

STATE OF SOUTH CAROLINA

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IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Lexington County

Honorable Walton J. McLead, IV, Circuit Court Judge

WORTH EDWARD COOK, III,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2019-001248

JOHNSON pro se RESPONSE

Worth Edward Cook, III,  
pro se Petitioner

ALLENDALE CORRECTIONAL INST.

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## ISSUES PRESENTED

1. Did PCR court err in finding trial counsel was not ineffective for failing to object to trial court's omission of any permissive inference language where the jury was instructed on inferred malice?
2. The deputy solicitor engaged in prosecutorial misconduct when in cross examination and closing arguments he attacks lead witness for defense, because she exercised her constitutional right to counsel instead of talking to police.
3. Solicitor engaged in prosecutorial misconduct that deprived petitioner of his constitutional rights to due process and violated Rule 5, SCRCP, when he failed to disclose evidence and facts that would have impeached several of the state's witnesses.
4. The assistant solicitor engaged in prosecutorial misconduct when he improperly characterized the role and intentions of defense counsel.
5. The deputy solicitor engaged in prosecutorial

misconduct when he withheld Diblasi's prior criminal records that showed Diblasi had a very long violent history.

6. PCR counsel was ineffective when he failed to raise any of the grievous, significant issues referred to in PCR application filed by petitioner; even after further clarification of said issues was requested by the state in their return to PCR application.

7. Trial counsel was ineffective when they failed to object to solicitor's closing arguments when solicitor suggests to the jury his "personal impression [I]" the defendant is guilty.

## STATEMENT

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

Petitioner and Diblasi spent the day together and petitioner told police they smoked meth throughout the day. App. 759-67; 768, 11. 1-21. Petitioner repaired Diblasi's vehicles and Diblasi left. App. 768, 1. 14-771, 1. 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, 1. 24-774, 1. 8; 778, 11. 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, 11. 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 the 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. App. 786, 1.20-787, 1.16; 788, 11.14-23.

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 B. 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 he feared for his life as well as that of his girlfriend and unborn child. App. 785, 1.22-786, 1.8.

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, 11.10-12. The jury found petitioner guilty of murder and Judge McMahon sentenced petitioner to thirty-five year's 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, 11. 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, 11. 1-19; 1031, 11. 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 by State v. Elmore, 279 S.C.

417, 421, 308 S.E.2d 781, 784 (1983), where the jury was charged with 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, 11.9-16. Aiken also failed to properly reply to state's return or present any of the relevant issues of petitioner's case.

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.

### ARGUMENT #1

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 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 court 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. Especially when taking into consideration that both the counsel for the defense (App. 910, 5-911, 1) and the solicitor (App. 935, 24-25; 940, 17-941, 3) made conflicting statements regarding malice and the judge's instructions. "[C]onduct showing a total disregard for human life" was vague and when combined with the comments referring to malice during the closing arguments there is no doubt that an element of confusion concerning the inference of malice was presented to the jury.

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.

## ARGUMENT #2

The deputy solicitor engaged in prosecutorial misconduct when in cross examination and closing arguments he attacks lead witness for defense, because she exercised her constitutional right to counsel instead of talking to police.

In App. 733, 19 solicitor asks:

19.a. And, in fact, you ended the interview by saying you wanted a attorney. Correct?

The witness answered yes. Then solicitor continues to attack the witness for her not talking to police (App. 734-735) even though he himself admitted that the witness had exercised her right to counsel and that was why she stopped talking to police. The witness even stated in (App. 734, 5) that she had contacted defense counsel. Then again in (App. 735, 22) witness stated that she had been talking with defence counsel for a while now; when solicitor continued to attack witness for not talking to police after she had exercised her right to counsel.

During solicitor's closing arguments (App. 916, 24-917, 15)

Solicitor attacks same key witness for defense's credibility for exercising her right to counsel. Then a second time during solicitor's closing arguments he continues to attack witness' credibility for using her constitutional right to counsel. (App. 920, 17-22)

ooo And she waited 3 years to tell that story. She was offered twice by two different officers in 2013 to tell them what happened. She said I want an attorney. She was offered last week to tell Detective Gooding what happened. What do you know? She said I already talked with my attorney.

The solicitor's attack of key witness for defense's constitutional right to counsel was a direct strike at the core of petitioner's defence. It was improper, inflammatory, prejudiced the petitioner denying him of his constitutional right to due process and fair trial. Also witness's sixth Amend. right to counsel. Courts have found:

Obvious and insidious attacks on the exercise of the constitutional right to counsel are antithetical to the concept of fair trial and are reversible error.  
(U.S. Const. Amend. 6)

Prosecutorial comments that penalize a defendant for the exercise of his right to counsel and that also strike at the core of his defense cannot be considered harmless error; the right to counsel is so basic to all other rights that it must be accorded very careful treatment.

(U.S. Const. Amend. 6)

This also violated the petitioner's constitutional rights to due process and fair trial. (U.S.C.A. Const. Amendments, 5; 14)

### ARGUMENT #3

Solicitor engaged in prosecutorial misconduct that deprived petitioner of his constitutional rights to due process and violated Rule 5, SCRPC, when he failed to disclose evidence and facts that would have impeached several of the state's witnesses.

Several of the state's witnesses were promised consideration on current and pending charges if they testified against the petitioner. Also arrest records that show that one of the state's witnesses was in jail on the day that was testified to during trial.

In U.S. v. SHAFFER, 789 F.2d 682 (1986) the Court held:

ooo evidence regarding government witness was

material and should have been disclosed, and failure to disclose the impeachment evidence undermined confidence in trial outcome; and government did not adequately disclose material exculpatory information, and thus grant of new trial was warranted.

#### ARGUMENT #4

The assistant solicitor engaged in prosecutorial misconduct when he improperly characterized the role and intentions of defense counsel.

After claiming the petitioner's words to be a "web of lies", the assistant solicitor tells the jury to "... pay attention to the testimony, pay attention to the evidence, pay attention to the defendant's lawyers trying to confuse you...".

This violated the petitioner's constitutional right to due process (U.S.C.A. Const. Amends. 5; 14) and it prejudiced the petitioner; when assistant solicitor improperly characterized the role of defense counsel as if it were a fact; A fact that the assistant solicitor followed with, "because you're going to have an opportunity to tell the world that Worth Cook is a murderer".

Courts have universally condemned this type of statement by a prosecutor. As the United States Court of Appeals for the Ninth Circuit has stated:

[It is not] accurate to state that defense counsel in general, act in underhanded and unethical ways, and absent specific evidence in the record, no particular defense counsel can be maligned. Even though such prosecutorial expressions of belief are only intended to ultimately impute guilt to the accused, not only are they invalid for that purpose, they also severely damage an accused's opportunity to present his case before the jury. It therefore is an impermissible strike at the very fundamental due process protections that the Fourteenth Amendment has made applicable to ensure an inherent fairness in our adversarial system of criminal justice. Furthermore, such tactics unquestionably tarnish the badge of evenhandedness and fairness that normally marks our system of justice and we readily presume because the principle is so fundamental that all attorneys are cognizant of it. Any abridgement of its sanctity therefore seems particularly unacceptable.

Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983) (per curiam);

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see also United States v. Ollivierre, 378 F.3d 412, 420 (4th Cir. 2004) ("emphasiz[ing] the importance of ensuring that prosecutors refrain from impugning, directly or through implication, the integrity or institutional role of their brothers and sisters at the bar who serve as defense lawyers"). Opinion vacated on other grounds by 543 U.S. 1112, 125 S.Ct. 1064, 160 L.Ed. 2d 1050 (2005); United States v. Vaccaro, 115 F.3d 1211, 1218 (5th Cir. 1997) (finding prosecutor's statements that defense lawyers "muddle the issues" is "clearly improper"); United States v. Friedman, 909 F.2d 705, 709 (2d Cir. 1990) (improper for prosecutor to argue that defense counsel would "make any argument he can to get the guy off"); United States v. McLain, 823 F.2d 1457, 1462-63 (11th Cir. 1987) (reversing conviction under plain error standard in part because prosecutor repeatedly stated that defense counsel "intentionally misle[d] the jurors and witnesses and ... [lied] in Court").

Our own Court has also condemned similar remarks. See State v. Parker, 391 S.C. 606, 614 n. 3, 707 S.E. 2d 799, 803 n. 3 (2011) ("It's generally improper for the prosecutor to accuse

defense counsel of fabricating a defense or to otherwise denigrate defense counsel". (citation omitted)).

### ARGUMENT #5

The deputy solicitor engaged in prosecutorial misconduct when he withheld Diblasi's prior criminal records that showed Diblasi had a very long violent history.

Diblasi has a long criminal record of multiple types of assaults, assault of officers and endangerment of human lives. Also an A.P.B. (all persons bulletin), at the time of missing persons report, warning members of law enforcement to consider Diblasi to be armed and dangerous.

The solicitor further complicated his misconduct by portraying Diblasi as if he were defenseless, and unarmed. When in fact the extent of Diblasi's violent criminal history and law enforcement's issued A.P.B. says Diblasi is extremely violent and expected to be armed.

The petitioner's case is a case of self-defense. Had the jury been presented with Diblasi's prior criminal records and

the A.P.B. issued by law enforcement it clearly would have changed the Outcome of the trial. Therefore, it cannot be considered harmless error.

The undiscloser of this material evidence violated petitioner's constitutional right to due process and fair trial. Also his fifth and fourteenth U.S. Const. Amendment rights. Courts have found:

The state violates the Constitution's due process clause if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment.

(U.S.C.A. Const. Amends. 5;14)

### ARGUMENT #6

P.C.R. Counsel was ineffective when he failed to raise any of the grievous, significant issues referred to in P.C.R. application filed by petitioner; even after further clarification of said issues was requested by the state in there return to P.C.R. application.

The further clarification of issues raised in P.C.R. application was the sole purpose that the state requested evidentiary hearing.

Each of the issues that the PCR attorney failed to raise at evidentiary hearing were issues that would have changed the outcome of the trial. Issues that were direct violations of petitioner's constitutional rights, violations of South Carolina Rules of Court, violations of the law and some that are down right criminal in nature.

Thus PCR counsel was ineffective and denied petitioner of his constitutional rights to due process of law and fair trial. (U.S. Const. Amends, 5;14) PCR counsels neglect in filing on PCR application's issues in response to the state's return is a direct violation of his leagle responsibility as a lawyer and appointed counsel in this case, Rule 11, SCRCP.

### ARGUMENT #7

Trial counsel was ineffective when they failed to object to solicitor's closing arguments when solicitor suggests to the jury his "personal impression" the defendant is guilty.

Solicitor repeatedly conveyed his "personal impression" that

the petitioner was guilty throughout his closing arguments. He also made repeated comments to his personal opinion when solicitor referred to events, items and circumstances that were not presented to the jury as evidence. The solicitor's comments prejudiced petitioner and denied him his constitutional rights to due process and fair trial. App. 911, 9-941, 17.

The Supreme Court has condemned a prosecutor's closing argument in which he suggests to the jury his "personal impression [ ]" the defendant is guilty.

[S]uch comments can convey the impression that evidence not presented, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.

## CONCLUSION

1.) By reason of the foregoing arguments, a writ of certiorari should be issued to allow full briefing on these issues. or;

2.) Order vacating conviction and sentence; or

3.) Appellant respectfully request this court reverse his conviction and remand for new trial. or;

4.) A supplementary PCR / evidentiary hearing granted so that each sufficiently grievous issues can be presented before a judge to be ruled upon, issues that PCR attorney neglected to raise in front of judge.