

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Lexington County

Honorable William Jeffrey Young, Circuit Court Judge

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RANDALL S. TYLER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000795

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REPLY BRIEF OF PETITIONER

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## ARGUMENT IN REPLY

### Issue 1- The Solicitor's Improper Closing Argument

In its prejudice argument, the State asks this Court to defer to the Court of Appeals' ruling in petitioner's direct appeal that there was overwhelming evidence of his guilt. Br. Resp. at 11-12. This Court is not bound by any such finding. In the case most analogous to petitioner's, this Court reversed despite its own finding of "overwhelming evidence" of the PCR applicant's guilt. Vasquez v. State, 388 S.C. 447, 463-64, 698 S.E.2d 561, 569 (2010). In Vasquez, the solicitor argued the defendant was a "domestic terrorist." Id. at 457, 698 S.E.2d at 565-66. In petitioner's case, after alluding to Winston Churchill's oft-quoted phrase about jury service, the solicitor told the jury that they were putting themselves on the line against these "domestic enemies." App. 352, ll. 2 – 23.

This Court reversed Vasquez' conviction because of the solicitor's improper argument. Id. at 463-65, 698 S.E.2d at 569-70. In reversing, this Court stated, "Admittedly, the facts of this case are horrific and there is overwhelming evidence of Petitioner's guilt." Id. If this Court may reverse a conviction in PCR based on improper argument despite **its own finding** of overwhelming evidence of guilt, then it certainly is not required to give **any deference to the Court of Appeals' finding** in an unpublished opinion. See also McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008) (reversing a conviction in PCR despite a harmless error finding during direct appeal), State v. McKnight, 352 S.C. 635, 656-57, 576 S.E.2d 168, 179 (2003).

Sound policy and logic also dictate that a finding of overwhelming evidence of guilt in a direct appeal cannot bind a court in a PCR. By definition, a PCR is about what was **not** presented at trial. Sometimes new evidence will be discovered and presented at a PCR. More often, petitioners

will present evidence that trial counsel did not use. The reviewing court in a PCR must consider all of the evidence—from trial and the PCR hearing—in forming a conclusion. Simply relying on the appellate record from the trial would defeat the entire purpose of PCR.

After considering the additional evidence produced at the PCR hearing, the evidence of petitioner's guilt is not overwhelming. The State's star witness, Donna Hutto, was shown at PCR to have lied to police in her initial statements. App. 584, ll. 9 – 19. Petitioner testified in his own defense and his co-defendant's family attempted to melt his gun. App. 214, ll. 5 – 17. The jury deliberated nearly six hours and sent multiple questions before returning its verdict. App. 383, l. 21 – 388, l. 20. And, while this Court did not grant certiorari on this issue, petitioner could have been convicted based solely on his presence at a drug deal because the jury was charged a version of the felony murder rule that allowed them to infer malice from an "unlawful act." App. 374, l. 7 – 375, l. 6. See McAninch, Fairey, and Coggiola, *The Criminal Law of South Carolina* at 108 (6<sup>th</sup> ed. 2013) (describing this charge as "patently erroneous.").

This Court recently reiterated that trial counsel must object to a solicitor's inflammatory appeal to jurors' emotions. Tappiener v. State, 416 S.C. 239, 785 S.E.2d 471 (2016). Tappiener is a child sexual abuse case in which the defendant was accused of raping a neighbor's child who was staying at her house. Id. at 243-44, 785 S.E.2d at 473. The solicitor told the jury that when they deliberated, they "should consider 'would you let [Tappeiner] babysit your kids? Your grand kids [sic]? Nieces and nephews? I think the answer to that is why you should find her guilty.'" Id. at 247, 785 S.E.2d at 475. The Court held that these remarks "improperly appealed to the jurors' emotions, rather than the evidence in the record" and reversed because of trial counsel's failure to object during the State's closing. Id. at 252, 785 S.E.2d at 478. Just like in Tappiener, the

solicitor's argument in petitioner's case that they were putting themselves "on the line" against "thugs" like petitioner inflamed the jury and was an improper appeal to emotion and fear. The State's improper and inflammatory closing argument denied petitioner due process. Trial counsel's failure to object denied petitioner his right to the effective assistance of counsel. This Court should reverse.

*Issue 2 – Failure to Impeach Donna Hutto With Inconsistent Statements*

It is undisputed that the State's star witness, Donna Hutto, lied to the police in her original statements. App. 751-58. Not impeaching Hutto with these statements affected the jury's credibility determinations in two ways. First, it affected their assessment of Hutto because the jury never learned that she lied to the police. Second, it affected their assessment of trial counsel's credibility because, in his opening statement, he promised the jury they would hear "statements filled with inconsistencies," but he failed to deliver on this promise. App. 57, ll. 1 – 5. The jury remembered this promise and asked to see Hutto's statements during their deliberations, but, of course, they were not in evidence. App. 384, ll. 13 – 18.

This Court recently reversed a murder conviction in PCR because of trial counsel's failure to impeach a key witness with prior inconsistent statements. Rutland v. State, 415 S.C. 570, 785 S.E.2d 350 (2016). In Rutland, trial counsel failed to cross-examine the State's star witness with prior inconsistent statements about whether the victim was armed. Id. at 573-74, 785 S.E.2d at 351. In her statements, the witness said she saw the victim with a gun. Id. At trial, she said she only saw the victim with a pack of cigarettes. Id.

This Court held trial counsel was ineffective and that the defendant was prejudiced because of the failure to impeach the witness with the prior statements. Id. at 577-78, 785 S.E.2d

at 353-54. This Court stated in Rutland that “had trial counsel discredited [the witness’s] testimony by raising the prior inconsistent statements on cross-examination, [the witness’s] credibility would have suffered.” Id.

Petitioner’s case bears several important similarities to this Court’s analysis of Strickland’s prejudice prong in Rutland. First, both Rutland and petitioner testified so both juries had to judge the credibility of the defendant against the State’s star witness. Rutland testified he acted in self-defense. Petitioner testified that Travis Harsey shot the victim and that he was unaware of Harsey’s intent to commit a robbery. Both defendants’ credibility were pitted against the State’s critical witnesses.

Second, this Court noted that the solicitor in Rutland relied heavily on the key witness in his closing argument. Id. at 578, 785 S.E.2d at 354 (“Any question as to whether petitioner was prejudiced may be answered by looking to the solicitor’s reliance on Kestner’s trial testimony.”). The solicitor in petitioner’s case repeatedly relied on Hutto’s testimony during closing argument. Based on Hutto’s testimony, he argued that Tyler attempted to hide his face:

**What did Donna Hutto say** about he had a little something around covering his face, had that hat on, had that long coat on? But, ladies and gentlemen, **Donna Hutto knows Randy Tyler.**

What is he trying to cover up? Those things that identify on him that **she would see** to know that is Randy Tyler.

App. 357, ll. 2 – 8 (emphasis added). The solicitor pinned the whole unraveling of Tyler’s alleged plot on Hutto’s testimony:

**Donna Hutto.** The plan was going just fine until **Donna Hutto** got into the mix. **She tore it up. It fell apart.** What did you hear about where that car was parked, ladies and gentlemen?

App. 358, ll. 12 – 15. The issue of where the car was parked was essential:

If he had really been parked in the driveway, **Donna** would have ran right into the front of him because there was no other place to park. **She** was parked in the driveway. **She had to get out.**

App. 360, ll. 8 – 12. Finally, and most importantly, the solicitor solely relied on Donna's testimony that she heard Tyler's voice—not Harsey's—arguing with the victim and that she saw Tyler:

What does **Donna hear Corky say?** “Randy, I ain't done no stuff like that.” I am sure it wasn't stuff. “Randy, I ain't done no stuff like that. Randy, we don't need to go into the F-ing house.”

App. 360, ll. 14 – 18 (emphasis added). The solicitor continued with Hutto's version:

He is standing right there (indicating) facing into the garage. What is he doing? He is ordering Corky Lewis into his house. “You better give me that damn money you owe me, Corky. Where is the money, Corky?”

I don't doubt at all that Travis Harsey was in that garage with that gun pointing on Corky Lewis. **But who is giving the marching orders**, ladies and gentlemen? Randy Tyler.

**She doesn't hear a third voice. She was clear about that.** “I didn't hear any other voices. I don't know Travis Harsey. I've never heard of Travis Harsey until this thing happened to Corky.”

App. 360, l. 24 – 361, l. 11 (emphasis added). The solicitor emphasized the credibility contest between Tyler and Hutto with his final words to the jury:

**Which version do you believe**, ladies and gentlemen? **We ask you for the truth.** I will never ask you for anything more. Please don't give us anything less. **To believe his story is an insult to your common sense.** I'm not going to sit there and do that to you. **Just find the truth.** Thank you.

App. 365, ll. 14 – 19 (emphasis added). Unfortunately, the jury never heard the truth—that Hutto was a liar.

And just like the jury in Rutland, petitioner's jury focused on Hutto and struggled with their verdict. In Rutland, the jury wanted to know whose fingerprints were on the gun found next to the victim. Rutland at 579, 785 S.E.2d at 354. The Rutland jury asked questions and deliberated for over six hours. Id. In petitioner's case, the jury specifically asked for Hutto's statements. App. 384, ll. 13 – 18. Hutto's testimony was replayed for the jury. App. 387, ll. 6 – 7. And just like Rutland, Petitioner's jury deliberated for six hours and asked multiple questions. App. 383, l. 21 – 388, l. 20. The same factors the Court used to find prejudice in Rutland exist in petitioner's case. This Court should reverse and allow a jury to assess Hutto's impaired credibility with the knowledge that she lied to the police.

### Issue 3 – Pitting and the Confrontation Clause

This Court should ignore the State's argument that the rule against pitting does not apply because Harsey did not testify. Far from making the State's argument better, it amplifies the prejudice to petitioner because the pitting error is compounded by a violation of his rights under the Confrontation Clause. This case presents an egregious example of pitting—one that the founders of our Constitution had specifically in mind when it drafted the Sixth Amendment. Crawford v. Washington, 541 U.S. 36, 42-51 (2004).

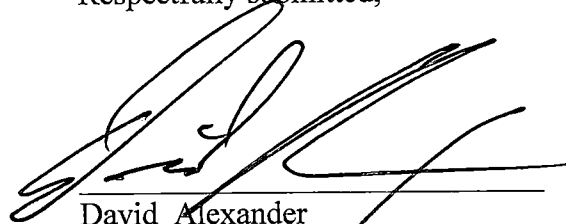
In Crawford, Justice Scalia wrote about the history of the Confrontation Clause and the evil it was designed to remedy. Id. Justice Scalia pointed out that the Founders were well aware that during Sir Walter Raleigh's trial for treason, out-of-court, civil-law examinations of his alleged accomplice, Lord Cobham, were used as the principal evidence against him. Id. Lord Cobham's statements were read to the jury and Raleigh "demanded that the judges call him to appear." Id.

Raleigh's ancient demand echoes here when the solicitor pits Tyler against Harsey. App. 303, 1. 24 -304, 1. 2. The solicitor demands, "Travis just says that about himself just to make himself look worse. I guess that is what you are telling this jury?" App. 303, 1. 24 -304, 1. 2. Tyler replies, "I don't know what Travis said. **Where is Travis?**" App. 303, 1. 24 -304, 1. 2 (emphasis added). The same tactics used in 1603 that the Founders tried to eliminate with the Sixth Amendment were used against Tyler exactly 400 years later in his 2003 trial. This Court must reverse.

**CONCLUSION**

For the foregoing reasons, this Court should reverse and grant petitioner a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', written over a horizontal line.

David Alexander  
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of August, 2016.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Appeal from Lexington County  
Honorable William Jeffrey Young, Circuit Court Judge

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RANDALL S. TYLER,

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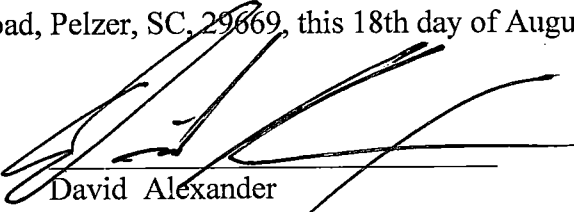
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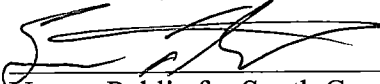
CERTIFICATE OF SERVICE

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The undersigned attorney hereby certifies that a true copy of the Reply Brief of Petitioner in the above referenced case has been served upon Patrick Schmeckpeper, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Reply Brief of Petitioner have been served on Randall S. Tyler, 294029 at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC, 29669, this 18th day of August, 2016.

  
David Alexander  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 18th day of August, 2016.

  
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(L.S.)  
Notary Public for South Carolina  
My Commission Expires: October 30, 2022.