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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Calhoun County

Honorable Paul M. Burch, Circuit Court Judge

BRYANT MCKNIGHT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2024-000752

JOHNSON PETITION FOR WRIT OF CERTIORARI

JESSICA M. SAXON
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR court err in finding trial counsel provided effective representation where counsel failed to request, or object to the omission of, the permissive inference language in a jury instruction regarding malice and use of a deadly weapon?

STATEMENT OF THE CASE

Kymmara Randolph went missing on February 13, 2014. App. 88, l. 23-App. 89, l. 15. The investigation into her disappearance ultimately led to the arrest and prosecution of Petitioner and his brother, Jerry McKnight. The investigation also led to the arrest of Jonathan McKnight, Stephon Green, Derrick Sumter, and Sandra Hughes for their roles in covering up the murder.[1] Petitioner was indicted for one count of murder and one count of kidnapping during the January 2015 term of the Calhoun County grand jury. App. 837-840. On March 2, 2015, the State called the case to trial before the Honorable Maite Murphy and a jury. The State also called Petitioner's co-defendant and brother, Jerry McKnight, to trial on the same charges.[2] App. 14, ll. 17-25. The State was represented by David Pascoe, Don Sorenson, and Kyle Ward. Petitioner was represented by Martin Banks. Jerry McKnight was represented by Mark A. Leiendecker. App. 1.

At trial the State alleged the McKnight brothers killed the decedent in retaliation for a burglary at their mother's home which they believed the decedent was involved in planning. App. 70, l. 14-App.72, l. 20. Jonathan McKnight, the first cousin of Petitioner and Jerry, testified that at 6 p.m. on February 13 he received a call from Petitioner that he needed a ride, so Jonathan went to pick up Petitioner and the decedent. Petitioner had Jonathan drive them to a family member's house where he retrieved a bag. Jerry was also at the house and asked for a ride to his girlfriend's house. Jerry directed Jonathan where to drive, eventually telling him to

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1 Jonathan McKnight was charged with obstruction of justice and accessory after the fact to murder. App. 231, 15-20; Stephon Green was charged with accessory after the fact to murder. App. 308, ll. 19-21; Derrick Sumter was charged with accessory after the fact to murder. App. 380, ll. 9-20. Sandra Hughes was charged with obstruction of justice and hindering a police officer. App. 389, ll. 2-9.

2 Jerry McKnight was also charged with, and convicted of, possession of a firearm by a person convicted of a violent crime. App. 14, ll. 21-24.

stop on Stiffmire Road so that Jerry could urinate. Jerry then got out of the vehicle and asked the decedent to get out of the vehicle, but she declined. Petitioner then asked the decedent to get out of the vehicle, but she again declined. Jerry then "snatched" her out of the vehicle, took her to the back of the car and shot her numerous times. App. 217, l. 16-App. 223, l. 1. Jerry then handed the gun to Petitioner telling him "You gone do this bitch too." App. 255, ll. 20-24. Jonathan claimed Petitioner and Jerry had previously stated they would kill anyone that was involved in the burglary of their mother's home. App. 229, ll. 8-25.

Stephon Green, a friend of Petitioner, testified Petitioner stated that if he found out the names of the people who broke into his mother's house that he would kill them. He also alleged to have heard Petitioner speculate that the decedent was involved in the burglary. App. 284, ll. 1-7; App. 290, ll. 2-17. He claimed Petitioner and he were exchanging text messages on the day of the murder in which Petitioner said he was "chilling" with a girl and thinking about killing her. App. 293, ll. 5-21. Green "laughed out loud" at the message and did not take it seriously. App. 293, l. 24-App. 294, l. 6. Later that same night Green claimed that Petitioner came to him and admitted he had "messed up and shot the girl." App. 298, ll. 15-19.

Derrick Sumter, a longtime friend of Petitioner, testified that Petitioner said when he found out who broke into his mother's house "he gone get at them." App. 332, ll. 6-16. He said that meant Petitioner would do them some harm. App. 332, ll. 17-19. Sumter admitted he disposed of a gun and bag of items at the behest of Petitioner. He also drove Jerry McKnight to move the body of the decedent from the location of the murder to the Four Holes swamp area. App. 334, ll. 11-App. 335, l. 15; App. 337, ll. 8-14; App, 338, ll. 13-24; App. 340, l. 20-App. 345, l. 20.

The body of the decedent was found on February 21 in the Four Holes swamp area. At an autopsy it was determined that the decedent was shot a total of twelve times with six gunshot wounds to her chest and six gunshot wounds to her head. The cause of death was laceration of multiple organs due to gunshot wounds of the head and chest. App. 457, l. 19-App. 458, l. 5.

Petitioner and his brother were found guilty as indicted on March 6, 2015. App. 826, ll. 1-19. Judge Murphy sentenced Petitioner to life imprisonment for murder and thirty years imprisonment for kidnapping. App. 835, ll. 10-15. Petitioner timely appealed his convictions and sentences. The Court of Appeals ultimately vacated Petitioner's kidnapping sentence pursuant to S.C. Code Ann. § 16-3-910 and State v. Vick, 384 S.C. 189, 682 S.E.2d 275 (2009). State v. McKnight, Op. No. 2017-UP-384 (Ct. App. 2017).

On March 22, 2018, Petitioner timely filed an application for post-conviction relief. App. 845-851. The State filed a return and motion for a more definite statement on June 28, 2018. App. 852-856. PCR Counsel Arthur Aiken filed an amended application on May 10, 2021, followed by a second amended application dated August 29, 2023. App. 857-862. An evidentiary hearing was convened on February 6, 2024, before the Honorable Paul M. Burch. The State was represented by Bryan T. Hall. Petitioner was represented by Counsel Aiken and Mark Hardee. App. 863. At the hearing, Counsel Aiken clarified that Petitioner was only going forward on the claims in the seconded amended application which were failure of counsel to ensure the trial court gave a permissive inference charge in its jury instructions on malice and failure of counsel to object to the trial court's statements that the jury's role was to find the true facts. App. 860; App. 868, l. 9-App. 869, l. 3.

No testimony was taken at the hearing. Regarding the permissive inference charge, Counsel Aiken argued under State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983), that the trial

court was required to include a permissive inference instruction in the instructions concerning inferring malice from the use of a deadly weapon. App. 871, l. 14- App. 872, l. 2. He continued that under Gibson v. State, 416 S.C. 260, 786 S.E.2d 121 (2016), counsel was deficient for failing to request the instruction or object to the lack of the instruction. App. 872, l. 9- App. 873, l. 7. Counsel Aiken continued,

> The prejudice in this case is patent because of the issue concerning malice. And of course, your Honor, the thing about malice is malice is an element of the offense. Okay? It's very important to give the jury the proper factual – fact – proper legal framework for finding the facts on – on an essential element of the crime charged, which is – which is malice. App. 873, ll. 8-14.

The State conceded that the permissive language from Elmore, *supra*, was not in the trial court's jury charge but argued that Petitioner could not prove prejudice because there was other evidence of malice in the case. App. 876, ll. 16-20. The State relied upon the Petitioner's statements to Jonathan and Sumter that he would kill or do harm to anyone involved with the burglary of his mother's home as evidence of express malice. The State argued that regardless of the erroneous charge, there was other evidence of malice in the record such that the jury would have still convicted Petitioner even if the permissive inference charge had been given. App. 876, l. 21-App. 879, l. 10.

Judge Burch signed an order of dismissal on March 27, 2024. App. 885-App. 897. The PCR court found that Petitioner could not show prejudice finding "Applicant's statements, as spoken through the testimonies of several witnesses, evidenced hatred, ill-will, and intent to kill the victim. Applicant's comments were evidence of express malice that was considered by the jury, irrespective of Applicant's use of a deadly weapon and the erroneous inferred malice charge." App. 892. The PCR court did not discuss deficiency of trial counsel, as it had decided the claim on the failure to prove prejudice.

ARGUMENT

The PCR court erred in finding trial counsel provided effective representation where counsel failed to request, or object to the omission of, the permissive inference language in a jury instruction regarding malice and use of a deadly weapon.

Relevant Facts

The parties had a jury charge conference in chambers. Counsel Banks did not submit any proposed jury instructions, nor did he place any objections to the instructions on the record. App. 713, l. 24-App. 715, l. 8. The trial court instructed the jury on malice as follows.

> The defendants are each charged with murder. The State must prove beyond a reasonable doubt that the defendants killed another person with malice aforethought. Malice is hatred, ill will or hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse and with the intent to inflict an injury or under circumstances that the law will infer an evil intent.
>
> Malice aforethought does not require that malice exists for any particular time before the act is committed, but malice must exist in the mind of the defendant just before and at the time of the act is committed. Therefore, there must be a combination of the previous evil intent and the act.
>
> Malice aforethought may be express or inferred. These terms, "express" and "inferred," do not mean different kinds of malice but merely the manner in which malice may be shown to exist. That is either by direct evidence or by inference from the facts and circumstances which are proved.
>
> Express malice is shown when a person speaks words which express hatred or ill will for another or when a person prepared beforehand to do the act which was later accomplished. For example, lying in wait for a person or any other acts of preparation going to show that the deed was within the defendant's mind would be express malice.
>
> Malice may be inferred from conduct showing a total disregard for human life. Inferred malice may arise when a deed is done with a deadly weapon. A deadly weapon is any article, instrument or substance which is likely to cause death or great bodily harm. Whether an instrument has been used as a deadly weapon depends on the facts and circumstances of each case.

> The following are examples of instruments which may be deadly weapons: A pistol, a shotgun, a rifle, a dirk, a dagger, a knife, a slingshot, metal knuckles, a razor, gasoline, a firebomb or Molotov cocktail, and lighter fluid. A gun may be a deadly weapon even if it is not operating. App. 820, l. 19-App. 822, l. 4.

At the conclusion of the jury charge, Counsel Banks again failed to request, or object to the lack of, the permissive inference language in the jury instruction regarding malice and use of a deadly weapon. App. 824, l. 24-App. 825, l. 1.

Discussion

In 1983, our Supreme Court held that a trial judge's instruction on the presumption of malice from the use of a deadly weapon improperly constituted a mandatory presumption instead of a permissive presumption. State v. Elmore, 279 S.C. 417, 421, 308 S.E.2d 781, 784. The Court suggested that the trial courts charge:

> The law says if one intentionally kills another with a deadly weapon, the implication of malice may arise. If facts, are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive. Id.

Our Supreme Court cautioned the bench "that hereafter only *slight deviations* from this charge will be tolerated." Id. (emphasis added).

In Gibson v. State, 416 S.C. 260, 261, 786 S.E.2d 121, 122 (2016), Gibson was convicted of murder and unlawful carrying of a pistol by a person under the age of twenty-one. At PCR he contended that trial counsel was ineffective in failing to object to the charge that malice may be inferred from the use of a deadly weapon on the ground that the charge did not include the permissive inference language approved in Elmore. Id. at 263, 786 S.E.2d at 123. The PCR court dismissed the claim, finding the charge as a whole was a proper statement of the law and did not constitute burden shifting. The PCR court further found that the jury was fully instructed

on the State's burden of proof and that the results of the trial would not have been different had counsel objected to the implied malice charge because the use of a deadly weapon was not the only evidence of malice. Id. at 264, 786 S.E.2d at 123.

Our Supreme Court reversed the decision of the PCR court holding that the complete omission of the permissive inference language was not a "slight deviation" that was permissible under Elmore. The Court found the charge erroneous and found that trial counsel was deficient for failing to object to the malice charge. Id. at 264-265, 786 S.E.2d at 123-124. Turning to prejudice, the Court wrote

> In determining whether petitioner was prejudiced by trial counsel's deficient performance, this Court must decide whether the erroneous malice instruction contributed to the verdict based on all the evidence presented to the jury. The Court must weigh the significance of the presumption to the jury against the other evidence of malice considered by the jury without the erroneous malice charge. Id. at 265, 786 S.E.2d at 124 (cleaned up).

The Court found that there was not overwhelming evidence of malice in the record. Thus, "[b]ecause there was little evidence of malice aside from the use of a gun, the PCR judge erred in finding petitioner was not prejudiced by trial counsel's failure to object to the charge on the inference of malice from the use of a deadly weapon." Id. at 266, 786 S.E.2d at 124.

In the matter *sub judice* the State conceded during the PCR hearing that the charge given to the jury was erroneous. App. 879, ll. 4-5. Under the law as set forth in Elmore, the charge given in this case was error because it completely omitted the permissive inference language in the inferred malice charge. As held in Gibson, the failure of Counsel Banks to object to the lack of permissive inference language or to request the language be included was deficient performance.

The PCR court disposed of Petitioner's claim by finding that he could not show prejudice as there was other evidence of express malice in the record. At the PCR hearing the State

couched the testimony regarding Petitioner's statements that he would harm or kill the people responsible for the burglary as evidence of his motive and of malice. Motive and malice are separate concepts in the law and evidence of motive does not necessarily equate to evidence of malice. That is because "there must be a conjunction between mental state and act. Even if one had the requisite mental state at some point in the past, a homicide is not murder unless that mental state existed at the time of the killing." McAninch, Fairey, & Coggiola, The Criminal Law of South Carolina (6th ed. 2013), pg. 105.

While a court could find that Petitioner's statements, as attested to by indicted co-defendants, were evidence of malice those statement were not evidence of malice at the time of the killing. Any evidence of Petitioner's malice at the time of the killing would have be tied to the use of the gun. The jury instruction told the jury that the use of a gun by itself satisfied the element of malice. Without the permissive inference language, the jury was left without a choice in deciding whether Petitioner had the requisite malice at the time of the killing. This prejudiced Petitioner, particularly considering the testimony that Petitioner only fired the gun after Jerry had repeatedly shot, and most likely killed, the decedent. Petitioner has shown both deficient performance and prejudice. This Court should reverse the decision of the PCR court.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests that this Court grant the Petition for Writ of Certiorari to allow full briefing of this issue.

For Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of March, 2025.

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RESPONDENT.

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Bryant McKnight states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge Paul M. Burch, which was held on Feb. 6, 2024, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Bryant McKnight.

Respectfully Submitted,

FOR _____
Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of March, 2025.

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

For Jessica M. Saxon
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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This 7th day of March, 2025.