
6. The judge told jury that:
 - a. We were not going to leave until we had a verdict and that a verdict had to be reached before we could leave.
 - b. There was not going to be a hung jury.
 - c. The checks were cut and the jurors would get them on the way out after we reached a verdict.
 - d. This is the last day, you need to reach a verdict before you can leave.



7. The judge never told the jury that we could take as much time as we needed to reach a verdict. The judge was clear that a verdict must be reached that evening. The jury went back to the jury room and returned a guilty verdict in about twenty minutes.
8. I felt the judge's comments were coercive and I felt pressured to reach a verdict that night. I felt the judge wanted the trial to be over with that evening and that he would not let us go home before we reached a verdict.
9. I personally never thought that Darryl Cook committed the murder. I did not believe there was enough evidence to prove that he did it. I felt that Darryl Cook was taking the fall or taking the blame for someone.
10. The combination of the pressure to reach a verdict and the feeling that Darryl knew who did commit the murder led me to change my vote to guilty. If there had been no time pressure from the judge to reach a verdict that night I would likely have voted not guilty.

FURTHER AFFIANT SAITH NOT.



Charles Walker

Sworn to before me this

19 Day of August, 2013



Notary Public for South Carolina

My Commission Expires 5/4/10, 2023

STATE OF SOUTH CAROLINA
COUNTY OF FAIRFIELD

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT

Darryl T. Cook,

2010-CP-20-0453

Applicant,

v.

Notice of Deposition

State of South Carolina

Respondent.

TO: SUZANE WHITE, ESQ. ATTORNEY FOR THE RESPONDENT AND TO CHARLES WALKER

YOU WILL PLEASE TAKE NOTICE that the Applicant, pursuant to Rule 30 of the South Carolina Rules of Civil Procedure, will take the deposition of Charles Walker, at Fairfield County Courthouse, Clerk's Office (basement) 101 S. Congress Street Winnsboro, South Carolina, 29180 on Thursday November 21, 2013 at 1:00 p.m., upon oral examination before a Notary Public for South Carolina or some other officer authorized by law to administer oaths. The oral examination shall continue from time to time and day to day until completed, including any adjournments thereof. You are hereby notified, requested and required to produce said person for examination on oral deposition, and you are further invited to attend and participate.



Glenn Bowens, Esquire
P.O. Box 424
Winnsboro, SC 29180
(803) 714-7766
Attorney for Plaintiff

Winnsboro, South Carolina
November 14, 2013



STATE OF SOUTH CAROLINA

ISSUED BY THE COMMON PLEAS COURT IN THE COUNTY OF FAIRFIELD

Darryl T. Cook, Plaintiff

v.

SUBPOENA IN A CIVIL CASE

The State of South Carolina, Defendant

Case Number: 2010-CP-20-0453

Pending in FAIRFIELD County

TO: Charles Walker [REDACTED] Winnsboro, SC 29180

☒ YOU ARE COMMANDED to appear in the above named court at the place, and time specified below to testify in the above case.

PLACE OF TESTIMONY
Fairfield County Courthouse
101 S. Congress Street
Winnsboro, SC 29180

COURTROOM Clerk of Court's Office - basement

DATE AND TIME Thursday November 21, 2013
1:00 PM

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION

DATE AND TIME , AM

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents or objects:

PLACE

DATE AND TIME , 00 AM

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES

DATE AND TIME , AM

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS IS HEREBY DIRECTED TO RULE 30(b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1), AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.

Glenn Bowens
Attorney/Issuing Officer's Signature
Indicate if Attorney for Plaintiff or Defendant
Attorney's Address and Telephone Number:
Glenn Bowens PO Box 424 Winnsboro, SC 29180
803-714-7766

11-14-13

Date

Glenn Bowens, Attorney for the Plaintiff

Print Name

Clerk of Court/Issuing Officer's Signature
Pro Se Litigant's Name, Address and Telephone Number:

Date

Print Name

PROOF OF SERVICE

SERVED	DATE	FEES AND MILEAGE TENDERED TO WITNESS ☒ YES ☐ NO AMOUNT \$ 32.33
	PLACE	
SERVED ON		MANNER OF SERVICE Personal
SERVED BY		TITLE

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____

SIGNATURE OF SERVER

ADDRESS OF SERVER

Rule 45, South Carolina Rules of Civil Procedures, Parts (c) and (d):

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

- i. fails to allow reasonable time for compliance; or
- ii. requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(ii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or
- iii. requires disclosure of privileged or otherwise protected matter and no exception or waiver applies; or
- iv. subjects a person to undue burden.

(B) If a subpoena:

- i. requires disclosure of a trade secret or other confidential research, development, or commercial information; or
- ii. requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party; or
- iii. requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed or regularly transacts business in person,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

Fairfield County Sheriff's Office

350 Columbia Road, Windsor, SC 29180

STATE OF SOUTH CAROLINA)

COUNTY OF FAIRFIELD)

AFFIDAVIT OF SERVICE / NON SERVICECASE NO. 2010-CF-20-0453

Darryl T. Cook
Plaintiff

vs.
The State of South Carolina
Defendant

The undersigned Cpl L. Hudson, being duly sworn, says that he
SERVED or NON SERVICED the

☐ Summons & Complaint	☐ Rule to Show Cause
☐ Summons & Petition	☐ Claim & Delivery
☐ Notice of Hearing	☐ Order of Default Judgment
☐ Rule to Vacate or Show Cause,	☐ Writ/Order of Assistance
Application for Ejectment	☐ Writ of Ejectment, Writ of Possession

☒ Other: Subpoena, Notice of Deposition

in this action by delivering the same to: Charles Walker

(Person to be served)

at Walmart, 32104-Ass Windsor, SC

(Address of person served)

☒ The Defendant/Person served Charles Walker personally,

☐ _____, a person of discretion residing at the defendant's residence

whose relationship is _____ to the defendant.

Remarks: _____

() NON SERVICE:

We were unable to serve the above entitled action on _____

(Person to be served)

for the following reason: _____

on the 14 day of November, 2013 at 1:30 (AM/PM)

Cpl. Hudson

Deputy Sheriff
Fairfield County, S. C.

SWORN to before me this

21 Day of November, 2013

Chenette W. Deeman

NOTARY PUBLIC for South Carolina

My Commission Expires: 11-13-2018

FCSO Oct 2012



STATE OF SOUTH CAROLINA

COUNTY OF FAIRFIELD

Darryl T. Cook, #267867

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT

2014 APR 14 PM 3 25

2010-CP-20-0453

FAIRFIELD COUNTY
CLERK OF COURT
BETTY JO BECKHAM**ORDER OF DISMISSAL**

This matter comes before the Court by way of an Application for Post-Conviction Relief filed November 8, 2010. Respondent made its Return on or about July 15, 2011. Applicant filed an amended application on July 15, 2013. An evidentiary hearing into the matter was convened on August 7, 2013, at the Lancaster County Courthouse. Applicant was present at the hearing and was represented by Glenn Bowens, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

At the hearing, Applicant testified on his own behalf. His mother, father, grandmother, and Hughley Grattic also testified on his behalf. The deposition of Charles Walker was introduced by Applicant in support of his claims. Jack B. Swerling, Esquire, ("Counsel") testified on behalf of the State.

This Court also had before it a copy of the records of the Fairfield County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Appellate Court records, the trial transcript, the transcript of the deposition of Charles Walker, along with memoranda and exhibits provided by both Applicant and Respondent.

PROCEDURAL HISTORY

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Fairfield County Clerk of Court's orders of commitment. The Fairfield County Grand Jury indicted Applicant at the January 2006 term of General Sessions for murder (2002-GS-20-0546, amended), armed robbery (2002-GS-20-0082, amended), and grand larceny - more than \$1,000 but less than \$5,000 (2002-GS-20-0132, amended). Jack B. Swerling, Esquire, represented Applicant. On October 23, 2007, Applicant was convicted of these charges by a jury. The Honorable Kenneth G. Goode sentenced Applicant to confinement for forty-five (45) years for murder, twenty-five (25) years for armed robbery, and five (5) years for grand larceny, all running concurrently.

A timely Notice of Appeal and subsequent Anders brief were filed on Applicant's behalf. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Cook, Op No. 2010-UP-0023 (filed January 25, 2010). The Remittitur was returned on February 10, 2010.

ALLEGATIONS

In his application and subsequent amendment, Applicant alleges that he is being held in custody unlawfully for the following reasons:

- 1) Ineffective assistance of Counsel, in that;
 - a) Counsel refused to subpoena witnesses on Applicant's behalf,
 - b) Counsel refused to ask questions the way Applicant wanted;
 - c) Counsel did not object to comments and instructions given by the trial judge to the jury when they came indicating they were deadlocked,

- d) Counsel did not object to sending the jury back to deliberate after the jury indicated they were deadlocked a second time,
- e) Counsel did not assert as a defense that Mr. McGuirt's death, which occurred over a year after the shooting, was due to the negligent medical care he received.
- 2) Insufficient evidence to support the murder, in that;
 - a) Trial judge allowed evidence that did not pertain to the actual crime to be used as evidence to gain a conviction,
- 3) Exclusion of relevant evidence, in that;
 - a) Presiding trial judge refused to let certain statements that could have been extremely credible on Applicant's behalf for a new trial.

At the beginning of the hearing, Applicant indicated his desire to specifically abandon claim 1(e), regarding Counsel's failure to assert negligent medical care as a cause of the victim's death. Additionally, Applicant informed the Court that he would proceed on claims 1(a), (c), and (d). Therefore, this Court finds that Applicant voluntarily abandoned all other claims.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon his or her credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Where ineffective assistance of counsel is alleged as a ground for relief, 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, 2064, 80 L.Ed.2d 674, 692 (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. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland).

Failure to subpoena witnesses on Applicant's behalf

Applicant alleged that Counsel was ineffective for failing to subpoena Hughley Grattic on Applicant's behalf at trial. This Court finds Counsel's testimony credible as to this claim.

Applicant testified that he and Counsel discussed calling Grattic. Counsel indicated his concern with calling Grattic and the fact that Grattic's statement appeared to contradict what all of the other officers stated. Counsel informed Applicant that he was concerned Grattic would

testify to something different than what his statement indicated.

Mr. Grattic testified that he was the Chief of the Ridgeway Police Department in November 2001 when the armed robbery and shooting occurred. He was one of the first to respond to the scene following the 911 call from the victim's daughter. Grattic testified that he spoke with the victim prior to EMS arriving on the scene. Grattic testified that the victim did not identify Applicant by name at the scene. However, Grattic testified that the victim indicated that he knew the person who shot him, but could not recall the person's name. Grattic testified that the Fairfield County Sheriff's Office then responded and SLED took over the investigation. Grattic testified that he never spoke with Counsel in regards to testifying at the trial, but would have been willing to testify if subpoenaed.

Counsel testified that contrary to Mr. Grattic's testimony, Counsel spoke with Grattic prior to the first trial and a couple of times in May 2006. Counsel testified that the information he received from Grattic was contradictory and Grattic appeared to be hostile when they spoke. Counsel testified that Grattic indicated that he was close to the victim. Counsel also testified that Grattic informed him that the workers at the service station knew the guy that had come in and gotten a soda earlier that afternoon as indicated by the victim. Counsel testified that he had the incident reports completed by Grattic, as well as the notes from the Solicitor's interview with Grattic. Counsel believed that Grattic might have been confusing his notes with Officer Guinyard's investigative notes for his testimony at the hearing because they contradicted his typed notes. Counsel testified that there was a previously provided handwritten acknowledgement by Grattic and Officer Bowman that the victim's truck was gone at the time they arrived on scene, but had previously been at the service station as late as 5:50 pm. Counsel made the strategic decision to not call Grattic as a witness because he believed that Grattic's

testimony might do more harm than good. Counsel testified that he discussed the decision and his concerns with Applicant and Applicant acknowledged his agreement with that decision by signature on a note dated May 15, 2006. Counsel testified that nothing changed in regards to Grattic's testimony prior to the trial in 2007.

This Court finds that Applicant failed to meet his burden of proof as to this claim. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post-conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). Although Applicant provided Grattic's testimony, this Court does not find that the testimony would have been helpful to Applicant's case at trial. The testimony appeared to be cumulative to the testimony presented at trial in regards to the victim failing to specifically name Applicant as the shooter.

Furthermore, this Court finds that the strategic reasons offered by Counsel for not calling Grattic as a witness were reasonable. "Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective." Underwood at 562; Legare v. State, 333 S.C. 275, 281, 509 S.E.2d 472, 475 (1998). This Court also does not find that Applicant established any prejudice suffered from Counsel's failure to subpoena Mr. Grattic. Therefore, this claim is denied and dismissed.

*Failure to object to comments and instructions given by trial judge to deadlocked jury and
Failure to object to sending jury back to deliberate after the jury indicated they were
deadlocked a second time*

Applicant alleged that the trial judge made coercive comments and provided coercive instructions to the jury when the jury came back twice indicating that they were deadlocked. Applicant alleged that Counsel failed to object to the comments or instructions, as well as failed to object to the jury being sent back to deliberate after indicating they were deadlocked a second time.

Applicant testified that the jury came back twice to indicate they were deadlocked. Applicant testified that the first time the jury indicated they were deadlocked the judge informed them that they had the right to go back and continue to deliberate. Applicant estimated that this was around six or seven o'clock at night. Applicant then testified that the jury came back an hour and a half later, which is the time that the judge made the alleged coercive statements. Applicant testified that the judge told the jury that there had been two mistrials in this case and he did not want a third, they would stay all night if they had to for a verdict, and the checks were already cut. Applicant testified that he did not express his concerns to Counsel about the statements at the time because Applicant was not aware that Counsel could object to the comments made in front of the jury by the trial judge. However, Applicant acknowledged that he was aware that Counsel objected to portions of the jury charge and also moved for a mistrial because of the charge as well.

Applicant's mother, Jerlean Miller Cook, testified that Applicant worked for the victim in his service station after school when was younger. Jerlean testified that the victim accused Applicant of stealing money from the station, which Jerlean paid back. She acknowledged that there was a videotaped recording of the meeting between her and the victim when she paid the

money back. However, Jerlean testified that Applicant never admitted taking the money and continued to work at the service station. Jerlean testified that she recalled the jury deliberating for approximately an hour and then returning with questions regarding the timeline and identity. Jerlean testified that the jury then came back and informed the court that they were deadlocked. At that time, Jerlean testified that the trial judge made statements to the jury indicating that there had already been one mistrial and this jury "needed to get it right." Jerlean testified that the jury returned to deliberate and returned to the courtroom a second time indicating they were still deadlocked. Jerlean testified that the judge then sent the jury back to deliberate and returned with a verdict in approximately 30-40 minutes. Jerlean testified that neither the Solicitor nor Counsel objected to the statements of the judge or the return to deliberations either time. She did acknowledge that Counsel objected many times during the trial and requested a mistrial once during the trial. Jerlean testified that she does not recall contacting Counsel about this issue, but was concerned.

Applicant's father, Darryl Cook, also testified. Mr. Cook testified that he knew the victim because Applicant used to work for the victim. Mr. Cook testified that the jury deliberated, then returned to the courtroom and indicated that they were deadlocked seven to five. Mr. Cook testified that the second time the jury returned to the courtroom was for the two questions. Mr. Cook then testified that the jury returned to the courtroom for a third time and were told by the trial judge that the "check was already cut," "they did not want another mistrial," and "they would stay all night if they needed to." Mr. Cook testified that the jury returned with a verdict with twenty minutes of those statements being made and returning to deliberate. Mr. Cook testified that neither the Solicitor, nor Counsel, objected either time the jury indicated they were deadlocked.

Majorie Cook, Applicant's grandmother, also testified on his behalf. Ms. Cook testified that she knew the victim and believed that the victim knew Applicant. Ms. Cook testified that the jury returned to the courtroom three times: the first time with the two questions; the second time with the information that they were deadlocked seven to five; and the third time indicating they were deadlocked again. Ms. Cook testified that the trial judge informed the jury that, "if they had to stay out all night, they would to come back with a verdict." Ms. Cook testified that it was not long until the jury returned with a verdict following that comment by the judge.

This Court notes that Charles Walker, one of the jurors, was subpoenaed to appear for the hearing, but failed to appear. This Court provided for an additional 60 days to obtain a deposition of Mr. Walker. Mr. Walker, again under subpoena, failed to appear for the first scheduled deposition; however, he did appear at a second deposition when this Court provided additional time to Applicant to obtain his testimony. This Court finds that Walker's testimony regarding his recollection of the alleged coercive comments by the trial judge is not credible. Walker testified that his first mention of feeling coerced into a verdict came as a result of "... working at Walmart, from [Walker] talking to [Applicant's] father coming in there quite a few times, that's where that came from." (Depo. Tr. p. 11, lines 10-12). Walker testified that he recalled the jury returning to the courtroom with questions and then returning once to indicate they were deadlocked. (Depo. Tr. p. 12-3). Walker testified that he did not recall that the jury went out to deliberate a third time. (Depo. Tr. p. 15). Walker acknowledged that he voted to convict Applicant "after [looking] at the evidence that was presented to [the jury]." (Depo. Tr. p. 9, lines 9-11). This Court notes that Walker affirmed that he voted to find Applicant guilty when polled by the trial court. (Tr. 2nd part p. 329-330). This Court does find Walker's testimony regarding the jury only coming back twice and acknowledging his guilty verdict to be credible.

The testimony given at the PCR hearing by Applicant's mother, father, and grandmother, is suspect because of their vested interest in seeing Applicant released from jail. This Court finds that the testimony of each lacks credibility. This Court notes that the allegation was not presented in Applicant's initial PCR application filed in 2010, but rather, was added as an amendment a month prior to the hearing in 2013. Additionally, these alleged statements made by the trial judge were never discussed with Counsel at the time of or following the trial. Although Applicant provided the testimony of Mr. Walker, a juror in the case and non-family member of Applicant, this Court cannot find his testimony credible. As Mr. Walker indicates, he was contacted by Applicant's father regarding testifying in this matter. Mr. Walker also testified that he had become friends with Applicant's family over the years since the trial. Walker indicated much of his affidavit was based on his memory of the trial six years prior, conversations with Applicant's father, and information heard through the community over the years.

Counsel testified that he keeps detailed notes of every trial and the notes indicate that an Allen charge was given at 5:30 pm. However, Counsel testified that he has no independent recollection of the jury being deadlocked or the Allen charge. Counsel did testify that he recalled the jury returning to the courtroom with questions, as reflected in the transcript. Counsel testified that had the Allen charge been coercive or had the trial judge made the alleged improper comments to the jury, he would have immediately objected as he had throughout the trial at the appropriate times. Counsel was adamant that the judge did not make any of the comments suggested by Applicant or his family in front of the jury. Counsel also testified that he had tried a number of cases in front of Judge Goode and Counsel has never heard any Goode make comments similar to those alleged to any jury.

Counsel also testified that he would not have allowed the judge to send the jury back to deliberate for a third time without raising a strenuous objection. Counsel testified that neither Applicant, nor anyone in his family, raised any concerns about the jury deliberations or anything said by the judge at the time of trial or appeal. In fact, Counsel testified that the first appearance of this claim regarding a deadlocked jury or improper coercive comments was in the amended application filed July 2013, immediately prior to the hearing and several years after the initial application was filed.

This Court finds Counsel's testimony to be most credible based upon the testimony presented, as well as Counsel's expansive career and experience in criminal defense. This Court finds that it is clear that Counsel had thoroughly prepared for this trial. The record is clear that Counsel was questioning statements and rulings by the trial judge throughout almost seven days of trial. As the transcript reflects, the trial began on October 15, 2007, and continued until the end of October 18, 2007, then resumed on the morning of October 22, 2007 until the end of October 23, 2007. Counsel questioned the jury charge and even moved for a mistrial based upon his concern with the corrective jury instruction provided by the trial judge. (Tr. 2nd part p. 317-9; p. 321; p. 322-3).

The record also reflects that following the verdict and sentencing, the judge stated, "... to the jury, you had a horrifically difficult task facing . . . Your resolve is apparent and the difficulty that you demonstrated that you had in deciding what to do, and on behalf of the State of South Carolina, I thank you, each and every one, very much. This will conclude your jury service for this term and for the next three years, and I thank all very much. *The Clerk has a huge check for each one of you.*" (Tr. 2nd part p. 349-50) (emphasis added). In as much as the judge made any comments which could have been interpreted by the family or others present in

the courtroom as questionable, this Court notes that the judge referenced the checks for the jurors following the verdict and sentencing.

This Court cannot conclude, without great speculation, that the trial judge made any improper comments to the jury during their deliberation or improperly sent the jury to deliberate a third time. It is more likely than not that Applicant and his family, after more than six years following the trial, recalled the situation differently from the reality of what occurred. The combination of Counsel's experience and credibility, the record indicating Counsel's various motions and numerous objections during the trial, and the fact that this issue was never discussed with Counsel by Applicant or his family following the trial leads this Court to find Applicant has failed to meet his burden of proof of establishing that Counsel was deficient in his representation as to this matter, or that Applicant suffered any prejudice as a result of the alleged deficiencies. This claim is denied and dismissed.

Summary

This Court finds in regards to the allegation of ineffective assistance of counsel, Counsel's testimony is most credible. This Court further finds Counsel adequately conferred with Applicant, conducted a proper investigation, was thoroughly competent in his representation, and that Counsel's conduct does not fall below the objective standard of reasonableness.

Accordingly, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in his representation of Applicant.

This Court also finds Applicant has failed to prove the second prong of Strickland – that

he was prejudiced by Counsel's performance. This Court concludes Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. See Frasier supra. Therefore, this allegation is denied.

CONCLUSION

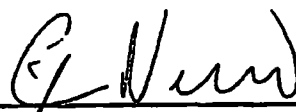
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court cautions Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if an applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 4th day of April, 2014.



Clifton Newman
Presiding Judge

WITNESSES

Inv. Greg Boney - FCSO #01-9786

ARREST WARRANT NUMBER/DOA

Direct Indictment

ACTION OF GRAND JURY

TRUE BILL 01-09 2006

Alicia W. Murphy
Foreperson of Grand Jury
Date: 01.09.06

VERDICT

Guilty

[Signature]
Foreperson of Petit Jury
Date: 10-23-07

AMENDED
DOCKET NO. 2002-GS-20-546

The State of South Carolina
County of Fairfield

COURT OF GENERAL SESSIONS

JANUARY TERM 2006

THE STATE
vs.

Darryl Tarmayne Cook

Indictment for

Murder

SC Code: §16-3-10
CDR Code: 0116
Class: Felony, EXM

2006 JAN - 9 P 3:31
FAIRFIELD COUNTY
CLERK OF COURT
BETTY JO BECKHAM

ORIGINAL

STATE OF SOUTH CAROLINA)
)
COUNTY OF FAIRFIELD)

INDICTMENT

At a Court of General Sessions, convened on January 9, 2006, the Grand Jurors of Fairfield County present upon their oath:

MURDER

That Darryl Termayne Cook did at McGuirt Tire Service, Dogwood Avenue, in Fairfield County on or about November 23, 2001, feloniously, willfully, and of his malice aforethought kill and murder Jesse "Jackie" Edward McGuirt by shooting him with a handgun and the victim did die as the proximate cause thereof on October 26, 2002, in violation of Section 16-3-10 of the *Code of Laws of South Carolina*.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


John R. Justice, SOLICITOR

WITNESSES

DOCKET NO. 2002-GS-20-546

Officer: Greg Boney
Agency: Fairfield County Sheriff's Office

The State of South Carolina

County of Fairfield

WARRANT NUMBERS

DI

[Empty box for Warrant Numbers]

ACTION OF GRAND JURY

TRUE BILL 11/5/2002

Carol P. Hines
Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury

Date

COURT OF GENERAL SESSIONS

NOVEMBER TERM 2002

THE STATE

vs.

Darryl Termayne Cook

CDR CODE 116

**Indictment for
§16-03-0010, 0020**

MURDER

ORIGINAL

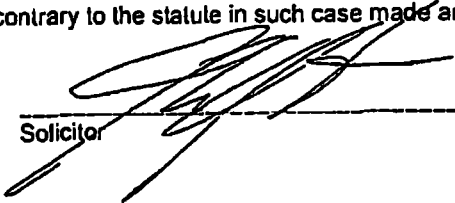
STATE OF SOUTH CAROLINA)
County of Fairfield) INDICTMENT FOR
) §16-03-0010, 0020
) MURDER
)

At a Court of General Sessions, convened in November 2002 the Grand Jurors of Fairfield County present upon their oath:

That Darryl Termayne Cook did in Fairfield County on or about November 23, 2001, feloniously, willfully and with malice aforethought murder one Jessie E. (Jackie) McQuirt, by shooting the victim with a handgun and the victim did die as a proximate result on or about October 26, 2002. This is in violation of §16-3-10 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

DOCKET NO. 2002-GS-20-546


Solicitor

STATE OF SOUTH CAROLINA

COUNTY OF Fairfield

STATE

AKA:

Race: BSex: MAge: 24DOB: [REDACTED]SS#: [REDACTED]

Address:

City, State, Zip:

DL#

SID#

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 02-GS-20-546AW#: 682-3623 Direct Ind.Date of Offense: 11/23/01S.C. Code §: 16-3-10CDR Code #: 0116

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: MURDERIn violation of § 16-3-10 of the S.C. Code of Laws, bearing CDR Code # 116☐ NON-VIOLENT☒ VIOLENT☐ SERIOUS☒ MOST SERIOUS☐ Mandatory GPS (CSC☐ §17-25-45w/minor 1st or Lewd Act)The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (Defendant initial)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 45 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years

and/or to pay a fine of \$ _____, provided that upon the service of _____ days/months/years and/or payment

of \$ _____; plus costs and assessments as applicable; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: October 23, 2007☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections. November 26, 2001 - Credit Time Served☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:

☐ set by SCDPPPS

Recipient:

*Fine:

\$14-1-206 (Assessments 107.5%)

\$

\$14-1-211(A)(1) (Conv. Surcharge)

\$100

\$100.00

\$14-1-211(A)(2) (DUI Surcharge)

\$100

\$

\$56-5-2995 (DUI Assessment)

\$12

\$

\$35.13 (Public Del/Prob)

\$500

\$

\$73.3, 1B TP (Law Enforce. Funding)

\$25

\$25.00

\$33.7, 1B TP (Drug Court Surcharge)

\$100

\$

\$50-21-114(BUI Breath Test Fee)

\$50

\$

\$56-5-2942(J) (Vehicle Assessment)

\$40/ea

\$

3% to County (if paid in installments)

\$

\$3.75

TOTAL

\$

\$128.75

PTUP

_____ days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, \$35.13 TP

Requires \$500 be paid to Clerk during probation.

Court Reporter

Clerk of Court/Deputy Clerk

PRESIDING JUDGE

Judge Code:

Sentence Date:

AMENDED
DOCKET NO. 2002-GS-20-82

WITNESSES

Inv. Greg Boney - FCSO #01-9786

The State of South Carolina

County of Fairfield

COURT OF GENERAL SESSIONS

JANUARY TERM 2006

ARREST WARRANT NUMBER/DOA

G818309

THE STATE
vs.

Darryl Termayne Cook

ACTION OF GRAND JURY

TRUE BILL 01-09-2006

Foreperson of Grand Jury
Date: 01-09-06

VERDICT

Indictment for

Armed Robbery

SC Code: §16-11-0330(A)
CDR Code: 0139
Class: Felony, A

Foreperson of Petit Jury
Date: 10-23-07

2006 JAN -9 P 3:37
FAIRFIELD COUNTY
CLERK OF COURT
BETTY JO BECKHAM

ORIGINAL

STATE OF SOUTH CAROLINA)
)
COUNTY OF FAIRFIELD)

INDICTMENT

At a Court of General Sessions, convened on January 9, 2006, the Grand Jurors of
Fairfield County present upon their oath:

ARMED ROBBERY

That Darryl Termayne Cook did in Fairfield County on or about November 23, 2001, while armed with a deadly weapon, to wit: a handgun feloniously take and carry away from the person or presence of Jesse "Jackie" Edward McGuirt by means of force, threats or intimidation goods or money of McGuirt Tire Service such goods or monies being described as follows: a large amount of cash money, with the intent to deprive the owner permanently of such property, in violation of § 16-11-0330(A), *Code of Laws of South Carolina, (1976), as amended.*

Against the peace and dignity of the State, and contrary to the statute in such case
made and provided.


John R. Justice, SOLICITOR

1315

WITNESSES

Greg Boney

Keith Lewis

ARREST WARRANT NO. G818309

ACTION OF GRAND JURY

TRUE BILL

Jan 28, 2002

Carol P. Hines

Foreman of Grand Jury

VERDICT

Foreman of Petit Jury

Date:

DOCKET NO. 02-GS-20-0082

The State of South Carolina,

County of FAIRFIELD

COURT OF GENERAL SESSIONS

JANUARY

TERM 2002

E

THE STATE

vs.

Darryl Termayne Cook

jele

Indictment for Armed
Robbery and Robbery

11-24-01 palmer

ORIGINAL

FORM 20 (1/91)

STATE OF SOUTH CAROLINA)
 COUNTY OF FAIRFIELD)

INDICTMENT FOR ARMED ROBBERY

~~XXXXXROBBERYXXXXXXXXXX~~At a Court of General Sessions, convened on January 28, 2002the Grand Jurors of Fairfield County present upon their oath:

COUNT ONE — ARMED ROBBERY

That Darryl Termayne Cook did in
Fairfield County on or about November 23, 2001 while armed with a deadly
 weapon, to wit: pistol
 _____ feloniously take from the person or presence of Jackie McGuirt by means of
 force or intimidation goods or monies of McGuirt's Tire Service such goods or monies being
 described as follows: large amount of cash

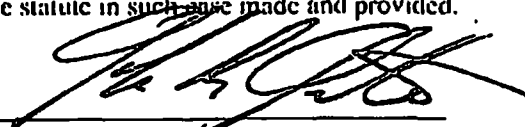
 with intent to deprive the owner permanently of such property.

COUNT TWO — ROBBERY

That _____ did in _____
 County on or about _____ feloniously take from the
 person or presence of _____ by means of
 force or intimidation goods or monies of _____
 such goods or monies being described as follows: _____

 with intent to deprive the owner permanently of such property.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


 SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF Fairfield
STATE VS.
Danny T. Cook
AKA: _____
Race: B Sex: M Age: 24
DOB: [REDACTED] SS#: [REDACTED]
Address: _____
City, State, Zip: _____
DL# _____ SID# _____

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 02-GS-20-52
AW#: 6818309
Date of Offense: 11/23/01
S.C. Code #: 16-11-330(A)
CDR Code #: 139

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS TO: Armed Robbery.

In violation of § 116-11-330(A) of the S.C. Code of Laws, bearing CDR Code # 30

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS (CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (Defendant initial)
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 2 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus costs and assessments as applicable; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: October 23, 2007

☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections. *November 26, 2001 - Credit Time Served*

☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:☐ set by SCDPPPS**Recipient:**

• **Fine:**

\$14-1-206 (Assessments 107.5%)	\$
\$14-1-211(A)(1) (Conv. Surcharge)	\$100
\$14-1-211(A)(2) (DUI Surcharge)	\$100
\$56-5-2995 (DUI Assessment)	\$12
\$35.13 (Public Def/Prob)	\$500
\$73.3, 1B TP (Law Enforce. Funding)	\$25
\$33.7, 1B TP (Drug Court Surcharge)	\$100
\$50-21-114(BUI Breath Test Fee)	\$50
\$56-5-2942(J) (Vehicle Assessment)	\$40/ea
3% to County (if paid in installments)	\$
TOTAL	\$1,288.75

PTUP

days/hours Public Service Employment

Obtain GEO

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ 'beginning

beginning
paid to Public Defender Fund

Other.

☐ Appointed PD or appointed other counsel, \$35.13 TP
Requires \$500 be paid to Clerk during probation.

Court Reporter:

Clerk of Court/ Deputy-Clerk

PRESIDING JUDGE

Judge Code:

Sentence Date:

ARREST WARRANT

G-818309

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
Fairfield

 THE STATE
 against

DARRYL TERNAN YE COOK

Address: [REDACTED]City: Waynesville S.C. 29180Phone: [REDACTED]Sex: M Race: B Height: 5'11" Weight: 173DL State: [REDACTED] DL #: [REDACTED]DOB: [REDACTED] Agency ORI #: [REDACTED]Prosecuting Agency: FLSOProsecuting Officer: ANYOffense: Armed RobberyOffense Code: [REDACTED]Code/Ordinance Sec. 16-11-30
 This warrant is CERTIFIED FOR SERVICE in the
☐ County/ ☐ Municipality of

 The accused
 is to be arrested and brought before me to be
 dealt with according to law.

Signature of Judge

(L.S.)

Date: [REDACTED]

RETURN

A copy of this arrest warrant was delivered to defendant DARRYL COOKon 11-26-01

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
Fairfield

AFFIDAVIT

 Form Approved by
 S.C. Attorney General
 July 26, 1990
 SCCA 618

 Personally appeared before me the affiant Greg Berry who
 being duly sworn deposes and says that defendant DARRYL TERNAN YE COOK
 did within this county and state on 11/23/2001 violate the criminal laws of the
 State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of Fairfield)
 in the following particulars:
DESCRIPTION OF OFFENSE: Armed Robbery 16-11-30
 I further state that there is probable cause to believe that the defendant named above did commit
 the crime set forth and that probable cause is based on the following facts:

That defendant did while armed with a handgun enter
 McGuff's Tire Service located on Dogwood Ave in Ridgeway
 County of Fairfield and rob the victim Jackie McGuff
 of a large amount of cash at gunpoint. This is based on
 witness statements and investigation by Fairfield County
 Sheriff's Office.

 Sworn to and subscribed before me)
 on 11/24/2001)
E. S. Palmer II (L.S.))
 Signature of Issuing Judge

Signature of Affiant

Affiant's Address 350 Hickory Rd.Waynesville S.C. 29180Affiant's Telephone 803-635-4141

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
Fairfield

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

 It appearing from the above affidavit that there are reasonable grounds to believe that
 on 11/23/2001 defendant DARRYL TERNAN YE COOK
 did violate the criminal laws of the State of South Carolina (or ordinance of

☒ County/ ☐ Municipality of Fairfield) as set forth below:
DESCRIPTION OF OFFENSE: Armed Robbery 16-11-30
 Now, therefore, you are empowered and directed to arrest the said defendant and bring him or her before
 me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the
 defendant at the time of its execution, or as soon thereafter as is practicable.

E. S. Palmer II (L.S.))
 Signature of Issuing Judge)
 Judge Code: 996
Judge's Address 115 B S. Wiggins St.Waynesville S.C. 29180Judge's Telephone 803-635-4525Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL

1318

AMENDED
DOCKET NO. 2002-GS-20-132

WITNESSES

Inv. Greg Boney - FCSO #01-9786

The State of South Carolina

County of Fairfield

COURT OF GENERAL SESSIONS

JANUARY TERM 2006

ARREST WARRANT NUMBER/DOA

G818640

ACTION OF GRAND JURY

TRUE BILL 01-09-06

THE STATE
vs.

Darryl Termayne Cook

2006 JAN - 9 P 3:37
FAIRFIELD COUNTY
CLERK OF COURT
BETTY JO BECKHAM

VERDICT

Guilty

Indictment for

Grand Larceny

More than \$1,000 but less than \$5,000

SC Code: § 16-13-0030(A), (B), (1)
CDR Code: 0478
Class: Felony, F

ORIGINAL

STATE OF SOUTH CAROLINA)

INDICTMENT

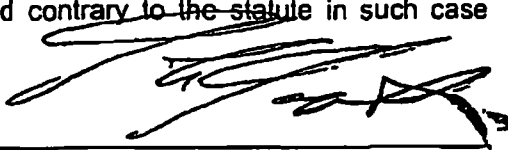
COUNTY OF FAIRFIELD)

At a Court of General Sessions, convened on January 9, 2006, the Grand Jurors of
Fairfield County present upon their oath:

Grand Larceny-More than \$1,000 but less than \$5,000

That Darryl Termayne Cook did in Fairfield County on or about November 23, 2001, take and carry away the personal property, to wit: a 1990 Chevrolet truck, of "Jesse "Jackie" Edward McGuirt with the intent to deprive the owner of possession of the property and to convert the property to the use of the defendant, the value of the property being more than \$1000.00 but less than \$5000.00, in violation of §16-13-30(A), (B)(1), *Code of Laws of South Carolina, (1976), as amended.*

Against the peace and dignity of the State, and ~~contrary to the statute~~ in such case made and provided.


John R. Justice, SOLICITOR

1321

WITNESSES

Greg Boney

Keith Lee

ARREST WARRANT NO. G818640

ACTION OF GRAND JURY

TRUE BILL *Jan. 28* 20 *02*

Carol P. Nims

Foreman of Grand Jury

VERDICT

Foreman of Petit Jury

Date:

DOCKET NO. 02-GS-20-0132

Johnson
The State of South Carolina,

County of FAIRFIELD

COURT OF GENERAL SESSIONS

JANUARY

TERM 2002

E THE STATE

vs.

Darryl Termayne Cook

guil

Indictment for Grand
Larceny of Vehicle, Use of
Vehicle Without Permission,
and Temporary Use of
Vehicle Without Permission

CDR = 478

1-14-02 pope

ORIGINAL

STATE OF SOUTH CAROLINA)
)
 COUNTY OF FAIRFIELD)

INDICTMENT FOR GRAND LARCENY OF
 VEHICLE, USE OF VEHICLE WITHOUT
 PERMISSION, AND TEMPORARY USE OF
 VEHICLE WITHOUT PERMISSION

At a Court of General Sessions, convened on January 28, 2002,
 the Grand Jurors of Fairfield County present upon their oath:

COUNT ONE — GRAND LARCENY OF VEHICLE

That Darryl Termayne Cook did in Fairfield
 County on or about November 23, 2001, feloniously take and carry away
 the personal property, to wit: 1999 Chevy truck belonging to Jackie McGuirt
One Thousand
 of the value of more than Two Hundred Dollars, with intent to deprive the owner permanently of
 such property.

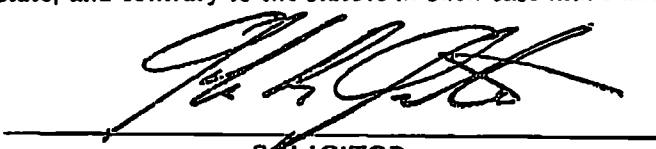
COUNT TWO — USE OF VEHICLE WITHOUT PERMISSION

That _____ did in _____
 County on or about _____, without the consent of the owner,
 take the vehicle, to wit: _____,
 of another, to wit: _____,
 he not being entitled to possession of such vehicle.

COUNT THREE — TEMPORARY USE OF VEHICLE WITHOUT PERMISSION

That _____ did in _____ County on or
 about _____, without the consent of the owner, take the vehicle,
 to wit: _____, of another, to wit:
 _____, with intent to deprive
 the owner of such vehicle temporarily, such deprivation of the owner being unconnected with the
 commission of or intent to commit a crime other than the taking of such vehicle, he not being enti-
 tled to possession of such vehicle.

Against the peace and dignity of the State, and contrary to the statute in such case made and
 provided.


 SOLICITOR

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Fairfield
 STATE VS
Barryl T. Cook
 AKA:
 Race: B Sex: M Age: 24
 DOB: [REDACTED] SS#: [REDACTED]
 Address:
 City, State, Zip:
 DL# SID#

INDICTMENT/CASE# 02-GS-20-132
 AWW# 6818649
 Date of Offense: 11/23/01
 S.C. Code §: 16-13-30(A)(B)(C)
 CDR Code #: 478

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: Grand Larceny more than \$1000In violation of § 16-13-30(A)(B)(C) of the S.C. Code of Laws, bearing CDR Code # 478

☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS (CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (Defendant Initial)
 The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

[Signature]
Solicitor[Signature]
Defendant[Signature]
Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 2 days/months/years or ☐ under the Youthful Offender Act not to exceed years and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment of \$; plus costs and assessments as applicable; the balance is suspended with probation for months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: October 23, 2007☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections. November 26, 2001 - Credit Time Served☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ OrderedTotal: \$ plus 20% fee: \$

Payment Terms:

☐ set by SCOPPPS

Recipient:

*Fine:	\$	
\$14-1-206 (Assessments 107.5%)	\$	
\$14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ <u>100.00</u>
\$14-1-211(A)(2) (DUI Surcharge)	\$100	\$
\$56-5-2995 (DUI Assessment)	\$12	\$
\$35.13 (Public Def/Prob)	\$500	\$
\$73.3, 1B TP (Law Enforce. Funding)	\$25	\$ <u>25.00</u>
\$33.7, 1B TP (Drug Court Surcharge)	\$100	\$
\$50-21-114(BUI Breath Test Fee)	\$50	\$
\$56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
3% to County (If paid in installments)	\$	\$ <u>3.93</u>
TOTAL		\$ <u>128.93</u>

PTUP

 days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ beginning\$ paid to Public Defender FundOther:

☐ Appointed PD or appointed other counsel, \$35.13 TP
 Requires \$500 be paid to Clerk during probation.

[Signature]
 Clerk of Court/ Deputy Clerk
 Court Reporter: [Signature]

PRESIDING JUDGE

Judge Code: 01 1 1 2 10Sentence Date: October 23, 2007

ARREST WARRANT

G-818640

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
Fairfield County

 THE STATE
against

DARRYL TERNAYNE COOK

RIDGEWAY, SC 29130

Phone: _____ SSN: _____

Sex: _____ Race: _____ Height: 5'11" Weight: 200

DL State: SC DL: _____

DOB: _____ Agency ORI: SC0200000

Prosecuting Agency: Fairfield County Sheriffs Dept

Prosecuting Officer: A

Offense: GRAND LARCENY OF MOTOR VEHICLE

Offense Code: 16-13-30

Code/Ordinance Sec. 82

This warrant is CERTIFIED FOR SERVICE in the

☐ County/ ☐ Municipality of

 The accused
is to be arrested and brought before me to be
dealt with according to law.

Signature of Judge

Date: _____

RETURN

 A copy of this arrest warrant was delivered to
defendant Darryl Ternayne Cook
on 01-14-02

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

 W F. POPE, JUDGE
115-B S. Congress St.
Winnsboro, SC 29180
803-635-4525

 STATE OF SOUTH CAROLINA)
☒ County/ ☐ Municipality of)
 Fairfield County)

AFFIDAVIT

 Form Approved by
S.C. Attorney General
July 23, 1990
SCCA 518

 Personally appeared before me the affiant GREG BOHEY who
being duly sworn deposes and says that defendant DARRYL TERNAYNE COOK
did within this county and state on November 23, 2001 violate the criminal laws of the
State of South Carolina (or ordinance of ☐ County/ ☐ Municipality of Fairfield County)
in the following particulars:
DESCRIPTION OF OFFENSE: GRAND LARCENY OF MOTOR VEHICLE

 I further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:
ABOVE NAMED DEFENDANT DID ON ABOVE DATE TAKE, STEAL AND DRIVE AWAY VICTIM, JACKIE MCGUIRT'S, 1990 CHEVY
PICKUP SC TAG NO. 4266LD FROM MCGUIRT'S TIRE SERVICE LOCATED ON OGDWOOD AVE IN RIDGEWAY, FAIRFIELD
COUNTY. THIS IS BASED ON WITNESS STATEMENTS AND INVESTIGATION BY FCSD.

 Sworn to and subscribed before me)
 on 01/14/2002)

 Signature of Affiant)
 Affiant's Address 330 COLUMBIA ROAD
Winnsboro, SC 29180
 Affiant's Telephone 803-635-4141

 STATE OF SOUTH CAROLINA)
☒ County/ ☐ Municipality of)
 Fairfield County)

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

 It appearing from the above affidavit that there are reasonable grounds to believe that
on November 23, 2001 defendant DARRYL TERNAYNE COOK
did violate the criminal laws of the State of South Carolina (or ordinance of
☒ County/ ☐ Municipality of Fairfield County) as set forth below:
DESCRIPTION OF OFFENSE: GRAND LARCENY OF MOTOR VEHICLE

 Now, therefore, you are empowered and directed to arrest the said defendant and bring him or her before
me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the
defendant at the time of its execution, or as soon thereafter as is practicable.

 Judge's Address 115-B S. Congress St.
Winnsboro, SC 29180
 Judge's Telephone 803-635-4525
 Issuing Court: ☐ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL

A6-818640

Xref #: 01-9786

 JAN 15 12 06 PM '02
 FAIRFIELD COUNTY
 CLERK OF COURT
 BETTY JO BACHMAN

1324

1325

BAIL set by

Judge _____

on _____

Type and Amount: _____

Name of Surety: _____

PRELIMINARY HEARING held by

Judge _____

on _____

Defense Attorney: _____

Decision: _____

DISPOSITION before

Judge _____

on _____

by _____

(indicate jury trial, bench trial, plea, nol. pros., etc.)

Disposition: _____

Sentence: _____

JURORS

WITNESSES

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

CODEFENDANTS
