THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions
Daniel D. Hall, Circuit Court Judge

Appellate Case No. 2016-002233

Korey Lamar Love, ... Petitioner,

v.

State of South Carolina, ... Respondent.

PETITION FOR WRIT OF *CERTIORARI*

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TABLE OF CONTENTS

Table of Contents i

Table of Authorities iii

Questions Presented 1

Statement of the Case 2

Standard of Review 3

Statement of Facts 5

Arguments 10

Question I

Did trial counsel render prejudicial, ineffective assistance of counsel by promising the jurors that Jerome Love and Demetrius Jackson would testify as alibi witnesses, despite knowing these witnesses were unreliable and impeachable, and then failing to call them as witnesses, a failure pointed out by the State in closing? 10

Question II

Did trial counsel render prejudicial, ineffective assistance of counsel for failing to call Kendel Love, Jerome Love, and Demetrius Jackson as alibi witnesses when these witnesses supported Korey Love's alibi, a failure pointed out by the State in closing? 13

Question III

Did Korey Love receive prejudicial, ineffective assistance of trial counsel when trial counsel promised during his opening statement the defense would *prove* the alibi defense and shifted the burden to the defense? 14

Question IV

Did Korey Love receive prejudicial, ineffective assistance of trial counsel when trial counsel when his trial counsel failed to object to a jury instruction that shifted the burden of proof on alibi? 16

Question V

Did Korey Love receive prejudicial, ineffective assistance of appellate counsel when appellate counsel failed to appeal a jury instruction that shifted the burden of proof on alibi?.....18

Question VI

Did Korey Love receive prejudicial, ineffective assistance of trial counsel when trial counsel when his trial counsel failed to request a correct jury instruction that did not shift the burden of proof on alibi?.....18

Question VII

Did Korey Love receive prejudicial, ineffective assistance of trial counsel when trial counsel when his trial counsel elicited testimony from his client that he had been incarcerated for 2 ½ years prior to trial? 21

Question VIII

Did the PCR court err by not allowing Korey Love to amend his PCR application to allege prejudicial, ineffective assistance of trial counsel for not objecting to the Solicitor's "Golden Rule" argument urging the jurors to "be instruments of justice for Isaac Bass?".....22

Question IX

Is Korey Love entitled to a new trial based on the cumulative error doctrine?.....24

Conclusion 25

TABLE OF AUTHORITIES

Cases

Anders v. California, 386 U.S. 738 (1967) 2

Anderson v. Butler, 858 F.2d 16 (1st Cir. 1988) 12

Battle v. State, 305 S.C. 460, 409 S.E.2d 400 (1991) 19

Brown v. State, 383 S.C. 506, 680 S.E.2d 909 (2009) 22

Carter v. Bowersox, 265 F.3d 705 (8th Cir. 2001) 4

Commonwealth v. Chambers, 807 A.2d 872 (Pa. 2002) 5

Dandy v. State, 301 S.C. 303, 391 S.E.2d 581 (1990) 17

Dawkins v. State, 346 S.C. 151, 551 S.E.2d 260 (2001) 10, 14

English v. Romanowsky, 602 F.3d 714 (6th Cir. 2010) 12

Evitts v. Lucey, 469 U.S. 387 (1985) 4

Francis v. Franklin, 471 U.S. 307 (1965) 18

Freiburger v. State, 413 S.C. 243, 775 S.E.2d 391 (Ct. App. 2015) 4

Geter v. State, 305 S.C. 365, 409 S.E.2d 344 (1991) 21

Gilchrist v. State, 350 S.C. 221, 565 S.E.2d 281 (2002) 23

Green v. State, 338 S.C. 428, 527 S.E.2d 98 (2000) 21

High v. State, 300 S.C. 88, 386 S.E.2d 463 (1989) 17

In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) 15

Ingle v. State, 348 S.C. 467, 560 S.E.2d 401 (2002) 4, 12

Jones v. Barnes, 463 U.S. 745 (1983) 4

Jordan v. State, 406 S.C. 443, 752 S.E.2d 538 (2013) 3

Kyles v. Whitley, 514 U.S 419 (1995) 24

Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008) 12

Lowry v. State, 376 S.C. 499, 657 S.E.2d 760 (2008) 17, 18, 19

Luchenburg v. Smith, 79 F.3d 388 (4th Cir. 1996) 20

McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008) 13

Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989) 22

Ouber v. Guarino, 293 F.3d 19 (1st. Cir. 2002) 12

Padilla v. Kentucky, 559 U.S. 356 (2010) 4

Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998) 14

Pierce v. State, 338 S.C. 139, 526 S.E.2d 222 (2000) 13

Riddle v. State, 308 S.C. 361, 418 S.E.2d 308 (1992) 19

Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995) 15, 17, 19

Simmons v. State, 416 S.C. 584, 788 S.E.2d 220 (2016) 24

Smalls v. State, 415 S.C. 490, 783 S.E.2d 817 (Ct. App. 2016) 11

Smith v. Berry, 231 Ga. 39, 200 S.E.2d 95 (1973) 11

Smith v. Robbins, 528 U.S. 259 (2000) 4

Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999) 4

State v. Bealin, 201 S.C. 490, 23 S.E.2d 746 (1943) 15, 17, 18

State v. Blurton, 342 S.C. 500, 537 S.E.2d 291 (Ct. App. 2000) 24

State v. Brown, 277 S.C. 203, 284 S.E.2d 777 (1981) 11

State v. Buckner, 341 S.C. 241, 534 S.E.2d 15 (Ct. App. 2000) 18

State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999) 24

State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001) 12

State v. Norris, 285 S.C. 86, 328 S.E.2d 339 (1985) 4

State v. Pace, 316 S.C. 71, 447 S.E.2d 186 (1994) 12

State v. Reese, 370 S.C. 31, 633 S.E.2d 898 (2006) 22

State v. Rothell, 301 S.C. 168, 391 S.E.2d 228 (1990) 17

State v. Simmons, 267 S.C. 479, 229 S.E.2d 597 (1976) 12

State v. Tate, 288 S.C. 104, 341 S.E.2d 380 (1986) 21

Stone v. State, 294 S.C. 286, 363 S.E.2d 903 (1988) 19

Strickland v. Washington, 466 U.S. 668 (1984) 3, 4, 10

Thrift v. State, 302 S.C. 535, 397 S.E.2d 523 (1990) 4

U.S. ex rel. Hampton v. Leibach, 347 F.3d 219 (7th Cir. 2003) 12

Vasquez v. State, 388 S.C. 447, 698 S.E.2d 561 (2010) 23

Von Dohlen v. State, 360 S.C. 598, 602 S.E.2d 738 (2004) 23

Williams v. Taylor, 529 U.S. 362 (2000) 24

Statutes

S.C. Code Ann. 17-27-90 23

Rules

Rule 404(a), SCRE 21

Rule 59(e), SCRCP 3, 13, 23

QUESTIONS PRESENTED

Question I

Did trial counsel render prejudicial, ineffective assistance of counsel by promising the jurors that Jerome Love and Demetrius Jackson would testify as alibi witnesses, despite knowing these witnesses were unreliable and impeachable, and then failing to call them as witnesses, a failure pointed out by the State in closing?

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Question VII

Did Korey Love receive prejudicial, ineffective assistance of trial counsel when trial counsel when his trial counsel elicited testimony from his client that he had been incarcerated for 2 ½ years prior to trial?

Question VIII

Did the PCR court err by not allowing Korey Love to amend his PCR application to allege prejudicial, ineffective assistance of trial counsel for not objecting to the Solicitor's "Golden Rule" argument urging the jurors to "be instruments of justice for Isaac Bass?"

Question IX

Is Korey Love entitled to a new trial based on the cumulative error doctrine?

STATEMENT OF THE CASE

In January 2011, the Greenville County Grand Jury indicted Korey Love for murder, attempted armed robbery, and possession of a pistol by someone under eighteen years of age for the shooting death of Isaac Bass. A. 506-11. On January 27, 2007, Mr. Bass was killed after leaving work at the Wendy's restaurant on Pleasantburg Drive in Greenville, South Carolina.

From November 5-8, 2012, the State tried Love before the Honorable Edward W. Miller and a jury. Bryna S. Sey and Howard L. Steinberg represented the State. Fletcher N. Smith, Jr. represented Love. The jurors convicted on all counts. Judge Miller sentenced Love to fifty years' imprisonment for murder, twenty years' imprisonment for attempted armed robbery, and five years' imprisonment for possession of a pistol by someone under eighteen years of age. The sentences are concurrent. A. 498-504.

Love appealed his convictions and sentences to the Court of Appeals. Benjamin J. Tripp of the Appellate Defense Division represented Love and filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). Donald J. Zelenka represented the State. The Court of Appeals dismissed Love's appeal. *State v. Love*, Unpublished Memorandum Opinion 2014-UP-177 (Filed April 23, 2014).

On April 8, 2015, Love filed his application for post-conviction relief (hereinafter "PCR"). The Honorable Daniel D. Hall convened an evidentiary hearing on February 17, 2016. Love submitted a post-hearing memorandum in support of his PCR application. A. 622-44. By written order dated March 23, 2016, Judge Hall dismissed Love's application for post-conviction relief. A. 645-56. On April 8, 2016, Love served a Rule 59(e), SCRCP motion. A. 657-71. The state filed a return to the motion. A. 673-75. By written order dated September 23, 2016, Judge Hall denied this motion. A. 676-77. Love served a notice of intent to appeal, and this petition for writ of *certiorari* follows.

STANDARD OF REVIEW

While this Court gives deference to findings of fact by the PCR judge, upholding findings with any evidence to support them, this Court "review[s] questions of law *de novo,* and will reverse the decision of the PCR court when it is controlled by an error of law." *See Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013).

Under *Strickland v. Washington*, Love "must show that counsel's representation fell below an objective standard of reasonableness," which must be judged under "prevailing professional norms." 466 U.S. 668, 688 (1984). Once the defendant asserting ineffective assistance of counsel has established counsel's failure to comply with the prevailing professional norms, he must affirmatively prove that this deficiency has prejudiced him. Specifically:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Id. at 694. The American Bar Association Criminal Justice Standards (hereinafter "ABA Standards"), National Legal Aid and Defender Association Performance Guidelines for Criminal Defense Representation (hereinafter "NLADA Guidelines"), and other national, state, and local publications "may be valuable measures of the prevailing professional norms of effective representation." *Padilla v. Kentucky*, 559 U.S. 356, 367 (2010).

"If the State contends the alleged deficiency resulted from a strategic decision made at trial, counsel must articulate a valid reason for employing a certain strategy." *Freiburger v. State*, 413 S.C. 243, 247, 775 S.E.2d 391, 393 (Ct. App. 2015). *And see Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) ("Counsel must articulate a **valid** reason for employing a certain strategy to avoid a finding of ineffectiveness." (emphasis supplied by court)).

Due process of law requires that a defendant receive effective assistance of counsel not only at trial, but also on direct appeal. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). Effectiveness of appellate counsel is judged under the same test as other ineffectiveness claims. *Smith v. Robbins*, 528 U.S. 259 (2000); *Strickland, supra.* Appellate counsel has no constitutional duty to raise every non-frivolous issue on appeal. *Jones v. Barnes*, 463 U.S. 745 (1983); *Thrift v. State*, 302 S.C. 535, 397 S.E.2d 523 (1990). Appellate Counsel, however, is ineffective for not raising a meritorious issue entitling an appellant to relief. *See, e.g., Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999) (appellate counsel provided ineffective assistance of counsel that required a new capital sentencing trial by failing to assert, as trial counsel had, that the defendant was entitled to a charge that life is to be understood in its "ordinary and plain meaning," pursuant to *State v. Norris*, 285 S.C. 86, 328 S.E.2d 339 (1985)). *See also Carter v.*

Bowersox, 265 F.3d 705 (8th Cir. 2001) (appellate counsel was ineffective in failing to assert as error that the trial court failed to instruct the jury, as required by state law, that if it failed to make a unanimous finding that the death penalty was warranted by evidence in aggravation of punishment, it was required to return a life sentence); *Commonwealth v. Chambers*, 807 A.2d 872 (Pa. 2002) (appellate counsel ineffective for failing to assert as error the trial court's instruction that once the jurors "have unanimously found an aggravating circumstance, before they can weigh aggravating circumstances against any mitigating circumstances, they must all find the existence of at least one mitigating circumstance," which misstated the law).

STATEMENT OF FACTS

On January 27, 2007, at 1:30 a.m., someone shot and killed Isaac Bass after he left work at Wendy's. The Wendy's did not have interior or exterior security cameras. A. 64-68, 70, 76-77, 97. Without any forensic evidence identifying a perpetrator, the prosecution relied heavily on the testimony of co-defendant, Eric Jarod Ransom, in its prosecution of Korey Love.

Ransom is Korey Love's stepbrother. (Ransom's mother married Korey Love's father, Jerome Love. A. 356-578.) Ransom claimed Love brought up robbing the Wendy's in a conversation at a basketball court where Ricky Simmons, Rashad Simmons, and Dontavius Sullivan were also present. Ricky and Rashad Simmons, sometimes referred to as "the twins," also claimed this conversation took place. A. 266-68, 310-11.

Despite initially saying, "I can't really remember like what happened," Ransom ultimately claimed Love came to his house, and the two walked to the Wendy's on

January 27, 2007. When they got to the Wendy's drive-thru, Love supposedly said he was going to rob someone. Ransom claimed Love crept up on Mr. Bass, pulled a gun, and pointed it in Mr. Bass's face. According to Ransom, Mr. Bass got away, and Love shot Mr. Bass while he was trying to get back inside Wendy's. Ransom claimed both he and Love then ran away. A. 359-67.

Ricky and Rashad Simmons claimed they were standing by the mailbox at their house when they heard a gunshot, and, shortly after, Love and Ransom showed up, appearing "anxious, upset." A. 271-72, 318-19. Ransom did not recall seeing Ricky and Rashad Simmons that night. A. 359-67.

Korey Love testified in his own defense that he was at home, where he, his brother Kendel, and father Jerome Love, lived with Demetrius Antoine[1] Jackson and Leslie Jackson and their young children. A. 430-39. Korey Love testified that Kendel Love, Jerome Love, Demetrius Jackson, and Leslie Jackson were all home, and with him, at the time of the incident. A. 429-39. Ms. Jackson confirmed Korey Love's alibi. A. 405-12. A records custodian confirmed that Jerome Love got off work early enough that he could have been home at the time of the incident. A. 401-05.

Trial counsel did not call Jerome Love and Demetrius Jackson to testify despite making this representation to the jurors during his opening statement:

> We'll prove to you that it was impossible, absolutely impossible for Korey Love to have murdered Isaac Bass on January the 27, 2007 at the hour of 1:30 a.m. in the morning. We're going to bring into this courtroom people who this (indicating) young man lived with at the time.... We will bring his dad in here Mr. Jerome Love and Mr. Jerome Love will testify that when he got off a [sic]

[1] Mr. Jackson's family and friends call him by his middle name, "Antoine," and he is sometimes referred to as "Antoine" in the record.

> Bonefish at 12:00 that night, between the hours of 12 and 12:30 he was at home and his son was in the house at that time and we will bring in another man by the name of Demetrius Jackson who the police interviewed in this case and he told 'em that he got off at 3 a.m. this mornin' when Korey was livin' in the house with this same family in Taylors, we're gonna prove that to ya. We're also gonna prove to ya in this case that not only that they enforced strict rules but these kids had a curfew to be in at night.

A. 58, line 12 – 59, line 11. Trial counsel additionally told the jurors, ***"[I]f I don't prove what I said I'm gonna prove then find him guilty."*** A. 63, lines 8-9 (emphasis assed).

During closing arguments, the prosecution exploited trial counsel's failure to call Jerome Love and Demetrius Jackson as alibi witnesses:

> Finally, I just wanna tell you that the defense witnesses didn't help you any and here's why: The records-keeper from Bonefish Grill came and brought Jerome's work records, so Jerome got off at 11:56 or whatever it was p.m. on that Friday night, so what do you do with that? Jerome wasn't here. They promised you Jerome in their opening statement. They promised you Demetrius Jackson in their opening statement. He wasn't here.

A. 473, lines 12- 19.

For the PCR hearing, both Jerome Love and Demetrius Jackson provided affidavits detailing their testimony. A. 618-21. Kendel Love testified at the evidentiary hearing and supported his brother's alibi defense. A. 540-49.

At the evidentiary hearing, trial counsel testified that the defense at trial was alibi. Specifically, at the time of the murder, Love was at home with his father Jerome Love, his brother Kendel Love, Demetrius Jackson, and Leslie Jackson. Trial counsel believed Ransom is the person that shot and killed Isaac Bass. The credibility of Love's alibi and the testimony of his accusers, including Ransom, was the central issue for the jurors to resolve. A. 551-54.

Trial counsel testified about Jerome Love. His client's father, "a street-smart criminal," was "unreliable" and not available to testify. Prior to trial, Jerome Love would not come to trial counsel's office to discuss the case. Jerome Love arrived at court "five minutes" before the start of trial. Initially he came to the courtroom but left because he was afraid he would be arrested for a misdemeanor domestic violence charge, even though trial counsel had an understanding with the prosecutor that his client's father could testify without fear of arrest. Jerome Love left the courthouse that day and "refused to come back." The defense team "went to the place where Demetrius Jackson was supposedly keeping him" but couldn't find him. Trial counsel knew Jerome Love was "irresponsible" and considered it an "outrage" that he didn't have "courage enough to show up at trial for his own son." Trial counsel acknowledged he knew Jerome Love was unreliable ***before he made his opening statement.*** A. 546-63.

Trial counsel testified that the State might be able to impeach Jerome Love with recordings of jail calls with his son where the father talked about hating "all white people." Trial counsel acknowledged these recordings were available to him through discovery ***before he made his opening statement.*** A. 589-93. Assistant Solicitor Steinberg confirmed the existence of these calls, which he had disclosed to trial counsel prior to trial. A. 600-02, 604-07.

Trial counsel testified that Demetrius Jackson had a prior conviction for drug distribution that could be used for impeachment. He further believed that Mr. Jackson's criminal history could undermine Leslie Jackson's testimony. Trial counsel acknowledged he was aware of Mr. Jackson's criminal history ***before he made his opening statement.*** A. 583.

In the order of dismissal, the PCR judge concluded:

> Trial counsel testified the Applicant told him to contact alibi witnesses and he talked to them. Trial counsel testified that he did not call Kendel Love because he was "wishy-washy" and would not have been a good witness. Trial counsel testified Jerome Love and Demetrius Jackson were on standby at trial as potential alibi witnesses. Trial counsel testified Jerome Love had an outstanding arrest warrant so he had an agreement with the State and the trial judge that Love would not be arrested. Trial counsel testified he could not subpoena Jerome Love, however, because he could not locate him and Love would not come meet with in his office. Trial counsel testified Jerome Love showed up right before court but noted the state had provided recordings of calls from the jail where Jerome Love had made racist statements to the Appellant. Trial counsel testified he had Demetrius Jackson under subpoena but decided not to call him. Trial counsel noted Demetrius Jackson had a prior conviction that could be used to impeach him. Trial counsel testified he believed he could make an alibi argument through just the Applicant and Leslie Jackson.

A. 649. The PCR court found trial counsel credible and further found that trial counsel had "articulated valid reasons that he did not call Kendel Love, Jerome Love, or Demetrius Jackson as alibi witnesses." A. 650. The PCR court found Kendel Love "was not a credible or compelling witness" and the affidavits of Jerome Love and Demetrius Jackson not "to be compelling evidence." The PCR court further found, "[E]ven if these witnesses had been called in the defense case, they would have been easily attacked with impeachable evidence by the State." A. 650-51.

ARGUMENTS

Question I

Did trial counsel render prejudicial, ineffective assistance of counsel by promising the jurors that Jerome Love and Demetrius Jackson would testify as alibi witnesses, despite knowing these witnesses were unreliable and impeachable, and then failing to call them as witnesses, a failure pointed out by the State in closing?

An accused's right to effective assistance of counsel is violated when counsel performs deficiently, and this deficient performance prejudices the defense. *Strickland v. Washington, supra*, 466 U.S. at 687. *See generally Dawkins v. State*, 346 S.C. 151, 551 S.E.2d 260 (2001) (finding prejudice when case hinged on credibility of complaining witness). "If the State contends the alleged deficiency resulted from a strategic decision made at trial, counsel must articulate a valid reason for employing a certain strategy." *Freiburger*, 413 S.C. at 247, 775 S.E.2d at 393.

In this case, the PCR court found, "[T]rial counsel articulated valid reasons that he did not call Kendel Love, Jerome Love, or Demetrius Jackson as alibi witnesses." A. 648-51. This finding is entitled great deference. *Jordan, supra.* Yet, the PCR court concluded trial counsel's promise in his opening statement to call Jerome Love and Demetrius Jackson as witnesses was a strategic decision. A. 651-52. The PCR court's order did not adequately explain why trial counsel promising to call these witnesses in opening was a valid strategic decision, despite trial counsel being aware of their unreliability and impeachability ***before he made his opening statement***. *See Freiburger* and *Ingle, supra.* The PCR court stated that trial counsel was not deficient for promising to call these alibi witnesses because "[i]t is axiomatic that counsel's arguments to the jury do not constitute evidence." A. 652. The PCR court's order further states, "Trial counsel was merely staking out a strong position in opening argument." A. 652. As discussed

below, it is never a reasonable strategy promise jurors evidence and then not deliver. Further, any illusion of a "strong position" during opening statements was exposed by the prosecution during closing arguments, damaging the credibility of the defense in a case where credibility was the central issue for the jury to determine.

The order of dismissal is controlled by an error of law. "An opening statement serves to inform the jury of the general nature of the action and defenses involved in a case so they will be better prepared to understand the evidence presented." *State v. Brown*, 277 S.C. 203, 204, 284 S.E.2d 777, 778 (1981) (quoting *Smith v. Berry*, 231 Ga. 39, 200 S.E.2d 95 (1973)). *See also Smalls v. State*, 415 S.C. 490, 499, 783 S.E.2d 817, 821 (Ct. App. 2016) (trial counsel ineffective for not challenging false statement made by solicitor in opening statement). "Counsel should consider the strategic advantages and disadvantages of disclosure of particular information during opening statement." NLADA Guideline 7.3(c).[2] "Defense counsel's opening statement at trial should be confined to a fair statement of the case from defense counsel's perspective, and discussion of evidence that defense counsel reasonably believes in good faith will be available, offered, and admitted." ABA Standards (Defense Function) 4-7.5(b). Trial counsel, therefore, was deficient for promising to call these witnesses during his opening statement when he knew they were unreliable and impeachable.

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[2] South Carolina Commission on Indigent Defense Performance Standards for Public Defenders and Appointed Counsel (2013) (hereinafter "SCCID Guidelines") (found at https://sccid.sc.gov/docs/SCCID%20%20Performance%20Standards%20(Non-Capital)%20for%20Public%20Defenders%20and%20Assigned%20Counsel%20as%20adopted%20by%20SCCID%206-7-2013%20with%20revised%20Preamble%208-22-2013.pdf (last viewed April 25, 2017)), Guideline 7.3(c) is identical to the NLADA Guideline 7.3(c). Although adopted after Korey Love's jury trial, the Commission noted in the preamble that its guidelines "are benchmarks taken from existing national standards."

Prejudice resulted from this opening statement. By promising testimony from witnesses he then failed to call, trial counsel lost credibility with the jurors. "[L]ittle is more damaging than to fail to produce important evidence that had been promised in an opening." *Anderson v. Butler*, 858 F.2d 16, 17 (1st Cir. 1988).[3] Further, the prosecution capitalized on counsel's failure to present these witnesses. This Court consistently finds prejudice when defense counsel's credibility is undermined. *Lounds v. State*, 380 S.C. 454, 465, 670 S.E.2d 646, 652 (2008) (Ineffective assistance of counsel results when trial counsel damages "the defense case because the closing argument did not support [his client's] account of what had happened.") and *Ingle v. State*, 348 S.C. 467, 472, 560 S.E.2d 401, 403 (2002) (where defense counsel put up a witness who gave testimony contradictory to the petitioner's defense and was therefore "quite damaging" to the defense, the Court found ineffective assistance of counsel).[4]

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[3] *See also Ouber v. Guarino*, 293 F.3d 19 (1st. Cir. 2002) (counsel ineffective in drug trafficking case for promising the jury four times in the opening to call the defendant as a witness, but then failing to keep those promises); *English v. Romanowsky*, 602 F.3d 714 (6th Cir. 2010) (counsel ineffective in assault with intent to commit murder case for failing to adequately investigate prior to informing the jury in opening statements that the defendant's girlfriend would be called as a witness to corroborate the claim of self-defense); *U.S. ex rel. Hampton v. Leibach*, 347 F.3d 219 (7th Cir. 2003) (counsel ineffective in sexual assault and robbery case for failing to investigate and interview exculpatory eyewitnesses and for making promises in his opening statement to the jury that he did not keep).

[4] For other cases stressing the importance of counsel's credibility, *see State v. Jones*, 343 S.C. 562, 578, 541 S.E.2d 813, 821 (2001) (trial judge changing language of the reasonable doubt instruction after counsel's closing argument "diminish[ed] appellant's attorney's credibility in the eyes of the jury"); *State v. Pace,* 316 S.C. 71, 447 S.E.2d 186 (1994) (new trial ordered where judge's comments on counsel's age and gender impugned counsel's credibility in jury's eyes); and *State v. Simmons,* 267 S.C. 479, 229 S.E.2d 597 (1976) (new trial where judge threatened defense counsel with jail because conduct affected jury's view of counsel's credibility).

Trial counsel additionally told the jurors, ***"[I]f I don't prove what I said I'm gonna prove then find him guilty."*** A. 63, lines 8-9 (emphasis assed). This statement compounded the prejudice. Not delivering Jerome Love and Demetrius Jackson as alibi witnesses invited the jurors to convict Korey Love.

But for trial counsel's deficient performance, there is a reasonable probability the result of the trial would have been different.

This Court should grant the writ and consider the issue.

Question II

Did trial counsel render prejudicial, ineffective assistance of counsel for failing to call Kendel Love, Jerome Love, and Demetrius Jackson as alibi witnesses when these witnesses supported Korey Love's alibi, a failure pointed out by the State in closing?

Love's Rule 59(e), SCRCP motion, at A. 659, pointed out that the findings of fact and conclusions of law in Section A of the PCR court's order, at A. 468-51, cannot be reconciled with the findings of fact and conclusions of law in Section B of the order, at A. 451-52. As seen in Question I, the PCR court found that Kendel Love, Jerome Love, and Demetrius Jackson would not have been credible alibi witnesses at trial. These findings of facts support Love's claim for relief in Question I. This Court could conclude that Love did not establish deficient performance in Question I because "no probative evidence exists to support the PCR court's findings" that Kendel Love, Jerome Love, and Demetrius Jackson are not credible alibi witnesses. *See McKnight v. State*, 378 S.C. 33, 40, 661 S.E.2d 354, 357 (2008) (quoting *Pierce v. State,* 338 S.C. 139, 144, 526 S.E.2d 222, 225 (2000)). If this Court reaches that conclusion, then it should find trial counsel was deficient for not calling these witnesses. Trial counsel testified that both Jerome Love and Demetrius Jackson supported Korey Love's alibi. He did not subpoena Jerome

Love. A. 557-59. He subpoenaed Demetrius Jackson but decided not to call him as a witness. A. 583. Affidavits of these two witnesses were introduced into evidence at the PCR hearing. A. 618-20. Kendel Love testified at the PCR hearing. A. 540-49. Failure to call favorable witnesses is ineffective assistance of counsel requiring a new trial. *E.g. Pauling v. State*, 331 S.C. 606, 503 S.E.2d 468 (1998) (trial counsel was ineffective for failing to call as defense witness triage nurse whose notes indicated that victim stated that her vagina was not penetrated).

Prejudice resulted from the failure to call these witnesses. Credibility of the prosecution and defense witnesses was the central issue for the jurors to decide. *See Dawkins, supra.* During closing arguments, the State exploited trial counsel's failure to call Jerome Love and Demetrius Jackson as alibi witnesses after having promised to do so during his opening statement. As discussed above, trial counsel lost credibility with the jurors. If this Court, decides Korey Love is not entitled to relief on Question I, then relief should be granted on this question. But for trial counsel's deficient performance, there is a reasonable probability the result of the trial would have been different.

This Court should grant the writ and consider the issue.

Question III

Did Korey Love receive prejudicial, ineffective assistance of trial counsel when trial counsel promised during his opening statement the defense would *prove* the alibi defense and shifted the burden to the defense?

As seen in Subsection I, *supra*, trial counsel promised he would "prove" the alibi defense. A. 58, line 12 – 59, line 11. In addition to those burden-shifting statements, trial counsel told the jurors:

> Now, ladies and gentleman of the jury, he is presumed innocent and His Honor has told you that and will tell you

> that again throughout the course of this chile [sic] – trial and although Mr. Love does not have to prove this case, Mr. Love is not asking for those advantages in this case. We're going to prove this case and that every inch of that indictment is a lie and that he is not guilty of these bogus charges and how are we going to do it? We're gonna go right to the prosecution's own file right here (indicating) and prove this case, that's what we're gonna prove this case.

A. 58, lines 2-11. And,

> I will prove to you in this case that it was impossible on January the 27, 2007 for that (indicating) young man, Korey Love, to have murdered Isaac Bass in this state and that the prosecution has cut a deal with the real murders in this case and that's her thing to do if she wants to but at the conclusion ***if I don't prove what I said I'm gonna prove then find him guilty*** but if I prove everything I say I'm gonna prove, I'm gonna as you to have the courage to come back and say to the State of South Carolina and to everybody Korey Love is not guilty as charged.

A. 63, lines 2-12 (emphasis assed).

Trial counsel's performance was deficient because he shifted the burden of proof to the defense and removed the requirement that the State prove each element of its case, including the identity of the murderer. *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). In South Carolina, the prosecution has the "burden of disproving the defense of alibi." *State v. Bealin*, 201 S.C. 490, ___, 23 S.E.2d 746, 754 (1943). *And see Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1995) (trial counsel provided ineffective assistance by failing to request alibi charge). Trial counsel should have used his opening statement "to emphasize the prosecution's burden of proof" and "clarify the jurors' responsibilities." NLADA Guidelines 7.3(d)(3) and (6).[5]

[5] SCCID Guidelines 7.3(d)(3) and (6) are identical to NLADA Guidelines 7.3(d)(3) and (6).

Prejudice resulted from trial counsel assuming the burden of proof. Credibility of the prosecution and defense witnesses was the central issue for the jurors to decide. *See Dawkins, supra.* During closing arguments, the State exploited trial counsel's failure to call Jerome Love and Demetrius Jackson as alibi witnesses after having promised to do so during his opening statement. As discussed above, trial counsel lost credibility with the jurors. Given trial counsel's failure to call the alibi witnesses identified in his opening statement, these statements invited the jurors to convict Korey Love. But for trial counsel's deficient performance, there is a reasonable probability the result of the trial would have been different.

This Court should grant the writ and consider the issue.

Question IV

Did Korey Love receive prejudicial, ineffective assistance of trial counsel when trial counsel when his trial counsel failed to object to a jury instruction that shifted the burden of proof on alibi?

At the conclusion of the case, the trial judge instructed the jurors:

> Now, the defendant raised the defense of alibi and in order to establish an alibi ***it must be shown*** that the defendant was at another specified place at the time the crime was committed and that it was therefore impossible for the defendant to have been at the scene of the crime. Mere denial of presence at the scene of a crime does not constitute an alibi. There is no burden on the defendant to prove an alibi, the burden of proof is on the State to prove beyond a reasonable doubt that the defendant was actually present at the scene of the crime, actually participated in it and was not somewhere else.

A. 483, lines 8-17 (emphasis added).

After the jury charge, trial counsel objected to the use of the term "mere denial" in the alibi instruction, and the trial judge overruled the objection. A. 485, lines 14-21.

Trial counsel did not object to the trial judge instructing the jurors that "***it must be shown*** that the defendant was at another specified place at the time the crime was committed." A. 483 (emphasis added). As seen in Section III, supra, the prosecution has the "burden of disproving the defense of alibi." *Bealin*, 201 S.C. at ___, 23 S.E.2d at 754.

The PCR court dismissed Korey Love's challenge to the jury instruction on alibi by stating, "Trial counsel testified he believed the trial judge's alibi instruction was consistent and not objectionable. Trial counsel testified he did not believe the alibi charge was burden shifting." Order, pp. 9-10. Trial counsel's testimony reflects the belief he expressed during opening statements—that his client had the burden of proving his alibi.

Trial counsel was ineffective by not objecting to an incorrect, burden shifting jury instruction. *See e.g. Roseboro, supra; Dandy v. State*, 301 S.C. 303, 391 S.E.2d 581 (1990) (counsel was ineffective for failing to object to self-defense instruction which required defendant to prove the defense by a preponderance of the evidence); and *High v. State*, 300 S.C. 88, 386 S.E.2d 463 (1989) (counsel's failure to object to burden-shifting instruction on element of crime constituted ineffective assistance). The internal contradiction in the jury instruction did not cure the error. In South Carolina, as elsewhere, "[i]t is error to give instructions which may confuse or mislead the jury. The test is what a reasonable juror would understand the charge to mean." *State v. Rothell*, 301 S.C. 168, 169-70, 391 S.E.2d 228, 229 (1990) (citations omitted). "In order to make this determination, the challenged instruction must be examined in the context of the trial court's entire charge to the jury and not in isolation." *Lowry v. State*, 376 S.C. 499, 505, 657 S.E.2d 760, 763 (2008). "Language that merely contradicts and does not explain a

constitutionally infirm instruction will not suffice to absolve the infirmity." *Id.*, 376 S.C. at 506, 657 S.E.2d at 64 (quoting *Francis v. Franklin,* 471 U.S. 307, 322 (1965)). "Where the charge contains both the correct and incorrect law, an appellate court must assume the jury followed the incorrect charge." *State v. Buckner*, 341 S.C. 241, 247, 534 S.E.2d 15, 18 (Ct. App. 2000).

Prejudice resulted from trial counsel assuming the burden to prove the alibi defense. During closing arguments, the State exploited trial counsel's failure to call Jerome Love and Demetrius Jackson as alibi witnesses after having promised to do so during his opening statement. As discussed above, trial counsel lost credibility with the jurors. Given trial counsel's failure to call the alibi witnesses identified in his opening statement, assuming the burden of proving the alibi defense invited the jurors to convict Korey Love. But for trial counsel's deficient performance, there is a reasonable probability the result of the trial would have been different.

This Court should grant the writ and consider the issue.

Question V

Did Korey Love receive prejudicial, ineffective assistance of appellate counsel when appellate counsel failed to appeal a jury instruction that shifted the burden of proof on alibi?

As seen, trial counsel objected to the use of the term "mere denial" in alibi instruction, and the trial judge overruled the objection. A. 485, lines 14-21. If this objection is deemed sufficient to preserve this issue for appeal, the appellate counsel was ineffective for not briefing the issue. *Strickland, Evitts, Smith,* and *Sutherland, supra.* As seen in Section III, supra, the prosecution has the "burden of disproving the defense of alibi." *Bealin,* 201 S.C. at ___, 23 S.E.2d at 754. But for appellate counsel's deficient

performance, there is a reasonable probability the result of the appeal would have been different.

This Court should grant the writ and consider the issue.

Question VI

Did Korey Love receive prejudicial, ineffective assistance of trial counsel when trial counsel when his trial counsel failed to request a correct jury instruction that did not shift the burden of proof on alibi?

Trial counsel, additionally, was ineffective by not requesting a correct instruction regarding an alibi defense. *See Roseboro*, *supra* (trial counsel provided ineffective assistance by failing to request alibi charge) and *Riddle v. State*, 308 S.C. 361, 418 S.E.2d 308 (1992) (failure to give alibi charge, where sole theory of defense was alibi, was ineffective assistance of counsel requiring reversal).[6] Trial counsel should have requested the following jury instruction that clearly and correctly sets forth the burden of proof for alibi:

> The defendant in this case has raised a defense of alibi. That means the defendant was not at the scene of the crime at the time it was committed, but was elsewhere and had nothing to do with it. The word "alibi" means "elsewhere."
>
> There is no burden upon the defendant to prove that he was not at the scene of the crime. There is no burden upon the defendant to prove his alibi. The defendant need not prove he was somewhere else.

---

[6] The same result occurs regarding other jury instructions. *E.g. Lowry v. State*, 376 S.C. 499, 657 S.E.2d 760 (2008) (trial counsel's failure to object to the trial court's supplemental jury instruction on malice murder, which impermissibly shifted the burden of proof for malice from the State to defendant, constituted ineffective assistance of counsel); *Battle v. State*, 305 S.C. 460, 409 S.E.2d 400 (1991) (trial defense counsel provided ineffective assistance by failing to request additional, specific self-defense instruction on appearances and retreat); and *Stone v. State*, 294 S.C. 286, 363 S.E.2d 903 (1988) (Trial counsel's failure to request jury instruction on self-defense denied defendant effective assistance of counsel).

> The burden is on the State to prove beyond a reasonable doubt that the defendant was present at the scene of the crime, actually participated in the crime, and was not somewhere else. Thus, the State has the burden of proving beyond a reasonable doubt that the defendant was present and committed the crime. The State has the burden of disproving the defendant's alibi defense.

Ralph King Anderson, Jr., South Carolina Request to Charge—Criminal, 2007, § 6-19, a copy of which is found at A. 642-44.

Counsel's performance was both deficient and prejudicial. As discussed in Question IV, *supra*, trial counsel likely operated under the misconception that the defense had the burden of proving the alibi. *Luchenburg v. Smith*, 79 F.3d 388, 392-93 (4th Cir. 1996) ("[C]ounsel made no tactical 'choice,' unless a failure to become informed of the law affecting his client can be so considered.").

Prejudice resulted from burden shifting alibi defense. During closing arguments, the State exploited trial counsel's failure to call Jerome Love and Demetrius Jackson as alibi witnesses after having promised to do so during his opening statement. As discussed above, trial counsel lost credibility with the jurors. Given trial counsel's failure to call the alibi witnesses identified in his opening statement, the burden shifting jury instruction invited the jurors to convict Korey Love. But for trial counsel's deficient performance, there is a reasonable probability the result of the trial would have been different.

This Court should grant the writ and consider the issue.

Question VII

Did Korey Love receive prejudicial, ineffective assistance of trial counsel when trial counsel when his trial counsel elicited testimony from his client that he had been incarcerated for 2 ½ years prior to trial?

During his direct testimony, trial counsel asked Korey Love, "[Y]ou've been in, uh, in the Greenville County Detention Center for two and a half years so far." His client responded, "Yes, sir." A. 430, lines 2-4. During closing argument, trial counsel reminded the jurors "this man has been in jail two and a half years." A. 453, line 10. This evidence implied bad character evidence about Korey Love, which was not admissible under Rule 404(a), SCRE. "[E]vidence introduced for the sole purpose of implying a defendant has a prior criminal record is improper." *Geter v. State*, 305 S.C. 365, 367, 409 S.E.2d 344, 345 (1991) (citing *State v. Tate,* 288 S.C. 104, 341 S.E.2d 380 (1986)). The PCR court's order did not address any of this legal authority. Rather, the court below found emphasizing "lengthy imprisonment" to be trial strategy consistent with the alibi defense without explaining why it was a valid strategy. A. 652-53. With counsel undermining defense credibility on the alibi defense, shifting the burden of proof to his client, and emphasizing "lengthy imprisonment," trial counsel compounded prejudice on top of prejudice on top of more prejudice.

Prejudice resulted from this deficient performance. Based on trial counsel's presentation, reasonable jurors would view Korey Love as imprisoned criminal that couldn't produce witnesses to prove his innocence. This strategy was not a valid trial strategy. *See Freiburger* and *Ingle, supra.* Trial counsel merely failing to prevent the admission of improper character evidence about the defendant is ineffective assistance of counsel requiring a new trial. *E.g. Green v. State*, 338 S.C. 428, 527 S.E.2d 98 (2000)

(held that: (1) finding that counsel was ineffective for failing to argue that prejudicial effect of petitioner's prior convictions outweighed their probative value was supported by evidence, and (2) any prejudice caused by counsel's ineffectiveness was not cured by limiting instruction); and *Mitchell v. State*, 298 S.C. 186, 379 S.E.2d 123 (1989) (failure to object to impermissible evidence of defendant's "devil worship" and "Mafia membership" constituted ineffective assistance of counsel). In this case, however, trial counsel *introduced* the improper character evidence. But for trial counsel's deficient performance, there is a reasonable probability the result of the trial would have been different.

This Court should grant the writ and consider the issue.

Question VIII

Did the PCR court err by not allowing Korey Love to amend his PCR application to allege prejudicial, ineffective assistance of trial counsel for not objecting to the Solicitor's "Golden Rule" argument urging the jurors to "be instruments of justice for Isaac Bass?"

During closing, the solicitor argued:

> This is your opportunity to do justice in this case under the oath that you have taken. You can be instruments of justice for Isaac Bass. His death was not the final chapter of his life, this trial is the final chapter of his life....

A. 473, lines 19-22.

"A Golden Rule argument asking the jurors to place themselves in the victim's shoes tends to completely destroy all sense of impartiality of the jurors, and its effect is to arouse passion and prejudice." *State v. Reese,* 370 S.C. 31, 38, 633 S.E.2d 898, 901 (2006). *And see Brown v. State*, 383 S.C. 506, 515-16, 680 S.E.2d 909, 914 (2009). This argument was improper and highly prejudicial. Failure to object to an improper closing

argument is ineffective assistance of counsel that requires a new trial when prejudice is established. *E.g.*, *Vasquez v. State*, 388 S.C. 447, 698 S.E.2d 561 (2010); and *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2004) (trial counsel formed deficiently by failing to object to solicitor's "golden rule argument" at penalty phase). *See also Gilchrist v. State*, 350 S.C. 221, 565 S.E.2d 281 (2002) (prejudice flowed from counsel's erroneous failure to object to opening statement). Trial counsel's failure to object to this argument was both deficient and prejudicial. But for trial counsel's deficient performance, there is a reasonable probability the result of the trial would have been different.

Prior to the commencement of the evidentiary hearing, Korey Love served and amended application for post-conviction relief. A. 636-41. The PCR court sustained the State's objection to the amendment. A. 539. Trial counsel testified about this statement contained in the prosecution's closing argument. At the close of all evidence, Korey Love moved to amend his initial application to conform to evidence, but the PCR court denied this motion. A. 595-96; 612. The Rule 59(e), SCRCP motion renewed the request to amend the application. A. 668-70.

The Uniform Post-Conviction Relief Act expressly authorizes consideration of a "supplemental or amended application." S.C. Code Ann. 17-27-90. Section 17-27-70(a) further provides:

> At any time prior to entry of judgment the court may, when appropriate, issue orders for amendment of the application or any pleading or motion, for pleading over, for filing further pleadings or motions, or for extending the time of the filing of any pleading. In considering the application, the court shall take account of substance, regardless of defects of form.

Because the PCR court should have allowed the amendment, this Court should grant the writ and consider the issue. In the alternative, this Court should remand for the consideration of the issue. *Simmons v. State*, 416 S.C. 584, 788 S.E.2d 220 (2016) (remanding application for post-conviction relief was warranted).

This Court should grant the writ and consider the issue.

Question IX

Is Korey Love entitled to a new trial based on the cumulative error doctrine?

Finally, this Court must apply a cumulative error analysis because the deficiencies taken together also combined to deny Korey Love a fair trial. *Kyles v. Whitley*, 514 U.S 419, 436 (1995) (the prejudice must be "considered collectively, not item-by-item"); *Williams v. Taylor*, 529 U.S. 362, 399 (2000) (considered "the entire post-conviction record...as a whole"); *State v. Johnson,* 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999) (citations omitted) ("cumulative error doctrine provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial and it requires the cumulative effect of the errors to affect the outcome of the trial"); and *State v. Blurton*, 342 S.C. 500, 537 S.E.2d 291 (Ct. App. 2000) (cumulative effect of prosecutor's closing argument when coupled with improper exclusion of evidence warranted reversal).

Trial counsel compounded prejudice on top of prejudice on top of more prejudice. He made promises in his opening statement by naming witnesses that would ***prove*** Korey Love's alibi, thereby shifting the burden of proof to the defense. He even went so far as to tell the jury to convict his client if he failed to present the evidence he had outlined in opening. When trial counsel did not keep these promises, the prosecution hammered

home that point in its closing. Once the Court considers trial counsel naming specific alibi witnesses that did not testify, promising to prove the alibi, and failing to object to the burden shifting alibi instruction, the need to reverse becomes apparent. The cumulative effect of these alibi issues invited the jurors to convict Korey Love.

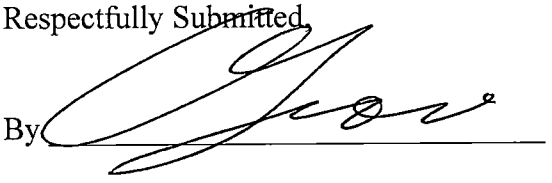
Trial counsel emphasizing his client's lengthy pre-trial incarceration, when considered with the alibi issues, further invited the jurors to convict Korey Love. By concluding the lengthy pre-trial incarceration represented bad character, the jurors could use the adverse character determination when deciding whether Korey Love's testimony proved his alibi defense.

None of these deficiencies are valid strategies. *Freiburger* and *Ingle*, *supra.* But for trial counsel's deficient performance, there is a reasonable probability the result of the trial would have been different. This Court should grant the writ and consider the issue.

CONCLUSION

For the foregoing reasons, this Court should grant Korey Love's petition for a writ of *certiorari.*

Respectfully Submitted,

By 

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May 1, 2017

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
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S.C. SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions
Daniel D. Hall, Circuit Court Judge

Appellate Case No. 2016-002233

Korey Lamar Love, ... Petitioner,

v.

State of South Carolina, ... Respondent.

Certificate of Service

I certify that I have served a copy of the Petition for Writ of *Certiorari* and Appendix on the State of South Carolina by placing a copy in the US Mail, postage prepaid, on the date reflected below, addressed to

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