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March 14, 2014

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

RECEIVED

SEP - 4 2014

Re: Frank Tolen v. State of South Carolina
Appellate Case No. 2013-001199

S.C. Supreme Court

Dear Mr. Shearouse:

Enclosed please find the original and six copies of a Mr. Tolen's reply to the State's return to his petition for writ of *certiorari*.

By copy of this letter to Mr. Whitmire, I am serving two copies on the State.

Thank you for your attention to this matter.

With kindest regards, I am

Yours very truly,


E. Charles Grose, Jr.

cc: Stephen D. Geoly, Esquire
Walt Whitmire, Esquire

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

SEP - 4 2014

Appeal from Saluda County
The Honorable R. Lawton McIntosh, Circuit Court Judge

S.C. Supreme Court

Appellate Case Number: 2013-001199

FRANK TOLEN,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

**Reply to State's Return to
Petition for Writ of *Certiorari***

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Attorneys for Petitioner

In reply

Argument I

The State acknowledges the victim, Mr. Oaton “Dyson possibly harbored resentment at the solicitor for detaining him in 1998,” Return at 14, until after he testified at trial and identified Mr. Tolen as one of the people that robbed him. Trial counsel never presented this evidence to the jurors. Reasonable jurors could have concluded that Mr. Dyson had a motive to offer testimony favorable to the prosecution to secure his release and, therefore, discounted his testimony. Mr. Tolen was prejudiced by trial counsel’s ineffectiveness. This Court should grant the writ and consider the issue.

Argument II

The State argues that trial counsel’s failure to cross-examine the co-defendant, Wade “Killer” Brannon, about the minimum mandatory and maximum sentences he faced, but for his turning state’s evidence, is “merely cumulative.” Return at 15. The record, however, is devoid of any evidence the jurors ever learned this information. Thus, despite voluminous authority supporting the admissibility of this information, *see Cert. Petition* at 18-19, the jurors never learned about the enormous benefit—charge reduction and probation—Brannon gained from his cooperation. Trial counsel offered no explanation for this failure. When the *Delaware v. Van Arsdall* factors are considered, *see Cert. Petition* at 20, Mr. Tolen has established prejudice from trial counsel’s deficient performance.

Likewise, the jurors never learned that the law partner of one of Mr. Tolen’s original prosecutors in the 1998 trial negotiated this “sweet” deal for Brannon. *See Cert. Petition*, Argument II(A).

This Court should grant the writ and consider this issue.

Argument III

The State argues, “Petitioner failed to prove . . . that counsel failed to render reasonably effective assistance under prevailing professional norms.” Return at 17. Trial counsel’s failure to request a *Batson* hearing, however, was based on his failure to understand the law. The PCR Judge’s conclusion to the contrary is not supported by the record. *See Cert. Petition, Section III(A). Von Dohlen v. State*, 360 S.C. 598, 603, 602 S.E.2d 738, 741 (2004) (“an appellate court will not affirm the decision when it is not supported by any probative evidence”). Here, despite the Mr. Tolen establishing that the State struck only African-American jurors, the State has never offered any justification for its strikes. The Court, therefore, should grant the writ to consider the issue.

Argument IV

As a threshold matter, the State implicitly recognizes that Mr. Tolen established deficient performance on at least some of his PCR claims. Return at 19. The State then asserts that trial counsel’s deficient performance was actually Mr. Tolen’s fault, as “he should have learned in [his] prior successful PCR action that counsel’s ability to provide sound representation hinges upon his willingness to aid counsel’s efforts.” Return at 20. This argument mischaracterizes the record.¹ In reality, trial counsel met with Mr. Tolen

¹ Respondent repeatedly tries to portray Mr. Tolen as manipulating the system, even though the record does not support those allegations. In footnote 3 of its return, the State alleged, “Respondent notes the troubling nature of Petitioner, again, retaining counsel to collaterally attach [sic] his conviction despite qualifying for indigent representation at both his trials.” Prior appointed counsel, Dee Compton, arranged for Mr. Geoly to assume his appointment. Mr. Geoly has not received any funds from Mr. Tolen, anyone on his behalf, or the Office of Indigent Defense. This Court appointed Mr.

only once, became upset with him, and sent him only one or two letters to the jail. *See Cert. Petition* at 26. Such a complete failure of trial counsel to establish a professional relationship with a client in a criminal case is contrary to the prevailing professional norms recognized by the American Bar Association, the National Legal Aid and Defender Association, and the South Carolina Commission on Indigent Defense. *See Cert. Petition*, Section IV(B). This case is the perfect vehicle for this Court to address the importance of appointed counsel establishing a relationship of trust and confidence with an indigent client.

Also, the State argues this Court has rejected the cumulative error analysis. *Return* at 18. Actually, “[w]hether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina.” *Simpson v. Moore*, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006). This Court should grant the writ and consider this issue.

Argument V

The State argues, Fortis “Smith’s prior testimony did not constitute inadmissible hearsay because Petitioner had a prior opportunity to cross-examine him.” And, “Petitioner actually did cross-examine Smith at his first trial.” *Return* at 21-22 (emphasis original). Although the State cites to Rule 804(b)(1), SCRE, it misses the point. In order to utilize the procedure under this rule, the prosecution must actually introduce the “[t]estimony given as a witness at another hearing of the same or a different proceeding.”

Geoly to repent Mr. Tolen during this appeal. Mr. Geoly in turn arranged for Mr. Grose’s assistance by making a donation to charity. Mr. Grose has not received any funds from Mr. Tolen, anyone on his behalf, or the Office of Indigent Defense.

That did not happen here. This Court, therefore, should reject the State's argument, grant the writ, and review the issue.

Argument VI

The State does not dispute that there was an error contained in the Court's Memorandum Opinion Number 2005-MO-061. Rather, the State seeks a benefit from the fact that none of Mr. Tolen's counsel have adequately raised this issue to this Court. *But see State v. Jones*, 343 S.C. 562, 578, 541 S.E.2d 813, 822 (2001) (Reaffirming that prosecutors "are 'ministers of justice and not mere advocates.' . . . Their special 'responsibility carries with it specific obligations to see the defendant is accorded procedural justice.'"). This Court, accordingly, should grant the writ and consider whether Mr. Tolen has received procedural justice on this issue.

Conclusion

For the foregoing reasons, this Court should grant the writ and review order dismissing Mr. Tolen's PCR Application.

Respectfully Submitted,

By



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Counsel for the Petitioner

August 29, 2014

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Saluda County
The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case Number: 2013-001199

FRANK TOLEN,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

Certificate of Service

I certify that I have served the **Reply to the State's Return to Petition for Writ of Certiorari** on the State of South Carolina by placing a copy in the United States Mail, postage prepaid, on the date reflected below, addressed as follows:

J. Walt Whitmire, Esquire
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Attorney for Respondent

Respectfully Submitted,

By 

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August 29, 2014
Greenwood, South Carolina