

STATE OF SOUTH CAROLINA  
In The Supreme Court

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CERTIORARI TO LEXINGTON COUNTY  
Court of Common Pleas

The Honorable William Jeffrey Young, Circuit Court Judge

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Appellate Case No. 2013-00795

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**RECEIVED**

NOV 12 2014

**S.C. Supreme Court**

Randall S. Tyler, ..... Petitioner,

v.

State of South Carolina, ..... Respondent.

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**RETURN TO PETITION FOR  
WRIT OF CERTIORARI**

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## STATEMENT OF THE CASE

Respondent adopts Petitioner's Statement of the Case.

## STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

## ARGUMENT

### I.

**Certiorari is most certainly not warranted the review whether the PCR Judge erred in finding Petitioner's contention that counsel was ineffective for failing experiment and make novel argument of law on a sound jury instruction was without merit.**

At the PCR hearing, Petitioner argued that his 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. Petitioner questioned the propriety of the following instruction:

"Murder is the killing of any person with malice aforethought either express or implied."

"...[M]alice 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 the implication does not require you as the jury to infer malice but only permits you to do so.”

App. p. 374, l. 20 – p. 375, l. 6.

Counsel disagreed with Petitioner’s assessment. In denying Petitioner’s application for post-conviction relief, the PCR Judge found counsel “did not object to the court’s malice instruction because there was nothing objectionable about the instruction.” App.p. 848. The PCR Judge agreed with counsel and found that “the trial court’s instruction on malice contained the correct definition and adequately cover[ed] the law.” App.p.849.

### **Effective Assistance of Counsel**

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

### **Discussion**

The PCR Judge did not err in correctly noting that the instruction in question was sound at the time of trial. “In reviewing jury charges for error, we must consider the

court's jury charge as a whole in light of the evidence and issues presented at trial." [On appeal, a reviewing court considers a "jury charge as a whole in light of the evidence and issues presented at trial."'] State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct.App.2003). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." Id. at 318, 577 S.E.2d at 464. A jury charge which is substantially correct and covers the law does not require reversal. State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996). "[T]he trial court is required to charge only the current and correct law of South Carolina." Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004). "The law to be charged must be determined from the evidence presented at trial." State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). "The substance of the law is what must be charged to the jury, not any particular verbiage." Adkins, 353 S.C. at 318-19, 577 S.E.2d at 464. If a jury charge given at trial is a correct statement of law, trial counsel is not ineffective for failing to object. Toomer v. State, 337 S.C. 434, 529 S.E.2d 719 (2000).

The PCR Judge correctly found that the trial court's instruction on malice contained the correct definition and adequately covered the law. The PCR forum is not a direct appeal, and Strickland provides an inappropriate avenue for arguing in favor of normative changes to substantive law. See Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993).

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he

was prejudiced by counsel's performance.

## II.

**Certiorari is not warranted the review whether the PCR Judge erred in finding Petitioner failed to prove counsel was ineffective for failing to object to purportedly improper comments made the solicitor during the State's closing argument.**

### A.

Petitioner alleged counsel was ineffective for failing to object the solicitor's comment that were "putting themselves on the line against those domestic enemies" constituted a 'Golden Rule' violation. Counsel testified that he made a "strategic decision" in determining what the impact would have been had he objected. App.p.708, ln.25—p. 709, ln.4. Counsel testified that while he normally does not "shy away from objecting to a closing argument," and that he does it "all the time," he had to consider how it would affect the credibility of the defense, or whether it would "alienate the jury..." App.p.709, ln.4-8. Counsel stated that he had "gotten a conviction reversed before on improper argument," so he is "normally attuned to that." App.p.706.

In denying and dismissing the allegation, the PCR Judge rejected Petitioner's contention that comments that even if improper, Petitioner the comments "did not so infect the trial with unfairness as to make the resulting conviction a denial of due process." App.p.847.

### Discussion

The PCR Judge did not err where the comment in question did not constitute a golden rule violation. A Golden Rule argument is an argument "that suggests to the jurors

that they put themselves in the shoes of one of the parties.” State v. Harris, 382 S.C. 107, 120, 674 S.E.2d 532, 539 (Ct. App. 2009). A solicitor’s statements constitute a prohibited form of argument sometimes described as a “golden rule argument,” in which jurors are urged to place themselves in the position of a party, a victim, or a victim’s family member and decide the case from that perspective. Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). Petitioner stretches to even infer that the comment requested the jurors to place themselves in the shoes of the victim. Therefore, PCR Judge’s finding here was sound.

B.

Petitioner alleged counsel was ineffective for failing to object to comments made by the solicitor during the State’s closing argument that purportedly constituted an impermissible burden shift. Petitioner takes issue with the solicitor comment they would have to believe every word that came out of Petitioner’s mouth from that witness stand to believe he is not guilty.

Counsel testified that he made a “strategic decision” in determining what the impact would have been had he objected. App.p.708, ln.25—p.709, ln. 4. Counsel testified that while he normally does not “shy away from objecting to a closing argument,” and that he does it “all the time,” he had to consider how it would affect the credibility of the defense, or whether it would “alienate the jury....” App.p.709, ln.4-8.

In denying and dismissing the allegation, the PCR Judge found that the Trial Judge’s instruction cured any figurative harm here.

**Discussion**

The PCR Judge did not err here. First, Petitioner took the stand and opened himself to comments from the solicitor concerning his credibility, and the import of his testimony in the context of the evidence presented at trial. Second, the Trial Judge offered a clear and unmistakable instruction on point.

A person charged with committing a criminal offense in South Carolina is never required to prove his innocence. The Defendant has no burden of proof. It is a vital and important rule of law in our State that the Defendant in a criminal trial, no matter how serious the offense, must always be presumed innocent until his guilt has been proven beyond a reasonable doubt.

“The presumption of innocence remains with him at all times, from the time of arraignment, all the way through trial and unless and until a jury reaches a verdict of guilty beyond a reasonable doubt.

It is the solemn duty of you as the jury if you are not clearly convinced of his guilty beyond every reasonable doubt to the contrary to find the Defendant not guilty.

Therefore, the PCR Judge correctly denied and dismissed the deficient allegation.

C.

Last in Petitioner’s ‘grab bag’ of allegations related to purported improper comments made by the solicitor in closing, Petitioner alleged counsel was ineffective for failing to the solicitor’s vouching. Petitioner asserted that the solicitor 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.

Counsel testified during that he did not object to these comments because Petitioner’s defense was to put his absent co-defendant on trial; to establish the gun belonged to the co-defendant, and to rely on the fact that the state would have to explain why that codefendant was not present at the trial. Counsel stated that, after blasting the

State for not calling the codefendant as a witness, he did not think it would have gone very far with the jury for him to have objected while the State was trying to explain why it did not call him. App.p.708, ln.2-8.

In denying the allegation, the PCR Judge articulated a valid trial to support his justification for not objecting here.

### **Discussion**

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 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. Counsel provided a compelling reason for not objecting that was central to his defense theory of the case. Therefore, further discussion on the matter is not necessary.

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by counsel's performance.

### **III.**

**Certiorari is not warranted the review whether the PCR Judge erred in finding Petitioner failed to prove counsel was ineffective for making a deliberate decision to not utilize Donna Hutto's prior statements to police in his cross-examination based on his assessment of the import of the witnesses testimony to the State's case.**

Petitioner alleged counsel was ineffective for failing to impeach a State's witness

with prior statements where that showed she lied to police.

Counsel expressed concern with the amount of “incriminating stuff” in Donna Hutto’s statement. App.p.711, ln.14-15. He said that Ms. Hutto was a very compelling witness, and was “clear in her identification of [Petitioner’s] voice and her general description of him.” App.p.711, ln.20-22. Counsel opined that where the issue was “the timeline between when they went back and when they called 9-1-1,” he did not think that had “any material impact on Petitioner’s defense.” App.p.711, l. 22-25. Counsel was also afraid that by putting in her other statements, they would bolster her as a witness. The PCR Judge again found the matter was handled within the vast discretion trial attorneys decision on how best to conduct his cross-examination.

#### **Discussion**

Counsel conducted his cross-examination consistently with the trial strategy at issue. Counsel went over the timeline of events concerning calling the police during cross-examination of the witness. Furthermore, counsel correctly assessed that the impeachment value of his unpursued action now being revisited upon post-hoc review lacked meaningful potency. Accordingly, Petitioner failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by counsel’s performance.

#### **IV.**

**Certiorari is not warranted the review whether the PCR Judge erred in finding Petitioner failed to prove counsel was ineffective for failing to object to the solicitor’s purported improper pitting of Petitioner against a phantom witness.**

The PCR Judge correctly found that Petitioner's allegation was facially defective. Pitting is only possible where there are two witnesses. Because the testimony that was allegedly being "pitted" here did not come from another "witness" Pitting witnesses is ground for reversible error "if the accused is unfairly prejudiced thereby." State v. Sapps, 295 S.C. 484 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 credibility is a crucial issue. Brown at 29, 374 S.E.2d at 670. Petitioner utterly cannot prove prejudice here a credibility 'swearing match' simply did not absolve him of criminal liability as an accomplice.

As Petitioner failed to meet this burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

### CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issues discussed above.

Respectfully submitted,

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By:   
ATTORNEYS FOR RESPONDENT

Nov 12<sup>th</sup>, 2014

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Hon. William Jeffrey Young, Circuit Court Judge  
Appellate Case No. 2013-000795

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RANDALL S. TYLER,

PETITIONER,

v.

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STATE OF SOUTH CAROLINA,

RESPONDENT **S.C. Supreme Court**

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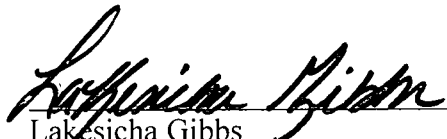
**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

**Adrienne L. Turner, Esquire**  
**Boykin & Davis, LLC**  
**Turner Law, LLC**  
**Post Office Box 210638**  
**Columbia, SC 29221**

This 12th day of November, 2014

  
Lakesicha Gibbs  
LEGAL ASSISTANT for the Respondent



ALAN WILSON  
ATTORNEY GENERAL

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NOV 12 2014

S.C. Supreme Court

November 12, 2014

The Honorable Daniel E. Shearouse  
Clerk of Court, South Carolina Supreme Court  
Post Office Box 11330  
Columbia SC 29211

**RE: Randall S. Tyler v. State of South Carolina**  
**Appellate Case No: 2013-000795**

Dear Mr. Shearouse:

Enclosed for filing is the original Return to Petition for Writ of Certiorari and six copies in the above-referenced case. By copy of this letter we are serving the opposing counsel today.

Sincerely,

J. Walt Whitmire  
Assistant Attorney General  
SC Bar No: 100793

JWW/lg  
Enclosures

cc: Adrienne L. Turner, Esquire