STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

William Jeffrey Young, Circuit Court Judge

RANDALL S. TYLER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000795

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1.

Whether petitioner's Sixth Amendment rights were violated when trial counsel failed to object to an incorrect charge that the jury could infer malice from "an unlawful act" which created the probability that the jury inferred malice from an attempted drug deal?

2.

Whether petitioner's Sixth Amendment rights were violated by trial counsel's failure to object during the prosecutor's closing argument which: (1) violated the "Golden Rule" when he told the jury, e.g., they were "putting themselves on the line against those domestic enemies" like the defendant; (2) impermissibly shifted the burden of proof when he told the jury, e.g., that they "would have to believe every word that came out of [the defendant's] mouth from that witness stand to believe he is not guilty;" and (3) injected a misleading ambiguity into the minds of the jurors by telling them that unexplained "rules" prevented the State from trying the defendant with his co-defendant?

3.

Whether petitioner's Sixth Amendment rights were violated by trial counsel's failure to impeach the State's key witness, Donna Hutto, with prior statements in which she lied to the police?

4.

Did trial counsel render ineffective assistance in failing to object when the solicitor pitted petitioner against his co-defendant, who did not even testify at trial and whose statement was admitted in violation of the Confrontation Clause?

STATEMENT

In June 2003, a Lexington County grand jury indicted petitioner for murder, first-degree burglary, and conspiracy. App. 895-99. On June 9-13, 2003, petitioner was tried before the Honorable Marc H. Westbrook and a jury. App. 1. August G. Swarat, II, and Marion Moses represented the State. App. 1. J. Dennis Bolt represented petitioner. App. 1. The jury convicted petitioner of all three charges. App. 389, l. 22 – 390, l. 8. Judge Westbrook sentenced petitioner to concurrent terms of life imprisonment without parole for murder, life imprisonment for burglary, and five years' imprisonment for conspiracy. App. 401, ll. 7 – 14. Petitioner's conviction was affirmed by the Court of Appeals. State v. Tyler, No. 2005-UP-274 (Ct. App. April 19, 2005).

On March 16, 2007, petitioner filed a PCR application. App. 405. On March 5, 2010, petitioner filed an amended PCR application. App. 464. On February 2, 2012, a hearing was held before the Honorable Jeffrey Young. App. 566. Kaelon E. May represented the State. App. 566. Adrianne L. Turner represented petitioner. App. 566. On May 17, 2012, Judge Young denied petitioner's PCR application. App. 835. On June 6, 2012, petitioner filed a motion to reconsider pursuant to Rule 59(e), SCRCP. App. 858. On August 15, 2012, Judge Young heard argument on the motion. App. 867. On March 28, 2013, Judge Young denied the motion. App. 891. This petition follows.

ARGUMENT

1.

Petitioner's Sixth Amendment rights were violated when trial counsel failed to object to an incorrect charge that the jury could infer malice from "an unlawful act" which created the probability that the jury inferred malice from an attempted drug deal.

Reasons Why Certiorari Should be Granted

This case presents the ideal vehicle for this Court to clarify the law on how to charge a jury on malice when a murder case presents evidence of several unlawful and wrongful acts, some of which have no causal link to the killing. Rule 242(b)(1), (5), SCACR. The jury was charged that they could infer malice from an unlawful act, which, in and of itself, is an incorrect charge. The deeper question presented by this case is when several wrongful acts are described by the evidence, what clarification must a jury be given as to which acts give rise to an inference of malice and which do not. Because this case contains evidence that petitioner was innocent and merely present at a drug deal when his co-defendant unexpectedly robbed and murdered the victim, the inference of malice from an unlawful act raises the probability that the jury inferred malice from the drug deal. While this case must be viewed through the lens of ineffective assistance of counsel, the legal question concerning the inference of malice is squarely presented and ripe for this Court to address.

Relevant Facts from the Trial

Petitioner Randall S. Tyler ("Tyler") testified that another man named Travis Harsey ("Harsey") murdered the decedent, Robert "Corky" Lewis ("Lewis"). App. 266, l. 11 – 269, l. 23. Tyler and Lewis were very good friends. App. 259, ll. 1 – 4. They were also in the drug business together. App. 260, ll. 3 – 10. Tyler bought drugs from Lewis to sell. App. 260, ll. 6 – 20. Tyler sold drugs to Harsey. App. 260, ll. 6 – 20.

Two days before the shooting, Tyler visited Lewis at his house. App. 262, l. 17 – 263, l. 17. He saw both Lewis and his girlfriend, Donna Hutto ("Hutto"). App. 262, ll. 22 – 25. Lewis told Tyler that he would have drugs to sell the coming weekend. App. 262, ll. 22 – 25. They made plans to go fishing because Lewis and Hutto would be at their lake house. App. 263, ll. 6 – 11.

The day of the shooting, Harsey wanted to buy drugs. App. 263, ll. 18 – 22. Tyler caught a ride to Harsey's house. App. 262, ll. 2 – 12. Harsey drove Tyler to Lewis's lake house, but Lewis and Hutto were not there. App. 264, l. 14 – 265, l. 6. Tyler asked Harsey to drive him to Lewis's home to find out when they could buy drugs and go fishing. App. 265, ll. 3 – 21.

They pulled into Lewis's driveway. App. 265, ll. 9 – 10. Tyler told Harsey he would be right back. App. 265, ll. 9 – 10. Tyler walked to the back of the house to the garage. App. 266, ll. 1 – 4. Lewis was inside working on a trailer. App. 266, ll. 5 – 10. Tyler previously helped Lewis work on this trailer and they briefly conversed about the progress made. App. 266, ll. 5 – 10.

When Tyler walked over to Lewis to shake his hand, Lewis called his name in a way to indicate that someone was coming up behind him. App. 266, ll. 11 – 17. Harsey unexpectedly ran into Tyler and then hit Lewis in the head. App. 266, ll. 14 – 17. Lewis and Tyler both fell and when they regained their feet, Harsey hit Lewis again, pulled a pistol, and made them go in Lewis's house at gunpoint. App. 266, ll. 18 – 23. Harsey made the two men sit on a couch and repeatedly screamed at them, "Where's the fucking dope?" Appendix 267, ll. 4 – 20. Harsey continued to hit Lewis and then fired a shot into the couch. App. 267, l. 21 – 268, l. 7. When Harsey fired the shot, Tyler ran out of the house and began running down the highway. App. 268, ll. 3 – 19.

Harsey pulled up behind Tyler on the road and, holding a pistol, ordered Tyler to "Get in the fucking car." App. 269, ll. 5 – 9. Tyler got in the car. App. 269, ll. 10 – 14. Harsey repeatedly screamed at Tyler that he "better take my fucking name out of [his] mouth." App.

269, ll. 10 – 14. Harsey took Tyler home. App. 269, ll. 15 – 17. The next day Tyler called Harsey and Harsey threatened his life, Tyler's wife, and Tyler's child if Tyler were to speak to the police. App. 281, ll. 2 – 15. Tyler then called a bail bondsman he knew who helped him to turn himself in to the police. App. 281, l. 16 – 282, l. 24. Tyler emphatically denied trying to rob Lewis or having a plan to rob Lewis. App. 269, ll. 18 – 23. Harsey was charged with Lewis's murder, but the two men were tried separately to avoid Bruton[1] issues. App. 586, l. 24 – 587, l. 6.

The State's case against Tyler centered around Hutto, Lewis's girlfriend. Hutto knew Lewis was in the drug business and hid money in various spots around his house. App. 187, l. 17 – 188, l. 5. She knew Tyler. App. 170, ll. 1 – 22. She corroborated Tyler's testimony that Tyler had paid them a friendly visit a few days prior to the shooting and that everything was fine between the two men. App. 187, ll. 15 – 21.

Hutto claimed that on the night of the shooting, the sound of dogs barking and people arguing awakened her from a nap in her living room. App. 171, l. 20 – 172, l. 20. She recognized Lewis and Tyler's voices coming from the garage. App. 172, l. 23 – 173, l. 6. She heard Lewis say, "I ain't done no kind of shit that like that, Randy. Randy, I ain't done no kind of shit like that." App. 173, ll. 7 – 10. Hutto got a cigarette and used the bathroom. App. 174, ll. 5 – 10.

Hutto then went to the kitchen and looked into the backyard where she saw a person she claimed was Tyler walking into the garage. App. 174, l. 22 – 176, l. 3. She claimed Tyler had on "like a partial mask." App. 176, ll. 4 – 8. She could not see the man's face, but claimed it was Tyler. App. 176, l. 23 – 177, l. 3. Hutto heard Tyler say, "Come on. Let's go in the f'ing

[1] Bruton v. United States, 391 U.S. 123 (1968).

house." App. 177, ll. 4 – 7. Lewis protested. App. 177, ll. 15 – 16. Hutto thought Lewis was scared. App. 177, ll. 4 – 23. Hutto left and went to her brother's house. App. 178, ll. 2 – 25. Hutto claimed she saw no vehicles in the driveway when she left for her brother's house. App. 180, ll. 3 – 13. The police were called. App. 179, ll. 5 – 6. The first officer on the scene met Hutto and her brother. App. 81, ll. 15 – 21. Lewis's body had lacerations on the top of the head and six gunshot wounds. App. to 18, ll. 9 – 19.

The other primary witness against Tyler was Jimmy Williams ("Williams"), the uncle of Tyler's wife. App. 137, ll. 23 – 25. Williams gave Tyler a ride to Harsey's house the afternoon of the shooting. App. 138, ll. 5 – 12. App. 139, ll. 12 – 20. Tyler told Williams he had plans to go fishing the following weekend with Lewis. App. 138, l. 22 – 139, l. 5. After the solicitor had Williams declared a hostile witness, he used Williams' prior statement to elicit testimony that during this ride, Tyler said that he was upset with Williams about money and "something to do with his brother Matt." App. 150, ll. 18 – 25. When they got to Harsey's, Tyler and Harsey spoke alone in the bedroom. App. 153, ll. 5 – 15. Williams became impatient and went into the bedroom to tell them he was going to leave. App. 153, l. 19 – 154, l. 5. Williams claimed he saw a clip for a gun on the bed. App. 154, ll. 9 – 23.

The next morning, Williams spoke with Tyler and Tyler said that he got into an argument with Lewis at Lewis's house. App. 157, ll. 6 – 16. Tyler said that Harsey shot Lewis. App. 158, ll. 3 – 5. Tyler told Williams that he saw Lewis get shot and that he knew Lewis was dead. App. 158, ll. 6 – 13. Tyler told Williams to tell the police they had been fishing the previous night because of Harsey's threats and Tyler was "in fear for his wife and his son." App. 140, ll. 16 – 141, l. 10. App. 160, l. 25 – 161, l. 19. Williams could tell that Tyler was scared of Harsey. App. 161, ll. 16 – 19.

The solicitor used a statement of Tyler's against him. After Tyler was arrested, he told the police that they needed to look into his brother's possible involvement because of their resemblance. App. 199, ll. 8 – 25. Tyler later gave a written statement describing Harsey's actions that was consistent with Tyler's testimony at trial. App. 209, l. 11 – 210, l. 4.

The police eventually recovered portions of the gun that belonged to Harsey. App. to 14, ll. 5 – 17. Harsey's family attempted to melt the gun. App. to 14, ll. 5 – 17. Harsey's mother, brother, and wife were all charged in conjunction with Lewis's death. App. to 14, ll. 5 – 17. Harsey admitted owning the same caliber pistol as the one that was used to shoot Lewis. App. to 15, ll. 6 – 10. The jury deliberated nearly six hours and sent multiple questions before returning its verdict. App. 383, l. 21 – 388, l. 20.

Discussion

Trial counsel rendered ineffective assistance by failing to object to the trial court's charge on the inference of malice. The judge instructed the jury they could infer malice because Tyler was at Lewis's house to facilitate a drug deal, prejudicing Tyler. The judge defined murder as "the killing of any person with malice aforethought either express or implied. App. 373, ll. 12 – 13. After further discussion concerning malice, the trial judge gave the following charge:

> Now, the words express or implied don't mean different kinds of malice but only the way or the manner in which malice can be shown to exist. In other words, malice may be proven by direct evidence or by inferences from the facts and circumstances that are proven.
>
> So in other words, proof of malice may be expressed, in other words, direct where there is evidence of previous threats or lying in wait or, in other words, circumstances which show directly that an intent to kill existed.
>
> But the circumstances of many homicides will prevent the possibility of offering this kind of evidence of the existence of malice. So of necessity the law says that malice may be inferred under certain circumstances even without direct evidence as to what was in the Defendant's heart and mind.

> **Malice may be inferred from the willful, deliberate, and intentional doing of an unlawful act without just cause or excuse** or it may be inferred from the use of a deadly weapon.
>
> The resulting implication only permits rather than requires you as the jury to infer malice. This permissive inference is of an evidentiary nature, and that implication does not require you as the jury to infer malice but only permits you to do so.

App. 374, l. 7 – 375, l. 6 (emphasis added). Defense counsel declined to object when asked if there were any exceptions to the charge. App. 382, l. 23 – 383, l. 4.

Petitioner raised this issue in his initial application. App. 439-46. The PCR court found that trial counsel "did not object to the court's malice instruction because there was nothing objectionable about the instruction." App. 848. The PCR court ratified trial counsel's opinion, stating that it "agrees with trial counsel and finds that the trial court's instruction on malice contained the correct definition and adequately covers the law." App. 849.

The PCR court erred in finding this charge was correct in this case. "Occasionally a jury will be charged that if the death results from any unlawful act, then malice may be found, making the homicide murder. **This is patently erroneous.** An unlawful act is not necessarily malicious." McAninch, Fairey, and Coggiola, The Criminal Law of South Carolina at 108 (6th ed. 2013) (emphasis added). The leading book on criminal jury charges does not include the phrase "unlawful act" and defines malice as "the doing of a wrongful act intentionally and without just cause or excuse." Ralph King Anderson, Jr., South Carolina Requests to Charge – Criminal, 2012, § 2-1. Judge Anderson's implied malice charge simply states: "Implied malice is when circumstances demonstrate a wanton or reckless disregard for human life or a reasonably prudent man would have known that according to common experience there was a plain and strong likelihood that death would follow the contemplated act." Id.

Because a number of reported decisions contain the "unlawful act" charge, tracing its history is helpful to understand the confusion in the law. In most cases, the confusion of "unlawful" and "wrongful" would not make a difference, but in Tyler's case, it is critical. In 1908, this Court approved a malice charge that used the term "wrongful act" to describe malice. State v. Gallman, 79 S.C. 229, 60 S.E. 682, 686-87 (1908). The trial court defined malice, in part, as "a performed purpose to do a wrongful act, without sufficient legal provocation; and in this case it would be an indication to do a wrongful act which resulted in the death of this man, without sufficient legal provocation, or just excuse, or legal excuse." Id., 60 S.E. at 686. Importantly, the approved charge showed there must be a causal link between the wrongful act and the death. Id. The causal link is shown from the language "wrongful act **which resulted** in the death of this man." Id. (emphasis added). This initial definition showed there must be a connection between the wrongful act and the death. The early cases using this definition also discussed presuming malice from an intentional act. See also State v. McDaniel, 68 S.C. 304, 47 S.E. 384, 386-87 (1904). The Court in McDaniel said, "'Malice', in common acceptation, means ill will against a person, but in its legal sense it means a wrongful act done intentionally, without just cause or excuse." Id. "There can be no doubt, under the decisions in this state, that malice is presumed from an intentional killing, in the absence of facts and circumstances in evidence tending to show want of malice." Id.

This early definition of malice makes perfect sense and was cited with approval again in 1941. State v. Heyward, 197 S.C. 371, 15 S.E.2d 669 (1941). In Heyward, this Court expanded, but did not alter the essential meaning of the charge given in Gallman. The Heyward Court stated "malice has been frequently, substantially so defined as consisting of the intentional doing of a wrongful act toward another without legal justification or excuse." Heyward, 15 S.E.2d at 671.

See also State v. Young, 238 S.C. 115, 124-25, 119 S.E.2d 504, 509 (1961) (defining malice "as the wilful, intentional doing of a wrongful act without just cause or excuse.").

In between Gallman and Heyward, in 1937, the term "unlawful act" appears in connection with malice in State v. Weeks, 185 S.C. 277, 194 S.E. 12, 13 (1937). Weeks dealt with the issue of malice—not in a murder case—but whether the defendant had maliciously cut down trees belonging to a lumber company. Id. The Court stated that the only question necessary to discuss was whether there was "any evidence of malice on the part of the appellant." Id.

The Weeks Court first noted the difference between the commission of an unlawful act and acting with malice. Id. at 14. It stated "An Act may be unlawful and so involve legal responsibility without being either willful or malicious, or it may be both unlawful and willful without being malicious." Id. "The terms used in the act under which these defendants have been indicted and convicted are 'unlawfully,' 'willfully' and 'maliciously.' These terms are not synonymous, and were not intended to express the same idea. They have each a different signification and import different degrees of guilt." Id. The trial judge in Weeks defined malice: "Malice means the intentional and deliberate doing of a wrongful act, intending it to be wrong and committing that act without just cause or excuse." Id.

The Weeks Court approved of the charge given. However, the Court continued to further expound on how to prove malice in a way that seemingly contradicted its earlier statements that "unlawful" and "malicious" were not synonymous. Id. at 15. The Court stated that "malice may be inferred from the willful doing of an unlawful act without just cause or excuse." Id. It further stated that "Malice is a term of art, implying wickedness and excluding a just cause or excuse. It is implied from an unlawful act willfully done, until the contrary be proved." Id.

In 1956, this Court approved a malice charge that contained the "unlawful act" language. State v. Fuller, 229 S.C. 439, 445-46, 93 S.E.2d 463, 466-67 (1956). The defendant in Fuller had an IQ of 58 and requested a charge that the jury could consider whether he was mentally capable of having malice. Id. The trial judge refused this charge. Id. On appeal, this Court quoted the trial judge's malice charge in full. Id. The trial judge defined malice as "a wrongful intent to injure another person." Id. However, the trial judge went further than this definition when he charged the jury on implied malice. Id. The court told the jury they could presume implied malice "from the willful, deliberate and intentional doing of an unlawful act without just cause or excuse." Id. Without much analysis, the Fuller Court concluded that the charge as a whole contained no error. Id. at 446, 93 S.E.2d at 467.

After Fuller, the idea that malice can be presumed from an unlawful act appears in several decisions. State v. Fields, 264 S.C. 260, 267-68, 214 S.E.2d 320, 322 (1975) ("Furthermore, malice may be presumed from the intentional doing of an unlawful act without just cause or excuse."); State v. Crocker, 272 S.C. 344, 345-46, 251 S.E.2d 764, 765-66 (1979) ("Malice aforethought may be implied by the jury from the intentional doing of an unlawful act without just cause or excuse."); State v. Hyman, 276 S.C. 559, 566, 281 S.E.2d 209, 213 (1981) (approving charge containing a presumption of malice from the intentional doing of an unlawful act). These cases, containing the presumption of malice, were found invalid after Sandstrom v. Montana, 442 U.S. 510 (1979) held that a charge creating a presumption unconstitutionally shifted the burden of proof to the defendant. However, the idea that a jury could permissibly infer malice from an unlawful act persisted. See, e.g. State v. Lucas, 285 S.C. 37, 40, 328 S.E.2d 63, 65 (1985).

The "wrongful act" charge also continued during this period. State v. Bell, 305 S.C. 11, 406 S.E.2d 165 (1991); see also Tate v. State, 351 S.C. 418, 426, 570 S.E.2d 522, 527 (2002). In Bell,

the defendant complained of malice being defined as "the doing of a wrongful act intentionally and without just cause or excuse." Id. The Court held the definition of malice was correct. Id. Citing State v. Judge, 208 S.C. 497, 38 S.E.2d 715 (1946). In a 1992 case, both "wrongful act" and "unlawful act" appeared in the same case. Plyler v. State, 309 S.C. 408, 410-11, 424 S.E.2d 477, 478 (1992). The Court upheld the charge. Id.

Complicating this analysis is the principle of the felony-murder rule. This Court engaged in an in-depth discussion of the felony-murder rule in Gore v. Leeke, 261 S.C. 308, 314-18, 199 S.E.2d 755, 757-59 (1973). The murder in Gore was committed when the defendants fled police after committing a robbery. Id. The trial judge charged the jury that the defendant could be guilty if the "homicide was a probable or natural consequence of the acts which were done in pursuance of this common design." Id. Gore held that malice could be implied "from the perpetration of a *malum in se*[2] felony." Id.

Gore also discussed how to determine which felonies would allow the inference of malice. Id. The Court noted that the application of the felony-murder rule to "any felony" was under great criticism. Id. Gore discussed the idea of felonies which are inherently dangerous or a more expansive viewpoint that weighed all of the facts to determine whether there was "any substantial forseeable human risk." Id. Ultimately, the Court chose not to decide which of these rules to adopt because the circumstances of the case would have qualified under either theory. Id.

Following Gore, the Court determined that South Carolina adheres to common law murder "and makes no distinction between murder and felony murder." State v. Yates, 280 S.C. 29, 34, 310

[2] "*Malum in se*" means "A wrong in itself; an act or case involving illegality from the very nature of the transaction, upon principles of natural, moral, and public law. Black's Law Dictionary, (6th Ed. 1990). "An act is said to be *malum in se* when it is inherently and essentially evil, that is, immoral in its nature and injurious in its consequences, without any regard to the fact of its being noticed or punished by the law of the state." Id.

S.E.2d 805, 808 (1982). After the dust settled from the reversals of the presumption of malice cases by the United States Supreme Court in the wake of Sandstrom, the Court addressed the giving of a felony-murder charge in State v. Norris, 285 S.C. 86, 90-92, 328 S.E.2d 339, 342-43 (1985). The trial judge in Norris charged: "If [the homicide] was during the commission of a felony you can consider that as facts and circumstances from which malice can be inferred." Id. Norris upheld the charge, but stated, "While we find no error in the trial judge's comment upon the felony-murder rule, we take this opportunity to remind Bench and Bar that South Carolina follows the common law rule of murder and makes no distinction between murder and felony-murder." Id. The Court then promulgated a "proper charge on malice:"

> The law says if one intentionally kills another during the commission of a felony, 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 you may give it such weight as you determine it should receive.

Id. at 92, 328 S.E.2d at 343. See also Lowry v. State, 376 S.C. 499, 657 S.E.2d 760 (2008) (approving of the Norris charge and reversing a conviction in PCR because the counsel failed to object to the charge that mandated the conclusion that a homicide was murder if committed during a felony).

Tyler's case contains a factual scenario that implicates the definition of malice, when malice may be inferred, and principles from how South Carolina deals with felony-murder. Tyler admitted he was at Lewis's house for a drug deal—an unlawful act and perhaps a felony. Tyler vehemently denied any knowledge of Harsey's plan to rob and murder Lewis. The judge charged the jury that they could infer malice from an unlawful act. App. 374, l. 7 – 375, l. 6. This meant that the jury could have believed Tyler, yet still inferred malice because of the drug deal. The contradiction of

this charge was made worse by the judge's charge that they could consider the "prior bad act" evidence related to drugs for the "limited purpose of determining motive or intent of the Defendant." App. 372, ll. 7 – 10.

Even though the inference here was permissive, not presumed, it still led to a contradiction that could have caused Tyler to be convicted because of the drug deal. In the landmark case of State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), this Court dealt with the confusion arising from allowing a jury to infer malice from the use of a deadly weapon when circumstances mitigate the homicide. After analyzing the history of the deadly weapon charge, the Court ultimately decided to eliminate any confusion from the deadly weapon charge by proscribing its use in cases where the homicide might be mitigated or justified. Id. at 611, 685 S.E.2d 809.

The analysis from Belcher applies to Tyler's case. Use of the "unlawful act" charge was contradictory, confusing, and created the unacceptable and real danger that the jury convicted Tyler because of the drug deal. While South Carolina never reached the question from Gore as how to determine which crimes other than *malum in se* qualify for a Norris charge, other states have determined that drug deals and their like do not. People v. Williams, 406 P.2d 647, 650 (Cal. 1965) (holding that instruction on felony-murder was incorrect when the underlying felony was conspiracy to possess methedrine); State v. Wesson, 802 P.2d 574, 579-80 (Kan. 1990) (finding sale of crack cocaine did not qualify under felony-murder rule) noted as superseded by statute in State v. Mitchell, 942 P.2d 1, 4-5 (Kan. 1997); People v. Pavlic, 199 N.W. 373, 374 (Mich. 1924) (finding that violation of liquor law was not "inherently criminal" and reversing a manslaughter conviction).

These cases, and Gore's definition of *malum in se* crimes qualifying for this instruction, lead to the conclusion that the unlawful act charge in this case was both incorrect and prejudicial. "Additionally, as a matter of policy, finding malice in the commission of every unlawful act would

appear to be unsound. . . . It would seem most inappropriate to infer malice from an insignificant unlawful act and to categorize the perpetrator with those most blameworthy." McAninch, The Criminal Law of South Carolina at 109. The State capitalized on this charge in its closing. The solicitor stated, "If we prove malice, it's murder, boom. It is murder if we prove malice. **Malice is when somebody knows that they are doing an unlawful act.** They are doing something wrong and they know it." App. 329, ll. 19 – 23 (emphasis added). The jury had a copy of the charge during deliberations. App. 365, ll. 24 - 25. Counsel's failure to object to this charge was ineffective and prejudicial under Strickland v. Washington, 466 U.S. 668 (1984). This Court should grant certiorari to consider this issue, clarify the law in this area, and ultimately grant Tyler a new trial.

2.

Petitioner's Sixth Amendment rights were violated by trial counsel's failure to object during the prosecutor's closing argument which: (1) violated the "Golden Rule" when he told the jury, e.g., they were "putting themselves on the line against those domestic enemies" like the defendant; (2) impermissibly shifted the burden of proof when he told the jury, e.g., that they "would have to believe every word that came out of [the defendant's] mouth from that witness stand to believe he is not guilty;" and (3) injected a misleading ambiguity into the minds of the jurors by telling them that unexplained "rules" prevented the State from trying the defendant with his co-defendant.

The solicitor in this case gave a closing argument that violated established law in several respects, yet trial counsel did not object. Trial counsel's failure to object to several egregious remarks by the solicitor prejudiced Tyler and requires reversal of his conviction. Strickland v. Washington, 466 U.S. 668 (1984).

The solicitor began his closing argument by violating the "golden rule" and asking the jury to place themselves in the position of the State, prosecuting on behalf of the victim. The solicitor

began by discussing Winston Churchill. App. 352, ll. 2 – 23. He described Churchill's leadership of England during World War II when "Germany was bombing his country every night." App. 352, ll. 2 – 23. He talked about people dying in the war and giving up their lives in service to their country. App. 352, ll. 2 – 23. The solicitor then related Winston Churchill's oft-used quote that "jury service is the highest form of service you can give to your community in peacetime," but added this service was "just short of putting your life on the line against a foreign enemy." App. 352, ll. 2 – 23. The solicitor then turned the jury into partisans with this turn of phrase:

> Because you are **putting yourselves on the line** against those domestic enemies, those people that walk among us, ladies and gentlemen, that won't follow the law: Dope dealing, murdering, thieving, conniving thugs like Travis Harsey—I agree with [defense counsel] on that—and Randy Tyler, both of them.

App. 352, ll. 18 – 23 (emphasis added). Trial counsel sat mute.

The solicitor injected another element of unfairness into the trial when he told the jury that "rules" he could not explain prevented him from bringing Harsey to court. App. 353, ll. 5 – 20. The solicitor told the jury:

> Well, ladies and gentlemen, a jury is going to get to hear about Travis Harsey. I want to bring up something the judge told you at the start. We have got rules we have to follow. There are rules that prevented us from putting Travis Harsey in the courtroom this week with Mr. Tyler.
>
> I am not even allowed to explain to you what the rules are. If you want to ask me after the trial is over, I would be happy to explain it to you. That's a shell game. That's a smoke screen. I wasn't allowed to do it.
>
> I will deal with Travis Harsey. Or better yet, the citizens of the community just like yourselves will deal with Travis Harsey. It won't be very long, but today we are here to deal about Randy Tyler and his participation in this crime.

App. 353, ll. 5 – 20. Trial counsel sat mute.

The solicitor shifted the burden of proof to Tyler when he told the jury:

> You would have to believe every word that came out of Randy Tyler's mouth from that witness stand to believe he is not guilty. **If you disbelieve him in any way whatsoever, he is guilty of all of it.**
>
> You would have to believe everything Randy Tyler has told you. That's your choice. If you want to believe dope-dealing, conspiring-with-thugs Randy Tyler, that's your choice. We don't get a second shot at this. If you find him not guilty, he walks out of this courtroom, no punishment, no charge. It's over.
>
> We don't get a chance to appeal your decision. That's why it's so important. That's why I am so passionate about it. I want to make sure you understand the truth before you leave this courtroom.

App. 357, l. 23 – 358, l. 11 (emphasis added). Trial counsel sat mute.

The PCR court held that the "solicitor's arguments were proper comments on the facts, but, even if improper, the arguments did not "so infect the trial with unfairness as to make the resulting conviction a denial of due process." App. 847. The PCR court stated it was not "convinced that the solicitor's arguments even reach the level of being improper, but certainly there is no evidence that Applicant was prejudiced." App. 847. These conclusions by the PCR court are errors of law.

The solicitor's argument about "domestic enemies" evokes the improper argument that a defendant was a "domestic terrorist" in Vasquez v. State, 388 S.C. 447, 698 S.E.2d 561 (2010). It invited the jurors to take sides against criminals as a whole and is not addressed to the evidence in Tyler's case. A solicitor's argument is bound by rules of fairness and may not be calculated to arouse a juror's passions or prejudice. Id. at 458, 698 S.E.2d at 566; State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981). It violated the prohibition against arguments which invite jurors to place themselves in the shoes of the victims or of a party. State v. White, 246 S.C. 502, 144 S.E.2d 481 (1965). In White, the solicitor told the jury, "Let him go, let him come back to Williamsburg County. Let him come in your wife's bedroom or your mother or daughters, any of them, what would you do?" Id. at 504, 144 S.E.2d at 482. The Court reversed, holding that the effect of

such an argument is to "completely destroy and nullify all sense of impartiality in a case of this kind." Id. at 506, 144 S.E.2d at 482.

The solicitor's argument concerning the "rules," that there was a "shell game," and offering to explain the rules to the jury after the trial injected an arbitrary and irrelevant factor into their deliberations. A solicitor cannot inject material outside of the evidence or the judge's charge, but must confine himself to the record in the case presented to the jury. See Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004) ("The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence."); State v. Copeland, 321 S.C. 318, 486 S.E.2d 620 (1996); State v. McAlister, 133 S.C. 99, 130 S.E. 511 (1925) (holding it is improper in closing argument for the State to refer to and comment about facts of other cases to indicate or suggest the same results).

Finally, the solicitor's comments that the jury had to believe every word Tyler said or he was "guilty of all of it" impermissibly shifted the burden of proof to the defendant. The State bears the burden of proof at all times and this argument cannot be construed in any way other than shifting the burden of proof to Tyler. The Solicitor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). This determination requires the Court to look to "the nature of the comments, the nature and quantum of the evidence before the jury, the arguments of opposing counsel, the judge's charge, and whether the errors were isolated or repeated." Bennett v. Angelone, 92 F.3d 1336, 1345–46 (4th Cir. 1996) (internal quotation marks omitted).

The State had last argument. These comments by the solicitor were the last things the jury heard from the attorneys. The solicitor did not just make an isolated remark, but deliberately violated established rules regarding closing arguments. Trial counsel could not have had any

reasonable strategy for failing to object to these arguments and giving the trial judge a chance to cure the error. The Court should grant certiorari and cure the prejudice from the solicitor's improper arguments by granting Tyler a new trial.

3.

Petitioner's Sixth Amendment rights were violated by trial counsel's failure to impeach the State's key witness, Donna Hutto, with prior statements in which she lied to the police.

As shown in the discussion of facts in Issue 1, Lewis's wife, Hutto, was the State's key witness at trial. She testified that she heard Tyler and Lewis arguing and that Tyler ordered Lewis in the house. App. 171, l. 20 – 172, l. 20. App. 173, ll. 7 – 10. App. 177, ll. 4 – 7. During his opening statement, trial counsel promised the jury that they would hear "statements filled with inconsistencies" from the State's witnesses. App. 57, ll. 1 – 5. Yet during his cross-examination of Hutto, trial counsel failed to impeach. Her statements were not entered into evidence. During deliberations, the jurors specifically asked for the written statements of Hutto, which, of course, could not be given to them since they were not part of the evidence. App. 384, ll. 13 – 18.

In her statements, Hutto lied about what happened after she left the house. App. 751-58. Hutto originally told the police that she went to her brother's house, her brother called the police, and then they went together back to Lewis's house. App. 752. In her second statement, she again said she, her brother, and another woman went back to Lewis's house together. App. 754. In her final statement, she admitted that when she first got to her brother's house, her brother got a gun and drove by himself to Lewis's house. App. 757. Hutto stayed at her brother's house. App. 757. She and the woman waited, but then drove together to Lewis's house. App. 757-58. Thirty minutes passed and they did not see her brother, so they went back to her brother's house.

App. 758. Her brother was home and he then called 911. App. 758. Hutto gave these false statements because her brother was not allowed to own a firearm. App. 584, ll. 9 – 19.

The PCR court held that trial counsel had a valid strategic reason for failing to impeach Hutto with these statements. App. 850. It credited trial counsel's testimony that he did not want to "beat up" on Hutto and that the statements did not have a "high impeachment value." App. 850. These findings were error.

The failure to impeach a witness with prior inconsistent statements is deficient performance that prejudices a defendant. Driscoll v. Delo, 71 F.3d 701, 710-11 (8th Cir. 1995); Berryman v. Morton, 100 F.3d 1089, 1097 (trial counsel failed to impeach with inconsistent eyewitness identifications). In Driscoll, defense counsel's failure to impeach an eyewitness with prior inconsistent statements was held prejudicial. Id. The defendant was sentenced to death for stabbing a prison guard. Trial counsel failed to impeach a prosecution witness who claimed at trial that the defendant confessed to the murder with a prior statement omitting the confession. Id. at 709-12. The centrality of the witness's testimony was an important factor in the court's consideration. Id. Here, Hutto was the central witness in the trial and failure to impeach her testimony was prejudicial. See also Peebles v. State, 958 S.W.2d 533, 536-37 (Ark. 1998) (holding that defendant was prejudiced by trial counsel's failure to impeach a witness with a prior denial that a crime occurred); Delarosa v. State, 24 So.3d 741, 741-42 (Fla. Ct. App. 2009) (remanding case for prejudice inquiry because of trial counsel's failure to impeach police officer with prior statement claiming he was attacked by three Mexicans when same officer testified at trial he was only attacked by defendant).

The PCR court erred in finding the strategy valid. Trial counsel's cross-examination reveals that his post-hoc rationale is not accurate. During his cross-examination of Hutto, he

went over the timeline of events concerning calling the police and confirmed her testimony. App. 188, ll. 6 – 25. Had the matter been "trivial," these questions would have had no purpose. Furthermore, the importance of the impeachment would not be to show what Hutto and her brother did, but exposing that Hutto was willing to lie to the police. Hutto's credibility concerning what she claimed about hearing Tyler and Lewis argue was essential to the State's case. Any attack on her credibility could have provided reasonable doubt. The Court should grant certiorari and reverse because of the prejudicial effect of trial counsel's ineffective assistance.

4.

Did trial counsel render ineffective assistance in failing to object when the solicitor pitted petitioner against his co-defendant, who did not even testify at trial and whose statement was admitted in violation of the Confrontation Clause?

A police officer was allowed to testify regarding an incriminating statement made by Tyler's co-defendant, Harsey, who did not testify at trial. App. 211, l. 14 – 213, l. 25. The officer testified that Harsey told him that he parked his car on the road hidden from Lewis's home. App. 213, ll. 21 – 25. This statement incriminated Tyler because it showed premeditation. Trial counsel objected to this statement on both hearsay and Confrontation Clause grounds, but the trial judge admitted the evidence. App. 211, l. 14 – 213, l. 25. The Court of Appeals found the admission of this statement violated the Confrontation Clause, but found the error harmless. State v. Tyler, No. 2005-UP-274 (Ct. App. April 19, 2005).

During Tyler's testimony, the solicitor pitted Tyler against this statement by Harsey. The following exchange occurred on cross-examination:

> Q. And you're telling this jury that y'all just pulled up in the driveway like just plan business?

A. I don't—

Q. Why would Travis say he parked his car way up at the road so nobody could see? Why would Travis say that and hurt himself?

A. I don't know.

Q. That wouldn't make sense, would it?

A. I don't know.

....

Q. Travis just says that about himself just to make himself look worse. I guess that is what you are telling this jury?

A. I don't know what Travis said. Where is Travis?

Q. Travis is going to be tried in two months, Mr. Tyler. You know he is charged with murder just like you are.

A. I haven't hurt nobody.

App. 302, l. 25 – 304, l. 6. Trial counsel failed to object.

Citing Burgess v. State, 329 S.C. 88, 495 S.E.2d 445 (1998), the PCR court recognized that the law does not allow a party to "cross-examine in a way that requires a witness to attack another witness's credibility." App. 851. Inexplicably, however, the PCR court ruled that trial counsel had a valid strategic reason for not objecting to this testimony because Harsey was not a witness at the trial. App. 851. Not only did this questioning violate the rule against pitting, it was a particularly egregious form of pitting because it violated the Confrontation Clause.

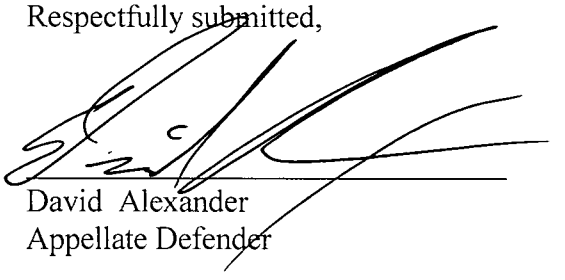
As recognized by the Court of Appeals in Tyler's case, Harsey's statement clearly was testimonial evidence and its admission violated the Confrontation Clause. Crawford v. Washington, 541 U.S. 36 (2004). Trial counsel previously objected to Harsey's statement based on the Confrontation Clause, so he could have had no strategic reason to object to this questioning.

Pitting witnesses is ground for reversible error "if the accused is unfairly prejudiced thereby." State v. Sapps, 295 S.C. 484, 486, 369 S.E.2d 145, 145-46 (1988); State v. Brown, 297 S.C. 27, 28-29, 374 S.E.2d 669, 670 (1988). Unfair prejudice results if the defendant's credibilty is a crucial issue. Brown at 29, 374 S.E.2d at 670. Certainly Tyler's credibility was a crucial issue. It is also hard to imagine prejudice from pitting witnesses as being more unfair than this case, in which Tyler did not even have the opportunity to cross-examine the witness against which he was pitted. The pitting against Harsey's statement magnified the Confrontation Clause error. The PCR court committed an error of law and logic in finding that Harsey's absence cured both a pitting error and a Confrontation Clause error. The Court should grant certiorari and reverse.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari, allow further briefing, and ultimately reverse petitioner's convictions.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of July, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County
William Jeffrey Young, Circuit Court Judge

RANDALL S. TYLER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on John Walt Whitmire, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Randall S. Tyler #294029, Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 28th day of July, 2014.

Susan B Hackett for

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 28th day
of July, 2014.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.