STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

J. Ernest Kinard, Jr.
Deceased Circuit Court Judge

Kenyatta Bryant -- Petitioner,

-Vs-

State of South Carolina -- Respondent,

Appellate Case NO.2015-000950

Pro-Se JOHNSON PETITION FOR WRIT OF CERTIORARI

Kenyatta Bryant
SCDC# 346659
PCI
430 Oaklawn Rd.
Pelzer, SC. 29669

Petitioner, pro-se

INDEX

ISSUE PRESENTED

I.

THE PCR COURT ERRED IN FAILING TO FIND COUNSEL RENDERED INEFFECTIVE ASSISTANCE WHEN COUNSEL FAILED TO OBJECT TO THE TRIAL COURT'S MALICE INSTRUCTIONS THAT MALICE COULD BE INFERRED FROM THE INTENTIONAL DOING OF AN "UNLAWFUL ACT" THAT SHIFTED THE BURDEN OF PROOF IN VIOLATION OF THE DUE PROCESS CLAUSE.

ARGUMENT

I.

THE PCR COURT ERRED IN FAILING TO FIND COUNSEL RENDERED INEFFECTIVE ASSISTANCE WHEN COUNSEL FAILED TO OBJECT TO THE TRIAL COURT'S MALICE INSTRUCTIONS THAT MALICE COULD BE INFERRED FROM THE INTENTIONAL DOING OF AN "UNLAWFUL ACT" THAT SHIFTED THE BURDEN OF PROOF IN VIOLATION OF THE DUE PROCESS CLAUSE.

FACTS

Petitioner's co-defendant Johnathan Holloway ("Holloway") testified for the State. Holloway testified that Petitioner lived next door to him and that he was friends with Petitioner's brother, App.272, L.8-25. Holloway testified that they used to chill out and smoke a little marijuana and just hang out, App.273, L.3-21.

Holloway testified that on March 21-22, 2010, he was smoking marijuana when Petitioner had inquired about "fake dope", App.274, L.2-p.277, L.19. Holloway testified that he and Petitioner had decided to sell the "fake dope" or "fake crack cocaine" to the decedent, App.p280, L.1-17.

Unfortunately the plan took a twist when the decedent got angry, apparently realizing the "dope was fake", and Holloway said he grabbed the decedent and the decedent was overpowering him. At that point Holloway said Petitioner was screaming at the decedent to give him his money. Holloway maintained that he was fighting with the decedent at this time. Holloway testified that Petitioner got out of the car, and that he saw Petitioner with a gun in his hand. Holloway claimed that he ran down the street and that Petitioner was still arguing with the decedent when he heard a

gun shot. App.280, L.2-p.288, L.5.

Holloway candidly admitted that he lied to the police when he said that he was not at the scene where the decedent was shot, App.290, L.22-p.291, L.25. Holloway testified that there was "no intention of robbing the decedent", and that he and Petitioner, were only going to "sell some fake dope". App.297, L.22-p.299, L. 9, App.301, L.2-10.

Petitioner took the stand in his own defense and denied Holloway's claim that Petitioner shot and killed the decedent, App.5-21, L.16-19. Petitioner admitted that they had taken some other medications and "shaved them down" to make them look like "crack cocaine." App.525, L.13-22.

Petitioner testified that Holloway said "I'm going to get his ass", referring to the decedent. Petitioner said he told Holloway "not to do that", App.530, L.24-p.531, L.25.

Petitioner testified that it was Holloway who was armed with a gun and was struggling with the decedent. Petitioner testified that as [he was] running away -- down the street -- Holloway and the decedent were fighting and he heard what he believed to be a gun shot. App.538, L.2-p.543, L.10.

Petitioner's credibility was essential before the jury. Ultimately it was a swearing match between Petitioner and Holloway.

Petitioner would submit that Holloway has essentially taken Petitioner's version of events and reversed them to make Petitioner the shooter and Holloway the one was the abandoner.

During the Solicitor's closing the following was recorded:

> Even if you were to take what Kenyatta Bannister told the police on simply most of the occasions as well as what he got up here and told you a a whole new version yesterday, **he is guilty under the law in this state.**
>
> App.653, L.11-15

Counsel sat mute. The Solicitor further argued:

> A crime -- if a crime is committed by two persons who are acting together in the commission of an offense. Both of them admit that they went there to sell either drugs or fake drugs, robbery or whatever you want to tell it. Nobody is going to get up here and say they weren't committing a crime, an offense. They were acting together.

App.653, L.5-21. Counsel again sat mute and the Solicitor further as was recorded without objection from counsel:

> Two or more people, persons, acting together in the commission of an offense. The act of one is the act of both or all. If two or more combine together to commit an unlawful act and in the execution of that criminal act a homicide is committed by one -- as a probable or natural consequence if the acts done in pursuance of the common design, all present participating in the unlawful undertaking are as guilty as the one who committed the fatal act.
>
> If both are together, acting together, assisting each other in the commission of an offense, the law says under those circumstances the act of one is the act of all.

App.654, L.1-13.

Coming directly after the Solicitor's just finished closing, the trial court instructed the jury regarding murder:

> Malice may be inferred from conduct showing a total disregard for human life. Malice may be inferred from willful, deliberate, and intentional doing of an unlawful act without just cause or legal excuse. Malice may arise when the deed is done with a deadly weapon.
>
> The law also allows a jury to infer malice if you conclude that the homicide was the proximate direct of the commission 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, L.1-11.

As was seen in the above the Court charged the jury that they infer malice if the jury concluded that Petitioner deliberately committed an "**unlawful act**". Thus echoing the Solicitor's just finished closing. The Court then instructed the jury on accomplice liability, App.713, L.18-p.714, L.3. The Court then instructed the jury as follows:

> Guilt as a principal is shown by actual or constructive **presence** at the scene **as a result of a prior arrangement**. Therefore, a finding of a **prior arranged plan or common scheme** is necessary for a finding of guilt as a principal. The State must prove beyond a reasonable doubt by competent evidence the theory of that hand of one is the hand of all.

App.714, L.9-15. The Court further told the jury that "intent is also a necessary element, for there must have been a common design or intent to commit a crime. App.715, L.4-5. Under the facts of the case that Petitioner and Holloway were selling "fake drugs ", thus a crime as succinctly argued by the solicitor's closing and perhaps a felony, the jury could have believed Petitioner and still found him guilty under the Court's instructions that malice if inferred from the willful, deliberate, intentional doing of an "unlawful act."

Trial Counsel did not object to the solicitor's closing or the jury instructions, App.720, L.8-12, and the jury convicted Petitioner of murder. App.725, L.20-p.727, L.2.

DISCUSSION

Occasionally a jury will be charged that if the death from any unlawful act, then malice may be found, making the homicide murder. **This is patently erroneous.** An "unlawful act" is not

necessarily malicious." McAninch, Fairey, and Coggiola, The Criminal Law of South Carolina at 108 (6th ed.2013). The leading book on criminal jury charges does not include the phrase "unlawful act" and defines malice as "the doing of a wrongful act intentionally and without just cause or excuse", Ralph King Anderson, Jr. South Carolina Requests to Charge -Criminal, 2012, §2-1. Judge Anderson's implied malice charge simply states" "implied malice is when circumstances demonstrate a wanton or reckless disregard for human life or a reasonably prudent man would have known that according to common experience there was a plain and strong likelihood that death would follow the contemplated act." Id.

In a 1992 case, both "wrongful act" and "unlawful act" appeared in the same case, Plyler v. State, 309 S.C. 408, 419-11, 424 S.E.2d 477, 478 (1992). The Court upheld the charge. Id.

Complicating the analysis in the instant case is the principle of the felony-murder rule. This Court engaged in an in-depth discussion of the felony-murder rule in Gore v. Leeke, 261 S.C. 308, 314, 314-18, 199 S.E.2d 755, 757-59 (1973). The trial judge charged the jury that the defendants could be guilty if the homocide was a probable or natural consequence of the acts which were done in pursuance of the common design, Id. Gore held that malice could be implied "from the prepetration of a [malum in se] felony Id. Malum in se, means a wrong in itself, an act or case involving illegality from the very nature of the transaction, upon principles of natural, moral, and public law. See Black's Law Dictionary, (6th ed. 1990). An act is said to be malum in se when it is inherently and essentially evil, that is, immoral in it's nature

and injurious in it's consequences, without any regard to the fact of it's being noticed or punished by the law of the state." Id

Gore also discussed how to determine which felonies would allow the inference of malice. Id. The Court noted that the application of the felony-murder rule to "any felony" was under "great criticism" Id. Gore discussed the idea of felonies which are inherently dangerous or a more expansive viewpoint that weighed all of the facts to determine whether there was "any substantial forseeable human risk." Id. Ultimately, the Court chose not to decide which of these rules to adopt because the circumstances of that case would have qualified under either theory. Id. Noting that the murder in Gore was committed when the defendants fled police after committing an armed robbery.

Following Gore, the Court determined that South Carolina adheres to common law murder "and makes no distinction between murder and felony-murder." State v. Yates, 280 S.C. 29, 34, 310 S.E.-2d. 805, 808 (1982).

There were few cases in which the "unlawful act" appears, State v. Fields, 264 S.C. 260, 267-68, 214 S.E.2d 320, 322 (1975)(furthermore, malice may be presumed from the intentional doing of an unlawful act without just cause or excuse); State v. Croker, 272 S.C. 344, 345-46, 251 S.E.2d 764, 765-66 (1979)(malice aforethought may be implied by the jury from the intentional doing of an unlawful act without just cause or excuse); State v. Hyman, 276 S.C. 559, 566, 281 S.E.2d 209, 213 (1981)approving charge contained a presumption of malice from the intentional doing of an unlawful act). These cases, containing the presumption of malice

, were found invalid after Sandstrom v. Montana, 442 U.S. 510 (1-979) held that a charge creating a presumption unconstitutionally shifted the burden of proof to the defendant.

After the dust settled from the reversals of the presumption of malice cases by the United States Supreme Court in the wake of Sandstrom, the Court addressed the giving of a felony-murder charge in State v. Norris, 285 S.C. 86, 90-92, 328 S.E.2d 339, 342-43 (1985). The trial judge in Norris charged: "If [the homicide] was during the commission of a felony you can consider that as facts and circumstances from which malice can be inferred." Id.

Norris upheld the charge, but stated, "while we find no error in the trial judge's comment upon the felony-murder rule, we take this opportunity to remind the bench and Bar that South Carolina follows the common law rule of murder and makes no distinction between murder and felony-murder." Id The Court then promulgated a "proper charge on malice:"

> The law says if one intentionally kills another during the commission of a felony, 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 at 92, 328 S.E.2d at 343, See also Lowry v. State, 376 S.C. 4-99, 657 S.E.2d 760 (2008)(approving of the Norris charge and reversing the conviction in PCR because counsel failed to object to the charge that mandated the conclusion that a homicide was murder if committed during a felony).

Petitioner's case contains a factual scenario that implicates the definition of malice, when malice may be inferred, and principles from how South Carolina deals with felony-murder. Petitioner admitted he was there for a "drug deal -- an unlawful act and perhaps a felony." Petitioner vehemently denied shooting the decedent. Holloway and Petitioner both testified there was no preconceived plan to rob the decedent. Both agreed they were only going to sell the decedent some "fake dope", App.297, L.22-p.299, L. 9; App.301, L.2-10; App.778, L.22-p.779, L.1, App.782, L.12-16.

The Solicitor successfully argued that if Holloway and Petitioner were committing a crime and selling drugs is a crime then [both] are equally guilty under the laws of this state. The Judge charged the jury they could infer malice from an "unlawful act."

This meant the jury could have believed Petitioner, yet still inferred malice because of the "drug deal." The contradiction of this charge was made worse by the trial court's instructions in regards to guilt as a principle as the court instructed the jury: "guilt as a principle is shown by actual or constructive presence at the scene as a result of prior arrangement. Therefore, a finding of a prior arranged plan or common scheme is necessary for a finding of guilt as a principle., App.714, L.9-15.

The confusion was compounded by the Solicitor's argument: "A crime -- if committed by two or more persons who are acting together in the commission of an offense. Both of them admit that they went there to sell either drugs or fake drugs, robbery, whatever you want to tell it. Nobody is going to get up here and say they weren't committing a crime, an offense. They were acting together., App.653, L.16-21.

Interestingly the trial court instructed the jury they could infer malice if they concluded "the homicide was the approximate result of the commission of a felony, and in that regard robbery would be a felony under our law, App.713, L.6-20. The PCR Court stated:

> I mean, Jonathan kind of does him in. His testimony does him in. In the light most favorable to him, he was going to sell him dope, which you can infer malice under the charge as such, not the case that you read where it says criminal activity has to be foreseeable that this will happen and so forth. But that's not the whole charge.
>
> If you're going to sell dope, you can anticipate that problems arise and so forth. And the judge went into great detail about the hand of one/hand of all, committing an unlawful act, and so forth.

App.801, L.22-p.802, L.6. From the above the PCR Court even concluded the "unlawful act" was the selling of drugs. Id

While South Carolina never reached the question from Gore as how to determine which crimes other than [malum in se] for a Norris charge, other state have determined that drug deals and their like do not. People v. Williams, 406 P.2d 647, 650 (Cal.1965)(holding that instruction on felony-murder was incorrect when the underlying felony was conspiracy to possess methedrine); State v. Wesson, 802 P.2d 574, 579-80 (Kan.1990)(finding sale of crack cocaine did not qualify under felony-murder rule), noted as superseded by statute in State v. Mitchell, 942 P.2d 1, 4-5 (Kan.1997); People v. Pavlic, 199 N.W. 373, 374 (Mich.1924)(finding that violation of liquor law was not "inherently criminal" and reversing a manslaughter conviction).

These cases, and Gore's definition of [malum in se] crimes qualifying for this instruction, lead to the conclusion that the

"unlawful act" charge in this case was both incorrect, confusing and prejudicial since this charge substantially lightened the State's burden of proving malice.

The trial court's "unlawful act" was hopelessly confusing, as is seen in the record as the jury asked to be recharged on the hand of one hand of all, App.723, L.9-17. At which time the trial judge reiterated the solicitor's just finished closing, that if " two or more people are acting together, assisting each other in the crime, the act of one is the act of all, App.18-p.724, L.2.

Here the jury had to look no further than Petitioner's prior agreement/arrangement with Holloway to sell "fake drugs", the ". unlawful act, the crime." Id (emphasis added and original).

Additionally, as a matter of policy, finding malice in the commission of every unlawful act would appear to be unsound ...It would seem mot inappropriate to infer malice from an insignificant unlawful act and to categorize the perpetrator with the most blame worthy." McAninch, The Criminal Law of South Carolina, at 109.

The State capitalized on this charge in it's closing. **Both of them admit that they went there to sell either drugs, or fake drugs, robbery, whatever you want to tell it. Nobody is going to get up here and say that they weren't committing a crime, an offense**, App.653, L.18-21.

Counsel's failure to object to this charge was ineffective and prejudicial under Strickland v. Washington, 466 U.S. 668 (1984). This Court should grant certiorari to consider this issue, clarify the law in this area, and ultimately grant Petitioner a new trial.

CONCLUSION

WHEREFORE, based on the aforegoing, certiorari should issue with an eye towards granting a new trial.

Respectfully Submitted,

/s/_____

Kenyatta Bryant

OPPOSITION TO PETITION TO BE RELIEVED AS COUNSEL

On January 7, 2016, PCR Appellate Counsel Robert M. Dudek filed a no merit Johnson petition stating the PCR appeal is without merit and has moved the Court to be relieved as counsel. See JOHNSON petition at 12.

Petitioner objects to PCR appellate counsel being relieved.

In support of this opposition Petitioner would submit that in accordance with Post Conviction Relief Actions Rule 71.1(g), S.C. R.Civ.P., Petitioner enjoys the [right] to the assistance of PCR appellate counsel. The choice made here by counsel is objectively unreasonable. The Federal Courts impose one general requirement: "that counsel make objectively reasonable choices, Bobby v. Hook, ___U.S.____, 130 S.Ct. 13 (2009), citing Roe v. Flores-Ortega, 5-28 U.S. 470, 479 (2000).

The duty is on the petitioner to show that a duty of care is owed to him, Rayfield v. S.C. Department of Corrections, 297 S.C. 95, 105-06, 374 S.E.2d 910, 916 (Ct.App.1988), cert. denied 298 S C. 204, 379 S.E.2d 133 (1989). An affirmative legal duty may be created by a statute, contract relationship, status, property interest, or some other special circumstance, Arhturs v. Aiken County, 338 S.C. 253, 525 S.E.2d 542, 547 (S.C.App.1999).

The affirmative legal duty here is created by Rule 71.1(g), South Carolina Rules of Civil Procedure. Consequently, Petitioner is a layman and unskilled in law and needs the adequate assistance of PCR appellate counsel to ensure that all of Petitioner's federal claims are adequately raised and presented to the State's highest Court having jurisdiction to adjudicate the claims on the

merits in a diligent attempt to obtain the best possibility of a favorable ruling.

Petitioner would submit that counsel here did nothing more than "whip" a brief together to get Petitioner's case off the his desk. Counsel's Johnson petition at 4 cites numerous defects in citations to pages of the record referred to. The purpose of marshalling the facts is give this Court a clear representation of the underlying facts essential to the issue at hand. Yet, that is impossible [if] counsel misrepresents the pages of the record, as this Court very well knows, the Court will not search through the pages of transcript trying to find what counsel is complaining of , while at the same time the Respondent will be quick to point to oblique assertions made in an argument and not adequately supported by correct references to proper pages.

Petitioner objects to counsel being relieved and would suggest this Court admonish counsel to [correct] the errors contained in the Johnson petition and would further ask this Court to issue an order for counsel to redraft Petitioner's brief in a meritorious petition to ensure Petitioner's federal rights are protected in the interest of justice.

For the reasons stated above Petitioner objects to counsel being relieved.

Respectfully Submitted,

/s/ _____

Kenyatta Bargaster

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Kanyatta Bryant -- Petitioner

-Vs-

State of South Carolina -- Respondent,

Appellate Case No.2015-000950

CERTIFICATE OF SERVICE

The undersigned does hereby certify he has served a true and correct copy of the enclosed Pro-Se Johnson petition on the parties whose names and addresses appear below. This being done by placing the aforesaid in properly addressed, first-class postage affixed envelopes and placed in the U.S. Mail this 19 day of Feb. 2016.

those served:

Daniel Shearouse, Clerk
S.C. Supreme Court
P.O. Box 11330
Columbia, SC. 29211

Assistant Attorney General
Clay Mitchell
P.O. Box 11549
Columbia, SC. 29211

Respectfully Submitted,

/s/ Kenyatta Bryant

Kenyatta Bryant #346659
430 Oaklawn rd.
Q2-A-104
Pelzer, S.C 29669

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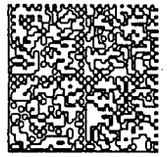

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