

No. 17-8276

IN THE
SUPREME COURT OF THE UNITED STATES

John Alexander PETITIONER

VS.

Charles Williams, Jr., Warden RESPONDENT(S)

PETITION FOR REHEARING

John Alexander

Department of Corrections

386 Redemption Way

McCormick, SC 29899

COMES the above Petitioner, John Alexander, pursuant to Supreme Court Rule 44 (i) with a Petition For Rehearing claiming that the Petition is presented in good faith and not for delay. Also, the Petitioner asserts that for the below extraordinary circumstances this Highest Court can and should grant the Petition For Rehearing:

Frankly, this Honorable Court erroneously denied the Petitioner's Petition For Writ of Certiorari because:

I. The Court's decision overrules the current and correct law and principles set out in Griffin v. McElroy, 785 F.2d 1172 (4th Cir. 1986) ("South Carolina Law has sought to impose the burden of persuasion on self-defense on the defendant." "But that was held constitutionally impermissible."); Holloway v. McElroy, 632 F.2d 605 (1980) ("It cannot be overemphasized that it is the 'Jury's function, not the Court's, to decide whether absence of self-defense had been proven beyond a reasonable doubt."); but most important, State v. Burkhardt, 565 S.E.2d 298 (2002); State v. Addison, 343 S.C. 290, 293, 540 S.E.2d 499 (2000); and State v. Davis, 330 S.C. at 544, 500 S.E.2d 492 ("The Due Process Clause requires that if there is any evidence in the record to support self-defense, the issue must be submitted to the Jury.") See Fourteenth Amendment.

In essence, this Court's April 30, 2018 Decision abolishes a South Carolina resident's Fourteenth Amendment guarantee to a self-defense instruction where a fair presentation of the evidence lays a foundation for such a jury charge. Abolishes the Fourteenth Amendment guarantee to have a jury of a defendant's peers determine the sufficiency or insufficiency of the evidence of self-defense. Abolishes a defendant's Fourteenth Amendment guarantee requiring South Carolina State to prove absence of self-defense beyond a reasonable doubt or "unlawfulness" an essential element of assault and battery with intent to kill (the crime charged). And annihilates a South Carolina resident's Sixth Amendment guarantee to have trial counsel object and preserve

for appellate review, a trial court's violation of any of the above mentioned Fourteenth Amendment protections to a fair and impartial jury trial.

Certainly, that is not lawful and should not be condoned in the instant case. Thus, this High Court should Reverse its ruling denying the Petition for a Writ of Certiorari to reconsider the issue governing an American citizen's constitutional right to a defense and charge on the law on self-defense where evidence is presented to Justify and warrant the Jury charge.

II. This Honorable Court overlooked or deviated from the Federal laws, standards and guidelines set out under the Fourteenth Amendment; and State v. Campbell, 374 S.E.2d 907 (1988):

"The trial courts are prohibited from making statements or giving professional opinions incompatible with the defendant's federal right to a fair and impartial jury trial and are irreconcilable with proper image of a neutral Judge";

State v. Kennedy, 250 S.E.2d 338 (1978):

"In the course of a criminal trial, trial Judge must refrain from all comments which tends to indicate his opinion as to the weight or sufficiency of the evidence, credibility of witness, guilt of accused or as to controverted facts";

State v. Norris, 243 S.E. 2d 440 (1978):

"All questions of the evidence and facts are to be decided exclusively by the Jury, uninfluenced by any expression of opinion by the Judge";

United States v. Goetz, 746 F.2d 705 (1984) [3]:

"This rule is firmly established that the trial Judge cannot direct a verdict in favor of the state for all or even one element of the crime. The former 5th Circuit emphatically stated this principle: 'No fact, not even an undisputed fact, may be determined by the trial Judge'"; and

Sosebee v. Leeke, 362 S.E. 2d 22, 24 (1987):

"Moreover, trial Judge is prohibited to make even the slightest remark, apparently innocent in its language, that may have a decided weight in shaping the opinion of one or more Jurors."

Particularly, in the present case where the trial court made the below bias and prejudicial statements in favor of the prosecution:

(1) "So, that's why I'm saying, if I were the prosecutor I'd argue that this is not a self-defense case. And the court won't be instructing them on the law of self-defense."

(2) "I can only assume that you intend to address that in your Closing Arguments, that I'll not be instructing them on self-defense. 'They cannot consider that or legal Justification.' And so I assume you'll be able to handle that through some persuasive Closing Argument."

(3) "I assume if Mr. Boggs had requested a self-defense instruction y'all would have objected on the ground that there's not sufficient evidence of establish it. 'They just weren't able to get "enough" testimony from the only other witness that was present.'"

(4) "Self-defense isn't going to be charged because 'there's not sufficient evidence' to support it. That's why they can't consider that."

In chief, trial counsel conceded along with the Petitioner during the PCR proceeding that there was sufficient evidence to support self-defense or, at the very least, to warrant a charge on the law of self-defense. And that the self-defense issue should have been objected to and preserved for appellate review.

Wherefore, the Petitioner respectfully request that this Court Reverse its decision denying the Petition For Writ of Certiorari to reconsider whether the Fifth and Fourteenth Amendments incorporates South Carolina State Court Judges to give prosecutors professional advise or opinions on what to include or argue in closing argument; make statements and give opinions as to controverted evidence/

Facts, the weight or sufficiency or insufficiency of the evidence in favor of the prosecutor; determine the evidence and facts which are questions to be decided exclusively by the jury; or make rulings and thereafter, comments that shifts the burden of proof on the element of a crime and absence of self-defense off the prosecutor but upon a defendant to prove by a preponderance self-defense.

III. On October 12, 2009 South Carolina Joined most, if not all other states in holding: "Where evidence is presented that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to kill) cause by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon. See Belcher v. State, 685 S.E.2d 802 (S.C. 2009). More important, the Belcher, Court emphatically stated:

"Because our decision represents a clear break from our modern precedent, today's ruling is effective in this case and for 'all cases which are pending on direct review.'"

The Respondents never disputed: (1) The Petitioner's case was pending on direct review prior to and, after the Belcher ruling; (2) Trial counsel conceded during Petitioner's Post-Conviction Relief proceeding that he recognized the trial court's malice may be inferred from the use of a deadly weapon instruction highly prejudiced the Petitioner, warranting an objecting and counsel's preserving the issue for direct review; and (3) Assistant Attorney General, Suzanne H. White advised the Post-Conviction Relief Court that the

Supreme Court of South Carolina held the Belcher, ruling effective in the Petitioner's case.

This Honorable Court overlooked the "letter of Law" pursuant to Griffin v. Kentucky, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed. 2d 649 (1987) ("A new rule for the conduct of criminal prosecutions is to be applied retroactive to all cases pending on direct review or not yet final."); also see Harris v. State, 273 Ga. 608, 543 S.E. 2d 716, 717-18 (2001) ("Reversing a murder conviction and overruling precedent that had approved inference of intent to kill from use of a deadly weapon and applying the new rule to 'all cases in the pipeline - i.e., cases which are pending on direct review or not yet final.'")

IV. Pursuant to State v. Peterson, 287 S.C. 244, 335 S.E. 2d 800, 802 (1985) ("A malice charge which use such term "9 times" were erroneous and prejudicial.") In the present case, the trial Judge issue the Jury Twent-Eight (28) inferences of malice during the Malice Charge. Consequently, the affect of the numerous inferences of malice unconstitutionally shifted the prosecutor's burden of proof on the element of malice beyond a reasonable doubt away from the state while, simultaneously, shifting an unreasonable burden upon the Petitioner to disprove the element of malice.

As such, this Highest Court can and should Reverse its decision denying the Petition and determine that the Due Process and Equal Protection Clause of the 5th and 14th Amendment protect the Petitioner against answering to twenty-eight (28) inferences of malice where

no written Requests were made by the prosecutor to charge any inferences outside the Standard Malice Charge. Or, where the state never put the Petitioner on Notice, prior to trial, to prepare for and defend against twenty-eight (28) inferences of malice at trial. This Court cannot find in South Carolina or otherwise, an identical case where a defendant was put to trial on twenty-eight (28) inferences of malice.

V. At the Jury's request, the trial court issue a Supplemental Malice Charge. However, the trial court did so through the bailiff, without informing the Petitioner of the contents of the answer and, with reading the response in open court. Subsequently, five minutes later the Jury returned a guilty verdict.

Pursuant to McKnight v. State, 378 S.C. 33, 601 S.E.2d 354 (S.Ct. 2008) ("That the Jury returned a guilty verdict five minutes after the trial court issued the supplemental charge indicates that counsel's failure to object to the erroneous charge was prejudicial.") McKnight sets out why this High Court should Reverse its decision denying the Petition For a Writ of Certiorari: (1) The Petitioner was denied and deprived the right to be present and defend himself during a critical stage of his trial; (2) Counsel was ^{not} afforded the opportunity to object to or make suggestion on the proposed supplemental charge; and (3) The Petitioner was not put on Notice of the contents of the supplemental instruction to avoid later claim that he was unaware. See C.F. Federal Rules of Criminal Procedure Rule 30; 18 U.S.C.A. Rule 43 Fed. R. Crim. P.; United States v. Rounder, 639 F.2d 931 (2nd Cir. 1981)

With respect to this issue, this High Court overlooked the guidelines of the Federal Court under United States v. Glick, 463 F.2d 491 (1972); United States v. Bascaro, 742 F.2d 1335 (11th Cir. 1984); also United States v. McDuffie, 542 F.2d 236-41 (5th Cir. 1976) ("It was reversible error for trial Judge to answer Jury's question during its deliberations in the absence of defendant and without notice to him.")

VI In Issue No. III, above, the Petitioner asserts the Trial Record manifests that the trial court issued the Jury a Malice Charge including Twenty-Eight inferences of malice. Under South Carolina Law only one other malice instruction existed. See State v. Fennell, 531 S.E.2d 512 (S.C. 2000) ("The absence of malice is not a required element of assault and battery of high and aggravated nature (ABHAN), and the fact that a defendant acts with malice does not preclude a finding of (ABHAN).")

Trial counsel testified during the post-conviction proceeding that: "absent the malice may be inferred from the use of a deadly weapon, malice instruction; the whole malice thing would have been kicked out." Conceding along that no overwhelming evidence of malice was adduced during the Petitioner's Jury trial.

The Petitioner contends this High Court overlooked that had trial counsel made a Request To Charge an instruction pursuant to State v. Pilgram, 465 S.E.2d 108 (S.C. App. 1995) ("A defendant may be convicted of ABHAN regardless of whether malice is present."), the Petitioner very well may have received Fifteen (15) years non violent under ABHAN rather than life with parole for ABWIK.

VII. Pursuant to former Statute Section 16-3-620 S.C. Code Ann. 1976 ABHAN was classified a non violent offense. But a crime of violence. However, during the solicitor's Closing Arguments; Solicitor Jordan told the Jury:

"In our State, ABHAN is not considered a crime of violence."

Trial counsel did not object. Nor did the trial court issue a curative instruction. Prejudice is presumed where the solicitor's statements had the affect of barring the Jury from a finding on ABHAN. Second, the Petitioner was put to trial for ABHAN on an element above that required by Statute Section 16-3-620 S.C. Code Ann. (1976) as well as the Due Process Clause. State v. Knox, 340 S.C. 81, 530 S.E. 2d 887 (S.C. 2000); 14th Amendment. ("ABHAN is an unlawful act of violent injury to another person accompanied by circumstances of aggravation.")

The Petitioner contends that this Honorable Court overlooked (1) ("An unconstitutional comment on the elements of an offense can never constitute a harmless error.") Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532 (1931); (2) ("When a solicitor's personal opinion is explicitly injected into the Jury's determination as though it were in itself law justifying a conviction or sentence... the resulting conviction or sentence is not free from the influence of arbitrary factor as required by the Due Process Clause.") See State v. Torrence, 406 S.E. 2d 315 (S.C. 1991); Leary v. United States, 395 U.S. at 31-32, 89 S.Ct. 1545-1546; Carpenters v. United States, 67 S.Ct. at 782; and

Bollenbach v. United States, 66 S.Ct., at 405, 406; (3) a false or misleading statement on an element of a crime charged which shifts the burden of proof on that element off the state and requires a defendant to disprove the false or misleading element denies and deprives the defendant of a fair and impartial trial. See 5th and 14th Amendments

VIII. The trial court instructed the Jury: "There must be proven beyond a reasonable doubt that the defendant maintained at least a General Intent in order for the offense of assault and battery with intent to kill to be established." However, the trial court failed and neglected to define or explain the legal basis or elements which legally constitute a General Intent. Thus, the Jury was made to decide upon the law for themselves legal standards of a general intent to deliberate the Petitioner's guilt or innocence on ABWIK.

Trial counsel failed and neglected to Request a Charge on the law of a General Intent pursuant to Holloway v. McElroy, 632 F.2d 605 (1980):

"By general intent we mean intent in the sense that a person intends the consequences of his voluntary physical actions e.g., an intentional shooting in self-defense. The contrasting term is specific criminal intent, which refers to a state of mind that is thought culpable - e.g. premeditation as part of murder;" and

"General Intent is the intent to perform an act even

though the actor does not desire the consequence that result. This is the state of mind required for the commission of certain common law crimes not requiring a specific intent or not imposing strict liability. General Intent usually takes the form of recklessness (involving awareness of a risk and the culpable taking of that risk) or negligence (involving blame worthy inadvertence.”)

Incidentally, the Jury could not effectively consider or deliberate how to distinguish the Petitioner's guilt of ABWIK as opposed to ABHAN absent the above mentioned facts in connection with the lawful standards of a general intent. Ultimately, the trial court's General Intent Charge mitigated the solicitor's burden of proof on the element of criminal intent down to the requirements for a conviction on the lesser included offense of ABHAN.

Specifically, such elements of recklessness, negligence and a mental state of conscious wrongdoing are all elements of ABHAN. Likewise, recklessness, negligence and a mental state of conscious wrongdoing are the foundation of General Intent for ABWIK. As a result, the Petitioner suffers the consequences of the greater offense (ABWIK) where the solicitor proves the element/s of the lesser included offense (ABHAN).

The Petitioner claims that this Honorable Court overlooked the affect of the trial court's General Intent to Kill Charge in connection with State v. Coleman, 536 S.E.2d 387 (S.C. App. 2000) (“ABHAN charge

is appropriate only when the evidence demonstrate the defendant lacked the requisite intent to kill.") Certainly, the General Intent Charge fatally deprived the Petitioner 5th and Fourteenth Amendment guarantee to a fair and impartial trial.

IX. Unbeknownst to the Petitioner, following the Jury selection, a secret in chamber meeting was held. The Petitioner was never placed on Notice who called for the meeting, why the secret meeting was called for or, the contents of the meeting. Subsequently, immediately prior to issuing the Jury Charge, the trial Judge denied the Petitioner's Final Request for a charge on the law of self-defense. Emphatically stating: "I told you I'm not going to give a self-defense charge. And I'm not. 'We had this discussion in chambers.'"

In the event the trial Judge not made the above statement, the Petitioner could not have discovered the existence of the secret meeting. Or, that trial counsel was put on Notice going into the Opening Statements that the trial court had determined not to give the Jury a self-defense instruction. The Petitioner respectfully requests this High Court not to overlook the federal protections found under Stewart v. State, 300 S.E. 2d 331 (1983) ("The right to appear in person is guaranteed to the accused by the Fundamental Fairness Law when the court takes any actions materially affecting the case.")

Relying on Tillman v. United States, 406 F.2d 930 (5th Cir. 1969) ("This rule is firmly established in order that the defendant

may see to it that he have a fair and impartial trial and that nothing is done that would in any wise tend to his prejudice. And, unless the character of the communication clearly shows that it was not prejudicial, the 'presumption of the law would be that it was prejudicial.' See Miller v. State, 79 S.E. 232 (1913); Wilson v. State, 90 S.E. 2d 557 (1955); also see Pierce v. State, 171 S.E. 731 (1933).

Additionally, under State v. James, 107 S.E. 907, 116 S.C. 243 ("In a prosecution for a felony, defendant has a right to be present at every part of the trial unless he absence himself."); Kentucky v. Stincer, 482 U.S. 730 (1987) ("This Due Process right especially applies where the accused presence has a reasonable substantial relation to his ability to mount his case."); plus, United States v. Gagnon, 470 U.S. 522 (1985) ("This constitutional right is guaranteed under the Due Process Clause because the defendant is being confronted by evidence, statements, testimony or witnesses use against him during his trial.

X. During the Petitioner's Post-Conviction Proceeding, he submitted into evidence an Operation Report by Dr. Patel, M.D. Surgeon Dr. Kramer and Dr. Yukley, Physician; Secondary Survey by Dr. Ari Kramer; Radiology Report; Discharge Summary; and Final Exam of Mr. Freeman by Devonne D. Barrineau. All unanimously indicating that Mr. Freeman's injuries were to the pelvis.

However, during Closing Arguments, solicitor Jordan Three (3) separate times told the Jury: "he was shot in the stomach." The sole purpose Solicitor Jordan knowingly and intentionally falsified.

Dated 6/22/18.

Respectfully Submitted

John Alexander

**Additional material
from this filing is
available in the
Clerk's Office.**