

**ORIGINAL**

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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SC SUPREME COURT

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Certiorari to Richland County

J. Ernest Kinard, Jr., Deceased Circuit Court Judge  
\_\_\_\_\_

KENYATTA BRYANT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000950  
\_\_\_\_\_

JOHNSON PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR Court err by finding defense counsel was not ineffective for failing to object to the judge's confusing instruction that malice could be inferred from the commission of a felony by way of accomplice liability, where the state maintained petitioner shot the victim, and the petitioner was never put on notice of an underlying felony by indictment or otherwise?

## ARGUMENT

The PCR Court erred by finding defense counsel was not ineffective for failing to object to the judge's confusing instruction that malice could be inferred from the commission of a felony by way of accomplice liability, where the state maintained petitioner shot the victim, and the petitioner was never put on notice of an underlying felony by indictment or otherwise.

### **Relevant facts:**

Petitioner was indicted at the April 14, 2010 term of the Richland County Grand Jury for the offense of murder. The indictment alleged that petitioner killed the decedent with malice aforethought by shooting him in the head. App. 821.

Petitioner's case was called to trial on June 20, 2011 before the Honorable James R. Barber, III, and a jury. Charlie Johnson represented petitioner. Katherine "Luck" Campbell and Meghan Walker were the assistant solicitors. App. 1:

Petitioner's codefendant, Johnathan Holloway, was not tried with petitioner. He testified as a state's witness. Petitioner lived next door to Holloway on Brookland Circle in Columbia. Petitioner's brother was a friend with Holloway. App. 272, ll. 8 - 25. Holloway said they used to "chill out probably smoke a little marijuana and just hang out. That's about it." App. 273, ll. 3 - 21.

Holloway testified that on March 21-22, 2010 he was smoking marijuana when petitioner inquired about "fake dope". App. 274, l. 2 - 277, l. 19. Holloway testified that he and petitioner decided to sell the "fake dope" or fake crack cocaine to the decedent. App. 280, ll. 1 - 17.

The plan went awry when decedent became angry during the sale. Holloway grabbed the decedent, and Holloway claimed decedent was overpowering him. Holloway maintained petitioner was screaming at the decendant to give him his money. Holloway claimed he was fighting with decedant at the time. Holloway maintained that petitioner got out of the car, and that he saw

petitioner with his gun in his hand. Holloway said that he ran down the street and that petitioner was still arguing and that he heard a gun shot. App. 280, l. 2 - 288 l 5.

Holloway admitted that he lied to police when he said that he was not at the scene where the decedant was shot. App. 290 l. 22 – 291, l. 25. On cross-examination, Holloway denied that he was a member of the Blood's gang, but he admitted: "I'm affiliated with a lot of them." App. 294 l. 2-25. Holloway said there was no intention of robbing the decedent, and that he and petitioner were only going to "sell them some fake dope." App. 297 l 22 – 299 l. 9; App. 301 l. 2-10.

Petitioner took stand in his own defense to refute Holloway's claim that he shot and killed the decedent. Petitioner was twenty-two-years-old at the time of the trial. App. 52, ll. 16 – 19. Petitioner admitted that they took some other medications -- "shaved them down" -- to "make them look like crack cocaine." App. 525, ll. 13 - 22.

Petitioner testified that Holloway was drunk and high at the time. Holloway told petitioner about the decedent: "I'm fixing to get his ass," and petitioner responded: "Man, don't do that shit." App. 530, l. 24- 531, l. 25. Petitioner said Holloway pulled a gun and Holloway struggled with the decedent. Petitioner testified that he was running away -- down the street -- while the men were still fighting. Petitioner said that while he was running he heard a gunshot. App. 538, l. 14 – 533, l. 13. Essentially, it appeared Holloway had taken petitioner's statement of what occurred, and made petitioner the shooter, and Holloway made himself the "withdrawer," or abandoner.

In her closing argument, Assistant Solicitor Campbell admitted that Holloway lied to the police. App. 653, ll. 5-15. However, she maintained that Holloway and petitioner were acting together in selling fake drugs or committing a robbery "whatever you want to call it," and therefore they were both equally guilty under the "hand of one" theory of accomplice liability. App. 653, l. 5 – 655, l. 19.

The judge then charged the jury that it *could infer malice* if it concluded *the homicide was approximate direct result of the commission of a felony*, and in that regard robbery would be a felony under our law.” The judge also charged accomplice liability: “The act of one is the act of all”. App, 713, ll. 6-20. (emphasis added). Defense counsel Johnson did not object to the solicitor’s closing argument or the jury instruction. App. 720, ll. 8-12. The jury found petitioner guilty of murder. App. 726, l. 20 – 727, l. 2.

After a post-trial motion the judge stated that jury believed Holloway, and not petitioner, and denied the post-trial motion. App 731, ll. 5-14. Judge Barber sentenced petitioner to forty-five years imprisonment. App. 737, ll. 5-7.

Petitioner dismissed his direct appeal, and chose to file a PCR application. App. 740. Petitioner filed this application for post-conviction relief on October 22, 2012. App. 739–756. The state filed a return dated December 20, 2012. App. 757–763.

An evidentiary hearing was convened on December 8, 2014 before the Honorable J. Ernest Kinard, Jr. Aimee Zmroczek represented petitioner. Joshua L. Thomas was the assistant attorney general. App. 765.

PCR counsel told the judge that their strongest issue was that petitioner had been tried for murder “based on a concept of felony murder.” However, PCR counsel argued petitioner had not been indicted for anything besides murder. Therefore, the jury instructions on malice from the commission of a felony were hopelessly confusing. App. 769, l. 18 – 770, l. 20.

Trial counsel Charlie Johnson testified that he had practiced criminal law “100 % of his practice” for nineteen years. App. 769, l. 18 – 770, l. 20. Johnson thought he “was appointed” on this case but he was not sure. App. 770, l. 24 – 771, l. 2.

Johnson estimated he met with petitioner at least ten times. App. 771, ll. 3 - 4. Johnson offered that petitioner had “always indicated” that he did not shoot anyone, and that he was running away when Holloway shot the decedent. App. 771, l. 5 - 773, l. 23. Johnson remembered that the solicitor’s office at first believed “Kenyatta and his story but then came to believe that [Holloway] was telling the truth when he claimed [petitioner] was the shooter.” App. 778, l. 14 – 775, l. 9.

Johnson acknowledged that petitioner was only indicted for murder – no other crime or felony. Throughout the hearing, Johnson argued with PCR counsel, maintaining: “I’m not aware of a felony murder rule in South Carolina.” App. 775, ll. 10-13.

Johnson noted that petitioner did not have an alibi defense. His defense was “that he did not have anything to do with the murder, and that he was running away at the time the gun was fired.” App. 778, ll. 2 -12. Johnson said that petitioner acknowledged they [Petitioner and Holloway] were going to sell fake drugs to the decedent. However, petitioner never had any “intent on robbing anyone.” App. 778, l. 22 – 779, l. 6; app. 782, ll. 12- 16.

As to the jury instruction, Johnson rationalized that the state’s “position was that my client was the triggerman.” The inference of malice from the commission of a felony instruction therefore did not make any difference, Johnson thought, because “our position was that my client didn’t do it.” App. 785, ll. 8-22. The state’s theory of the case was that petitioner and Holloway planned to rob the decedent together, and that there was a struggle and that petitioner “walks around and shoots the victim.” App. 786, l. 7 – 790, l. 11.

Johnson added that he believed “to this day” that petitioner did not shoot the decedent, and it was never petitioner’s intent for the decedent to be shot. Consequently, Johnson reasoned that there was no reason to object to the solicitor’s closing argument on malice from the

commission of a crime, or the jury instruction on the inference of malice from committing “a felony” or the accomplice liability instruction. App. 787, l. 14 – 790, l. 11.

Petitioner testified that he was never indicted for robbery. Nonetheless, he was found guilty of murder based on jury instructions that the jury could “infer malice from the commission of a felony.” App. 790, l. 22 - 794, l. 11.

Petitioner admitted on cross-examination that he planned to sell “fake dope.” It was co-defendant Holloway, however, who decided that he was going to rob the decedent. Petitioner acknowledged that the Holloway said he shot the decedent, and petitioner told the PCR judge what actually happened -- as he testified at trial -- was that Holloway shot the decedent. App. 797, ll. 1-13.

PCR counsel argued that defense counsel was ineffective for allowing the state in argument; and then to judge by jury instruction, to tell the jury that malice could be inferred from the commission of a felony. PCR counsel maintained that: “Felony murder rule does exist in South Carolina, and it was improperly argued; and to this day, still unknown to defense counsel [is that fact that felony murder exists.” App. 797, l. 16- 800, l. 6. The assistant attorney general argued that South Carolina was the only state in the country that has “no felony murder rule.” He argued that the jury instruction and closing arguments on the inference of malice from the commission of a felony were proper under South Carolina law. App. 800, l. 7 - 801, l. 17. The PCR judge reasoned that malice could be inferred even if they were only going to sell “fake dope.” App. 801, l. 18- 802, l. 10.

An order of dismissal dated January 9, 2015 was issued. App. 804 - 815. In this order, the judge noted that petitioner planned to sell “fake drugs to the victim when the co-defendant decided they were going to rob the victim instead.” App. 806- 807. The PCR judge reasoned

that South Carolina law allowed a permissive inference of malice from a commission of a dangerous felony. App. 808 - 809. The judge found that the jury instruction on the implication of malice in this case was proper. App. 809 - 810. The judge also reasoned that petitioner was not prejudiced by the implication of malice instruction because the state's theory of the case was that petitioner was the shooter, and the theory was there for "one of malice murder, and not felony murder." App. 810 - 811.

From this order, petitioner is seeking a writ of certiorari pursuant to Rule 243 of the SCACR.

### **Discussion**

The trial judge's instruction on inferred malice was hopelessly confusing given the facts of this case. The judge charged the jury that it could infer malice if it concluded, "that the homicide was a proximate direct result of a felony, and in that regard robbery would be a felony under our law. You can imply that malice existed if a person is in the commission of a felony at the time of the fatal blow . . ." App. 713, ll. 6-11. The judge also instructed the jury that "the act of one is the act of all," the accomplice liability instruction. App. 713, l. 18- 715, l. 3.

These instructions were confusing because they allowed the jury to infer malice, as the solicitor urged, whether petitioner agreed to participate in merely selling "fake dope" to the decedent, his friend, or whether Holloway planned or chose to commit a robbery as the drug deal was in progress.

Defense counsel reasoned that he did not care about these jury instructions because his position was that petitioner did not shoot the decedent. However, that does not change the fact that the instructions were confusing because they allowed the jury to infer malice from the selling of fake drugs or a robbery. This occurred in a case where the state maintained petitioner

was the shooter. In the context of this case, the import of the instruction was that even if the jury believed petitioner did not shoot the decedent, and petitioner only planned to sell him fake drugs, petitioner was still guilty of murder if Holloway chose to commit a robbery during the fake drug sale. While the judge did instruct that robbery was a felony, this trial, as a whole, with the arguments of the solicitor, and the judge's instructions on the law of inferred malice were very confusing. The PCR judge erred by reasoning that the inference of malice was correct from either the sale of fake drugs or the robbery.

In State v. Norris, 285 S.C. 86, 328 S.E.2d 339(1985) Appellant Norris was found guilty of murder while in the commission of a criminal sexual assault in the first degree. The facts revealed that Norris raped and killed a 75-year-old woman in Anderson, South Carolina. Norris admitted that he beat the victim had sex with her. However, at trial Norris claimed the victim not only consented to sex, but she solicited sex from him. Norris maintained he was provoked into beating the victim but he did not intend to kill her.

The judge instructed the Norris jury that it could infer malice if it concluded the homicide was the approximate direct result of the commission of a felony. In a supplemental instruction, the trial judge stated the jury could infer malice but it did not have to infer malice. State v. Norris, 285 S.C. at. 91, 328 S.E.2d at. 342.

Our Supreme Court in State v. Norris noted, "South Carolina follows the common law rule of murder and makes no distinction between murder and felony-murder." State v. Norris, 285 S.C. at. 92, 328S.E.2d at. 342- 343. Our Supreme Court said that a proper instruction was that if one intentionally kills another during a commission of a felony, "the implication of malice may arise." The instruction went on to say that the inference of malice was only an evidentiary fact, and the jury could give such weight to that fact as it determined it should receive.

Here, the inference of malice instruction -- particularly in light of the solicitor's closing argument -- hopelessly confused the jury. For that reason, defense counsel was incorrect in reasoning it did not prejudice petitioner simply because his defense was that petitioner was not the triggerman. A reasonable juror in this case would have understood that he or she was free to infer malice if they believed -- which they had too -- that petitioner had planned to sell "fake dope" to the decedent.

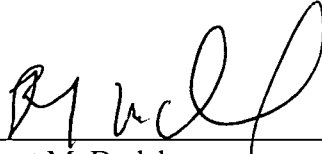
That is what the solicitor urged, and although the judge told the jurors that a "robbery" was a felony it left the jury without the proper guidance on what crime it could infer malice from, and there was no definition of "robbery."

The purpose of jury instructions is to enlighten the jury, and confusing giving confusing instructions are error. Further, merely superimposing good law over bad law only fosters confusion, and they therefore such instructions are reversible error. Moreover, when an incorrect charge on the law is given, the trial court must withdraw it. See State v. Robinson, 305 S.C. 399, 401- 402, 412 S.E.2d 411, 412 (1991). Defense counsel should have objected to the implication of malice instruction in this case, and it would have preserved the issue for direct appeal. It also would have removed the confusion from the jury if the trial judge withdrew the instruction after a proper objection. The PCR judge erred by finding defense counsel provided effective representation based on the highly unusual facts of this case.

CONCLUSION

By reason of the foregoing arguments, a petition for writ of certiorari should issue to allow full briefing on these issues.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. M. Dudek', written over a horizontal line.

Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of January, 2016.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO RICHLAND COUNTY  
J. ERNEST KINARD, JR., DECEASED CIRCUIT COURT JUDGE

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KENYATTA BRYANT,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000950

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PETITION TO BE RELIEVED AS COUNSEL

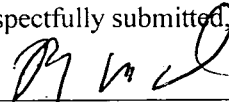
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Counsel for Kenyatta Bryant states:

1. He is a Chief Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on December 8, 2014. In his opinion seeking certiorari from the order of dismissal is without merit.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Kenyatta Bryant.

Respectfully submitted,



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Robert M. Dudek  
Chief Appellate Defender  
ATTORNEY FOR PETITIONER

This 7th day of January, 2016

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Richland County  
J. Ernest Kinard, Jr., Deceased Circuit Court Judge

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KENYATTA BRYANT,

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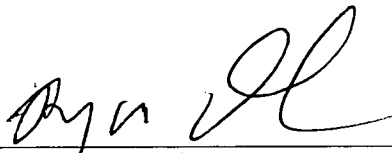
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CERTIFICATE OF SERVICE

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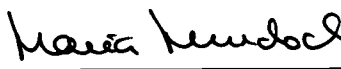
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Clay Mitchell, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Kenyatta Bryant, #346659, at Perry Correctional Institution, this 7th day of January, 2016.



Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 7th day  
of January, 2016.

 (L.S.)

Notary Public for South Carolina  
My Commission Expires: July 3, 2023.