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

BRIEF OF PETITIONER

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2.

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3.

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 OF THE CASE

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. On February 16, 2016, this Court granted certiorari on three of the four issues raised by petitioner. This brief of petitioner follows.

STATEMENT OF FACTS

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 Lewis's 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 talked about their progress. 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?" App. 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 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, threatened Tyler's wife, and threatened 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 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 Lewis 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.

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

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. 214, ll. 5 – 17. Harsey's mother, brother, and wife were all charged in conjunction with Lewis's death. App. 214, ll. 5 – 17. Harsey admitted owning the same caliber pistol as the one that was used to shoot Lewis. App. 215, ll. 6 – 10. The jury deliberated nearly six hours and sent multiple questions before returning its verdict. App. 383, l. 21 – 388, l. 20.

ARGUMENT

1.

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, working against not just Tyler, but against all criminals. 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 (emphasis added). 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.

Asking the jurors to equate themselves to combatants in a war against criminals has long been held to violate a defendant's right to a fair trial. Viereck v. United States, 318 U.S. 236, 247-48 (1943). In Viereck, during World War II, a prosecutor told the jury that the

> American people **are relying upon you** ladies and gentlemen for their protection against this sort of crime, just as much as they are relying upon the protection of the Men who man the guns in Bataan Peninsula, and everywhere else. They are **relying upon you ladies and gentlemen for their protection.** We are at war. You have a duty to perform here.

Viereck, 318 U.S. at 247 n.3 (emphasis added). The Court found these remarks "highly prejudicial" and reversed. Id. at 248. The idea that the nation is "relying" on the jury for "protection" is similar to the solicitor in this case telling the jury that they "are putting themselves on the line against those domestic enemies." App. 352, ll. 18 – 23.

In State v. Echevarria, 860 P.2d 420, 421-22 (Wash. Ct. App. 1993), the court reversed a conviction because the prosecutor compared the crime at issue with the 1991 Persian Gulf War. In a drug case, the prosecutor referred to the "war on drugs" and told the jury, "This country just had a good example of how to fight a war, how a war can be fought successfully. This country has also seen situations where we haven't been as successful. The one thing we have learned is the way to successfully fight a war is **to know who your enemy is**, to have a strategy and a direct approach." Id. at 421 (emphasis added). The court reversed, calling the "prosecutor's remarks egregious misconduct." Id. at 422.

The Echevarria court held that the prosecutor's comments comparing neighborhoods to battlefields and references to the Gulf War "were a deliberate appeal to the jury's passion and prejudice." Id. The solicitor's comments in this case about the jury putting themselves on the line against "those domestic enemies" is analytically indistinguishable and requires reversal. Just as in Viereck, it invited the jury to reach a verdict not on the basis of the evidence presented, but as part of a larger war on crime. See also Arrieta-Agressot v. United States, 3 F.3d 525, 527 (3rd Cir. 1993) (reversing because of prosecutor's closing arguments regarding the war on drugs and calling the defendants "soldiers in the army of evil, in the army which only purpose [sic] is to

poison, to disrupt, to corrupt."); United States v. Johnson, 968 F.2d 768, 770 (8th Cir. 1992) (finding that prosecutor telling the jury that they had "to 'stand as a bulwark against the continuation of what Mr. Johnson is doing on the street, putting poison on the streets,'" constituted reversible error). A solicitor may not enlist the jury on the side of the state in a general war on crime.

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).

In Vaughn, the solicitor informed the jury she did not present additional witnesses because the rules of evidence did not permit the presentation of duplicative testimony. Vaughn at 168, 607 S.E.2d at 74. This Court reversed, in part, because of trial counsel's failure to object to the solicitor's misleading argument. Id. Just as in Vaughn, the solicitor in Tyler's case introduced arbitrary and speculative matter outside of the jury's province with his improper argument about unspecified "rules" and a "shell game."

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. The State's closing contained three egregiously improper arguments which, when taken as a whole, satisfies the Donnelly standard. 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. This Court should reverse and grant Tyler a new trial.

2.

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.

Lewis's girlfriend, 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 Hutto. Her statements were not entered into evidence. During deliberations, the jurors

specifically asked for the written statements of Hutto, which, of course, they could not see because they were not part of the evidence. App. 384, ll. 13 – 18.

Despite trial counsel's failure to deliver what he promised in his opening statement during the cross-examination of Hutto, the PCR court found the inexplicable refusal to impeach her was a matter of trial strategy. 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, especially when it conflicts with what trial counsel stated was his trial strategy during his opening statement.

Had the jury heard competent impeachment by trial counsel, it would have learned that Hutto lied to police 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 solicitor asked Hutto on direct about talking to the police:

Q. When you came back, did you talk to the police?

A. Yes, sir.

Q. Did you tell them what you saw?

A. Yes, sir.

Q. Do you recall talking to Detective Frier, who is right here (indicating), at your house in the middle of the night that night?

A. Yes, sir.

App. 180, ll. 14 – 21. This line of questioning by the prosecutor left the jury with the false impression that Hutto was honest and forthcoming with the police. Inconsistent with what the PCR court credited as trial counsel's strategy not to "beat up" on Hutto, trial counsel did cross-examine Hutto on the points she lied about, but inexplicably failed to impeach her with her prior statements:

Q. Now, at some point did you or your brother Johnny call 911?

A. Yes, sir.

Q. Was it you or Johnny?

A. Johnny did.

Q. You didn't call 911 from the house?

A. No.

Q. Did you have a cell phone?

A. No.

Q. And you went to your brother's house and y'all came back. You discovered that Corky was dead.

A. Yes, sir.

Q. And that is when you called 911, when Johnny called 911?

A. That was before we left the house to go back out there.

Q. From his house?

A. Yeah.

App. 188, ll. 8 – 25 (emphasis added). Trial counsel glossed over Hutto's false statements and failed to confront her with what she originally told the police. The importance of the impeachment was not Hutto's actions, but exposing that Hutto was willing to lie to the police. Hutto's claims about hearing Tyler and Lewis argue and that no car was parked in the driveway were essential to the State's case. The jury needed to believe Hutto instead of Tyler to convict. The PCR court erred in crediting trial counsel with any reasonable strategy on this issue.

The failure to impeach a witness with prior inconsistent statements is deficient performance that prejudices a defendant. Dixon v. Snyder, 266 F.3d 693, 704-05 (7th Cir. 2001) (finding defendant was prejudiced by trial counsel's failure to impeach a witness with prior inconsistent statements); Driscoll v. Delo, 71 F.3d 701, 710-11 (8th Cir. 1995); Berryman v. Morton, 100 F.3d 1089, 1097 (3rd Cir. 1996) (trial counsel failed to impeach with inconsistent eyewitness identifications); State v. Fritz, 519 A.2d 336, 348-49 (N.J. 1987) (reversing conviction because attorney failed to impeach police officer's testimony with prior inconsistent testimony at a probably cause hearing).

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).

Any attack on Hutto's credibility could have provided reasonable doubt. "It is no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt." People v. Savvides, 154 N.Y.S. 885, 887 (1956). In reversing because of a prosecutor's failure to correct false testimony, the Savvides court stated, "A lie is a lie, no matter what its subject . . . ." Id. "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend. Napue v. Illinois, 360 U.S. 264, 269 (1959).

Lying to the police is a crime. S.C. Code Ann. § 16-9-10(A)(2); see also State v. Stanley, 365 S.C. 24, 35, 615 S.E.2d 455, 460 (Ct. App. 2005) ("Thus, if the information given to Officer Little was false, Richard was guilty of perjury."). App. 751-58 (Hutto's statements). Had the jury known that Hutto lied to police about what happened that night, it would have cast great doubt on her credibility and the outcome of the trial would have been different.

3.

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?

"It [is] black letter law that a prosecutor may not ask a defendant to comment on the truthfulness of another witness." United States v. Harrison, 585 F.3d 1155, 1158 (9th Cir. 2009);

see also United States v. Richter, 826 F.2d 206, 208-09 (2nd Cir. 1987) (reversing conviction after prosecutor capitalized on pitting error in rebuttal and closing argument). In petitioner's case, the solicitor asked Tyler to comment on the veracity of a witness who did not testify, exacerbating the trial court's Confrontation Clause error.

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.

The PCR court erred in crediting trial counsel with a reasonable strategy. 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 questioning because Harsey was not a witness at the trial. App. 851. Trial counsel objected to Harsey's statement, but did not object to the improper pitting. These actions are inconsistent and are evidence of deficient performance, not strategic decisions.

Actions by counsel during the trial that are inconsistent with a professed strategy during collateral proceedings show that such strategic reasons are merely *post-hoc* inventions. Wiggins v. Smith, 539 U.S. 510, 526-29 (2003). In Wiggins, counsel were credited with strategic reasons for abandoning an investigation into the defendant's background. Id. The supposed strategy credited by the state court was to show that the defendant "was not directly responsible for the murder" instead of presenting a complete mitigation case. Id. at 517-18. Examining the trial record, the Supreme Court noted that trial counsel's actions were inconsistent with this invented strategy. Id. at 526-27. The Court stated, "What is more, during the sentencing proceeding itself, counsel did not focus exclusively on Wiggins' direct responsibility for the murder," and also noted that trial counsel "put on a halfhearted mitigation case." Id. at 526. "When viewed in this light, the 'strategic

decision' the state courts and respondents all invoke to justify counsel's limited pursuit of mitigating evidence resembles more a *post hoc* rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing." Id. at 526-27.

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 not to object to the solicitor's improper cross-examination. Not only did this questioning violate the rule against pitting, it was a particularly egregious form of pitting because it violated the Confrontation Clause. The PCR court's conclusion is not supported by counsel's actions during the trial.

Furthermore, the PCR court credited trial counsel with a strategy based on a mistake of law. App. 851. The PCR court noted trial counsel's testimony at PCR that there was no proper objection to be made because Harsey was not a witness at trial. App. 851. The PCR court held, "The record reflects that Travis Harsey was not a witness at Applicant's trial. This Court accepts counsel's reasoning and finds that there has been no showing by the Applicant that the outcome of his trial would have been different if counsel had made such an objection." App. 851-52. This conclusion is a mistake of law. It is hard to imagine a more prejudicial example of pitting than interrogating the defendant about a co-defendant who did not testify and who he did not have the opportunity to cross-examine.

"No matter how a question is worded, anytime a solicitor asks a defendant to comment on the truthfulness or explain the testimony of an adverse witness, the defendant is in effect being pitted against the adverse witness. This kind of argumentative questioning is improper." Burgess at 91, 495 S.E.2d at 447. 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). In Sapps, just as in this case, the defendant testified and the solicitor pitted him against his co-defendant. Id. at 485, 369 S.E.2d at 485. However, unlike this case, the co-defendant testified and the defense had the opportunity to cross-examine him. Id. The Supreme Court unanimously reversed, holding, "Because credibility was the crucial issue in this case, we hold appellant was unfairly prejudiced by the solicitor's cross-examination." Id. at486, 369 S.E.2d at 146. The prejudice in petitioner's case exceeds that in Sapps because it compounded the Confrontation Clause error. Tyler's credibility was pitted against a witness he could not cross-examine.

In State v. Brown, 297 S.C. 27, 28-29, 374 S.E.2d 669, 670 (1988), the improper questioning which resulted in reversal closely resembles the solicitor's questions in this case. In Brown, the solicitor asked the defendant whether a police officer "made up the story about him." Id. at 28, 374 S.E.2d at 670. The solicitor "compounded her error by challenging Brown that his 'made up' story was 'pretty convenient,' which pitted his testimony another time against that of the officers." Id. at 29, 374 S.E.2d at 670. The Court reversed, finding unfair prejudice because the defendant's "credibility was a crucial issue." Id. Similarly, the solicitor in this case challenged Tyler to explain why Harsey would make a statement "just to make himself look worse." App. 302, l. 25 – 304, l. 6.

Unfair prejudice results if the defendant's credibility is a crucial issue. Brown at 29, 374 S.E.2d at 670. Certainly Tyler's credibility was a crucial issue. Not only was Tyler's credibility pitted against Harsey's, but it was done so through the testimony of a police officer, which magnifies the prejudice. Richter, 826 F.2d at 208-09. Harsey's statement concerning the position of the car was entered through Detective Scottie Frier of the Lexington County Sheriff's Department. App. 211, l. 11 – 213, l. 25. The solicitor asked Detective Frier:

Q. And did you make contact with Travis Harsey?

A. Yes, Travis was subsequently arrested for this incident.

Q. As a result of that, did you have a chance to talk with him also?

A. He was interviewed at length, yes sir.

Q. Did Travis indicate to you where he parked his car in relation—

App. 211, ll. 14 – 21. Defense counsel objected, citing the Confrontation Clause. App. 211, ll. 22 – 23. The trial judge overruled the objection outside of the presence of the jury and the solicitor resumed the line of questioning when the jury returned:

Q. Detective Frier.

A. Yes, sir.

Q. The question I had for you: Did Travis Harsey tell you where he parked his Cadillac car in relation to Corky Lewis' house?

A. Yes, he indicated he parked the car back up towards the road hidden from the home.

Q. Back up in the wood line up there that we saw in the photographs?

A. It would have been on the other side of the wood line towards the main highway, which was 321.

App. 213, l. 6 – 214, l. 4. The pitting by the solicitor improperly placed Tyler's credibility against both Harsey's and a police officer's. See State v. Hariott, 210 S.C. 290, 298-300, 42 S.E.2d 385, 388-89 (1947) (reversing after solicitor pitted the defendants against a police officer and another witness).

In United States v. Hall, 989 F.2d 711, 713 (4th Cir. 1993), the Fourth Circuit reversed "[b]ecause [the defendant] was improperly cross-examined." The error in Hall is closely analogous to Tyler's case because the prosecutor pitted the defendant against an inadmissible hearsay

statement made to the government. Hall, 989 F.2d at 713, 715-17. The defendant's wife gave statements to the government implicating her husband in cocaine use. Id. at 713. She then asserted her spousal privilege and the government elected not to call her at trial. Id. During his cross-examination of the defendant, the prosecutor several times questioned him about his wife's inculpatory statement. Id. at 715.

The Fourth Circuit found there "were numerous deficiencies with this cross-examination." Id. at 716. The statement "was inadmissible as hearsay thus violating Fed. R. Evid. 802, and perhaps, the Confrontation Clause as well, since Hall had no opportunity for cross-examination." Id. at 716. In reversing, the Fourth Circuit noted in a parenthetical citation that such cross-examination allows the government to receive "'the benefit of having, in effect, an additional witness against [the defendant] while simultaneously insulating [the witness] from cross-examination.'" Id. *quoting* United States v. Check, 582 F.2d 669, 683 (2nd Cir. 1978).

The errors in Tyler's case also bear a close similarity to a case reversed by the Ninth Circuit because of multiple instances of improper conduct by a prosecutor. United States v. Sanchez, 176 F.3d 1214 (9th Cir. 1999). Sanchez contains two pitting errors and a closing argument error. In Sanchez, the prosecutor first pitted the defendant against a prosecution witness. Id. at 1219. Reviewing under the plain error standard, the court found improper the prosecutor's cross-examination, which asked the defendant to comment on another witness's credibility. Id. at 1219-20.

The second pitting error in Sanchez closely resembles what occurred in this case, however the court treated it as a basic hearsay question. Id. at 1221-22. The defendant's wife asserted the spousal privilege and did not testify. Id. The government asked the defendant whether his wife was mistaken in a statement she gave to law enforcement about a key fact. Id. Noting that the

prosecutor "was fully aware that he could not call [the defendant's wife] as a witness," the court found the prosecutor committed misconduct. Id. Pitting the defendant in Sanchez against an unavailable witness who asserted a privilege is exactly what happened in Tyler's case. Harsey was unavailable because of his Fifth Amendment privilege and pitting Tyler against an unavailable witness prejudiced his ability to present a defense.

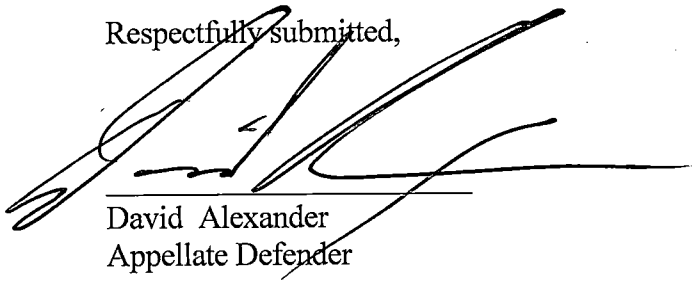
The questioning regarding where the car was parked was of central importance to determining the outcome of the case. Tyler testified that he and Harsey pulled into Lewis's driveway. App. 265, ll. 9 – 10. Tyler and Lewis were friends and Tyler would have had no reason not to park in the driveway. Hutto claimed she saw no vehicles in the driveway when she left for her brother's house. App. 180, ll. 3 – 13. The case largely hinged on whether the jury believed Tyler or Hutto. Along with the Confrontation Clause error, the improper pitting by the solicitor allowed the State to add a third witness—Harsey—to its evidence and made the case against Tyler much stronger by showing that Tyler knew Harsey planned to rob Lewis because of where he parked.

It is hard to imagine an instance of pitting witnesses more prejudicial than this case, in which Tyler did not even have the opportunity to cross-examine the witness against whom he was pitted. Pitting Tyler 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 trial counsel's failure to object to a pitting error of constitutional dimension. This Court should reverse.

CONCLUSION

For the foregoing reasons, the judgment of the PCR court should be reversed and petitioner should be granted a new trial.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER.

This 17th day of March, 2016

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

CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner, in this case has been served on Patrick Schmeckpeper, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Randall S. Tyler, #294029, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 17th day of March, 2016.

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 17th day
of March, 2016.

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