ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Honorable Walton J. McLeod, IV, Circuit Court Judge

WORTH EDWARD COOK,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001248

JOHNSON PETITION FOR WRIT OF CERTIORARI

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South Carolina Commission on Indigent Defense
Division of Appellate Defense
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S.C. SUPREME COURT

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ISSUE PRESENTED

Did the PCR court err in finding trial counsel was not ineffective for failing to object to the trial court's omission of any permissive inference language where the jury was instructed on inferred malice?

STATEMENT

On February 25, 2013 petitioner met David Diblasi at the home of a mutual friend. App. 214, ll. 11-12; 757, ll. 7-25. After a discussion, they agreed petitioner would do some repairs on Diblasi's motorcycle and truck. App. 757, l. 20-758, l.6. After making several stops together, Diblasi brought both vehicles to petitioner's residence. App. 767, ll. 1-16. Diblasi's family reported him missing March 9, 2013. App. 221, l. 24-222, l. 4.

Petitioner and Diblasi spent the day together and petitioner told police they smoked meth throughout the day. App. 759-67; 768, ll. 1-21. Petitioner repaired Diblasi's vehicles and Diblasi left. App. 768, l. 14-771, l. 20. Not long after, petitioner testified that Diblasi returned to his home angry, accusing petitioner of stealing and Diblasi attacked him with a knife. App. 773, l. 24-774, l. 8; 778, ll. 10-18. During the struggle petitioner's girlfriend, several months pregnant at the time, attempted to intervene and Diblasi kicked her, knocking her unconscious. App. 780, ll. 6-18. Petitioner and Diblasi continued to struggle and petitioner ultimately killed Diblasi when he stabbed him in the eye. App. 781-81. Petitioner, afraid to call police for fear that he would be arrested on drug charges, buried Diblasi in his yard and initially denied any involvement in his disappearance when questioned by police.[1] App. 786, l. 20-787, l. 16; 788, ll. 14-23.

On January 13, 2014, a Lexington County grand jury indicted petitioner for murder. App. 1055. Petitioner's case was called to trial on February 29, 2016, before the Honorable R. Knox McMahon and a jury in Lexington County. App. 1. Sally Henry and Beth Fullwood represented petitioner and Shawn Graham and Micah Caskey represented the state. App. 1. At trial, petitioner testified he was responsible for the death of David Diblasi but killed him because

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[1] Police found Diblasi's body in a shallow grave covered by a trashcan and debris.

he feared for his life as well as that of his girlfriend and unborn child. App. 785, l. 22-786, l. 8.

The judge instructed the jury on murder, voluntary manslaughter, self defense, defense of others, and defense of habitation. During the charge on murder the judge instructed the jury on inferred malice, "[m]alice may be inferred from conduct showing a total disregard for human life based on the totality of the circumstances shown to have existed." App. 955, ll. 10-12. The jury found petitioner guilty of murder and Judge McMahon sentenced petitioner to thirty-five years' imprisonment. App. 974; 990.

Thereafter, petitioner filed an application for PCR on May 4, 2018. App. 992. On April 5, 2019, an evidentiary hearing was held before the Honorable Walton McLeod, IV. App. 1022. Art Aiken represented petitioner and Johnny James, Jr., assistant attorney general, represented the state. App. 1022.

At the evidentiary hearing, trial counsel Fullwood testified the judge charged the jury on the definition of implied malice. App. 1028, ll. 9-21. Fullwood did not request the permissive language or object when it was not charged but she maintained that a permissive inference instruction is only required in certain circumstances such as when a court tells the jury that an inference of malice can arise from certain conduct or behavior or lapses in behavior. Fullwood claimed in petitioner's case, because the judge only gave a general definition of implied malice and did not go on to discuss any inference of malice, there was no need for the permissive inference instruction. App. 1029, ll. 1-19; 1031, ll. 6-11. Trial counsel did not recall whether there was any evidence of express malice in petitioner's trial. App. 1031, 25.

PCR counsel Aiken argued trial counsel was ineffective for failing to request the permissive inference language required by *State v. Elmore*,[2] where the jury was charged with

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2 *State v. Elmore*, 279 S.C. 417, 421, 308 S.E.2d 781, 784 (1983).

inferred malice. Aiken asserted the absence of the permissive inference instruction signaled to the jury that there was a presumption of malice, and therefore, petitioner was prejudiced. App. 1026, ll. 9-16.

On June 27, 2019, Judge McMahon signed an order denying PCR. App. 1043-52. Judge McMahon found trial counsel was not deficient because there is no obligation to charge the general permissive inference of malice instruction, where there is no charge on the implication of malice from the use of a deadly weapon. App. 1050. Judge McMahon also found there was no reasonable probability the outcome of the trial would have been different had trial counsel requested and the court charged the jury with permissive inference. App. 1051.

This appeal follows.

ARGUMENT

The PCR court erred in finding trial counsel was not ineffective for failing to object to the trial court's omission of any permissive inference language where the jury was instructed on inferred malice.

In *State v. Elmore*, this Court held the trial court's instruction on the presumption of malice from the use of a deadly weapon constituted a mandatory presumption rather than a permissive inference. 279 S.C. 417, 421, 308 S.E.2d 781, 784 (1983). The Court suggested the following 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. (Emphasis added). The Court warned the bench "that hereafter only slight deviations from this charge will be tolerated." *Id.*

In *Gibson v. State*, this Court reversed a denial of PCR where the trial court charged the inference of malice from the use of a deadly weapon but failed to include the permissive language from the *Elmore* charge. *Gibson v. State*, 416 S.C. 260, 786 S.E.2d 121 (2016). The Court noted the total omission of the general permissive inference language was more than a "slight deviation" from the *Elmore* charge. *Id.* at 264-65, 786 S.E.2d at 124.

In *State v. Belcher*, 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 where evidence is presented that would reduce, mitigate, excuse, or justify the homicide. 385 S.C. 597, 685 S.E.2d 802 (2009).

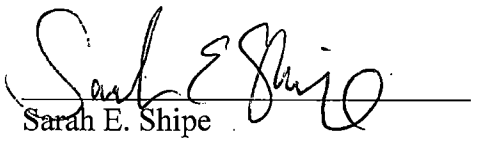
Recently in *State v. Burdette*, this Court overruled all of its precedent to the extent that it permits a jury instruction that malice may be inferred from defendant's use of a deadly weapon

regardless of what evidence is presented at trial. 427 S.C. 490, 832 S.E.2d 575 (2019).

As noted in the order this case does not involve a jury instruction on the inference of malice from the use of a deadly weapon. However, that does not mean the jury should not have been charged with the permissive language used in *Elmore*. The *Elmore* language was necessary to the jury's understanding of inferred malice. "[C]onduct showing a total disregard for human life," was vague. Trial counsel was deficient for failing to request the jury be instructed on how to view any evidence of "total disregard for human life." Without the permissive instruction mandated in *Elmore* the jury might have concluded there was a presumption of malice from whatever may have been "conduct showing a total disregard for human life." Thus, petitioner was prejudiced when trial counsel did not object to the absence of the permissive inference instruction language.

CONCLUSION

By reason of the foregoing argument, a writ of certiorari should be issued to allow full briefing on this issue.



Sarah E. Shipe
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of March, 2020.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Worth Edward Cook 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 Walton J. McLeod, IV, which was held on April 5, 2019, 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 Worth Edward Cook.

Respectfully Submitted,

Sarah E. Shipe
Appellate Defender
ATTORNEY FOR PETITIONER

This 9th day of March, 2020.

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."

Sarah E. Shipe
Appellate Defender

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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 Johnny Ellis James, Jr., 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 Worth Edward Cook, #293532, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 9th day of March, 2020.

Sarah E. Shipe
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 9th day of March, 2020.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: December 31, 2029.