

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

**ORIGINAL**

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Certiorari to Marion County

Honorable George M. McFaddin, Circuit Court Judge  
\_\_\_\_\_

KEMONIE LASHAWN JONES,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-000729  
\_\_\_\_\_

JOHNSON PETITION FOR WRIT OF CERTIORARI  
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ATTORNEY FOR PETITIONER

**RECEIVED**  
DEC 31 2019  
PETITIONER  
S.C. SUPREME COURT

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**ISSUE PRESENTED**

Whether the PCR court erred where it found counsel provided effective assistance in petitioner's murder trial where counsel failed to object to the trial court's jury instruction on inferred malice, since an instruction that the jury may infer malice when the deed was done with a deadly weapon is prohibited?

## STATEMENT

On August 1, 2013, a Marion County Grand Jury indicted petitioner for the offenses of murder and possession with intent to distribute marijuana. App. 708 – 709. Petitioner was tried before the Honorable Donald B. Hocker and a jury, from February 23 – 27, 2015. App. 1. Henry Anderson, Jr., and Scott Floyd represented petitioner. App. 1. Fitzlee McEachin represented the state. App. 1.

On the morning of February 16, 2013, shots were heard in a neighborhood in Marion. App. 127, ll. 14-19; App. 129, ll. 17-19. Stan Witek, the decedent, had planned to dig up the shrubs in his front yard that morning. App. 164, ll. 2-6. Moments later, petitioner was seen running through the area. App. 131, ll. 6-17; App. 176, l. 19 – 177, l. 12. The decedent was found shortly thereafter in his garage; he had been shot three times in the chest and died. App. 135, ll. 17-22; App. 476, ll. 5-6.

Petitioner was arrested nearby with marijuana and was found to have gunshot residue particles on his hands and clothing. App. 338, l. 3 – 339, l. 11; App. 425, l. 13 – 428, l. 14. A jailhouse “snitch” claimed that petitioner confessed to killing the decedent. App. 451, ll. 2-9; App. 459, ll. 10-11.

Petitioner testified in his own defense and explained that the gunshot residue particles were likely from an unrelated shell casing police officers found in his pants, which he had picked up the night before. App. 516, ll. 7-18. Petitioner also explained that he was merely in the area to sell marijuana. App. 520, ll. 12-19.

After the state and the defense rested, the trial judge charged the jury that malice may be inferred from the use of a deadly weapon, without any objection from defense counsel. The trial court charged that, “Malice may be inferred from conduct showing a total disregard for human

life. Inferred malice may also arise when the deed is done with a deadly weapon.” App. 578, ll. 5-7.

The jury deliberated for two and a half hours before returning verdicts of guilty. App. 582, l. 5; App. 584, l. 1 – 585, l. 12. Petitioner was sentenced to concurrent terms of imprisonment for forty-five years for murder and five years for possession of marijuana with intent to distribute. App. 602, l. 21 – 603, l. 2.

After his conviction was affirmed on direct appeal, petitioner timely filed an application for post-conviction relief (PCR), and the state made its return. App. 623 – 638; App. 639 – 648. A hearing was held on the matter before the Honorable George M. McFaddin, Jr. App. 649. Petitioner was represented by Jonathan Waller and the state was represented by Lindsey McAllister. App. 649.

At the hearing, PCR counsel argued that petitioner’s trial counsel provided ineffective assistance for failing to object to a jury charge on implied malice. App. 653, l. 25 – 654, l. 5. Petitioner’s trial counsel, Henry Anderson, Jr., testified that he did not object to the jury charge on implied malice because he did not see “any valid objection to make . . .” App. 679, ll. 3-6. According to trial counsel, “[T]his was not a self-defense issue . . .” App. 679, ll. 9-11.

On March 27, 2019, the PCR court issued an order of dismissal. App. 693 – 707. In its order of dismissal, the PCR court addressed the allegation that petitioner’s trial counsel was “ineffective for failing to object to a jury instruction in violation of *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009), when the trial judge instructed the jury that inferred malice may arise when the act is committed with a deadly weapon.” App. 706.

The order of dismissal stated that the PCR court “has reviewed the jury instructions in their entirety, along with the trial record, and finds in [petitioner’s] case there was no evidence

presented that would reduce, mitigate, excuse, or justify the homicide of the elderly victim on his own property.” App. 706. “Further, [petitioner’s] defense was not self-defense, but that [petitioner] was not the shooter at all. App. 706. “Here, there was overwhelming evidence of malice other than the use of a deadly weapon such that [petitioner] cannot show he was prejudiced by the jury instruction or the conduct of his counsel regarding the jury instruction—namely [petitioner’s] flight from the scene without alerting authorities to the plight of the victim.” App. 706 – 707.

This petition for writ of certiorari follows.

## ARGUMENT

The PCR court erred where it found counsel provided effective assistance in petitioner's murder trial where counsel failed to object to the trial court's jury instruction on inferred malice, since an instruction that the jury may infer malice when the deed was done with a deadly weapon is prohibited.

Counsel's performance was deficient when he failed to object to the trial court's jury instruction on implied malice since it was an improper comment on the facts which prejudiced petitioner.

In *State v. Belcher*, 385 S.C. 597, 600, 685 S.E.2d 802, 803-04 (2009), *overruled by State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019), this Court held that "a jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse or justify the homicide."

However, in *State v. Burdette*, 427 S.C. at 503, 832 S.E.2d at 582, this Court recently overruled *Belcher* and held that "regardless of the evidence presented at trial, a trial court shall not instruct the jury that it may infer the existence of malice when the deed was done with a deadly weapon." This Court explained, "A jury instruction that malice may be inferred from the use of a deadly weapon is an improper court-sponsored emphasis of a fact in evidence—that the deed was done with a deadly weapon—and should no longer be permitted." *Id.* See S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law.").

This Court clarified that it "overrule[d] our precedent to the extent it permits a jury instruction that malice may be inferred from the defendant's use of a deadly weapon. Regardless

of the evidence presented at trial, trial courts shall not instruct a jury that the element of malice may be inferred when the deed is done with a deadly weapon.” *Id.* at 504-05, 832 S.E.2d at 583.

This Court concluded that its ruling in *Burdette* was effective “in those cases which are pending on direct review or are not yet final, so long as the issue is preserved.” *Id.* at 505, 832 S.E.2d at 583. However, this Court declared that “today’s ruling will not apply to convictions challenged on post-conviction relief.” *Id.* Despite this stated limitation, petitioner believes that fundamental fairness supports the application of the holding in *Burdette* to his case. Petitioner therefore asks this Court to apply the holding of *Burdette* to his case and find that counsel was ineffective for failing to object to the implied malice instruction.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court has established a two-pronged test to evaluate allegations of ineffective assistance of counsel. A petitioner must prove “that counsel’s performance was deficient” and fell below reasonable professional norms, and the deficient performance prejudiced the petitioner. *Id.* at 687.

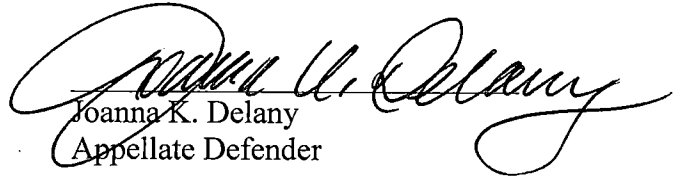
Here, counsel failed to object to the implied malice charge: counsel’s performance was deficient in this regard. Counsel did not have a strategic reason for failing to object.

“To show prejudice, the applicant must show that, but for counsel’s errors, there is a reasonable probability the result of the trial would have been different.” *Patrick v. State*, 349 S.C. 203, 207, 562 S.E.2d 609, 611 (2002). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

Here, petitioner was prejudiced because the state was not held to its burden to prove each element of the offense beyond a reasonable doubt, since the trial court's jury instruction allowed the jury to convict petitioner of murder even if it found a critical element of the crime was merely implied rather than proven.

**CONCLUSION**

Based on the foregoing argument, petitioner respectfully requests that a writ of certiorari be granted to allow full briefing on this issue.



Joanna K. Delany  
Appellate Defender

ATTORNEY FOR PETITIONER

This 31st day of December, 2019.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Marion County

Honorable George M. McFaddin, Circuit Court Judge

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KEMONIE LASHAWN JONES,

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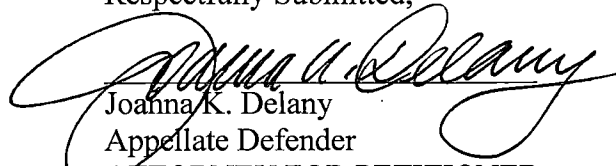
PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Kemonie Lashawn Jones 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 George M. McFaddin, which was held on April 2, 2018, 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 Kemonie Lashawn Jones.

Respectfully Submitted,

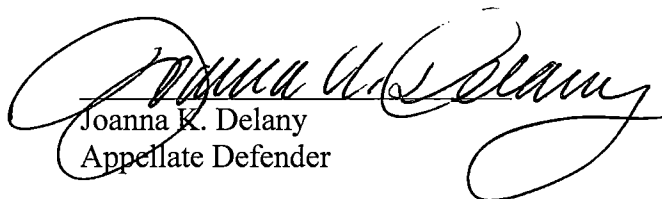


Joanna K. Delany  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 31st day of December, 2019.

**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."



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ATTORNEY FOR PETITIONER

This 31st day of December, 2019.

STATE OF SOUTH CAROLINA

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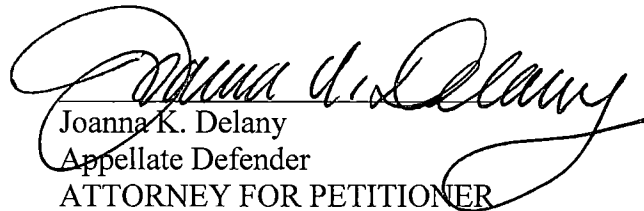
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STATE OF SOUTH CAROLINA,

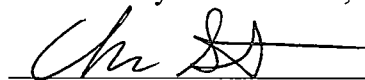
RESPONDENT

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CERTIFICATE OF SERVICE  
\_\_\_\_\_

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Lindsey McCallister, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Kemonie Lashawn Jones, #363162, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 31st day of December, 2019.

  
Joanna K. Delany  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 31st day of December, 2019.

 (L.S)

Notary Public for South Carolina

My Commission Expires: *September 30, 2029*