The Supreme Court of South Carolina

RE: Administrative Suspensions for Failure to Comply with Continuing Legal Education Requirements

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O R D E R

The South Carolina Commission on Continuing Legal Education and Specialization has furnished the attached list of lawyers who have failed to file reports showing compliance with continuing legal education requirements, or who have failed to pay the filing fee or any penalty required for the report of compliance, for the reporting year ending in February 2016. Pursuant to Rule 419(d)(2), SCACR, these lawyers are hereby suspended from the practice of law. They shall surrender their certificates to practice law in this State to the Clerk of this Court by June 6, 2016.

Any petition for reinstatement must be made in the manner specified by Rule 419(e), SCACR. Additionally, if they have not verified their information in the Attorney Information System, they shall do so prior to seeking reinstatement.

These lawyers are warned that any continuation of the practice of law in this State after being suspended by this order is the unauthorized practice of law, and will subject them to disciplinary action under Rule 413, SCACR, and could result in a finding of criminal or civil contempt by this Court. Further, any lawyer who is aware of any violation of this suspension shall report the matter to the Office of Disciplinary Counsel. Rule 8.3, Rules of Professional Conduct for Lawyers, Rule 407, SCACR.

s/ Costa M. Pleicones C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

Columbia, South Carolina
May 5, 2016

LAWYERS NON-COMPLIANT
WITH THE MCLE REQUIREMENTS
FOR THE 2015-2016 REPORTING YEAR
AS OF MAY 5, 2016

Robert Glenn Bacon
Bacon Law Firm
1019 Hwy 17 S #123
North Myrtle Beach, SC 29582

Brandon Ashley Barr
1301 Havenhurst Drive
West Hollywood, CA 90046
ADMINISTRATIVE SUSPENSION
(02/26/16)

Christopher Mark Behr
Wigger Law Firm
4526 Vance Road
Holly Hill, SC 29059

Maria Magdalena Brown
67 Fort Royal Ave.
Charleston, SC 29407-6000

Clair Gilliland Campbell
Campbell & Associates, P.A.
717 East Blvd.
Charlotte, NC 28203

R. Clenten Campbell
1421 Perdita Way
Greer, SC 29650
INTERIM SUSPENSION (10/29/15)

Charles Clark, III
116 E. Earle Street
Anderson, SC 29621

Richard G. D'Agostino
744 Arden Lane, Ste. 175
Rock Hill, SC 29732
INTERIM SUSPENSION (02/29/16)

Christopher Matthews Glenn
3232 Danfield Drive
Columbia, SC 29204
ADMINISTRATIVE SUSPENSION
(03/04/15)

Miles Lavan Green, Jr.
Miles Lavan Green, Jr., Attorney at Law
1878 Boone Hall Drive
Charleston, SC 29407

Angus Quentine Long
56 Radcliffe Street
Charleston, SC 29403

Cynthia Barrier Patterson
PO Box 6786
Columbia, SC 29260

Steven Salcedo
Law Offices of Steven Salcedo, LLC
150 East Ponce De Leon Avenue, Suite 225
Decatur, GA 30030-2543
ADMINISTRATIVE SUSPENSION
(02/26/16)

Dorothy Stefan
8427 Lakemont Drive
Dallas, TX 75209

Thaddaeus T. Viers
Thad Viers Attorney at Law
100 Holly Lane
Myrtle Beach, SC 29572
INTERIM SUSPENSION (04/11/12)

Wendy Rae Webb
Glasser & Schaeffer
56 Perimeter Center East, Suite 450
Atlanta, GA 30346

The Supreme Court of South Carolina

In the Matter of H. Michael Solloa, Jr., Petitioner

Appellate Case No. 2016-000825

ORDER

Petitioner is currently admitted to practice law in South Carolina, and has now submitted a resignation under Rule 409 of the South Carolina Appellate Court Rules. The resignation is accepted.

If petitioner is currently representing any South Carolina clients, petitioner shall immediately notify those clients of the resignation by certified mail, return receipt requested. Further, if petitioner is currently counsel of record before any court of this State, petitioner shall immediately move to be relieved as counsel in that matter.

Within twenty (20) days of the date of this order, petitioner shall:

(1) surrender the certificate of admission to the Clerk of this Court. If petitioner cannot locate this certificate, petitioner shall provide the Clerk with an affidavit indicating this fact and indicating that the certificate will be immediately surrendered if it is subsequently located.

(2) provide an affidavit to the Clerk of this Court showing that petitioner has fully complied with the requirements of this order.

s/ Costa M. Pleicones C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ John Cannon Few J.

Hearn, J., not participating.

Columbia, South Carolina

May 4, 2016

The Supreme Court of South Carolina

In the Matter George A. Kastanes, Respondent.

Appellate Case No. 2016-000449

ORDER

Respondent has submitted a Motion to Resign in Lieu of Discipline pursuant to Rule 35 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules. We grant the Motion to Resign in Lieu of Discipline. In accordance with the provisions of Rule 35, RLDE, respondent's resignation shall be permanent.

Within fifteen (15) days of the date of this order, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, and shall also surrender his Certificate of Admission to Practice Law to the Clerk of Court.

s/ Costa M. Pleicones C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ John Cannon Few J.

Hearn, J., not participating

Columbia, South Carolina
May 4, 2016

The Supreme Court of South Carolina

In the Matter Edward Earl Gilbert, Petitioner.

Appellate Case No. 2015-002488

ORDER

On February 11, 2015, this Court issued a public reprimand with conditions in this matter. *In re Gilb*ert, 411 S.C. 419, 768 S.E.2d 665 (2015). In the opinion, we directed petitioner to, within thirty days of the date of the opinion, pay the costs incurred in the investigation and prosecution of the matter by the Office of Disciplinary Counsel and the Commission on Lawyer Conduct and submit a payment plan agreeing to pay $28,594 in restitution to Jane Doe. This Court further directed that within twelve months of the date of the opinion, petitioner complete the South Carolina Bar's Trust Account School and provide certification of completion to the Commission on Lawyer Conduct no later than ten days after the conclusion of the course.

In February 2016, we rejected petitioner's request to accept his resignation from the South Carolina Bar because petitioner had not entered into a payment plan regarding restitution for Ms. Doe.

Petitioner has entered into a payment plan as required and has re-submitted his request to accept his resignation from the South Carolina Bar. Petitioner further requests that this Court reconsider the requirement that he complete the South Carolina Bar's Trust Account School.

Petitioner's resignation is accepted. Petitioner must continue to comply with the payment plan or face further proceedings to enforce this Court's directive.[1]

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[1] *See* Rule 2(q), RLDE, Rule 413, SCACR (definition of lawyer includes "any formerly admitted lawyer with respect to act committed prior to resignation"); Rule 5, RLDE, Rule 413, SCACR (disciplinary counsel has authority and duty to initiate and prosecute proceedings before this Court to enforce orders related to disciplinary proceedings).

Moreover, while we waive the requirement that petitioner complete the South Carolina Bar's Trust Account School at this time, in the event petitioner ever seeks to again be admitted or licensed as a member of the South Carolina Bar, he will first have to meet that requirement as a condition for readmission.

If petitioner is currently representing any South Carolina clients, petitioner shall immediately notify those clients of the resignation by certified mail, return receipt requested. Further, if petitioner is currently counsel of record before any court of this State, petitioner shall immediately move to be relieved as counsel in that matter.

Within twenty days of the date of this order, petitioner shall:

(1) surrender the certificate of admission to the Clerk of this Court. If petitioner cannot locate this certificate, petitioner shall provide the Clerk with an affidavit indicating this fact and indicating that the certificate will be immediately surrendered if it is subsequently located.

(2) provide an affidavit to the Clerk of this Court showing that petitioner has fully complied with the requirements of this order.

s/ Costa M. Pleicones C.J.

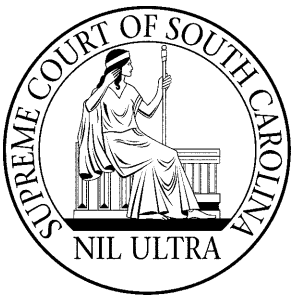
s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ John Cannon Few J.

Hearn, J., not participating

Columbia, South Carolina
May 4, 2016



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 19
May 11, 2016
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Robert W. Herlong, Respondent.

Appellate Case No. 2016-000547

Opinion No. 27634
Submitted April 18, 2016 – Filed May 11, 2016

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Barbara M. Seymour, Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Robert W. Herlong, of Elgin, *pro se*.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of an admonition or public reprimand with conditions. We accept the Agreement and issue a public reprimand. In addition, we impose the conditions set forth in the conclusion of this opinion. The facts, as set forth in the Agreement, are as follows.

Background

Respondent is seventy years old. He has not actively represented clients for approximately twenty years.

In August 2011, respondent changed his South Carolina Bar membership to inactive status. By order dated March 14, 2014, the Court placed respondent on administrative suspension for failure to pay his annual license fees. On August 6, 2015, the Court placed respondent on interim suspension as a result of his arrest for serious crimes and for failure to cooperate in the disciplinary investigation. *In the Matter of Herlong*, 413 S.C. 232, 776 S.E.2d 86 (2015).

Facts and Law

Matter I

Respondent was arrested on misdemeanor charges on four occasions: February 3, 2013, for shoplifting; September 23, 2013, for possession of cocaine and multiple driving offenses; October 13, 2013, for open container; and on May 24, 2015, for public disorderly conduct. Following his arrest on June 26, 2013, respondent was indicted on May 5, 2014, for possession with intent to distribute crack cocaine, possession of cocaine, and contributing to the delinquency of a minor. Respondent was incarcerated on June 23, 2015, for 120 days pursuant to a civil contempt order issued by the Fifth Judicial Circuit Family Court for failure to pay court-ordered spousal support. Respondent was released in September 2015 and the felony charges were resolved with a sentence of time served.

Respondent acknowledges that his felony charges constitute serious crimes pursuant to Rule 1.0(o) of the Rules of Professional Conduct (RPC) contained in Rule 407, SCACR.[1] He admits that, in committing those felonies, multiple misdemeanors, and traffic offenses, he violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 8.4(b) (it is professional misconduct for lawyer to commit criminal act that reflects adversely on lawyer's honesty, trustworthiness or fitness as lawyer in other respects); and Rule 8.4(c) (it is professional

[1] Rule 1.0(o) ("'serious crime' denotes any felony; any lesser crime that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; or, any crime a necessary element of which, as determined by the statutory or common law definition of the crime, involves interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, willful failure to file income tax returns, or an attempt, conspiracy or solicitation of another to commit a serious crime.").

misconduct for lawyer to commit criminal act involving moral turpitude). In addition, respondent admits he failed to notify the Commission on Lawyer Conduct (the Commission) of his felony indictment as required by Rule 8.3(a), RPC (lawyer who is arrested for or charged by way of indictment with serious crime shall inform Commission in writing within fifteen days of arrest or charge).

Respondent admits he is subject to discipline pursuant the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct); Rule 7(a)(4) (it shall be ground for discipline for lawyer to be convicted of crime of moral turpitude or serious crime); and Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute administration of justice or to bring courts or legal profession into disrepute or conduct demonstrating unfitness to practice law).

Matter II

On May 25, 2015, respondent received a telephone call from someone he met while attending drug court related to his own criminal charges. The caller told respondent that the child of a friend was in jail and asked if respondent would talk to the caller's friend. Respondent spoke with the caller's friend (the juvenile's father) and told him that he had not practiced law in twenty years, that his license was not current,[2] and that he had very little experience in criminal court. Respondent advised the father that he would attempt to contact the public defender on the juvenile's behalf. Respondent agreed to meet the juvenile and the family at the courthouse prior to the hearing. Respondent was unable to reach the public defender prior to the scheduled hearing. In a misguided attempt to help the juvenile and his family, respondent agreed to appear at the hearing.

On May 26, 2015, respondent appeared in the Ninth Judicial Circuit Family Court on behalf of the juvenile who had been charged with a serious crime. Respondent represented to the judge that his Bar status was inactive and he was "in the process

[2] As noted above, in August 2011, respondent changed his South Carolina Bar status to inactive and, by order dated March 14, 2014, the Court placed respondent on administrative suspension for failure to pay his annual license fees.

of reactivating at this moment."[3] The judge allowed respondent to participate in the hearing. Respondent proceeded to cross-examine the state's witnesses and called the juvenile's parents to testify.[4]

Following the hearing, respondent advised the family that he could not assist them further and they needed to contact the public defender. The next day, respondent received a telephone call from the juvenile's father confirming a public defender was going to handle the case.

After the hearing, the judge and the solicitor learned that respondent's license to practice law was suspended. They both filed disciplinary complaints pursuant to Rule 8.3(b), RPC (lawyer who knows another lawyer has committed violation of Rules of Professional Conduct that raises substantial question as to lawyer's honesty, trustworthiness or fitness as lawyer in other respects shall inform appropriate professional authority).

Respondent's appearance in the juvenile's case was apparently reported to the drug court judge presiding over respondent's own pending criminal matters. He was discharged from the drug court program.

Respondent acknowledges that, regardless of the exigency of the circumstances, he was not authorized to appear in court, provide legal advice, or otherwise represent a client while his license was suspended. Respondent admits that by his conduct, he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 3.3(a)(1) (lawyer shall not knowingly make false statement of fact to tribunal); Rule 5.5(a) (lawyer shall not practice law in jurisdiction in violation of regulation of legal profession in that jurisdiction); Rule 8.4(d) (it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct prejudicial to administration of justice).

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[3] Respondent understands that, even if his license was inactive and he was "in the process of reactivating," he would not have been eligible to practice law and should not have been permitted to proceed on behalf of the juvenile at the hearing.

[4] Respondent neither sought nor received payment for his legal services.

Respondent admits he is subject to discipline pursuant the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct); Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute administration of justice or bring courts or the legal profession into disrepute or conduct demonstrating unfitness to practice law); and Rule 7(a)(7) (it shall be ground for discipline for lawyer to willfully violate valid court order issued by court of this state).

Conclusion

According to the Agreement, respondent went through a difficult divorce in 2013. His subsequent alcohol and drug abuse resulted in the loss of his home in foreclosure, numerous attempts at in-patient rehabilitation and treatment, multiple arrests, and his participation in drug court. Respondent suffers from health issues, including heart and respiratory ailments.

The Agreement further provides that respondent is currently maintaining sobriety with the support of a Lawyers Helping Lawyers volunteer and daily 12-step program meetings. Respondent does not plan to return to the practice of law. The Court recognizes that, on January 27, 2016, at the request of ODC and with respondent's consent, the Court lifted respondent's interim suspension[5] and transferred him to incapacity inactive status. *In the Matter of Herlong*, 415 S.C. 274, 781 S.E.2d 913 (2016).

We find respondent's misconduct warrants a public reprimand. We hereby accept the Agreement and publicly reprimand respondent for his misconduct. Respondent shall enter into a two (2) year monitoring contract with Lawyers Helping Lawyers and shall file annual reports of his contract compliance with the Commission.

PUBLIC REPRIMAND.

PLEICONES, C.J., BEATTY, KITTREDGE, HEARN and FEW, JJ., concur.

[5] As noted above, the criminal charges against respondent were resolved.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Daniel Demond Griffin, Petitioner.

Appellate Case No. 2015-001839

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Greenwood County
Thomas L. Hughston, Jr., Circuit Court Judge

Opinion No. 27635
Submitted April 19, 2016 – Filed May 11, 2016

AFFIRMED AS MODIFIED

Appellate Defender LaNelle Cantey DuRant, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, and Assistant Attorney General John Benjamin Aplin, both of Columbia, for Respondent.

PER CURIAM: Petitioner seeks a writ of certiorari to review the Court of Appeals' decision in *State v. Griffin*, 413 S.C. 258, 776 S.E.2d 87 (Ct. App. 2015).

We grant the petition, dispense with further briefing, and affirm the Court of Appeals' decision as modified.

After the start of trial, Petitioner moved to dismiss the case on the grounds that the deputies involved in his arrest and detainment were not duly qualified pursuant to S.C. Code Ann. §§ 23-13-10 and -20 (2007), because: (1) they were not properly bonded; (2) their oaths of office were not properly evidenced by a certificate signed by the sheriff until after Petitioner's arrest; and (3) the certificates acknowledging their appointments and oaths were not properly authenticated in the public record. The motion was denied.

The Court of Appeals affirmed the trial court's ruling, finding the deputies could be considered "de facto deputies despite their failure to comply with all of the requirements of sections 23-13-10 and 23-13-20," because they: (1) were employed with the sheriff's office for a significant amount of time; (2) stated at trial they were bonded and had taken an oath to every sheriff for whom they had worked; (3) performed duties consistent with their appointments as deputies; and (4) were identifiable to Petitioner as deputy sheriffs who had the authority to act.

However, we find such an analysis unnecessary, as it is well established that "the illegality of an initial arrest [does] not bar the accused person's subsequent prosecution and conviction of the offense charged." *State v. Biehl*, 271 S.C. 201, 246 S.E.2d 859 (1978); *see also Frisbie v. Collins*, 342 U.S. 519 (1952); *State v. Holliday*, 255 S.C. 142, 177 S.E.2d 541 (1970); 5 Am. Jur. 2d *Arrest* § 129 (2016) ("The illegality of an arrest does not preclude trial of the accused for the offense."). Petitioner asked for his case to be dismissed with prejudice, a remedy that runs contrary to the established law of South Carolina. Therefore, the trial court did not err in denying Petitioner's motion to dismiss, regardless of whether the underlying arrest was unlawful or committed lawfully by de facto sheriff's deputies.

Accordingly, we vacate the Court of Appeals' analysis, but affirm on the grounds set forth above.

The decision of the Court of Appeals is hereby

AFFIRMED AS MODIFIED

PLEICONES, C.J., BEATTY, KITTREDGE, HEARN and FEW, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Jacques Gibson, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2014-001074

ON WRIT OF CERTIORARI

Appeal From Richland County
The Honorable Diane Schafer Goodstein, Post-Conviction Relief Judge

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Opinion No. 27636
Submitted April 25, 2016 – Filed May 11, 2016

REVERSED

Tricia A. Blanchette, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General James Clayton Mitchell, III, both of Columbia, for Respondent.

PER CURIAM: Petitioner was convicted of murder and unlawful possession of a pistol by a person under the age of twenty-one. He now seeks a writ of certiorari from the denial, after a hearing, of his application for post-conviction relief (PCR).

We grant the petition on petitioner's Question III, dispense with further briefing, reverse the order of the PCR judge, and grant petitioner a new trial on the murder charge. The petition for a writ of certiorari is denied on the remaining questions.

The evidence presented at trial showed that a fight occurred between two groups at a bar. Following the initial confrontation, petitioner's brother, Adams, called petitioner to request a ride home.[1] Shortly after petitioner arrived to pick up Adams, the dispute that began inside the bar spilled out into the parking lot and became a physical altercation between numerous members of each group. During the melee, several gunshots were heard, and the victim was killed by a single nine-millimeter shot to the back of his shoulder.

There was evidence, including a statement petitioner gave to police, that petitioner retrieved his gun from his car, pointed his gun at another person he suspected was going to hit Adams, and subsequently fired his gun into the air three to four times as he drove away from the scene. When asked whether he believed he may have shot the victim, petitioner responded, "I think that I did, because I was doing some shooting, but I didn't just look at him and shoot him. . . . the gun could have dropped down because I was driving. I promise I don't remember seeing him and aiming."

One witness, Shunta Wilson, testified Adams walked over to petitioner's car, sat in the driver's seat, reached under it, and pulled out what she recognized as a small caliber handgun, either a .22 or .25. Wilson maintained Adams was the only person she saw with a gun. Wilson identified Adams as wearing jeans and a black t-shirt; however, other witnesses and evidence presented at trial showed petitioner was wearing a black t-shirt and Adams wore a white t-shirt. The evidence did not provide a clear picture of who fired a weapon or how many shots were fired.

The trial judge charged the jury, in part, as follows:

> Both defendants in this case have been charged with the offense of murder. The State has to prove beyond a reasonable doubt that the defendant charged killed another person with malice aforethought. Malice: that's hatred, ill will, hostility towards

[1] Adams was tried with petitioner and was also convicted of murder. His application for PCR was granted on the ground that trial counsel was ineffective in failing to object to the erroneous jury charge on the inference of malice from the use of a deadly weapon. This Court denied the State's petition for a writ of certiorari to review the PCR order in Adams' case.

> another person. It's the intentional doing of a wrongful act without just cause or excuse and with an intent to inflict an injury or under such circumstances that the law would infer an evil intent.
>
> Now, malice aforethought does not require that the malice exist for any particular time before the act was committed, but malice has to exist in the mind of the defendant just before and at the time the act was committed. Therefore, there has to be that combination of the previous evil intent and the act.
>
> Now, malice aforethought can either be express or inferred. Express means that malice is shown when a person speaks words with express hatred or ill will for another or the person prepared beforehand to do the act which was later accomplished. Malice can 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. A deadly weapon is any article, instrument, or substance which is likely to cause death or great bodily harm. Whether an instrument has been used as a deadly weapon depends upon the facts and circumstances of each case.
>
> I'll just give you some examples of deadly weapons. There's [sic] a lot of them, and I'm not -- this is obviously not an exhaustive list. It could be a knife, a dagger, a slingshot, metal knuckles, a rifle, a shotgun, a pistol, a razor, gasoline. Any number of things that you determine from the facts would be a deadly weapon.

Trial counsel objected to the charge as a comment on the facts, but did not object to the trial judge's failure to use the permissive inference language approved in *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). In her closing argument, the solicitor twice stated, "Malice may be inferred from the use of a deadly weapon alone."

Petitioner contends trial counsel was ineffective in failing to object to the charge that malice may be inferred from the use of a deadly weapon on the ground that the

charge did not include the permissive inference language approved by this Court in *Elmore*.

The PCR judge found that the charge given was, as a whole, a proper statement of law, despite the lack of the permissive inference language suggested in *Elmore*, and did not constitute impermissible burden shifting. The judge relied on the phrases "can be inferred," "may arise," and "depends on the facts and circumstances of each case" in finding the charge was not erroneous. In addition, the PCR judge found the jury was explicitly instructed on the State's burden of proof. Finally, the judge found that the result of the trial would have been no different had trial counsel objected to the implied malice charge since the use of a deadly weapon was not the only evidence of malice. We disagree and reverse the order of the PCR judge on this issue.

In *Elmore*, this Court stated:

> We suggest the following charge:
>
> > The law says if one intentionally kills another with a deadly weapon, the implication of malice may arise. If facts, [sic] 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.
> >
> > We caution the bench, [sic] that hereafter only slight deviations from this charge will be tolerated.

In *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009), this Court referred to the first sentence of the *Elmore* charge as the standard implied malice charge and the second sentence as the permissive inference charge. The Court stated in a footnote that "[t]he standard implied malice charge remains valid, as does the general permissive inference instruction." *Id.*

The charge given by the trial judge in this case clearly deviates from the suggested *Elmore* charge as it does not contain the permissive inference language. Although the PCR judge refers to the fact that *Elmore* merely suggested the language, this

ignores the provision in *Elmore* indicating that "only slight deviations from this charge will be tolerated." The complete omission of the permissive inference language is not a "slight deviation" that would be permissible under *Elmore.*

The "depends upon the facts and circumstances of each case" language cited by the PCR judge is contained in the charge on whether an instrument has been used as a

deadly weapon, not in the charge on the inference of malice. Therefore, this does not cure the error in omitting the permissive inference instruction.

Because the charge was erroneous, the PCR judge erred in finding trial counsel was not deficient for failing to object to the malice charge. *Tate v. State*, 351 S.C. 418, 570 S.E.2d 522 (2002), *overruled on other grounds by State v. Belcher, supra* (counsel was deficient in failing to object to a malice charge that shifted the burden of proof to the defendant); *McCray v. State*, 317 S.C. 557, 455 S.E.2d 686 (1995) (this Court must affirm the rulings of the PCR judge if there is any evidence to support the decision).

In determining whether petitioner was prejudiced by trial counsel's deficient performance, this Court must decide whether the erroneous malice instruction contributed to the verdict based on all the evidence presented to the jury. *Rose v. Clark*, 478 U.S. 570 (1986); *Plyler v. State*, 309 S.C. 408, 424 S.E.2d 477 (1992). The Court must weigh the significance of the presumption to the jury against the other evidence of malice considered by the jury without the erroneous malice charge. *Lowry v. State*, 376 S.C. 499, 657 S.E.2d 760 (2008).

In this case, the PCR judge erred in finding there was evidence of malice other than the use of a deadly weapon. *State v. Fennell*, 340 S.C. 266, 531 S.E.2d 512 (2000) (malice is hatred, ill-will, or hostility toward another person; a wrongful intent to injure another person indicating a wicked or depraved spirit intent on doing wrong; a formed purpose and design to do a wrongful act without legal justification or excuse); *State v. Harvey*, 220 S.C. 506, 68 S.E.2d 409 (1951) *overruled on other grounds by State v. Torrence, supra* (as used in the description of murder, malice does not necessarily import ill-will toward the individual injured, but signifies a general malignant recklessness toward the lives and safety of others, or a condition of the mind that "shows a heart regardless of social duty and fatally bent on mischief."). Although the State argued petitioner received a phone call from his brother, who knew petitioner had a gun, to come to the bar, the only evidence of petitioner shooting the gun indicated he shot his weapon in the air

after other shots were fired. Petitioner admitted in one of his statements that it was possible his gun "may have dropped down" toward the victim while he was driving away and shooting in the air; however, this is not overwhelming evidence of malice. Because there was little evidence of malice aside from the use of a gun, the PCR judge erred in finding petitioner was not prejudiced by trial counsel's failure to object to the charge on the inference of malice from the use of a deadly weapon. Accordingly, we reverse the order of the PCR judge and grant petitioner a new trial on the murder charge.

REVERSED.

PLEICONES, C.J., BEATTY, KITTREDGE and HEARN, JJ., concur. FEW, J., not participating.

The Supreme Court of South Carolina

Re: Amendments to Rules 413 and 502, South Carolina Appellate Court Rules

Appellate Case No. 2016-000747

ORDER

Pursuant to Art. V, Section 4 of the South Carolina Constitution, Rule 2(a), RLDE, Rule 413, and Rule 2(a), RJDE, Rule 502, SCACR, are amended to correct scrivener's errors in those rules. In both rules, references contained at the end of the first sentence are amended to refer to Rule 7(b)(4) and Rule 19(d). The amendments are effective immediately.

s/ Costa M. Pleicones C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

Columbia, South Carolina
May 11, 2016