

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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**May 14 2024**

S.C. SUPREME COURT

Certiorari to the Court of Appeals  
Appeal from Greenville County  
Edward W. Miller, Circuit Court Judge

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Opinion No. 5953 (S.C. Ct. App. Filed November 30, 2022)

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THE STATE,

RESPONDENT,

V.

NYQUAN TYKIE BROWN,

PETITIONER.

APPELLATE CASE NO. 2023-000166

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MOTION TO ARGUE AGAINST PRECEDENT

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Pursuant to Rule 217, SCACR, Petitioner moves this Court to permit argument against precedent. This case is scheduled for oral argument on Wednesday, June 19, 2024, at 10:30 a.m. before this Court.


The trial judge charged the jury that “malice can be inferred if one killed another during the commission of a felony.” Petitioner argued on appeal that this implied malice instruction is an impermissible comment on the facts and eliminated the state’s burden to prove malice, a critical element of the offense of murder, beyond a reasonable doubt. Brief of Petitioner at 13, 19, 20.

The state contends, and the Court of Appeals held, that State v. Norris, 285 S.C. 86, 328 S.E.2d 339 (1985) and Lowry v. State, 376 S.C. 499, 657 S.E.2d 760 (2008) control the result of

Petitioner’s burden shifting argument. See State v. Brown, 438 S.C. 146, 153-54, 881 S.E.2d 771, 774-75 (Ct. App. 2022); Brief of Respondent at 12, 13, 18. Accordingly, counsel seeks permission to argue against this precedent.

Additionally, the Court of Appeals suggested Gore v. Leeke, 261 S.C. 308, 199 S.E.2d 755 (1973) controls since “felony murder under Gore does not involve the jury using the intent to commit a felony to infer the malice element of murder.” See State v. Brown, 438 S.C. 146, 153, 881 S.E.2d 771, 774 (2022) (citing Gore, 261 S.C. at 315, 199 S.E.2d at 757). Rather, the Court of Appeals noted, in felony murder, “the law implies malice from proof of the felony.” Brown, 438 S.C. at 153, 881 S.E.2d at 774 (citing Gore, 261 S.C. at 315, 199 S.E.2d at 757) (internal quotation marks omitted). The state also relies on Gore in support of its argument and contends “the felony murder doctrine stands and should continue to stand.” Brief of Respondent at 13. To the extent this Court agrees that Gore is controlling precedent, counsel seeks permission to argue against precedent.

Respectfully submitted,

  
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This 14th day of May, 2024.