

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

William Burke — PETITIONER
(Your Name)

vs.

State of Georgia — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Supreme Court of Georgia
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

William Burke
(Your Name)

GDC 1001415051 Dooly State Prison P.O. Box 750
(Address)

Chadilla, Ga 31091
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

- 1) At what point does it become fundamentally unfair to 'adjust the charges to the evidence'? In this instance, the State adjusted the charges, and by extension their position, almost two years after the trial ended. This not only denied the defendant the opportunity to react in an adversarial manner but also fails to correct any errant and or confusing statements made to the jury before deliberation.
- 2) Shouldn't the 'belated conclusion' be applied to all charges and decisions if they are allowed to be the basis of the SCOGA's decision? Shouldn't the 'Summary of Facts' be corrected and verified preceding a new review in accordance of Jackson v. Virginia now that a premise had changed?
- 3) What level of due diligence should be required by the prosecution to review and analyze the evidence before trial? Was due process denied when after two complete trials the State vacillated its position making it difficult, if not impossible, for the defense to strategize counter arguments.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

[] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix E to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the Superior Court court appears at Appendix A to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was Jan 29, 2018. A copy of that decision appears at Appendix E.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

5th Amendment of the U.S. Constitution

14th Amendment of the U.S. Constitution

)

STATEMENT OF THE CASE

- 1) The Court failed to rule explicitly on defendant's Enumerations of Errors.

The court sidestepped the defendants complaints that: 1) the court committed plain error when it limited the jury's consideration of voluntary manslaughter solely to malice murder, and 2) the court committed plain error when it provided jurors with an erroneous, improper and misleading verdict form that precluded them from considering voluntary manslaughter as an alternative to the felony murder count. [Appendix B p10]. The well-articulated brief for the appellant lays out these issues backed by solid citations, yet the SCOGA glossed over these points, siding with the trial court's 'belated conclusion' that the 'voluntary manslaughter charge was not supported by the evidence - and thus should never have been given at all" [Appendix E p.6] That was certainly not the prosecutor's nor the trial court's position on October 2, 2014 when they agreed to give that charge over objection and the appellant asks this court to consider the actions and statements of that day concerning the jury charges as a whole.

'The State acknowledges it requested that a voluntary manslaughter instruction be given as a lesser included offense of malice murder at trial and that the trial court gave said charge. However, after Burke filed his Third Amended Motion for New Trial alleging the instant enumeration of error after the Motion for New Trial hearing was conducted, the State and trial court changed positions as a closer look at the evidence shows the giving of a voluntary manslaughter

charge was not warranted by the evidence.' [Appendix C p11 fn3, see also Appendix D p12 fn3.]

"The court must read and consider the jury charges as a whole in the determination of plain error." *Guajardo v. State*, 290 Ga. 172, 176, 718 S.E.2d 292 (2011). "A jury charge must be adjusted to the evidence and be an apt and correct statement of law." *Ware v. State*, 575 S.E.2d 654 (2002). This seems to imply the time to make 'adjustment' is before deliberation.

Edge v. State, 261 Ga. 865, 414 S.E.2d 463 (1992), made it clear when applicable to give the voluntary manslaughter charge, it should be given for both malice and felony murder when both exist.

'Omission of instruction to consider voluntary manslaughter is what Edge sought to cure...the intent of Edge is to preclude a felony murder conviction... where [such a conviction] would prevent an otherwise warranted conviction of voluntary manslaughter.' *McGill v State*, 428 S.E.2d 341 (1993), *Miner v. State*, 286 Ga. 67, 485 S.E.2d 456 (1997). The 'charge is improper when it eliminates the jury's full consideration of voluntary manslaughter.' *McNeal v State*, 263 Ga. 397, 435 S.E.2d 47 (1993), *Turner v. State*, 283 Ga.17, 655 S.E.2d 589 (2008).

The trial court gave answers to jury questions that were wrong and could have only added to their confusion.

Q3: Are felony murder/aggravated assault and voluntary manslaughter mutually exclusive?

Answer: No

Edge was convicted of both felony murder and voluntary manslaughter. The court went into great detail while explaining the difference between the two offenses and why a conviction on both predicated on the same evidence could not stand. 'Verdicts are mutually exclusive where it is both legally and logically impossible to convict [the accused] of both counts.' *Dumas v State*, 266 Ga. 797, 471 S.E.2d 508 (1996). "Verdicts are mutually exclusive where a guilty verdict on one count logically excludes a finding of guilt on the other." *Carter v. State*, 298 Ga. 876, 785 S.E.2d 274 (2016).

Q5: Does voluntary manslaughter require the intent to kill?

Answer: No

The prosecutor said in her closing argument 'voluntary manslaughter comes into play if you don't believe Mr. Burke had the intent to kill' (1003,1104) [T 930]. This answer and that statement are only correct in reference to felony murder, but the jury was charged as to malice murder. The Attorney General states in their brief "To that end, to be guilty of voluntary manslaughter, a defendant must intend to kill the victim." [Appendix D p14].

That is not applicable here and there is more to be considered. In a more thorough reading of *Carter, supra*, we find the proper exposition of intent to kill as it pertains to voluntary manslaughter.

"In short, a defendant must have intent to kill in order for voluntary manslaughter to serve as a potential lesser included offense of malice murder but need not have any intent to kill for voluntary manslaughter to mitigate the circumstances that would otherwise constitute felony murder. Because of this fundamental difference between felony murder and malice murder, voluntary manslaughter as a lesser included of malice murder cannot stand."

It seems neither the trial court or the state was well versed in the differences of the types of murder and certainly not to the degree necessary to accurately inform the jury.

"Erroneous jury instructions are grounds for a new trial unless the error is harmless." *Murphy v. City of Long Beach*, 914 F.2d 183, 187 (9th Cir.) (1990). "Where the court's instruction misleads the jury as to the correct legal standard or where it fails to adequately inform the jury on the law, it will be deemed erroneous." *Cobb v. Pozzi*, 363 F.3d 89, 112 (2nd Cir.) (2004).

Once again this underscores the problems created by the trial court telling the jury to consider voluntary manslaughter for malice murder only. Had they not proffered it to begin with, which they seem now to believe they should not have, the jury would not have been saddled with these questions. Alternately, if this Court tends to agree that the State can alter their stance and now claim the charge was unsupported by the evidence and should have never been given at all [Appendix E p6], yet was not harmful error, we

reference *Crosby v. State*, 150 Ga. App. 555 (258 S.E.2d 264) (1979) for relative opinion.

'It is error to inject into a case on trial any extraneous matter not at issue and unsupported by evidence, whether done by improper argument by counsel or by improper instructions on the part of the court. Instructions to the jury on a subject unsupported by any evidence and wholly irrelevant is error. A charge that injects into the case and submits for the jury's consideration issues not made by the indictment or the evidence tends to confuse the jury as to the true issue in the case, is probably harmful to the defendant and is error requiring the granting of a new trial. This is particularly true where the evidence on the issues really involved is conflicting. And where the inapplicable instruction involves one of the vital issues appellate courts take a closer, more critical and less tolerant look.

The inapplicable instruction in the instant case authorized the jury to reach a finding of guilty by a theory not supported by the evidence, and we cannot say as a matter of law, that the charge was neither confusing or misleading. We find prejudicial error.'

Certainly, allowing the State to vacillate between two such diametrically opposite stances is fundamentally unfair. Even more so when the now accepted position was rendered at least two years after the trial had concluded.

2) The Outcome was impacted by the confusing instructions.

Courts should not deal in assumptions or speculation. To say giving an instruction, whether warranted or not, in such incomprehensible way and as a misstatement of law is not harmful and would have no effect on the outcome of the trial is recklessly presumptive. One needs to go no further than the first trial where the properly given charge of the lesser included voluntary manslaughter resulted in a hung jury when gauging harm.

The 'belated conclusion' "leaves an uncertainty that the verdict rested exclusively on sufficient ground." *Zant v. Stephens*, 103 S.Ct. 2733, 462 U.S. 862 (1983).

3) The state's 'belated conclusion' as to intent and provocation should be applied to the other charges and to a new review of the evidence supporting them. The State's position on intent has apparently changed and intent is a requisite of any crime. "Due process prohibits the use of presumption that relieves the State burden of persuasion on essential element of intent." *Francis v. Franklin*, 471 U.S. 307, 317 (1985). In this instance, intent is necessary to support the underlying felony.

"He also testified unequivocally that it was not his intention to shoot the victim (T. 791-92, 794)." [Appendix D p14]

The State now maintains the intent to kill was questionable when arguing as to why involuntary manslaughter should not have been given as an option, which is contrary to the reason for denying the Ineffective Assistance of Counsel complaint for not requesting a charge of Involuntary Manslaughter. [Appendix A p11]

4) The issue of whether the appellant had waived the right to have Voluntary Manslaughter given as a lesser included charge by objecting to it should be deemed moot. Although the SCOGA didn't rule on it, the trial court overruled the objection and gave the charge anyway, albeit incomplete, which is tantamount to not accepting the supposed waiver.

REASONS FOR GRANTING THE WRIT

The appellant prays this Court will take ownership of this case since the SCOGA has ruled on this, the only issue properly presented and now not procedurally barred, thereby fulfilling requirement of exhausting all state remedies. Although the State was not specific about what their 'belated conclusion' imparted, it is insinuated to be lack of intent and whether the provocation would have incited a sudden, irresistible passion [Appendix D p14] .That would imply a change to a major premise and hence render any conclusion unfounded

The appellant requests an impartial determination fundamental fairness, due process and right to a fair trial in accordance to the laws of Georgia under the auspices of the U.S. Constitution. Such a study would hopefully result in the granting of this writ.

Conclusion

The SCOGA erred by simply agreeing with the trial court's 'belated conclusion' that the charge should not have been made. The very same court who gave the charge over objection now seems to try to absolve itself in hopes of 'unringing a bell'. The fact is this differs from their position at the charge conference and to allow this would set a dangerous precedent if an erroneous charge is cured by reviewing the evidence and adjusting the charge long after the jury, to whom the charge was indeed given, had long since gone home. It is a fundamental aspect of our judicial system that the juries make the ultimate determination of guilt. See *U.S. v. Gaudin*, 515 U.S. 506 (1995).

Whether or not the charge of voluntary manslaughter should have been given is of less importance than the fact that, in actuality, it was. It presented an option that the jury may have considered, if properly given, in conjunction with felony murder if they didn't want to acquit the defendant. See *U.S. v. Hernandez*, 476 F.3d 791, 802 (9th Cir.) (2007)

Both the impropriety of the jury instructions and the basis for the denial of appeal were clear violations of due process and fundamentally unfair to the degree where protection under the 5th and 14th amendments of the U.S. Constitution were not afforded.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

William Burke

Date: March 16, 2018