

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY

Court of General Sessions
Daniel D. Hall, Circuit Court Judge

RECEIVED

MAY 03 2017

S.C. SUPREME COURT

Appellate Case No. 2016-002233

Korey Lamar Love,.....Petitioner,

v.

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

APPENDIX – VOLUME II OF II

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INDEX

Volume I

Trial Transcript	1
Jury Qualification.....	25
Jury Sworn	46
Collis Flavell (Pre-trial)	
Direct by Ms. Seay.....	47
Cross by Mr. Smith	51
Opening Statement by State.....	54
Opening Statement by Defense.....	57
Barbara Jackson (SW)	
Direct by Ms. Seay.....	64
Cross by Mr. Smith	71
Re-direct by Ms. Seay.....	72
Re-cross by Mr. Smith	73
Shauntiqua Glenn (SW)	
Direct by Ms. Seay.....	74
Gloria Shelton (SW)	
Direct by Ms. Seay.....	78
Cross by Mr. Smith	81
Sebastian Restrepo (SW)	
Direct by MR. Steinberg.....	83
Cross by Mr. Smith	87

Jeremiah Lynn Motz (SW)

Direct by Mr. Steinberg 88

Cross by Mr. Smith 92

Charles Keith Cothran (SW)

Direct by Mr. Steinberg 96

Cross by Mr. Smith 100

Sara Brunson (SW)

Direct by Ms. Seay 104

Cross by Mr. Smith 111

April Jane Deitz (SW)

Direct by Ms. Seay 113

Cross by Mr. Smith 123

James William Armstrong (SW)

Direct by Mr. Steinberg 126

Cross by Mr. Smith 135

Dr. Michael Eugene Ward (SW)

Direct by Mr. Steinberg 126

Cross by Mr. Smith 135

Daniel C. Fuller (SW)

Direct by Mr. Steinberg 150

Cross by Mr. Smith 160

Re-direct by Mr. Steinberg 163

Re-cross by Mr. Smith	164
Collis Flavell (SW)	
Direct by Ms. Seay.....	166
Cross by Mr. Smith.....	200
Corliss Orlena Love (SW)	
Direct by Ms. Seay.....	208
Cross by Mr. Smith.....	213
Jalesa Neal (SW)	
Direct by Ms. Seay.....	219
Cross by Mr. Smith.....	225
Re-direct by Ms. Seay.....	230
Rashida Peters (SW)	
Direct by Mr. Steinberg	236
Cross by Mr. Smith.....	254
Ricky D. Simmons (SW)	
Direct by Mr. Steinberg	236
Cross by Mr. Smith.....	284
Re-Direct by Mr. Steinberg.....	305
Rashad Simmons (SW)	
Direct by Mr. Steinberg	308
Cross by Mr. Smith.....	325
Re-Direct by Mr. Steinberg.....	336
Re-cross by Mr. Smith.....	339

Eric Jarod Ransom (SW)

Direct by Ms. Seay.....	351
Cross by Mr. Smith.....	378
Re-direct by Ms. Seay.....	395

Ben Nauman (DW)

Direct by Mr. Smith.....	401
Cross by Ms. Seay	404

Leslie Jackson (DW)

Direct by Mr. Smith.....	405
Cross by Ms. Seay	412
Re-direct by Mr. Smith.....	417

Ronald Chapman, Jr. (DW)

Direct by Mr. Smith.....	418
Cross by Ms. Seay	420

Original Mustafa (DW)

Direct by Mr. Smith.....	421
--------------------------	-----

Kristina Lockwood (DW)

Direct by Mr. Smith.....	423
Cross by Ms. Seay	426

Korey Love (DW)

Direct by Mr. Smith.....	430
Cross by Ms. Seay	439
Re-direct by Mr. Smith.....	446

Closing Argument by Mr. Steinberg.....	450
Closing Argument by Mr. Smith	452
Closing Argument by Ms. Seay	461
Jury Charge	475
Verdict.....	498

Volume II

Sentence	504
Certificate of Court Reporter	505
Indictments.....	506
Application for Post-Conviction Relief	512
Return to Application for Post-Conviction Relief	518
Post-Conviction Relief Transcript	524

Kendel Love (AW)

Direct by Mr. Grose	540
Cross by Ms. Ratigan.....	546

Fletcher Smith (AW)

Direct by Mr. Grose	550
Cross by Ms. Ratigan.....	586
Re-direct by Mr. Grose	591

Howard Steinberg (SW)

Direct by Mr. Grose	599
Cross by Ms. Ratigan.....	604

Certificate of Court Reporter	615
-------------------------------------	-----

Post-Conviction Relief Hearing Exhibits

A-1 (Handwritten Letter of Eric Jarod Ransom)	616
A-2 (Affidavit of Demetrius Jackson)	618
A-3 (Affidavit of Jerome Love)	619

Memorandum in Support of Application for Post-Conviction Relief

Memorandum	622
Proposed Amended PCR Application (Attachment 1)	636
Ralph King Anderson, Jr., South Carolina Request to Charge— Criminal, 2007, § 6-19 (Attachment 2)	642
Order of Dismissal	645
Rule 59(e), SCRCP Motion	657
Return to Rule 59(e), SCRCP Motion	673
Order Denying Rule 59(e), SCRCP Motion	676

MOTIONS AND MATTERS

1 test in cross, uh, and show that she was lying during the
2 course of the polygraph test and her sliver of information was
3 added into the, uh, State's case with regard to Rashida
4 Peters. We believe that the facts and circumstance even
5 looking at in light most favorable to the State would bear to
6 indicate that Mr. Love is not guilty of the charges.

7 THE COURT: Alright, well thank you for your motions,
8 they are denied.

9 MR. SMITH: Thank Your Honor.

10 (Pause.)

11 THE COURT: Okay. Alright, c'mon around.

12 (Whereupon, the defendant came forward.)

13 THE COURT: Alright, before we -- how many days has he
14 spent in jail or has he been incarcerated since when?

15 MS. SEAY: He's been incarcerated since March 16th of
16 2010.

17 THE COURT: Okay. Alright, well I'll be happy to hear
18 any victim input.

19 MS. SEAY: Yes, the family does have a statement to
20 present to the Court.

21 THE COURT: Alright, be happy to hear it.

22 MR. BASS: Uh, Your Honor, my name is Marvin Bass, uh,
23 I'm gonna have somebody ---

24 MS. COX: Your Honor, I'm Darlene Cox, I'm Isaac's ant.
25 This is his father Marvin Bass. Isaac was very special to all

MOTIONS AND MATTERS

1 of us, he was a special young man and he had potential in
2 life.

3 UNIDENTIFIED MAN: Do you want me to read it for ---

4 MR. BRIDGES: Okay. Uh, Your Honor, my name's
5 Christopher Bridges, I'm gonna read this from, uh, Isaac's
6 father. Isaac was a good young man whose life held a lotta
7 promise. He was cheerful, funny and worked hard, he loved his
8 family. It is terrible that Isaac was cheated of his life but
9 also unfortunate that all of us are cheated by the senseless
10 murder of Isaac Bass. We ask that the Cou -- Court issue a
11 sentence that is appropriate for the crime committed. Thank
12 you.

13 THE COURT: Alright, thank you. Anything else?

14 (No response.)

15 THE COURT: Alright. Alright, tell me wha -- does he
16 have a prior criminal history?

17 MS. SEAY: He does not have a prior cri -- prior criminal
18 history, Your Honor, he does have another pending armed
19 robbery case, um, that, uh, is from 2009.

20 THE COURT: Okay. Alright.

21 MR. SMITH: Your Honor, -- oh, may it please the Court.

22 THE COURT: Yeah, let's ---

23 MR. SMITH: He ---

24 THE COURT: --- go, Mr. Smith.

25 MR. SMITH: --- with regard to that charge, the person

MOTIONS AND MATTERS

1 uh, gave conflicting statements about whether or not they
2 could identify him.

3 THE COURT: I'm not concerned about ---

4 MR. SMITH: Okay, ---

5 THE COURT: --- that.

6 MR. SMITH: --- alright, sir. Your Honor, we, think this
7 young man had a very promising life, he was majoring in math
8 at Greenville Technical College. Fact is that this family
9 that his dad married into was not conducive to helping him.
10 We accept the jury's verdict, that's the way our system
11 operates. We believe that a sentence of of life with parole
12 would be, uh, wholly unconscionable under the circumstances,
13 there oughta be some hope for someone to be able to get outta
14 prison and and become a productive member of our society. For
15 society to take complete hope away from someone, and we
16 understand a death was involved in this matter, shows extreme
17 retribution with regard to the sentencing process and on that
18 basis we would ask for a a and a sentence appropriate with
19 regard to appropriate parole.

20 THE COURT: Alright, what do you wanna tell me?

21 THE DEFENDANT: Um, that I'm sorry about the family
22 losin' their son and e -- and everything but I didn't, I know
23 the jury said wha -- made their decision but I'm I'm not
24 guilty, I did not commit that murder, I did not kill their --
25 your son, wasn't me, you know. I really am deeply sorry about

SENTENCE

1 them losin' a child, you know, it's sad how one person, one
2 family lost their son, now another family losin' their son and
3 I just feel it's not right, ya know, 'cause I didn't do it,
4 wasn't me but ---

5 THE COURT: Well what did ya know about it?

6 THE DEFENDANT: I didn't know nothing about it. Them
7 people up there came up there and lie. They said they
8 admitted liars not one time, not two times, they kept e --
9 until every time they pressured 'em they change their
10 statement. Now a little sumtin', when they say sumtin' that
11 sound good they wanna go with it.

12 THE COURT: Hmm, it's kinda unusual in my mind that this
13 was a cold case and that years after the event occurred
14 different people on different parts of the globe all told
15 about the same story and yet your story is that you didn't
16 have any participation, didn't discuss potential robbery,
17 didn't have anything to do with it and yet these other people
18 from all over the globe told a mainly consistent story. Well
19 and what Mr. Smith says is, uh, carries some weight but this,
20 the victim's family I appreciate ya'll being here and we all
21 send you our heartfelt condolences, 23-years-old from what I
22 can tell, I'm gonna sentence him to 50 years in prison for the
23 murder, 20 years on the armed robbery, 5 on the other two.

24 MR. STEINBERG: Thank Your Honor.

25 MS. SEAY: Thank you, Your Honor.

CERTIFICATE OF REPORTER

I, Margaret A. Woods, Court Reporter in and for the State of South Carolina at Large, hereby certify that I reported the preceding case on November 5, 6, 7 and 8, 2012 at the time and place heretofore set forth; and that the foregoing pages numbered from 10 through 504, inclusive, constitute a true and accurate transcription of my stenographic notes of the said proceeding.

I further certify that I am neither attorney nor counsel for, nor related to or employed by any of the parties connected to the action, nor am I financially interested in the action.

April 7, 2013



Margaret A. Woods, Court Reporter
in and for the State of South Carolina at Large.

WITNESSES

C H Flavell

CHF

Greenville Police Department

3/16/2010

ARREST WARRANT NUMBER

M382315

ACTION OF GRAND JURY

TRUE BILL*Bob Dave*

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2010-GS-23-

BSD

004508

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

January

TERM 2010 2011

THE STATE

vs.

KOREY LAMAR LOVE

Indictment for

2364

POSSESSION OF A PISTOL BY A PERSON
UNDER 18 YEARS OF AGE

VIOLATION § 16-23-0030

RECEIVED

JUN 17 2010

Clerk of Court
Greenville County

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

INDICTMENT FOR
POSSESSION OF A PISTOL BY A PERSON UNDER 18 YEARS
OF AGE

JAN 19 2011

At a Court of General Sessions, convened on

the Grand Jurors of Greenville

County present upon their oath:

That KOREY LAMAR LOVE did in Greenville County, on or about the 27th day of January, 2007, while at 943 North Pleasantburg Drive (Wendy's), Greenville, South Carolina, willfully and unlawfully have in his possession and under his control a pistol, the said defendant being under the age of eighteen (18). This is in violation of § 16-23-0030 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Chupria S. Seay
SOLICITOR

WITNESSES

C H Flavell *CH*

Greenville Police Department

3/16/2010

ARREST WARRANT NUMBER

M382313 and M382314

ACTION OF GRAND JURY

TRUE BILL*Bob Damm*
FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2010-GS-23-
BSD

004509

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

January

TERM 2010 2011

THE STATE

VS.

KOREY LAMAR LOVE

Indictment for

0026/0549

ATTEMPTED ARMED ROBBERY AND
POSSESSION OF A WEAPON DURING THE
COMMISSION OF A VIOLENT CRIME

VIOLATION § 16-11-0330 and § 16-23-0490

RECEIVED

JUN 17 2010

Clerk of Court
Greenville County

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

INDICTMENT FOR
ATTEMPTED ARMED ROBBERY AND POSSESSION OF A
WEAPON DURING THE COMMISSION OF A VIOLENT CRIME

At a Court of General Sessions, convened on **JAN 19 2011** the Grand Jurors of Greenville
County present upon their oath:

COUNT I - ATTEMPTED ARMED ROBBERY

That KOREY LAMAR LOVE did in Greenville County, on or about the 27th day of January, 2007, while armed with a deadly weapon, or while alleging either by action or words he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery would reasonably believe to be a deadly weapon, attempt to take by means of force or intimidation, goods or monies from the person or presence of MARVELIN ISAAC BASS. This is in violation of §16-11-330 of the South Carolina Code of Laws (1976) as amended.

COUNT II - POSSESSION OF A WEAPON DURING THE COMMISSION OF A VIOLENT CRIME

That KOREY LAMAR LOVE did in Greenville County on or about the 27th day of January, 2007, possess or visibly display a handgun during the commission or attempted commission of a violent crime, to wit: Attempted Armed Robbery. This is in violation of §16-23-490 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


SOLICITOR

WITNESSES

C H Flavell *CH*

Greenville Police Department

3/16/2010

ARREST WARRANT NUMBER

M382312

ACTION OF GRAND JURY

TRUE BILL*Bob L. Green*
FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2010-GS-23-
BSD

004510

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

January

TERM 2010 *2011*

THE STATE

vs.

KOREY LAMAR LOVE

Indictment for

0116

MURDER

VIOLATION § 16-03-0010

RECEIVED

JUN 17 2010

Clerk of Court
Greenville County

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
MURDER

At a Court of General Sessions, convened on

JAN 19 2011

the Grand Jurors of Greenville

County present upon their oath:

That KOREY LAMAR LOVE did in Greenville County, on or about the 27th day of January, 2007, unlawfully and with malice aforethought kill MARVELIN ISAAC BASS by means of shooting him and that MARVELIN ISAAC BASS died as a proximate result thereof. This is in violation of §16-3-10 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Brayna J. Seay
SOLICITOR

Appendix 512

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF Greenville)

Korey Love, SCDC # 353157)

Full name and prison number (if any) of Applicant.)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention McCormick Correctional Institute
2. Name and location of Court which imposed sentence The Honorable Edward Miller,
Presiding Judge, Greenville County Court of General Sessions
3. Name(s) of co-defendant(s) (if any) Eric Jarod Ransom.
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed: 2010-GS-23-4508, 4509, and 4510
5. The date upon which sentence was imposed and the terms of the sentence: On November 8, 2012, Judge Miller sentenced Applicant to 50 years for murder, 20 years for attempted armed robbery, 5 years for possession of a firearm during the commission of a violent crime, and 5 years for possession of a pistol by someone under 21 years of age.

Appendix 513

6. Check whether a finding of guilty was made:
 - (a) after a plea of guilty. n/a
 - (b) after a plea of not guilty. X
 - (c) after a plea of nolo contendere. n/a
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes.
8. If you answered "yes" to (7), list:
 - (a) the name of each Court to which you appealed: S. C. Court of Appeals
 - (b) the result in each such Court to which you appealed: Convictions and sentences affirmed.
 - (c) the date of each such result: April 23, 2014
 - (d) if known, citations of any written opinion or orders entered pursuant to such results: Unpublished Opinion Number 2014-UP-177.
9. If you answered "no" to (7), state your reasons for not so appealing: n/a
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
 - (a) Applicant was denied the right to effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, during his jury trial to determine his guilt or innocence.
 - (b) Applicant was denied the right to effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, during the appeal of his conviction and sentence.
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
 - (a) Trial counsel's performance was both unreasonable and prejudicial. See *Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's acts or omissions included, but are not limited to, the following:
 - 1) During opening statement and closing argument, making burden shifting

Appendix 514

comments that conveyed to the jurors that Applicant had the burdern of proving his defense, including his alibi.

2) During opening statements, promising the jurors that the defense would call certain alibi witnesses, which trial counsel never called to testify, thereby undermining the defense's credibility with the jurors.

3) Not calling witness that supported Applicant's alibi defense.

4) During direct testiony, eliciting from the Applicant that he had been incarcerated on these charges for 2 ½ years.

5) Emphasizing during closing argument that the Applicant had been incarcerated for 2 ½ years on these cahrges.

6) Failing to make a specific objection the trial court judge's instrucing the jurors "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."

7) During juror deliberations, failing to object to the trial court judge answering a question from the jurors by providing factual information.

(b) Counsel's performance on direct appeal was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's acts or omissions included, but are not limited to, the following:

1) Failing to appeal the trial court judge's instrucing the jurors "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."

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? No.

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No.

Appendix 515

- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No.
- (d) any other petitions, motions or applications in this or any other Court? No.
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application: n/a
- (a) the specific nature thereof: n/a
- (b) the name and location of the Court in which each was filed: n/a
- (c) the disposition thereof: n/a
- (d) the date of each such disposition: n/a
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition: n/a
14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
No.
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented: n/a
- (b) the proceedings in which each ground was raised: n/a
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented: n/a
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? No.
- (b) your trial, if any? Feltcher Smith, 112 Wakefield Street, Greenville, SC 29601
- (c) your sentencing? Fletcher Smith
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Benjamin John Tripp, S.C. Commission on Indigent Defense, PO Box 11589, Columbia, SC 29211-1589
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Only the undersigned counsel with regard to this petition.
18. If you answered "yes" to one or more parts of (17), list: See No. 17, supra.

Appendix 516

19. State clearly the relief you seek in filing this application:

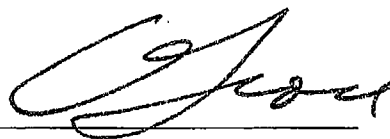
The Court should vacate the convictions and sentences and order a new trial.

20. Are you now under sentence from any other court that you have not challenged?

No.

Respectfully submitted,

By



E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 20646
(864) 538-4466

Counsel for Applicant

April 8, 2015
Greenwood, South Carolina

Appendix 517

STATE OF SOUTH CAROLINA

County of McCormick

)
)
)

VERIFICATION

I, **Korey Love**, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Korey Love

SWORN to and subscribed before me this 8th
day of April, 2015.

E. Charles Grose, Jr. (L.S.)
E. Charles Grose, Jr., Notary Public for S.C.

My Commission Expires: May 31, 2023

Appendix 518

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)
Korey Lamar Love,)
S.C.D.C. No. 353157,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
C.A. No. 2015-CP-23-2618

RETURN

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2015 JUL 21 AM 11 40

In response to the post-conviction relief application filed April 20, 2015, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. The Greenville County Grand Jury indicted the Applicant at the January 2011 term of General Sessions for possession of a pistol by a person under 18 years of age (2010-GS-23-4508), attempted armed robbery (2010-GS-23-4509, count 1), possession of a weapon during commission of a violent crime (2010-GS-23-4509, count 2), and murder (2010-GS-23-4510). Fletcher N. Smith, Jr., Esquire represented the Applicant.

After the State called the case to trial, the Applicant was found guilty. On November 8, 2012, the Honorable Edward W. Miller sentenced the Applicant to concurrent terms of 5 years for possession of a pistol by a person under 18 years of age, 20 years for attempted armed robbery, 5 years for possession of a weapon during commission of a violent crime, and 50 years

Appendix 519

for murder.

A notice of appeal was filed at the South Carolina Court of Appeals. Benjamin J. Tripp, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal in the form of an Anders¹ brief. The Court of Appeals dismissed the appeal. State v. Love, Op. No. 2014-UP-177 (S.C. Ct. App. filed April 23, 2014). The Remittitur was sent on May 19, 2014.

Attached herewith and incorporated herein by reference are the records of the Greenville County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, and the appellate records.

II.

In his application for post-conviction relief, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel.
 - a. "During opening statement and closing argument, making burden shifting comments that conveyed to the jurors that Applicant had the burdern of proving his defense, includning his alibi."
 - b. "During opening statements, promising the jurors that the defense would call certain alibi witnesses, which trial counsel never called to testify, thereby undermining the defense's credibility with the jurors."
 - c. "Not calling witness that supported Applicant's alibi defense."
 - d. "During direct testiony, eliciting from the Applicant that he had been incarcerated on these charges for 2 1/2 years."
 - e. "Emphasizing during closing argument that the Applicant had been incarcerated for 2 1/2 years on these cahrges."
 - f. "Failing to make a specific objection the trial court judge's instrucing the jurors '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.'"
 - g. "During juror deliberations, failing to object to the trial court judge

¹ Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

Appendix 520

answering a question from the jurors by providing factual information.”

2. Ineffective assistance of appellate counsel.
 - a. Failing to appeal the trial court judge’s instructing the jurors ‘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.’”

III.

The Respondent asserts the Applicant’s allegation that his trial attorney was ineffective is without merit. The Respondent asserts the Applicant’s attorney rendered effective assistance well within the standard of “reasonableness within professional norms” for a defense attorney.

Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel “rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under prevailing professional norms.” Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at

Appendix 521

2065). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

IV.

The Respondent asserts the Applicant's allegation that his appellate attorney was ineffective is without merit. The Respondent asserts the Applicant's attorney rendered effective assistance well within the standard of "reasonableness within professional norms" for an appellate attorney. A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830 (1985). In analyzing a claim of ineffective assistance of appellate counsel, the Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009); Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999) (noting courts apply the Strickland test to determine if appellate counsel was deficient for failing to raise an issue and whether the defendant was prejudiced from the failure

Appendix 522

to raise the issue). Appellate counsel, however, is not required to raise every non-frivolous claim, but instead may select among them in order to maximize the likelihood of a favorable outcome. Smith v. Robbins, 528 U.S. 259, 288, 120 S. Ct. 746, 765 (2000).

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. at 265, 305 S.E.2d at 248.

V.

The Respondent denies each allegation not expressly admitted, qualified or explained.

VI.

WHEREFORE, having made its Return, the Respondent requests that a hearing be held on the issues raised in the PCR application.

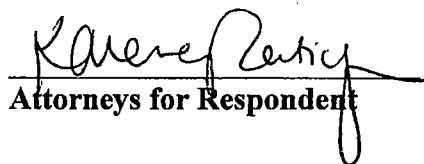
Respectfully submitted,

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By:


Attorneys for Respondent

July 17, 2015

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

KOREY LAMAR LOVE, 353157)

Applicant,)

vs)

STATE OF SOUTH CAROLINA,)

Respondent.)

IN THE COURT OF COMMON PLEAS

2015-CP-23-2618

AFFIDAVIT OF SERVICE BY MAIL

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2015 JUL 21 AM 11 40

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

E. Charles Grose, Jr., Esquire
Grose Law Firm
404 Main Street
Greenwood SC 29646

DATED this 17th day of July, 2015.


Judy A. C. Carey, Legal Assistant
For Respondent

Appendix 524

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	2015-CP-23-02618
COUNTY OF GREENVILLE.	)	
	)	
	)	
	)	
KOREY L. LOVE,	)	
APPLICANT,	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
STATE OF SOUTH CAROLINA,	)	
RESPONDENT.	)	

February 17, 2016
Greenville, South Carolina

B E F O R E:

THE HONORABLE DANIEL DEWITT HALL, JUDGE

A P P E A R A N C E S:

E. CHARLES GROSE, JR., ESQ.
Attorney for the Applicant

KAREN C. RATIGAN, ESQ.
Attorney for the Respondent

CHERYL A. SMITH
Circuit Court Reporter

INDEX

(AW) - Denotes Applicant's Witness

(SW) - Denotes State's Witness

PAGE

Motions	3, 8, 10, 15
---------	--------------

(AW) KENDEL LOVE:

Direct Examination by Mr. Grose	17
---------------------------------	----

Cross-Examination by Ms. Ratigan	23
----------------------------------	----

(AW) FLETCHER SMITH:

Direct Examination by Mr. Grose	27
---------------------------------	----

Cross-Examination by Ms. Ratigan	63
----------------------------------	----

Redirect Examination by Mr. Grose	68
-----------------------------------	----

Motion	75
--------	----

Applicant Rests	76
-----------------	----

(SW) HOWARD STEINBERG:

Direct Examination by Ms. Ratigan	76
-----------------------------------	----

Cross-Examination by Mr. Grose	81
--------------------------------	----

State Rests	89
-------------	----

Motion	89
--------	----

Certificate of Reporter	92
-------------------------	----

EXHIBITS

<u>NO</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVD</u>
-----------	--------------------	-----------	------------

(Applicant's Exhibits)

A-1	Handwritten Letter	3	
-----	--------------------	---	--

A-2	Affidavit of Demetrius Jackson	11	
-----	--------------------------------	----	--

A-3	Affidavit of Jerome Love	11	
-----	--------------------------	----	--

P R O C E E D I N G S

MS. RATIGAN: The first case today is Korey Love. The docket number is 2015-CP-23-2618.

Rather than going into the procedural history and all that, Mr. Grose has some motions to make. So I'll turn that over to him, and then I'll just respond once he's made his motions, Judge.

THE COURT: All right.

MR. GROSE: Thank you.

THE COURT: Yes, Mr. Grose?

MR. GROSE: Your Honor, I learned about a letter that was sent -- we believe or pretty certain was sent by the testifying codefendant, Eric Jarod Ransom, to Mr. Love. I just learned about this letter last night and actually saw it for the first time this morning. And I would like to mark it as an exhibit and hand it up. I've given the attorney general a chance to look at it.

(WHEREUPON, Applicant's Exhibit No. 1 was marked for identification.)

THE COURT: Before I look at it, what's the relevance of me looking at a letter from a codefendant? Is he in SCDC? Well, regardless of where he is, what's the relevance at a PCR hearing for me hearing or reading a letter from a codefendant on the day of the PCR?

MR. GROSE: Well, I'm going to ask for time to

1 investigate what's in this letter.

2 THE COURT: Well, if you'll just put on -- you tell me
3 what's in the -- as an officer of the Court what's in the
4 letter and how it's relevant to what we're doing here
5 today.

6 MR. GROSE: Well, the letter suggests that
7 Mr. Ransom's testimony at trial was not true, and there's a
8 number of things in it that go to that. But one of the
9 most significant things, I think, is that -- just by way of
10 background, when this homicide happened, it happened at a
11 Wendy's on Pleasantburg Drive here in Greenville in 2007.
12 It wasn't until, I believe, 2010 that arrests were made.
13 And Mr. Ransom, at that time, was in the military, and he
14 was stationed in Okinawa, Japan. And a big part of the
15 State's case was is that they have witnesses here in South
16 Carolina making statements implicating Mr. Love, and then
17 they had this Mr. Ransom over in Japan making statements
18 implicating Mr. Love without any knowledge of the
19 investigation that was going on in South Carolina.

20 That letter says that when the investigators first
21 confronted Mr. Ransom in Japan, that they showed him
22 statements of three witnesses that had given the statements
23 here in South Carolina. And then based on those
24 statements, Mr. Ransom in Japan knew what to say so that he
25 could ultimately get a deal for having the murder charge

1 dropped and pleading to attempted armed robbery, ultimately
2 got 5 or 7 years instead of 30 years to life plus 20 years
3 that he would have been facing.

4 Mr. Smith's theory at trial, which I think was ---

5 THE COURT: Let me -- I'm a little bit baffled. If
6 this is part of -- we're here for postconviction relief
7 involving the allegations that Mr. Smith was ineffective,
8 right?

9 MR. GROSE: Well, right now we are. This would be new
10 evidence. And under the statute ---

11 THE COURT: Well, yeah. Educate me on how I'm
12 supposed to -- how, as a PCR judge, am I supposed to handle
13 what is allegedly new evidence?

14 MR. GROSE: Under the statute, if there's evidence
15 that's not previously been presented that would make a
16 difference in the outcome of the case, you have an
17 obligation to consider that evidence in determining whether
18 or not it would make a difference on the outcome of the
19 case, and if it would, to grant a new trial so the jurors
20 could consider that.

21 THE COURT: All right. And so is that your motion
22 before we do anything on the PCR?

23 MR. GROSE: My motion is ---

24 THE COURT: What's your motion?

25 MR. GROSE: My motion is for a continuance so I can

1 investigate the contents of that letter.

2 THE COURT: All right. So that's where we are.

3 MR. GROSE: Yes, sir.

4 THE COURT: And, Ms. Ratigan, what is your position?

5 Have you seen the letter?

6 MS. RATIGAN: I saw the letter this morning, Your
7 Honor. It's not signed, there's no authentication, it's
8 hearsay. This case -- the application was filed in April
9 of 2015. The roster was sent out more than a month ago.
10 The State's position is that we should be allowed to go
11 forward today. This is just kind of a last-minute attempt
12 to stretch the case out even further, and that all issues
13 should have been marshaled prior to the night before the
14 case, Your Honor.

15 And I would also say I believe Mr. Grose has a couple
16 other ---

17 THE COURT: Well, let's take them one at a time here.

18 In the first one, Mr. Grose is alleging that he has
19 new evidence, and he's asking for a continuance so that he
20 can investigate that further.

21 Mr. Grose, educate me on where, in the statute, that I
22 need to be looking at.

23 MR. GROSE: It's the section regarding grounds for
24 relief.

25 MS. RATIGAN: I want to say it's 17-27-45, I want to

1 say. But there is a provision for after-discovered
2 evidence, Your Honor. However, our argument would be this
3 doesn't even rise to that level because it's simply
4 scrawling on a piece of paper with no providence to it.

5 MR. GROSE: It would be 17-27-45(C).

6 And her statement is exactly why I want to have an
7 opportunity to investigate it. I mean, if I investigate it
8 and it turns out to be nothing, I'm not going to present
9 it. But if I investigate it and it turns out that he did,
10 in fact, say that and confirms that, then that's
11 information that Mr. Smith was entitled to know and ask him
12 about during the trial. It would also rise to a Brady
13 violation.

14 THE COURT: Let me see the letter.

15 All right. Mr. Grose, again, there's no -- I haven't
16 read the contents of the letter. The letter marked
17 Applicant's Exhibit 1 is very small writing in pencil that
18 has no names on it, certainly not signed. But there are --
19 it's not dated, there's no -- what makes you believe this
20 came from a codefendant?

21 MR. GROSE: Because when it was given to my client,
22 that was the impression that he was given. When you read
23 the content of the letter, it's certainly talking as if it
24 was the codefendant because he talks about the NCIS
25 investigators approaching him in Japan, he talks about

1 giving various statements that evolved over time, he talks
2 about -- gives the first names of witnesses in the case,
3 and it, you know, suggests that, you know, he was doing
4 what Mr. Smith believed that he was doing at the time of
5 trial which was changing his story to fit a theory that the
6 prosecution had that would save Mr. Ransom's own hide from
7 a 30-year-to-life sentence in prison.

8 And I understand you have some concerns. I just want
9 a chance to look into it. Like I say, if it doesn't pan
10 out, then we'll know. But if it does, then I think
11 Mr. Love's entitled to have that presented.

12 THE COURT: All right. What's your next motion?

13 MR. GROSE: The other issue that I have -- which this
14 is not really by way of motion. This is just, I guess,
15 sort of the procedural hurdles that we're going to have to
16 deal with. In Mr. Smith's opening at trial, he identified
17 by name three alibi witnesses that he was going to call to
18 testify. A woman by the name of Leslie Jackson was one of
19 them. She did testify. Her husband, Demetrius Antwen
20 [phonetic] Jackson, and Korey Love's father, Jerome Love,
21 were also identified as alibi witnesses in the opening.

22 Mr. Jackson lives in Atlanta now, Mr. Love lives in
23 California. He may have been living in California at the
24 time, but he was in South Carolina for the trial. I have
25 affidavits from them as to what their testimony would have

1 been.

2 And, of course, under the statutes, you can receive
3 not only oral testimony, but affidavits and depositions.
4 And I believe that the attorney general would want to
5 cross-examine these witnesses. In their affidavits, they
6 both agree to give depositions. So even if we proceed
7 today, I'm going to be asking that the record be held open
8 to get that deposition testimony, if that's what the
9 attorney general wants to do. Were you to give me the time
10 that I'm asking for, we could have these depositions by the
11 time we came back at the next hearing.

12 This is not unprecedented. I've done this in at least
13 one other case and I know other lawyers have done it where
14 you hold the record open for depositions. And I can
15 introduce the affidavits.

16 THE COURT: All right. I'm reading -- 17-27-45(C)
17 states, "If the applicant contends that there is evidence
18 of material facts not previously presented and heard that
19 requires vacation of a conviction or sentence, the
20 application must be filed under this chapter within one
21 year after the date of actual discovery of the facts by the
22 applicant or after the date when the facts could have been
23 ascertained by the exercise of reasonable diligence."

24 I think in reading 17-27-45(C), that in this case, the
25 applicant, Mr. Love, does contend that there is evidence

1 and material facts not previously presented and heard, and
2 he contends that it requires vacation of the conviction or
3 sentence. Certainly, Mr. Grose, when did your guy get the
4 letter?

5 DEFENDANT LOVE: When I was in Kirkland.

6 THE COURT: When were you in Kirkland?

7 DEFENDANT LOVE: 2012, November.

8 THE COURT: You got the letter in 2012.

9 DEFENDANT LOVE: I think so, yeah.

10 THE COURT: All right. Then I deny your motion. He's
11 had the letter since 2012. The statute says that after one
12 year of actual discovery. He had the letter and knew about
13 it in 2012, here we are in 2016. Then I'm going to deny
14 that motion on the continuance on this issue.

15 Now, what was your second?

16 MR. GROSE: Well, the second issue is at this time I
17 would introduce the affidavit of Demetrius Jackson as
18 Applicant's Exhibit 2 and Jerome Love as Applicant's
19 Exhibit 3.

20 THE COURT: Let me just put back on the record, what
21 was presented as Applicant's Exhibit 1, there appears to be
22 that the applicant, in fact, had that unsigned letter in
23 his possession since 2012, and now some four years later is
24 presenting it as a material fact and that I find that he
25 knew about that, in fact, I assume when he made application

1 for his PCR, and he did not act on it. And so therefore,
2 that's the basis of denying that motion.

3 Here's your letter back.

4 THE COURT: All right. Now tell me about the
5 affidavits.

6 MR. GROSE: Can we mark them?

7 THE COURT: Yes.

8 (WHEREUPON, Applicant's Exhibit Nos. 2 and 3 were marked
9 for identification.)

10 THE COURT: All right. Mr. Grose, what's your motion
11 again on these affidavits?

12 MR. GROSE: Well, under the statute, we're allowed to
13 submit affidavits to court for review in postconviction.
14 Both of those witnesses are out of state. Both are
15 agreeing to give depositions. I think the attorney general
16 wants to have an opportunity to cross-examine them. And so
17 we would be requesting that the Court either consider those
18 as is -- or, actually, I just request the Court keep the
19 record open so that we can take those depositions and
20 submit them to the Court in a reasonable amount of time
21 after today's hearing.

22 THE COURT: And, Ms. Ratigan, what's the State's
23 position?

24 MS. RATIGAN: Your Honor, Mr. Grose is correct that we
25 object to the affidavits being entered as is. We would

1 also object to depositions in this case, Your Honor. The
2 purpose of these witnesses would be called as alibi
3 witnesses, therefore, their credibility would be very
4 important for the PCR judge to ascertain. Obviously, you
5 can't judge credibility as clearly in terms of demeanor and
6 things of that nature when it's in a deposition.

7 Again, Mr. Love filed this application about ten
8 months ago. He knew this day was coming. We would say
9 that the witnesses should be presented for proper
10 cross-examination, and so we would object to there being
11 depositions in lieu of that.

12 MR. GROSE: Well, my response to that would be, of
13 course, that the Statute 17-27-70 contemplates the use of
14 both affidavits and depositions. It doesn't require both
15 of them. The affidavits are admissible for postconviction.
16 If the attorney general wants to have Your Honor to be able
17 to observe their demeanor, the videos -- the depositions
18 could be videotaped. I don't really see what the basis of
19 her objection is.

20 Basically, what I have to do is to satisfy the Court
21 as to what these witnesses would have testified to, they
22 would have testified to an alibi, and Mr. Love's father,
23 Jerome Love, would have provided testimony that
24 contradicted another witness. And these are allegations of
25 ineffective assistance of counsel, and I have to establish

1 what they would have testified to. I've done that with
2 those affidavits. In fact, I don't think there's going to
3 be any dispute that they would have testified to an alibi
4 because Mr. Smith knew that and said so in his opening
5 statements to the jurors.

6 If they're going to -- I don't think they can object
7 to the affidavits coming in. I'm willing to give them the
8 opportunity of what they want, which is cross-examination,
9 and do it in a way that can get Your Honor the most
10 information.

11 THE COURT: All right. We're here on the day of the
12 PCR. Why aren't they -- again, tell me why they're not
13 here.

14 MR. GROSE: They live out of state.

15 THE COURT: I mean, did you go through the
16 out-of-state subpoena process?

17 MR. GROSE: For criminal cases, not civil cases.
18 Depositions is what we do in civil cases all the time, Your
19 Honor.

20 THE COURT: Obviously, they're not agreeing to come.
21 I mean, they're unavailable simply because they're out of
22 state? Have you tried to get them here?

23 MR. GROSE: I don't know that Mr. Jerome Love has the
24 finances to travel from California. He works two jobs.

25 I was hoping to have Demetrius Fuller here. He lives

1 in Atlanta. He's much closer. One of the things that
2 you'll note in his affidavit, which is Applicant's Exhibit
3 Number 2, is that he works at a restaurant there and they
4 had somebody on their staff that died recently, and -- last
5 week, I believe, and he told me that they were all having
6 to work extra hours.

7 THE COURT: All right. Well, let me ask you another
8 practical question. Why were they not deposed? I mean,
9 this is a civil case, and civil cases, when trial dates are
10 set, lawyers depose their witnesses. Both sides have an
11 opportunity to examine the witnesses. And that's done -- I
12 mean, sometimes it's not done until the week before a civil
13 trial, but they get done.

14 MR. GROSE: In order to take depositions in a PCR, I
15 need a court order allowing me to do that.

16 Also, my experience has been I have had a PCR before
17 where the Court held the record open to take the
18 depositions of witnesses that, for whatever reason,
19 couldn't be at the PCR hearing. This is not an
20 unprecedented practice.

21 And quite frankly, Your Honor, the affidavits are
22 admissible under the statute, so I don't know that it's
23 required that they be deposed. I think it would -- you
24 know, I don't want the attorney general being able to make
25 an argument on appeal that they were denied the opportunity

1 to do that, so I'm giving them that opportunity. But under
2 the statute, they're admissible.

3 I've established that these two witnesses would
4 testify about alibi. I've established that Mr. Jerome Love
5 would have contradicted statements that were entered into
6 evidence in trial. That's all I have to do.

7 THE COURT: All right. I'll allow the affidavits in
8 for the purposes of the hearing today and part of the
9 record that the Court will consider in Mr. Love's argument.

10 All right. What's next?

11 MR. GROSE: I have an amended application that I would
12 like to hand up. It adds some matters that were on the
13 record but not included in the original application.

14 MS. RATIGAN: Your Honor, we would object to that.
15 Again, this case has been scheduled for more than a month.
16 I was handed the amendments this morning.

17 MR. GROSE: I've marked this as Applicant's Exhibit
18 Number 4, at least as a proffer, and I move to be allowed
19 to amend under the liberal rules of evidence -- or liberal
20 rules of civil procedure that allow amendments, even
21 amendments during and after the trial in a civil case.

22 THE COURT: Ms. Ratigan, have you seen the amended
23 application?

24 MS. RATIGAN: About 20 minutes ago for the first time.
25 Yes, Your Honor. I mean, there's no reason this couldn't

1 have been e-mailed to me at any point prior to this
2 morning. I mean, this is not a surprise. The roster goes
3 out a month in advance. Mr. Grose and I discussed before I
4 put the roster out the fact that this case would be held in
5 February. This is not a surprise to anybody.

6 The fact that I'm being hit with affidavits and
7 phantom letters and amendments the day of the hearing, if I
8 did this to opposing counsel, there would be hell to pay.
9 I do not believe that we should be made to go forward on
10 amendments that clearly could have been filed prior to this
11 morning, Your Honor.

12 THE COURT: Yeah. I'm not going to allow -- I'm not
13 going to allow the amended application to be considered for
14 purposes of today when here, at the moment of trial, the
15 moment of hearing -- or 20 minutes prior is when the
16 attorney general just received that and has not had an
17 opportunity to respond. And so I'm not going to allow the
18 amended application to be a part of this hearing.

19 All right. What's next?

20 MR. GROSE: That's it. I just would -- at the time I
21 would proffer testimony or proffer parts of the record that
22 relate to the amendment so I can appeal that ruling, Your
23 Honor.

24 THE COURT: All right. I'll leave that in your court.

25 Are y'all ready to proceed?

Appendix 540

KENDEL LOVE DIRECT BY MR. GROSE

17

1 MR. GROSE: I am, Your Honor.

2 MS. RATIGAN: Yes.

3 THE COURT: All right. Then, Mr. Grose, call your
4 first witness.

5 MR. GROSS: Your Honor, I call Kendel Love.

6 WHEREUPON,

7 KENDEL LOVE,

8 After having been duly sworn, testified as follows:

9 THE CLERK: Please state your full name for the
10 record.

11 MR. KENDEL LOVE: My name is Kendel Love.

12 THE CLERK: Thank you. You may be seated.

13 DIRECT EXAMINATION

14 BY MR. GROSE:

15 Q Can you state your full name for the record again,
16 please.

17 A My name is Kendel Love.

18 Q I can't hear you very well. Can we adjust that
19 microphone a little bit more?

20 A Kendel Love.

21 MR. GROSE: It doesn't sound like it's on to me, but
22 can y'all hear him all right?

23 THE COURT: Yeah. I can hear him.

24 MR. GROSE: Okay. I'll just move a little closer
25 then.

Appendix 541

KENDEL LOVE DIRECT BY MR. GROSE

18

1 BY MR. GROSE:

2 Q Mr. Love, where do you currently live?

3 A Right now I currently live in California, but moving
4 back just to visit.

5 Q And are you related to Korey Love?

6 A Yes. That's my brother.

7 Q And who is older or younger?

8 A He's older by four years.

9 Q All right. And in January of 2007, where did you
10 live?

11 A I lived at --- down -- South Carolina.

12 Q All right. And specifically, where did you live in
13 South Carolina?

14 A By Pelham Road.

15 Q All right. And what was the address?

16 A I'm not really familiar with the address.

17 Q How old were you in 2007?

18 A I was -- it's 2016 -- about 12, 13.

19 Q And who did you live with near Pelham Road in 2007?

20 A Antwen Jackson.

21 Q And what is Antwen Jackson's full name?

22 A Demetrius Jackson.

23 Q Okay. So his full name would be Demetrius Antwen
24 Jackson. Does he go by his middle name to most people?

25 A Yes.

Appendix 542

KENDEL LOVE DIRECT BY MR. GROSE

19

1 Q And was Mr. Jackson married?

2 A Yes.

3 Q And who was he married to?

4 A To Leslie Jackson.

5 Q All right. And did Mr. Antwen Jackson and Ms. Leslie
6 Jackson have any children?

7 A Yes.

8 Q And how many children do they have?

9 A They have four.

10 Q All right. And did they also live there?

11 A Yes.

12 Q And were those children younger than you?

13 A Yeah. They were younger than me.

14 Q All right. Do you remember what their ages were?

15 A At the time, I believe they were -- there was twins so
16 they both was 3, and then they had a 5-year-old and a
17 9-year-old, I believe.

18 Q Okay. And I think we've already asked this, but
19 Leslie and the four children also lived at that address; is
20 that correct?

21 A Correct.

22 Q All right. And in addition to the Jacksons and you,
23 who else lived there?

24 A Me, my brother and my dad.

25 Q All right. And when you say your brother, you're

Appendix 543

KENDEL LOVE DIRECT BY MR. GROSE

20

1 talking about your brother Korey Love?

2 A Korey Love. Yes.

3 Q Okay. And your dad ---

4 A Jerome Love.

5 Q --- Jerome Love?

6 A Yes.

7 Q Okay. Did your dad work anywhere?

8 A Yes. He was working at the Bonefish Grill.

9 Q Is that the one on Woodruff Road?

10 A Yes. I believe so.

11 Q Okay. And was Mr. Jackson also working anywhere?

12 A Yes. They both actually worked at the Bonefish Grill.

13 Q Okay. And did you have a curfew?

14 A Yes strict. Very strict.

15 Q What do you remember about your curfew?

16 A My curfew was Monday through Friday, it was 10:30.

17 And on the weekends, it was about 12:00 to 1:00, around
18 there.

19 Q And did Korey also have a curfew?

20 A Yeah.

21 Q And what do you remember about his curfew?

22 A The exact same as mine.

23 Q Okay. And you obviously know that Korey has been
24 charged with and convicted for the murder that happened at
25 the Wendy's on the late night/early morning -- actually,

Appendix 544

KENDEL LOVE DIRECT BY MR. GROSE

21

1 early morning on the 27th of February of 2007?

2 A Yes.

3 Q All right. Would the curfew have been in place then?

4 A Yes, it was.

5 Q Okay. And did you and Korey ordinarily observe that
6 curfew?

7 A Yes. Because my father was very strict on school, so
8 he made sure we always put school first. So that was the
9 main purpose of the curfew.

10 Q All right. And was Korey a good student?

11 A Yes.

12 Q All right. And do you remember when -- the time of
13 the -- the homicide happened?

14 A No.

15 Q All right. Would you and Korey have been observing
16 your curfew like you were supposed to on that night?

17 A Yes.

18 Q All right. And if you had not been observing your
19 curfew, would the other -- would the adults that lived in
20 the house know about it?

21 A Yes, they would.

22 Q All right. And tell us a little bit about the house,
23 okay? How many floors was it?

24 A It was upstairs -- two floors: upstairs, downstairs.

25 Q All right. And where was your room?

1 A Our room was upstairs. It was like three rooms and
2 then the bathroom. Our room is the room straight ahead.
3 As soon as you get up the steps, it's the room directly in
4 front.

5 Q All right. So when you say "our room," who are you
6 talking about?

7 A Me and my brother Korey Love.

8 Q Okay. And did you and Korey have a key to the house?

9 A No.

10 Q Okay. And why was that?

11 A I'm not sure. Maybe because too young, but I'm not
12 sure.

13 Q You just know that you were never given one?

14 A A key, uh-huh.

15 Q All right. Now, when you would come home -- or when
16 you -- let me rephrase that. When your dad would come home
17 from work, would he check on you and Korey?

18 A Yeah. He would make sure -- because all we did is we
19 would play the game, and then after a certain time, we had
20 to turn the game off, get ready for school, make sure
21 everything was ready, had the clothes out and homework and
22 stuff like that. So he definitely made sure we were there
23 when we got there to make sure those things were done.

24 Q All right. And would you say it was a routine that
25 when your father would come home from work, that he would

1 check on you and Korey?

2 A Yes.

3 Q And so if your father came home from work and either
4 you or Korey weren't there, would he know about it?

5 A Definitely.

6 MR. GROSE: All right. Beg the Court's indulgence for
7 a moment.

8 I'd ask that you answer any questions the attorney
9 general's office has.

10 THE WITNESS: Okay.

11 CROSS EXAMINATION

12 BY MS. RATIGAN:

13 Q I'm going to step forward so I can make sure that I
14 hear you.

15 So, Mr. Love, you were 12 or 13 years old back in
16 2007?

17 A Correct.

18 Q So at the time of your brother's trial, you would have
19 been 17 or 18, somewhere in there?

20 A Yeah.

21 Q Okay. And had you ever spoken to his attorney,
22 Mr. Smith, about the case?

23 A Yes.

24 Q Okay. When did you speak to him?

25 A I really -- only when I had the time to come down to

Appendix 547

KENDEL LOVE CROSS BY MS. RATIGAN

24

1 South Carolina. Because at the time, I was living in New
2 York with my mom.

3 Q But when you came down to South Carolina, you'd
4 sometimes go talk to Mr. Smith?

5 A Yes.

6 Q And what did you tell him?

7 A I told him that we had a strict curfew that my dad
8 gave us, and I told him the situation that -- he was
9 talking about the situation that was going on.

10 Q Okay. How can you be certain that Korey was home on
11 this particular night?

12 A Because I was -- I was always there, and everywhere he
13 went, I went. Even when we lived in New York, I was stuck
14 to him. So everywhere he would go, I would go.

15 Q So I could give you just any random date and you'd be
16 able to tell me if your brother was with you or not?

17 A Yep.

18 Q Even though this happened back in 2007?

19 A Correct.

20 Q Okay. And obviously, you know Jarod Ransom?

21 A Yes.

22 Q His mom ended up marrying your dad at some point; is
23 that correct?

24 A Correct.

25 Q So you and Korey became Mr. Ransom's stepbrothers?

Appendix 548

KENDEL LOVE CROSS BY MS. RATIGAN

25

1 A Yes.

2 Q And your mom and Mr. Love, they got married. Do you
3 remember when they got married?

4 A I don't remember when they got married, but I know it
5 was four months into their relationship.

6 Q Was it before or after the shooting at Wendy's?

7 A When was the shooting at Wendy's?

8 Q January of 2007.

9 A I believe it was after. I'm not sure, honestly.

10 Q So you know where your brother is at all times, but
11 you don't know when your mother got married?

12 A Our mother ---

13 Q I mean -- I'm sorry. You don't know when your father
14 got married to Ms. Corliss [phonetic] Love?

15 A No. Because we wasn't invited to the wedding.

16 Q You also knew the twins in this case?

17 A Correct.

18 Q So all y'all just kind of hung out together?

19 A Yes.

20 Q And your testimony is that anywhere that your brother
21 went, you also went?

22 A Correct.

23 Q Even though you were much younger than him?

24 A Yep.

25 Q And you can say with absolute certainty that he was

Appendix 549

KENDEL LOVE CROSS BY MS. RATIGAN

26

1 home on the night in question?

2 A Correct.

3 MS. RATIGAN: Okay. That's all I have Your Honor.

4 THE COURT: Anything further, Mr. Grose?

5 MR. GROSE: I have nothing further Your Honor.

6 THE COURT: All right. Mr. Love, you can step down.

7 Thank you.

8 THE WITNESS: Thank you, Your Honor.

9 MR. GROSE: At this time, Your Honor, I would call
10 Fletcher Smith.

11 WHEREUPON,

12 FLETCHER SMITH,

13 After having been duly sworn, testified as follows:

14 THE CLERK: Please state your full name for the
15 record.

16 THE WITNESS: Fletcher Nathaniel Smith, Jr.

17 THE COURT: Does the court need the microphone? I
18 mean, I can hear. Are you able hear Ms. Ratigan? Is your
19 client able to hear?

20 DEFENDANT LOVE: I can hear a little bit.

21 MR. GROSE: I think we'll probably be able to hear
22 Mr. Smith a little bit better.

23 THE COURT: Okay. All right.

24 MR. GROSE: I could actually hear better over there
25 than I thought I could.

Appendix 550

FLETCHER SMITH DIRECT BY MR. GROSE

27

1 THE COURT: Okay. All right.

2 DIRECT EXAMINATION

3 BY MR. GROSE:

4 Q Mr. Smith, how are you employed?

5 A I'm an attorney in private practice.

6 Q And how long have you been an attorney in private --
7 well, how long have you been licensed to practice law?

8 A Oh, probably 33, 35 years. Something like that.

9 Q And have you been in private practice all of that
10 time?

11 A Well, I was in public service as an assistant
12 solicitor for a while.

13 Q Okay. And then ---

14 A When -- I went into private practice with Theo
15 Mitchell, and then from Theo Mitchell, I opened my own
16 office.

17 Q Okay. All right. And did you represent Korey Love in
18 this case?

19 A I did.

20 Q All right. And when did -- do you recall when you
21 were retained to represent him?

22 A No, I don't.

23 Q You were retained, though?

24 A I was retained.

25 Q Okay. And, of course, the allegations were that he

Appendix 551

FLETCHER SMITH DIRECT BY MR. GROSE

28

1 had shot Isaac Bass after Mr. Bass got off work at the
2 Wendy's on Pleasantburg Drive?

3 A Right. Mr. Bass, I believe, was 21 years old at the
4 time.

5 Q Okay. And there were other witnesses who worked at
6 the Wendy's, but they didn't actually see the shooting.

7 A Correct.

8 Q Do you recall that?

9 A Yes.

10 Q All right. And do you recall whether or not this case
11 remained unsolved for a period of time?

12 A Yeah. Maybe six years or so.

13 Q All right.

14 A Or maybe less. I don't know. But I know it remained
15 unsolved. It was an unsolved murder.

16 Q All right. And eventually, they did make some arrests
17 several years later?

18 A Correct. As I understood it, the focus of the arrest
19 -- the focus of the investigation was on a Kendel Love, the
20 fellow that just testified. And one of the family members
21 said, "No, the person you're actually looking for is Korey
22 Love." So the focus of the investigation shifted from
23 Kendel Love to Korey Love.

24 Q All right. Now, the credibility of the people that
25 implicated Korey Love in this case was an issue that you

Appendix 552

FLETCHER SMITH DIRECT BY MR. GROSE

29

1 raised at trial, wasn't it?

2 A Correct.

3 Q All right. And if you could, could you summarize what
4 your defense was?

5 A Well, basically, the defense was, based on what
6 Mr. Love had told me, that he wasn't present at the scene
7 when the crime occurred. And so my defense had to be
8 centered around alibi at that point. I would have
9 preferred to defend on the issue that he was there but he
10 wasn't the shooter, but I didn't have those sorts of
11 factual matters at hand.

12 Q All right. Well, but the defense that you had, the
13 facts that you had at hand was that your client told you
14 that he wasn't there?

15 A Right.

16 Q That he had an alibi?

17 A Correct.

18 Q That his alibi was that he was at home where he lived
19 with his father, his brother and the Jacksons?

20 A Correct.

21 Q All right. And so that was one part of your defense.
22 Was also a part of your defense to challenge the
23 credibility of the people who made statements against
24 Mr. Love?

25 A Right. Yeah.

Appendix 553

FLETCHER SMITH DIRECT BY MR. GROSE

30

1 Q All right. And does that include Jarod Ransom?

2 A Jarod Ransom.

3 Q Who was a codefendant?

4 A Right.

5 Mr. Love's girlfriend who gave a polygraph test who
6 made one statement and then made a completely different
7 statement later.

8 Q All right. That was Ms. Peters, right?

9 A Peters. And I guess the two brothers who were down at
10 the military base in Georgia. I can't remember all the
11 witnesses. They're in the transcript, though, because the
12 State called . . .

13 Q Because the State called them.

14 And you did try to challenge their credibility?

15 A Yes.

16 Q All right. And, in, fact did you have a theory as to
17 who was responsible for shooting Isaac Bass?

18 A Yeah. I was trying to put the gun in the hand of the
19 guy who y'all allege had the letter that you had today.
20 The guy who was in the Marines.

21 Q All right. That was Applicant's Exhibit 1 that you're
22 referring to.

23 A Right.

24 Q And you were in the courtroom when we discussed that
25 with the PCR judge, weren't you?

Appendix 554

FLETCHER SMITH DIRECT BY MR. GROSE

31

1 A I was.

2 Q Okay. All right. So this is a case that came down to
3 credibility on both sides; isn't that correct?

4 A Yeah. It came down to credibility on both sides.

5 Q All right. The State had a cooperating codefendant
6 and other witnesses, correct?

7 A Correct.

8 Q And Mr. Love, Korey Love, testified in his own
9 defense?

10 A Right. He was the star witness.

11 Q All right. And he testified about his alibi?

12 A Correct.

13 Q All right. And you also called Leslie Jackson as an
14 alibi witness?

15 A Correct.

16 Q And she was one of the people that Kendel just
17 testified that he and Korey lived with?

18 A Right. And before Leslie Jackson, I called the fellow
19 who was the manager out at Bonefish ---

20 Q Right.

21 A --- to bring the employee timecards and records to the
22 court.

23 Q Right. And I believe that you established that
24 through that, the time that Jerome Love got off work that
25 night.

1 A Correct.

2 Q All right. Now I want to talk to you about your
3 opening statement and closing argument for a second. In
4 your opening statement, you made a number of statements to
5 the jurors about what you planned on proving in the case;
6 is that right?

7 A Correct.

8 Q All right. And that one of the things that you were
9 going to prove was the alibi, right?

10 A Correct.

11 Q And at one point, you went as far as to say that if
12 you were not able to prove these things, then the jurors
13 should find Korey guilty of murder?

14 A I may have said that, yeah.

15 Q Okay. Of course, the transcript would reflect what
16 you said ---

17 A Correct.

18 Q --- is that right? Okay.

19 Now, one of the things that you did -- one of the
20 things that you did in your opening statement was talk
21 about the alibi, wasn't it?

22 A Correct.

23 Q All right. And you -- if you'll bear with me for just
24 a second. Okay. If you could turn to page 59. I think
25 you have the transcript in front of you, don't you?

Appendix 556

FLETCHER SMITH DIRECT BY MR. GROSE

33

1 A Uh-huh.

2 Q Okay. If you look at that paragraph that begins --
3 hold on one second. I'm in the wrong place. If you go
4 back to 58, I'm just looking at the wrong side of it, and
5 you're talking about in that paragraph -- big paragraph
6 that begins at line 2, you're talking about the fact that
7 y'all intend to prove the defense; is that right?

8 A Correct.

9 Q Okay. And then at line 15, you indicate that you're
10 going to bring in alibi witnesses; is that correct?

11 A Correct.

12 Q And you name those witnesses, don't you?

13 A I do.

14 Q All right. And you name Leslie Jackson, don't you?

15 A Yes.

16 Q All right. And if you go over to the paragraph that
17 goes onto page 59, you name ---

18 A I name Jerome Love.

19 Q And Demetrius Jackson?

20 A And Demetrius Jackson.

21 Q Okay. And it sounds like, from what Kendel testified
22 to earlier, that you had talked with him as well, Kendel
23 Love, Korey's brother?

24 A Yeah. I probably did. I talked to a lot of people.

25 Q Okay. And, in fact, when you were explaining the

1 alibi at line 16 on page 58, it says, "We're going to bring
2 in a lady by the name of Leslie Jackson who had a curfew on
3 this young man because he, his dad and his other brother
4 had been homeless and he worked, his dad worked at Bonefish
5 with Leslie Jackson's husband," right?

6 A Correct.

7 Q All right. And so the brother that you would be
8 referring to on page 58 of the transcript would be Kendel
9 Love; is that correct?

10 A Correct.

11 Q Okay. Now, you did call Leslie Jackson as a witness;
12 is that right?

13 A Correct.

14 Q You did not call Jerome Love, did you?

15 A No, I didn't.

16 Q And you did not call Demetrius Antwen Jackson, did
17 you?

18 A No.

19 Q Okay.

20 A I had them on standby.

21 Q All right. And then they were available?

22 A No, they weren't.

23 Q All right. You just said that you had them on ---

24 A They were on standby, but Jerome Love came to the
25 courtroom and was afraid that he was going to be arrested

Appendix 558

FLETCHER SMITH DIRECT BY MR. GROSE

35

1 for criminal domestic violence where he was facing 30 days
2 in jail. I got an agreement with the prosecutor and the
3 judge that they would not arrest him for that criminal
4 charge so he would be able to testify. We imparted that to
5 him.

6 We told him we wouldn't need him for the trial that
7 day, but he needed to come back the next day. He refused
8 to come back. And then when we went to the place where
9 Demetrius Jackson was supposedly been keeping him, we
10 couldn't find him. We went over there every day of the
11 trial after we got out of trial looking for Jerome Love.
12 He refused to show up for his own son's trial. We even
13 told Korey that, and Korey was very disappointed that his
14 own daddy wouldn't show up for trial. His mother was from
15 New York. We told her the same thing.

16 We knew this guy was irresponsible. And so the fact
17 of the matter is, I had been upset about it the whole time
18 that his own daddy didn't have sense enough or the courage
19 enough to show up at trial for his own son. That's an
20 outrage.

21 Q Right. Now, he wouldn't ---

22 A So that's why he didn't come to trial. It wasn't any
23 fault of mine. It was his fault. He should have taken
24 responsibility to try to come up here and offer testimony
25 for his own son.

1 Q Okay. Let me ask you some questions about that.
2 Mr. Jerome Love was physically present in this courthouse,
3 correct?

4 A Right. Right out the door.

5 Q Right out the door right out in this hallway?

6 A Correct.

7 Q All right. You never gave him a subpoena, did you?

8 A No. We wouldn't give him a subpoena. We looked for
9 him with a subpoena because we were thinking that he was
10 living -- the word we got, he was living with Demetrius
11 Jackson while he was from somewhere, and he would never
12 come to the office. He would never come to the office to
13 discuss this case. He would discuss it on the
14 telephone ---

15 Q You were ---

16 A Can you -- can you let me finish, please, sir.

17 Q Yes, sir.

18 A So he would never come to my office to discuss the
19 case. He shows up about five minutes before we get ready
20 to go into the courtroom. And I had already gotten with
21 the prosecutor and the judge to say they wouldn't arrest
22 him. I told him that. But I wouldn't need him that day
23 because we were doing opening statements, closing
24 statements, and the State had an opportunity to put up
25 their case. He was supposed to come back the next day. I

Appendix 560

FLETCHER SMITH DIRECT BY MR. GROSE

37

1 didn't have a subpoena to give him right at that point.

2 He came -- this guy is a street-smart criminal. He
3 knew exactly what to do and when to come to court. He
4 didn't want to protect his son. If he had, wouldn't you
5 think he would have said, "Okay. Mr. Smith, I haven't
6 heard from you. Can I come over to the courtroom and
7 testify on behalf of my son?" He did that -- he did not do
8 any of that during the entire trial.

9 Q All right. So you were looking this man in the eye,
10 and you didn't have a subpoena to give him. Is that what
11 you're testifying to?

12 A That's correct. Because the judge wanted us to come
13 here and start trying the case.

14 Q All right. And you didn't -- you didn't have a
15 subpoena ready that you could give to a deputy to give to
16 Mr. Jerome Love. Is that what your testimony is?

17 A Not at the time. I had to do the trial.

18 Q All right.

19 A But we had a process server out there looking for this
20 gentleman.

21 Q All right. And you didn't ask the judge while -- when
22 Mr. Love was here for opening statements to put him under
23 subpoena?

24 A No, I didn't.

25 Q All right. And, in fact, if he was here under a

Appendix 561

FLETCHER SMITH DIRECT BY MR. GROSE

38

1 subpoena as a witness, they couldn't arrest him anyway,
2 could they?

3 A Well, I don't know. I mean, I can't tell you. But we
4 had an agreement they weren't going to arrest.

5 Q All right. So that wasn't an issue. He wasn't going
6 to be arrested.

7 A That's correct. And he knew he wasn't going to be
8 arrested.

9 Q All right. Now, you just testified to a number of
10 other things. You contend that Mr. Love -- Jerome Love
11 would not come to your office and talk to you?

12 A Correct.

13 Q All right. When you stood in front of the jury like
14 this jury box and told them that Mr. Love was going to be
15 an alibi witness, you knew what you're testifying to today,
16 that he hadn't come to your office, right?

17 A Right. But he had come to the courtroom.

18 Q All right. And you knew that he would only be
19 interviewed over the phone?

20 A Correct.

21 Q And you referred to him as a street-smart criminal or
22 something like that?

23 A Correct.

24 Q All right. And so when you told the jury that you
25 were going to call him, you had all the information you

Appendix 562

FLETCHER SMITH DIRECT BY MR. GROSE

39

1 needed to know that Jerome Love was, in your estimation, a
2 street-smart criminal?

3 A Yes. In terms of the -- in terms of beating up on his
4 wife, yes. But I don't think that would have been
5 admissible during the course of the trial.

6 Q Okay. All right. But you -- but what you're trying
7 to imply to the judge here today is is that when you made
8 your opening statements, you had all this history and you
9 knew that Jerome Love was not a reliable person?

10 A Well, this is the way I try a case, sir.

11 Q I have not ---

12 A No, no. Won't you ---

13 Q My question ---

14 THE COURT: Hold on a minute.

15 MR. GROSE: I --

16 THE COURT: Mr. Grose?

17 MR. GROSE: Yes, sir.

18 THE COURT: He has an opportunity to explain his
19 answer.

20 MR. GROSE: But I'm waiting for him to answer it
21 first.

22 THE COURT: Well, I'm not sure exactly what the
23 question was. Repeat your question. Give him an
24 opportunity to answer, and then you can ask your next
25 question. I can't hear both of you at one time.

Appendix 563

FLETCHER SMITH DIRECT BY MR. GROSE

40

1 MR. GROSE: Yes, sir.

2 BY MR. GROSE:

3 Q When you made your opening statement, you had all the
4 information that you needed to know that Jerome Love was
5 not a reliable person, in your estimation, and you still
6 told the jurors that you were going to call him as a
7 witness?

8 A Yes. Because he showed up for trial that day and the
9 fact -- and I told you Mr. Bowman, who was the guy who he
10 worked at Bonefish, brought the time cards so I could
11 establish that he got off at 1:00. So that along with that
12 and the testimony of Leslie Jackson could have overcome
13 some of the difficulty I would have with this guy as a
14 witness. So it depends on the order of witnesses when
15 you're strategizing as to who you're going to put up on the
16 stand.

17 Q All right. Well, you had -- well, and would it
18 surprise you to know that he actually got off work a few
19 minutes before midnight that night?

20 A He may have. I don't know what we put in the --
21 whatever the man testified to, who he worked with who was a
22 supervisor ---

23 Q Right.

24 A --- we brought him in to testify what time he got off.

25 Q Okay. Now, there were other ways you could have

Appendix 564

FLETCHER SMITH DIRECT BY MR. GROSE

41

1 presented your opening statement and still told the jurors
2 in a very affirmative way that there was going to be an
3 alibi defense, wasn't there?

4 A I don't know. I was trained at the University of
5 Virginia Trial Advocacy School to try a case to win. And
6 we are taught at the University of Virginia, and I have two
7 certificates where I studied under distinguished judges
8 like the judge we have today on how to try a case, how to
9 do an opening statement and say what you've got to say in
10 this most powerful position. And as a result of that, I
11 win most of my cases by the same opening statement.

12 So the key to it is -- the key to it is when you put
13 up evidence under the rules of evidence, everything that
14 you put into evidence is evidence. So under Rule 404,
15 anything that I say, you know, is not evidence during the
16 course of the opening statement, and, of course, they've
17 got to respect the judge's instructions.

18 But under Rule 404 dealing with relevancy, the
19 evidence that we put up, I am telling the jury the truth
20 that I am going to prove that there is an alibi. And I
21 didn't -- I didn't violate that statement to them because
22 when I put up Leslie Jackson, I did put up an alibi defense
23 for the defendant. The other two, from a trial strategy
24 standpoint, I couldn't very well say I could put them up at
25 the conclusion of the case because they didn't testify.

Appendix 565

FLETCHER SMITH DIRECT BY MR. GROSE

42

1 But Leslie Jackson was more credible, in my opinion, than
2 her husband. And the man who was at the -- at the -- who
3 was the supervisor, of course he had credibility, and I
4 could show where the man got off.

5 Q All right. Well, let's be clear about this. There is
6 no dispute that Jerome Love supported Korey's alibi, is
7 there?

8 A There's no dispute that -- what he said, but then ---

9 Q And that's what I'm asking.

10 A Yeah, yeah. Basically, he did support his son's alibi
11 on the phone.

12 Q Okay. And there's no dispute that Demetrius Jackson
13 supported Korey Love's alibi with his testimony or what his
14 testimony would have been ---

15 A Correct.

16 Q --- is that correct? Okay.

17 And their testimony, Jerome Love's testimony and
18 Demetrius Antwen Jackson's testimony would have been
19 entirely consistent with Leslie Jackson's testimony, right?

20 A Correct.

21 Q And the testimony of all three of them would have been
22 consistent with the testimony of the supervisor, manager,
23 records custodian from Bonefish Grill that testified?

24 A Well, it would have been consistent as to when they
25 got off ---

Appendix 566

FLETCHER SMITH DIRECT BY MR. GROSE

43

1 Q Right.

2 A --- but the manager wasn't at their home. So from
3 that standpoint, it wouldn't have been consistent there.

4 Q All right. Well, it would have been a piece of the
5 puzzle that gave a consistent picture.

6 A Correct.

7 Q Okay. Now, you said you give the same opening in
8 every case. By that you don't mean you tell every jury
9 that you're going to prove that your defendant had an alibi
10 of the murder at Wendy's.

11 A No. I tell them that we're going to prove -- we're
12 going to prove this case.

13 Q All right. And so ---

14 A Or prove our, yeah, defense.

15 Q All right. And so when you're talking about making a
16 powerful opening statement, you're talking about it's like
17 an introduction to a book, isn't it?

18 A Correct.

19 Q And you're telling the jurors what is going to come,
20 right?

21 A Correct.

22 Q And it's much more powerful, is what you're telling
23 us, is to make a statement where you say, "In this case,
24 this young man has an alibi," than it is to get up there
25 and talk about the Constitution and the presumption of

Appendix 567

FLETCHER SMITH DIRECT BY MR. GROSE

44

1 innocence and things that have no bearing on the facts of
2 the case even though they're important concepts.

3 A Right. This was going to be a credibility case.

4 Q All right. And in a credibility case, your
5 credibility as a lawyer's important, isn't it?

6 A It is.

7 Q And, in fact, I imagine, I haven't been to the Trial
8 Advocacy School in Virginia, but I've been to one, and they
9 talk about the importance of trying to maintain your
10 credibility as a lawyer in front of the jury.

11 A Correct.

12 Q I mean, you're trying to impart your credibility onto
13 the client.

14 A Right.

15 Q And if they teach you at the University of Virginia
16 like they taught me, they teach you not to say something in
17 opening that you can't deliver, don't they?

18 A And I delivered.

19 Q All right. You delivered Leslie Jackson.

20 A Correct.

21 Q And you delivered the person from the Bonefish Grill.

22 A Correct.

23 Q You promised them Jerome Love, but you didn't deliver
24 him.

25 A Correct.

Appendix 568

FLETCHER SMITH DIRECT BY MR. GROSE

45

1 Q You promised Demetrius Jackson and you didn't deliver
2 him.

3 A Right.

4 Q And this was something that was not lost on the
5 prosecution, was it?

6 A I don't know.

7 Q All right. You still have that transcript in front of
8 you? Would you go to page 473, please. Let me know when
9 you get there.

10 A Okay.

11 Q All right. If you look at the paragraph that begins
12 at line 12, the prosecutor says, "Finally, I just want to
13 tell you that the defense witnesses didn't help you any,
14 and here's why." Do you see that?

15 A Uh-huh.

16 Q Then she acknowledges the records keeper from Bonefish
17 Grill came and brought Jerome's work records. So Jerome
18 got off at 11:56, or whatever it was, p.m. on that Friday
19 night. So what do you do with that? Do you see that
20 question that she asked the jurors?

21 A Uh-huh.

22 Q Her next statement is, "Jerome wasn't here. They
23 promised you Jerome in their opening statement." Do you
24 see that?

25 A Correct.

Appendix 569

FLETCHER SMITH DIRECT BY MR. GROSE

46

1 Q "They promised you Demetrius Jackson in their opening
2 statement. He wasn't here." Do you see that?

3 A Correct.

4 Q So that was -- the failure to call those two witnesses
5 that had been identified to the jury was something that the
6 prosecutor capitalized on in her closing.

7 A Right.

8 Q Okay. Now, if you had given a powerful opening saying
9 that at the time of the murder at the Wendy's that Korey
10 was at home with Leslie Fuller and the other children and
11 perhaps his brother, and that other family members came
12 home but you hadn't identified all the witnesses that you
13 were going to call, she couldn't have made that statement
14 that you promised two witnesses and didn't deliver.

15 A That is true.

16 Q Okay.

17 A And -- but I gave a powerful closing statement, too.

18 Q You did. But you also told the jurors in opening that
19 if I don't prove something to you, you should find Korey
20 guilty.

21 A Right. The judge told them to ignore that during the
22 course of his charges.

23 Q All right. Well, that might have affected your
24 credibility a little bit, too.

25 A Well, I don't think my credibility -- see -- never

Appendix 570

FLETCHER SMITH DIRECT BY MR. GROSE

47

1 mind. Go ahead.

2 Q Okay. Well, you got the judge saying one thing and
3 the jurors saying -- and you saying something else.

4 A That's fine. That's fine.

5 Q Okay. All right. Now, in that same paragraph that
6 we're looking at, the prosecutor makes a statement about
7 this is your opportunity to do justice in this case under
8 the oath that you've taken. You can be an instrument of
9 justice for Isaac Bass. His death was not the final
10 chapter of his life. This trial is the final chapter of
11 his life. You didn't object to that statement, did you?

12 A No, I didn't.

13 Q Okay. Now, the judge did give an instruction on
14 alibi, didn't he?

15 A He did.

16 Q Okay. And if you could, turn to page 483, and that
17 first paragraph that begins on line 8.

18 A Right. The judge says, "Now the defendant has raised
19 a defense of alibi. And in order to establish an alibi, it
20 must be shown the defendant was at another specified place
21 at the time the crime was committed, that it was therefore
22 impossible for the defendant to have been at the scene of
23 the crime. Mere denial of presence at the scene of a crime
24 does not constitute an alibi. There is no burden on the
25 defendant to prove an alibi. The burden is on the State to

Appendix 571

FLETCHER SMITH DIRECT BY MR. GROSE

48

1 prove beyond a reasonable doubt that the defendant was
2 actually present at the scene of the crime, actually
3 participated in it, and was not somewhere else."

4 Q Okay. That statement almost seems contradictory,
5 though, doesn't it?

6 A I think it's a consistent statement.

7 Q Well, when it says, "It must be shown that the
8 defendant was at another specified place at the time of the
9 crime," that statement almost sounds like the defendant has
10 to prove something, doesn't it?

11 A I don't know. The judge who's doing the PCR can
12 interpret it how he wants to.

13 Q All right. Well, certainly, when you're making an
14 argument and they say, you know, it must be shown that
15 somebody killed the decedent with malice aforethought, that
16 the State has to prove their case, that puts a burden on
17 the case.

18 A Correct.

19 Q Okay. Burden on the State.

20 A Right. And I think the judge said the burden is on
21 the State.

22 Q All right. And the -- of course, there's that final
23 sentence in that that does talk about the burden of proof
24 always being on the State.

25 A Correct.

Appendix 572

FLETCHER SMITH DIRECT BY MR. GROSE

49

1 Q So somebody listening to that could be confused,
2 couldn't they?

3 A I don't know.

4 Q All right. And somebody listening to the "it must be
5 shown" language in connection with your arguments that you
6 were going to prove the State's theory was a lie and you
7 were going to prove the alibi, the whole picture could be
8 kind of confusing, couldn't it?

9 A I don't know if it could be. I don't -- I wasn't
10 sitting in the box with the jury.

11 Q Okay. All right. Well, you -- if you turn over to
12 485, you do make an objection on line 14, right?

13 A Yeah.

14 Q Out of an abundance of caution on the alibi part, you
15 said mere denial. I think we did have a witness that
16 confirmed what he said, so -- and then the Court kind of
17 cut you off there and you pick up. You just say, "Okay.
18 All right." And there's some discussion there, right? But
19 you didn't make an objection to that alibi instruction, at
20 least part of it being potentially burden shifting if the
21 jurors heard it that way.

22 A Correct. I didn't.

23 Q Now, one of the witnesses that they called was Rashida
24 Peters ---

25 A Correct.

1 Q --- is that right?

2 And I believe you talked earlier about her having
3 given different statements.

4 A Correct.

5 Q And I think we've already established that the
6 credibility of the witnesses on each side was a central
7 issue in this case, right?

8 A Correct.

9 Q And, in fact, Ms. Peters, when she testified, did not
10 testify in the way that the State wanted her -- or had
11 hoped she would, correct?

12 A I'll take your word for that. I don't know. I mean,
13 I -- this has been so long. I hadn't read all this
14 testimony.

15 Q Well, we were talking earlier today.

16 A Yeah. I think so. I think there's something on that
17 -- the reason why I say that -- what we were talking about
18 was because the -- I think I was objecting -- I was trying
19 to get the judge to give me the whole transcript or
20 something because part of it was played, a slither, and I
21 was like under the rule of completeness, under the Rules of
22 Evidence 105, I thought maybe anything that may have been
23 helpful to Ms. -- part of the polygraph that should be
24 redacted, you know. We were arguing about redaction, and I
25 thought there was certain stuff on that thing that could be

1 helpful.

2 Q We're on the same page. Let me just flesh that out a
3 little bit more. When you're saying "polygraph," you're
4 talking about that she went to take a polygraph exam and
5 there was a recorded interview, right?

6 A Right, right.

7 Q And the word "polygraph" was mentioned in the
8 interview.

9 A Right. That's right.

10 Q And, of course, polygraph results are not admissible
11 because they're not reliable, right?

12 A That's correct.

13 Q But statements made to a polygraph examiner when put
14 in the proper context can be admitted?

15 A Correct, yes.

16 Q All right. And the State was wanting to impeach her
17 trial testimony with a portion of the recording that she
18 made to the polygraph examiner, right?

19 A I think that's right, yeah.

20 Q And you were saying that under the rule of
21 completeness, parts that favored your client should be
22 considered at the same time as their evidence?

23 A That's right. That's right.

24 Q And, in fact, under the rule, you're allowed to move
25 for all of that to be introduced at the same time.

1 A And I think I made the proper objection to that.

2 Q I think you did, too. And the judge said that it was
3 a civil case, a civil rule, but, in fact, it's a rule of
4 evidence that applies to both; is that right?

5 A I think so, yes, sir.

6 Q Okay. And assuming that you made the proper
7 objection, is that something that you believe should have
8 been appealed by the Office of Appellate Defense?

9 A Well, yeah. But, I mean, if they wanted to. I mean,
10 I don't know what their strategy is. I'm not trying to
11 defend Appellate Defense. That would have been something I
12 told his mother after the trial that we had a good -- a
13 good appeal for, and I thought maybe they were going to
14 hire me to do the appeal. But I don't think they had the
15 money at the time, and that's why they had to get the
16 Appellate Defense.

17 Q All right. And do you remember -- and you, obviously,
18 because we just talked about it, do you recall discussing
19 this with the judge outside the presence of the jurors?

20 A Yeah. But I can't really tell you what that colloquy
21 was about.

22 Q All right. But it would be on the record?

23 A Yeah. I guess so. I mean, some stuff that you talk,
24 you know, I don't remember everything. Whatever's in the
25 record is in the record.

Appendix 576

FLETCHER SMITH DIRECT BY MR. GROSE

53

1 Q All right. And if you made an objection or didn't
2 make an objection at the time the State actually introduced
3 it, that would be on the record or not on the record, too?

4 A Correct.

5 Q Okay.

6 A I mean, I'd go by the record because I can't depend on
7 my memory.

8 Q All right. Now, you said that Korey was the star
9 witness for ---

10 A For us he was the star witness.

11 Q Right, right.

12 A And for the -- for the State, Eric Jarod Ransom, his
13 half-brother -- or stepbrother.

14 Q Right. All right. And so then, again, it's just a
15 credibility issue, right?

16 A Yeah.

17 Q Do you remember having Korey testify that he had been
18 in jail for two and a half years?

19 A I think so, yeah.

20 Q And do you remember telling the jurors in closing
21 argument that Korey had been incarcerated for two and a
22 half years?

23 A Uh-huh.

24 Q Is that a "yes"?

25 A That's a yes.

1 Q I do the same thing. The "uh-huhs" and the "hu-uhs"
2 don't pick up as well, so thank you.

3 All right. The fact that Korey was in jail for -- and
4 pretrial detention prior to the trial is something that the
5 jurors could have used in assessing his credibility, isn't
6 it?

7 A I don't think so. I was trying to show that he was a
8 victim of being falsely accused of a crime he didn't
9 commit.

10 Q But you could do that without necessarily establishing
11 that he'd been in jail for two years.

12 A Well, I mean, each lawyer has his own strategy. My
13 strategy is to do what I did.

14 Q Okay. Being in jail can imply bad character, though,
15 can't it?

16 A And it could imply victimization.

17 Q Okay. And, again, you're not in the minds of the
18 jurors, and so you don't know how they view that, do you?

19 A That is correct.

20 Q Okay. All right. And I've had clients charged with
21 murder that have been out on bond. Have you?

22 A I don't think so. I don't know -- I don't recall a
23 client I've had who has been charged with murder, been out
24 on bond. Usually the bond is so high, he can't get out.

25 And sometimes, if they have prior criminal charges, they're

Appendix 578

FLETCHER SMITH DIRECT BY MR. GROSE

55

1 a danger to the community, the judge won't let them out.

2 Q All right. Certainly in South Carolina, even in a
3 capital case, you're entitled to apply for a bond.

4 A Yeah. You're entitled to a reasonable bond.

5 Q All right. And in noncapital cases, judges oftentimes
6 set a bond, don't they? Is that correct?

7 A Yes.

8 Q In a murder case. All right.

9 And so we all know, in fact, I imagine in the General
10 Assembly, you've heard some politicians jumping up and down
11 about people being out on bond and committing crimes,
12 right?

13 A Right.

14 Q And we should hold those people in jail, right?

15 A Yeah.

16 Q In fact, y'all passed a statute that ---

17 THE COURT: I'm not sure where you're going with all
18 this questioning on the bond. It seems to be completely
19 irrelevant, so I'm asking that you move on.

20 MR. GROSE: Okay. All right.

21 BY MR. GROSE:

22 Q The jurors could have concluded that because Korey was
23 in jail, that that meant that he had a record for other
24 offenses.

25 A I don't know what the jury could have concluded, but I

1 do know they concluded he was guilty based on the testimony
2 of Eric Jarod Ransom.

3 Q Okay. If you could, turn to page -- bear with me just
4 a second. It's during deliberations.

5 MS. RATIGAN: I believe it's 497.

6 BY MR. GROSE:

7 Q I think actually we're starting at 495 to 96. There
8 was a question on page 495 at line 16. There was a
9 question that says, "Which twin says Korey shot Isaac Bass?
10 Because Isaac shot Korey's face. Did Ricky or Rashida say
11 that first? Can you answer that for us without listening
12 to the twin's testimony again?" All right. Do you see
13 that?

14 A Uh-huh.

15 Q And then there was some discussion about whether or
16 not to replay the testimony, wasn't there?

17 A Correct.

18 Q All right. And do you know if the judge ever answered
19 that question or not?

20 A Whatever is in the transcript. I just have to go by
21 the transcript. I can't tell you.

22 Q Okay. Going back to Jarod Ransom's credibility, okay,
23 you said a minute ago that the jurors convicted him --
24 convicted Korey because they believe Jarod?

25 A Right. They believe Jarod over against Korey when

Appendix 580

FLETCHER SMITH DIRECT BY MR. GROSE

57

1 Korey testified, in my opinion.

2 Q All right. And, of course, Jarod was the one that was
3 interviewed first in Japan, right?

4 A Correct.

5 Q And part of the State's case was that he was halfway
6 around the world and saying the same thing that the twins
7 and Ms. Peters were saying.

8 A Correct.

9 Q All right. If, in fact, it turns out that the
10 investigators in Japan showed Jarod the statements of the
11 twins and Ms. Peters, that would be an important piece of
12 information, wouldn't it?

13 A I suppose it would. But that's not your charge
14 against me, is it?

15 Q No. That's not a charge. In fact, because you didn't
16 have that information, did you?

17 A I didn't have that information, no.

18 Q All right. And, in fact, that could probably be --
19 would be characterized as Brady information, wouldn't it?

20 A Could be. I mean, between you and the judge.

21 Q Right. Well, and argument that ---

22 A But if I was the lawyer, I'd make an argument of
23 Brady, whether it would succeed or not.

24 Q Right. Because Brady goes to impeachment evidence,
25 right?

Appendix 581

FLETCHER SMITH DIRECT BY MR. GROSE

58

1 A Correct.

2 Q And if that information turns out to be true and you
3 had that information, then you could have asked -- you
4 could have -- you could have brought out with Jarod as he
5 was changing his statements, he was changing them to fit a
6 theory that the State already had because of these other
7 statements, right?

8 A Could be. Yes, sir.

9 Q All right. If it turns out to be true.

10 A If it turns out to be true.

11 Q And, obviously, I mean, you weren't in Japan for that
12 interrogation.

13 A No.

14 Q And -- but the investigators were and NCIS.

15 A Whoever the investigators that were listed on the
16 documents where he gave his statements.

17 Q Right.

18 A I don't recall who they are, but they were -- there --
19 I got the -- the prosecution here in Greenville gave me
20 everything they could from the military, and they gave me
21 all of the investigatory work they had done on the case.
22 So we had a complete file from Okinawa all the way here to
23 the United States and the re-interviews by the prosecution
24 -- by the police department here in Greenville. They
25 re-interviewed this Jarod Ransom as well. So I got all

Appendix 582

FLETCHER SMITH DIRECT BY MR. GROSE

59

1 that information, and when Mr. Love asked me for it back, I
2 sent it to him while he was -- while he's been in jail.

3 Q Right. And if there was information in there from the
4 investigators how you should know that we showed him these
5 statements before he gave his or he changed his statements,
6 you would have brought that out with Mr. Ransom.

7 A Right. And there was no prosecutorial misconduct from
8 the Greenville people because they did everything above
9 board.

10 Q I'm not really talking -- and let's just be clear.
11 I'm not really talking about the Greenville people because
12 the people in Greenville wouldn't have been doing that
13 interview in Japan.

14 A Okay. Good.

15 Q And the solicitor wouldn't be doing the interview in
16 Japan. And if -- but Brady also goes to law enforcement.

17 A It goes to law enforcement.

18 Q Right. And so if these were United States military or
19 Federal investigators, even though they were conducting an
20 interview in Japan, they would still be subject to the
21 Constitution and providing Brady material charging somebody
22 here in the United States.

23 A Correct.

24 MR. GROSE: Okay. All right. Beg the Court's
25 indulgence for a moment.

1 BY MR. GROSE:

2 Q Let me go back to the alibi witnesses for a second.

3 A Yes, sir.

4 Q Did you have Demetrius Jackson under subpoena?

5 A Yeah. And I turned him loose.

6 Q And you turned him loose. All right. So there was no
7 reason not to call him other than the decision that you
8 made?

9 A Right. The decision I made when I talked to him. He
10 had a -- I think he had a prior drug distribution. So I
11 felt if I put this guy up with this drug distribution, he
12 felt uncomfortable, too, with having this criminal charge
13 because I -- look, you've got to think about -- you've got
14 to think about this is how to cross-examine. You're the
15 same Demetrius Jackson that did this on such-and-such a
16 day. Well, that takes away the thunder that his wife has
17 already given by bringing other storm clouds that's going
18 to take away the credibility. So I wanted to put him up,
19 but I made a decision he wouldn't have been a good witness.

20 Q All right. And you had all the information necessary
21 to make that decision before your opening statement.

22 A Right. I did. But I wanted to keep my options open.

23 Q Okay. Well, and you could have kept your options open
24 by having him on the witness list but not naming him in
25 your opening.

Appendix 584

FLETCHER SMITH DIRECT BY MR. GROSE

61

1 A That's true. But what you've got to realize is that
2 he and the dad came in kind of like as a group. I was
3 depending on those two guys. So your strategy might have
4 been to put all three of them up, take the risk with the
5 guy being cross-examined and the jury not believing that
6 the -- he's being impeached with the distribution. That's
7 fine. I made a determination that I was going to not put
8 Mr. Jackson up.

9 The other thing, too, was Mr. Korey Love took the
10 responsibility of getting on the stand himself.
11 Ordinarily, I would not have advised my client. We did
12 tell him not to get up on the stand and testify because his
13 credibility was at issue, too. So I don't believe the jury
14 believed his testimony.

15 So the key is -- the key is where the case came down,
16 when you strip everything out, the jury believed Eric Jarod
17 Ransom when he said that Korey Love was there. The jury
18 believed that the guys who were down in Georgia was there.
19 They believed that Korey Love told his girlfriend that he
20 had done something real bad that he wanted to tell, had the
21 sister overhearing the dad and Korey Love talking about the
22 murder.

23 So when you get right down to it, the jury had enough
24 information to convict, you know. I don't know who -- I
25 don't know if I could have brought Pope Francis in here in

1 order to overturn that kind of stuff by saying you were not
2 present at the scene. I would have preferred the
3 defendant, that I was present at the scene, but we couldn't
4 based on the factual statement that the client gave, okay?

5 Q All right. And that's -- I guess you could argue that
6 one strategy would be to call all three of the witnesses
7 plus the manager at the Bonefish Grill, right?

8 A Right. I mean ---

9 Q Okay. That's one strategy.

10 A Right. But your man wouldn't even come today. I
11 mean, the two witnesses who are most important in your
12 postconviction, you couldn't even get them to come from
13 California and you couldn't even get the other one to come
14 from Georgia to testify on his behalf even today. You had
15 to submit affidavits. So these people -- these people have
16 not been the most functionally up aboveboard people that
17 you can deal with.

18 Q All right. And if we accept that as true, then --
19 what I'm getting at is is that the strategy you told the
20 jurors was we were going to call Witness A, B and C.

21 THE COURT: We've been down this road before. Is
22 there any new ground we need to hear?

23 MR. GROSE: I don't think so.

24 THE COURT: All right. I think you made -- I think
25 I'm clear on what happened.

1 MR. GROSE: All right.

2 BY MR. GROSE:

3 Q The other thing that you just mentioned about
4 Ms. Neal overhearing the conversation between Korey and
5 Jerome Love, were you aware that Jerome could contradict
6 that statement from Ms. Neal?

7 A Yeah. That's why we wanted him on the stand.

8 MR. GROSE: All right. Beg the Court's indulgence.

9 Nothing else at this time.

10 THE COURT: All right. Thank you, Mr. Grose.

11 Ms. Ratigan, any questions?

12 MS. RATIGAN: Just very briefly Your Honor.

13 THE COURT: All right.

14 CROSS EXAMINATION

15 BY MS. RATIGAN:

16 Q Mr. Smith, you filed the usual Brady and Rule 5
17 motions in this case?

18 A Yes, ma'am.

19 Q And, in your opinion, did you receive full discovery
20 from the State?

21 A I most certainly did. And the prosecutor that you've
22 got back there, he and I -- we always fight and fight and
23 fight, but he's aboveboard and he'll give it to you. And
24 Bryna Seay, she was good, too.

25 Q And as you received this discovery, did you review it

Appendix 587

FLETCHER SMITH CROSS BY MS. RATIGAN

64

1 with Mr. Love?

2 A I did. A number of occasions.

3 Q And would that have included the statements that
4 Greenville law enforcement took as well as when they went
5 down to Fort Benning?

6 A Right.

7 Q And when the NCIS folks interviewed Mr. Ransom on base
8 in Okinawa, did they have a written statement? Did they
9 have a video or an audiotape; do you recall?

10 A Yes, they did.

11 Q Which one of those?

12 A I think they had a written statement and video, as I
13 recall. I think it was written. I can't remember, but I
14 think there was audio or something. I don't know.

15 Q And these things you would have reviewed with
16 Mr. Love?

17 A Yeah. I went down to the jail. I developed a good
18 relationship with Love. I would come down to the jail
19 often to see him.

20 Q And Mr. Love's story from the start was that he wasn't
21 there, it wasn't him?

22 A Correct.

23 Q And he'd given you the names of all these folks to
24 contact as alibi witnesses?

25 A Yes, ma'am.

Appendix 588

FLETCHER SMITH CROSS BY MS. RATIGAN

65

1 Q And your testimony today is that you were able to talk
2 to all of them prior to court?

3 A I did, yes.

4 Q Did that include speaking to his little brother Kendel
5 who we heard from this morning?

6 A Right. I spoke to Kendel, yeah.

7 Q And do you remember why it was you didn't call him as
8 a witness?

9 A I don't think he could get down. He was kind of
10 wishy-washy on things, and I don't think he -- I don't
11 think he would have been a good witness. Plus there's some
12 other countervailing stuff that I've learned in terms of
13 could potentially put him in a bad spot legally, so I just
14 didn't call.

15 MR. GROSE: I'm going to object to that and move to
16 exclude it, unless it was something that he knew at the
17 time. His statement is saying that he's learned since
18 would not be -- would not be part of the decision he made
19 at the time of trial.

20 THE COURT: All right. I'm going to overrule your
21 objection.

22 Go ahead. Ask your next question.

23 BY MS. RATIGAN:

24 Q In your opinion, would Jerome Love and Demetrius
25 Jackson's testimony merely have been cumulative to Leslie

Appendix 589

1 Jackson's testimony?

2 A Yeah. That, too, and the fact that, you know, I
3 didn't want to take away Ms. Leslie Jackson's thunder. But
4 I would have put Jerome Love on the stand. But, see, the
5 other thing, too, is that Jerome Love gave a lot of phone
6 conversations at the jail that he shouldn't -- statements
7 he shouldn't have been making.

8 Q That was actually going to be my next question. Were
9 you aware that there was some impeachable evidence for
10 Jerome?

11 A Yes.

12 Q And that was the jail calls?

13 A Jail calls.

14 Q And those jail calls were to who?

15 A His son Korey Love.

16 Q And were you provided copies of those calls as part of
17 discovery?

18 A I was.

19 Q And did you review those with Korey?

20 A Yes.

21 Q And in your opinion, are those calls something that
22 the State could have used on cross-examination with Jerome
23 Love?

24 A I believe they could have. Some of the stuff may have
25 been irrelevant and some of the stuff could have been

Appendix 590

FLETCHER SMITH CROSS BY MS. RATIGAN

67

1 relevant to impeaching Mr. Love.

2 Q And in addition to the statements to the twins --
3 Mr. Love's statement to the twins that he had shot the
4 victim, his statement to his girlfriends and the
5 codefendant's testimony, there was also the codefendant
6 sister Jalesa, and she testified about overhearing the
7 statement?

8 A Correct.

9 Q Okay. At the time, did you interpret the judge's
10 alibi charge to be burden shifting?

11 A No.

12 Q If you had interpreted it to be burden shifting at the
13 time, would you have objected?

14 A I would have.

15 Q Are there any -- this is kind of a Monday morning
16 quarterback question, but are there any witnesses or
17 avenues of investigation you wish you would have pursued
18 further?

19 A No. I think I had the complete investigatory file.
20 No. I don't think so.

21 MS. RATIGAN: That's all I have, Your Honor.

22 THE COURT: Thank you.

23 Anything further, Mr. Grose?

24 MR. GROSE: Yes. Just in response to that.

25 ///

REDIRECT EXAMINATION

BY MR. GROSE:

Q The attorney general asked you some questions about jail calls between Korey Love and Jerome Love. Do you recall that question?

A Yes, sir.

Q All right. There were no admissions by Korey on those jail calls, were there?

A I don't think so, no. No.

Q And certainly they didn't introduce any admissions at trial; is that right?

A Correct. That's right.

Q Okay. When we were talking earlier, you were concerned about some statements that Jerome Love made that could have been interpreted as racist.

A Yeah.

Q Is that a "yes"?

A Yes.

Q Okay. That would not necessarily be relevant, would it?

A That would be -- I don't know if he -- if he hates all white people, then it may mean he might not tell white people the truth. I mean, I don't know. It would be a call for the judge to make.

Q All right. And you didn't ask the judge to make that

Appendix 592

1 call, did you?

2 A Well, he didn't testify.

3 Q All right. You didn't bring a motion to ask the judge
4 to exclude that information if he did testify, did you?

5 A No. But I could have made the motion to exclude if he
6 had come in and testified.

7 Q And you knew that that information was hanging out
8 there when you named Jerome Love as a witness to the
9 jurors.

10 A Yeah. Uh-huh.

11 Q Is that a "yes"?

12 A Yes.

13 Q Okay. Anything else on those tapes that you were
14 concerned about or is that the main thing?

15 A No. It's been so long. I don't remember everything
16 on those tapes.

17 Q Okay. Sitting there today, that's all you can
18 remember.

19 A Yes, sir.

20 Q And back in 2012 when this case was tried, what was on
21 those tapes would be fresh in your memory.

22 A I suppose so. I mean, you know, I have a lot of
23 things to juggle.

24 Q All right. And -- well, let's put it this way. You
25 knew everything -- you had access to those tapes through

Appendix 593

1 discovery prior to your opening statement.

2 A Correct.

3 Q All right. And so that was all information that was
4 available to you before you named Jerome Love as a witness
5 that would testify in the trial.

6 A Yes, sir.

7 MR. GROSE: Beg the Court's indulgence.

8 THE COURT: All right.

9 MR. GROSE: That is, in fact, all, Your Honor.

10 THE COURT: All right. Thank you, Mr. Smith. You can
11 step down.

12 THE WITNESS: Thank you, Your Honor.

13 MS. RATIGAN: Mr. Smith is here under a subpoena. May
14 he be released, Your Honor?

15 THE COURT: Any objection?

16 MR. GROSE: No objection.

17 THE COURT: Thank you, Mr. Smith. You're released.

18 All right. Call your next witness.

19 MR. GROSE: Can I have a moment to confer with one
20 other person who may or may not be a witness?

21 THE COURT: All right. Well, let's just take about no
22 more than a ten-minute break.

23 MR. GROSE: All right.

24 MS. RATIGAN: Thank you, Judge.

25 (WHEREUPON, a recess is taken at 11:22 a.m.)

1 THE COURT: We're back on the record in this PCR
2 hearing of Korey Love vs. The State of South Carolina.

3 Yes, Mr. Grose?

4 MR. GROSE: I'm not going to call the witness that I
5 wanted to confer with. But during the recess, Mr. Smith
6 and I spoke, and he wants to clarify something that he
7 said. I don't think it's ultimately a major point, but we
8 could either just put that on the record or we could call
9 him -- recall him real quickly to do that. However you
10 would like.

11 THE COURT: I'm comfortable with him just stating from
12 where he is. He's an officer of the Court and also a
13 witness in this case, and I'm happy for him -- I think it's
14 fine for him to put whatever clarification he'd like to
15 say.

16 MR. SMITH: Yes. I don't know whether the prosecutor
17 actually gave me the phone calls, but I do know he and I
18 discussed what was on them, how he was going to try to
19 impeach Mr. Jerome Love, the father. That's basically it.

20 THE COURT: Okay. All right. Thank you.

21 MR. SMITH: Yes, sir. But I didn't want to, you know,
22 do anything that would undermine anybody's case.

23 THE COURT: Okay. Thank you, Mr. Smith.

24 All right. Mr. Grose?

25 MR. GROSE: I don't have any other witnesses.

1 The interview of Ms. Peters that we were talking about
2 is identified in the record as State's Exhibit 39, CD-R,
3 RPC of Rashida Peters, in talking with the solicitor during
4 the break, he cannot recall for sure whether that was the
5 entire recording and he just played the relevant snippets
6 in front of the jury or if that was the redacted version.
7 What I want to do is, you know, he's agreed to help us
8 check on a full copy, and I would just like to be able to
9 submit a full copy for the record in case a full copy is
10 not in the record.

11 THE COURT: All right. Ms. Ratigan?

12 MS. RATIGAN: Your Honor, my only objection to that
13 would be that this is an issue that was fleshed out for the
14 first time in the amendment and Your Honor has not allowed
15 the amendment. So I don't know that the appellate counsel
16 issue regarding Rashida Peters' recorded statement is even
17 before this court because Your Honor dismissed or did not
18 allow the amendment.

19 THE COURT: Right.

20 MR. GROSE: Well, and that's why I just want to be
21 able to put that in the record as a proffer, although our
22 position is going to be is that everything else came in
23 under the amended application without objection, and under
24 the rules, we also move to amend to conform to evidence. I
25 respect your ruling from before, but you did say we could

1 handle the proffer, and I just -- I asked ---

2 THE COURT: No. I did not say that. I said I was not
3 going to allow it in. You indicated that you wanted to
4 proffer some testimony on the amended application. I did
5 not -- we had not gotten to the point whether we were going
6 to take proffered testimony on the amended application, so
7 that's an issue I had not ruled on.

8 MR. GROSE: Well, maybe I understood [sic]. But all
9 the testimony I wanted to get in came in without objection.

10 THE COURT: Yeah. I'm not going to allow -- I'm not
11 going to allow you to submit what may -- right now you
12 don't even know whether it exists, whether there's a full
13 -- it sounds like what you told me when you talked to the
14 solicitor, that you don't know whether there is a tape in
15 another version that exists; is that correct?

16 MR. GROSE: I know that there's a tape that exists
17 somewhere, and it's an entire version. I'm not sure if
18 that's what's in the record or not.

19 THE COURT: Well, that's what I'm saying. There's no
20 -- it may be what's in the record. On the other hand, it
21 may not be what's in the record. There may be a redacted
22 version in the record. But ---

23 MR. GROSE: Well, and at this point, I'm just asking
24 to submit it as a proffer. And I think ---

25 THE COURT: But you don't have anything to submit.

1 You're wanting time to find it and see if it's out there
2 and then submit it, right?

3 MR. GROSE: Right. Well, yes, sir. And I think that
4 that can be done without any delay on the case. You said
5 you're not going to consider it. I just want to be able to
6 put it in the record.

7 THE COURT: All right. Well, I'm not going to allow
8 it.

9 MR. GROSE: All right. Fair enough.

10 THE COURT: We don't even know whether it exists or
11 whether it's out there, so I'm not going to allow that.
12 I'm not going to allow you -- we're not going to take any
13 more -- we're not going to take any proffered testimony on
14 the amended application that is not part of this hearing.
15 All right.

16 MR. GROSE: And I'm not ---

17 THE COURT: And I understand you've already gotten
18 everything else in, why can't we get this in. That wasn't
19 proffered testimony, what you've gotten in. That was part
20 of the questions that you asked Mr. Smith.

21 MR. GROSE: Right. And my position is is that
22 everything except what I'm asking to submit now is in
23 evidence without an objection, and so it's part of the
24 record.

25 THE COURT: Right. And ---

1 MR. GROSE: And that goes to the majority of the
2 amendments, and so we also move that the application be
3 amended to conform to evidence per the rules of civil
4 procedure.

5 THE COURT: All right. I'm not going to allow it in.
6 Thank you.

7 MR. GROSE: And you're talking about the tape?

8 THE COURT: Right. I mean, that's the only thing I've
9 got. What else is there -- or you got other stuff you want
10 in?

11 MR. GROSE: No. Well, we still have the preliminary
12 ruling on the depositions. I don't know if you made a
13 final ruling.

14 THE COURT: That wasn't preliminary. I allowed them
15 in.

16 MR. GROSE: You let the affidavits in.

17 THE COURT: The affidavit.

18 MR. GROSE: Whether we were going to hold the record
19 open for the depositions.

20 THE COURT: No. Because I'm allowing the affidavits
21 in. I'm not going to take any more -- we're not going to
22 hold the ruling open so that there can be depositions.
23 I've allowed the affidavits in. The State doesn't have an
24 opportunity to cross-examine those, but I'm going to still
25 allow those in.

Appendix 599

HOWARD STEINBERG DIRECT BY MS. RATIGAN

76

1 MR. GROSE: All right. And I guess the only thing
2 that I believe is unruled on then is the motion to amend
3 the application to conform to evidence.

4 THE COURT: That's denied. All right.

5 MR. GROSE: I have no other witnesses, Your Honor.

6 THE COURT: All right. Thank you.

7 MR. GROSE: I'd like to propose that both sides either
8 be allowed to brief or submit proposed orders.

9 MS. RATIGAN: I would like to be able to call my
10 witness first.

11 MR. GROSE: Oh, I'm sorry.

12 THE COURT: All right. Ms. Ratigan, call your first
13 witness.

14 MS. RATIGAN: Thank you, Judge. We call
15 Mr. Steinberg.

16 WHEREUPON,

17 HOWARD STEINBERG,

18 After having been duly sworn, testified as follows:

19 THE CLERK: Please state your full name for the
20 record.

21 THE WITNESS: Howard Steinberg.

22 DIRECT EXAMINATION

23 BY MS. RATIGAN:

24 Q Mr. Steinberg, how were you involved in this case?

25 A I was the assistant solicitor who was assigned to

Appendix 600

HOWARD STEINBERG DIRECT BY MS. RATIGAN

77

1 review the case before charges had been made, even before
2 Korey Love had been involved. That was from 2007 on up.
3 And once the charges were made, the case was assigned to
4 Bryna Seay, and Ms. Seay asked me to be her co-chair.

5 Q And where is Ms. Seay today?

6 A Ms. Seay is unfortunately not here. She is under
7 medical leave in another state.

8 Q And how involved were you in both the discovery
9 process and preparing the case for trial?

10 A Totally. Either I could have tried this case or
11 Ms. Seay could have tried this case.

12 Q In terms of discovery, did you provide to Mr. Smith
13 all of the discovery that you had?

14 A Yes. We checked over discovery because Ms. Seay had a
15 different file than I had. She had the primary file
16 because she was the primary chair. We made sure that I had
17 turned over everything. We even sent e-mails if there were
18 some that came up. For example, a conversation between
19 myself and a witness, I would have turned that over to
20 Mr. Smith. We even checked our index of discovery to make
21 sure that everything had been sent over.

22 Q In addition to the usual incident supplementals and
23 statements, were there any audio or videotapes in this
24 case?

25 A There were jail phone calls that were of no use in the

Appendix 601

HOWARD STEINBERG DIRECT BY MS. RATIGAN

78

1 trial itself. They were turned over but not introduced. I
2 made them. I turned them over. But they were not of any
3 use to the State.

4 There was also an interview ---

5 Q Well, let me stop you right there real quick while
6 we're still on jail calls. Whose calls? Were they calls
7 to and from Mr. Love?

8 A No calls to Mr. Love because he can't be called while
9 in jail. These were calls made from Korey Love to his
10 family members, primarily.

11 Q Now, do you recall whether or not you turned over a
12 tape of those calls to Mr. Smith?

13 A I am very confident I did. If there's ever anything
14 that I'm going to use, I turn it over. If I'm not going to
15 use it, I might decide not to turn it over because it's
16 just mere words. It doesn't help. I am very confident I
17 turned this over. My conversation with Mr. Smith earlier
18 today also made me think I turned it over.

19 Q While there was no -- while your opinion that there
20 was nothing on the calls that would help the case, was
21 there anything on those calls that you would have been able
22 to use for impeachment, in your opinion?

23 A There would have been impeachment and primarily mostly
24 background about Jerome Love. Jerome Love has already been
25 described as a bit of a character and as a street criminal.

Appendix 602

HOWARD STEINBERG DIRECT BY MS. RATIGAN

79

1 He would have been a terrible witness for the defense and a
2 great witness for cross-examination by the State. He's a
3 bully, he has a number of poor qualities, and he would have
4 been a dream for me to cross-examine. Specifically I was
5 actually tasked to cross-examine him had he shown up, but
6 he elected not to show up. He was present in the building.
7 I physically saw him, but he did not testify.

8 Q That's actually what I was going to get to next.
9 Mr. Smith testified that Mr. Love -- Mr. Jerome Love had an
10 outstanding warrant, and y'all had worked out something
11 such that he was not under threat of being arrested. Does
12 that sound familiar to you?

13 A Yes. Mr. Smith and Ms. Seay and I and the judge had a
14 meeting, and we agreed, I think, with some arm-twisting by
15 Judge Miller not to have him arrested on the outstanding
16 CDV. We made a particular call in this case to keep the
17 CDV victim, who was present in the building, away and
18 secure so she didn't even have to lay eyes on Mr. Love.

19 Q Now getting back to videotapes. Did you receive any
20 videotapes in this case?

21 A Yes. We received videotapes from the NCIS officers in
22 Okinawa. We reviewed them. They were really not helpful
23 to the State. We turned them over in their entirety to the
24 defense attorney. He thought they might be helpful. I
25 actually recall it being played in the courtroom. I don't

Appendix 603

HOWARD STEINBERG DIRECT BY MS. RATIGAN

80

1 have a copy of the transcript so I'm going off of sheer
2 memory, but I do remember transcripts -- pardon me -- the
3 videotape being played, at least in part, to the jury.

4 Q And your testimony earlier was that you recall
5 Mr. Jerome Love having been at the courthouse at some
6 point?

7 A I physically laid eyes on him.

8 Q And did Mr. Smith ever tell you or the judge why he
9 decided not to call Mr. Love? Mr. Jerome Love, I should
10 say.

11 MR. GROSE: Objection. Hearsay.

12 BY MS. RATIGAN:

13 Q But he ultimately -- well, let me back that up. Do
14 you recall if Mr. Jerome Love was there throughout the
15 trial or do you just not remember?

16 A I don't remember Mr. Love actually walking into the
17 courtroom. I remember him actually in the hallway, and I
18 remember seeing him outside the building.

19 MS. RATIGAN: May I approach, Your Honor?

20 THE COURT: Yes, you may.

21 BY MS. RATIGAN:

22 Q Mr. Steinberg, I'm handing you what has been marked as
23 Applicant's Exhibit 1. Have you ever, prior to today, seen
24 this letter?

25 A No, I haven't.

Appendix 604

HOWARD STEINBERG CROSS BY MR. GROSE

81

1 Q Did Mr. Korey Love ever contact you and say -- after
2 his conviction and say he had received some kind of
3 exculpatory letter?

4 A No. I had no contact with Mr. Love or with -- I
5 believe with Mr. Ransom who was, at that time, the
6 stepbrother or half brother who testified for the State.

7 Q So no contact with either of them after their cases
8 were disposed of?

9 A No. No contact after that.

10 MS. RATIGAN: Beg the Court's indulgence, Your Honor.
11 I believe that's all I have, Judge.

12 THE COURT: All right. Thank you.

13 Mr. Grose?

14 MR. GROSE: Thank you, Your Honor.

15 CROSS EXAMINATION

16 BY MR. GROSE:

17 Q This will probably be pretty brief, Mr. Steinberg.

18 A Yes, sir.

19 Q You testified that you either handed over or were
20 shared everything that you had that was by way of discovery
21 with Mr. Smith.

22 A Yes. In fact, I'm going by recollection, but I think
23 in 2012, I think Mr. Smith actually came into our office to
24 inspect the items, the open-file policy.

25 Q Okay. And, of course, earlier he was very

Appendix 605

HOWARD STEINBERG CROSS BY MR. GROSE

82

1 complimentary of the accessibility that you give him to
2 your file.

3 A I think that was what we talked about. I also
4 remember checking over the index of what was sent to making
5 sure we had everything turned over that we had.

6 Q All right. And you testified that you were the one
7 designated to cross-examine Jerome Love if he testified.

8 A Yes, sir.

9 Q And from your testimony, I gathered you know of Jerome
10 Love prior to or outside of this case.

11 A No. I only know him through this case. I do not know
12 of his other incidents.

13 Q Okay. All right. But then through this case, you
14 knew of him as a character?

15 A Yes, sir.

16 Q I believe that was your words earlier.

17 A Yes, sir.

18 Q And certainly you shared all the information that you
19 had about Jerome Love with Fletcher Smith?

20 A Yes, sir. I didn't share with him perhaps my beliefs
21 and maybe my work product, but he had all the information I
22 had.

23 Q All right. He would have had the facts about Jerome
24 Love that you had.

25 A Yes, sir. He actually spoke to Mr. Love whereas I

Appendix 606

HOWARD STEINBERG CROSS BY MR. GROSE

83

1 didn't speak to Mr. Love.

2 Q Okay. All right. So if anything, he would have more
3 facts about Mr. Love than you.

4 A That's possible. I have -- I listened to all the jail
5 phone calls. I had more of his personality, perhaps, in
6 mind than anybody else, but I didn't have any particular
7 facts that he would not have had.

8 Q And you shared all that information with the calls
9 with Mr. Smith.

10 A Yes, sir.

11 Q He was aware of all of the facts that you knew?

12 A Yes. All the facts, certainly.

13 Q All right. And based on the facts that you were aware
14 of that you shared with Mr. Smith, it sounds like you were
15 kind of looking forward to crossing Jerome Love?

16 A He was going to be a very interesting
17 cross-examination with his personality, his speech pattern
18 in front of a jury.

19 Q Okay. And if -- I mean, if you were defending a case,
20 you wouldn't want to use Mr. Love as a witness, it doesn't
21 sound like.

22 A It would have been a combination of what my client
23 wanted and how important he was and whether, frankly,
24 another witness could have accommodated that. If another
25 witness could have given the same information that

Appendix 607

HOWARD STEINBERG CROSS BY MR. GROSE

84

1 Mr. Jerome Love could have given, I would have loved it to
2 come in by a different witness, Leslie Jackson.

3 Q All right. And that's something that you -- from what
4 you knew, you were able to determine prior to trial.

5 A I knew -- what I knew about Mr. Jerome Love, I would
6 not have called him as a witness, but, again, Mr. Smith has
7 been an attorney twice as long or longer than I have.

8 Q Okay. Now, the recording of the pre-polygraph
9 interview with Ms. Peters, do you have the transcript in
10 front of you?

11 A I've never seen the transcript. I think there may
12 have been a post-polygraph.

13 Q Okay. Well, either pre or post.

14 A Yes.

15 Q It was in relation to that.

16 I'm going to hand you an extra copy of it.

17 A Thank you, sir.

18 Q If you could, go to page 230.

19 A Yes, sir.

20 Q Actually, if you could, go to page 231.

21 A Yes. And I see here it's a post-polygraph.

22 Q There's a discussion about that going from page 231
23 over to 232?

24 A Yes, sir.

25 Q All right. And, you know, Mr. Smith states on the

Appendix 608

1 record -- now, he refers to it as there being Brady
2 material in the part that wasn't played, but he certainly
3 believed that there was information in the part that wasn't
4 played that would be favorable for his side of the case to
5 come out.

6 A No. I don't know that.

7 Q Okay. Well, he states that, doesn't he?

8 A Please point me to the part.

9 Q If you look at page 231 at line 20 ---

10 A Yes, sir.

11 Q --- Mr. Smith says, Your Honor, I think, and then you
12 pick up at line 22, The problem with -- it's a confusing
13 sentence the way its typed, but there said, Is there Brady
14 material on that recording? And I asked them to redact
15 before we got to trial so that we could play the recording.
16 Other things is the Court, I believe, should listen because
17 she was coerced into giving that statement that she heard
18 him say it because she flip-flops and says something else
19 totally different after she says it's -- and that's where
20 we left off. And the judge eventually rules that the --
21 well, Mr. Smith mentions the rule of completeness, the
22 objection he testified about at line 9 on 232, and the
23 judge ultimately rules that Mr. Smith's objection was under
24 a civil rule that apparently didn't apply in criminal
25 cases.

Appendix 609

HOWARD STEINBERG CROSS BY MR. GROSE

86

1 Do you dispute what Mr. Smith said, that there would
2 be something that -- on the tape -- I'm not accusing you of
3 not turning it over.

4 A I understand.

5 Q You very clearly turned it over. He was wanting to
6 play more of it for the jury because he thought it would
7 help his client, is what he's telling Judge Miller.

8 A He doesn't say specifically what he wanted to have
9 played. We had to use an audio redacting tool on the
10 computer, and we did not want the words "polygraph" or "lie
11 detector" to come in, obviously. We instructed both the
12 polygraph examiner, who I decided I did not need, and the
13 witness, Ms. Peters, never to say the word "lie detector"
14 or "polygraph." We made sure that nothing ever came in.
15 And that's why we had to -- we had to slice part of it out
16 of there.

17 Q All right. And you could have sliced just those words
18 out of it and played the whole thing, couldn't you?

19 A The problem is sometimes there's so many -- the
20 weaving in and out of a conversation during an interview
21 has so many improper things, we did not want anything
22 improper to come in. But I do want to say we did turn over
23 the entirety of the polygraph -- post-polygraph interview
24 to Mr. Smith, so he had all of it.

25 Q Okay. And just so we're clear, I'm not accusing you

Appendix 610

HOWARD STEINBERG CROSS BY MR. GROSE

87

1 of ---

2 A I understand you're not.

3 Q It's very clear from the record that he had all of it.

4 But you're not disputing that there might have been things

5 on that that he could have argued to the jury that was

6 helpful to him about Ms. Peters' credibility?

7 A Yes. But if I remember correctly, I think Ms. Peters

8 beat him to the punch. Ms. Peters actually denied making

9 certain statements until we played the statements for her.

10 And anyways, the examination and cross-examination of

11 Ms. Peters I think resolved all Mr. Smith's concerns. If

12 not, obviously, he can play -- he can play the tape, if he

13 wishes.

14 Q Right. And he didn't.

15 A Right.

16 Q He didn't play any other parts of the tape.

17 A That's correct.

18 Q And he was asking -- at least asking for more of it to

19 be played when you introduced it.

20 A Yes. But I think the judge made a ruling ---

21 Q Right.

22 A --- later on that it had to be relevant. It just

23 can't be -- it can't include hearsay of another party.

24 Sometimes during the interview process, the officers will

25 bring in hearsay information, and we can't have that played

1 through a videotape or an audiotape. It's not otherwise
2 introducable. I think the judge may have addressed part of
3 that on page 234, perhaps.

4 Q Right. But whether there was evidence on the
5 statement that she was coerced or there was other prior
6 inconsistent statements of her own on that or things that
7 would be admissible wouldn't be the hearsay. The
8 things ---

9 A It would not be hearsay if she had made a prior
10 inconsistent statement.

11 Q Right. Or if there was evidence on the tape of her
12 being coerced.

13 A I agree. You're allowed to introduce that.

14 MR. GROSE: Okay. I believe that's it, but if I could
15 just have a moment.

16 THE COURT: All right. Thank you, Mr. Grose.

17 MR. GROSE: Begging the Court's indulgence just
18 another moment.

19 BY MR. GROSE:

20 Q Just briefly, Mr. Steinberg, do you recall whether or
21 not the jurors asked to hear again that tape that was
22 Exhibit Number 39?

23 A I'm not sure if they asked to see it -- hear it again
24 as we played it or at the end, but I think I do recall
25 playing the tape twice to the jury. Again, I don't

Appendix 612

1 remember if it was the end of our closing arguments or
2 right away as we were playing it. Sometimes jurors will
3 indicate to a judge if they have trouble hearing, so it's
4 one of those two.

5 Q Okay.

6 A Do the transcripts reflect ---

7 Q The transcript appears to reflect that they asked for
8 it during deliberations.

9 A During deliberations.

10 Q And, of course, whatever the transcript says is what
11 it says.

12 A Yes, sir.

13 MR. GROSE: That's it, Your Honor. Thank you.

14 THE COURT: All right. Thank you.

15 Ms. Ratigan?

16 MS. RATIGAN: Nothing further, Your Honor. The State
17 would rest.

18 THE COURT: All right. Thank you, Mr. Steinberg. You
19 can step down.

20 THE WITNESS: Thank you, Your Honor.

21 THE COURT: All right. Anything further, Mr. Grose?

22 MR. GROSE: I would renew all the prior motions
23 including the motion to amend and conform to evidence now
24 that the State has rested.

25 THE COURT: All right. Thank you. Well, I abide by

1 my prior rulings.

2 Anything else?

3 MR. GROSE: I would like to request that both sides be
4 allowed to submit briefs or proposed orders.

5 THE COURT: All right. When could you have your brief
6 and proposed order?

7 MR. GROSE: Is 30 days too long?

8 THE COURT: Yep. You do it before then.

9 What's your position, Ms. Ratigan?

10 MS. RATIGAN: I honestly don't-- I'm sorry. My voice
11 just dropped out on me. I honestly don't know that it's
12 necessary, Your Honor. We'd be happy to abide by Your
13 Honor's ruling one way or the other. I don't know that
14 it's necessary, unless Your Honor has specific points he's
15 concerned about.

16 THE COURT: Well, I certainly believe I need to give
17 both sides an opportunity to brief the Court if they feel
18 inclined to do so.

19 MR. GROSE: How soon would you like it, Your Honor?

20 THE COURT: Well, let's do this. Just have your brief
21 and your proposed order in by March the 15th. That will
22 give you almost 30 days. By March the 15th.

23 MR. GROSE: That's good, yes.

24 THE COURT: And so we'll rule after your brief and
25 proposed order come in. All right?

1 MR. GROSE: Thank you, Your Honor.

2 THE COURT: Anything else?

3 MR. GROSE: Not from us, Your Honor.

4 THE COURT: All right. Thank you.

5 MS. RATIGAN: Thank you, Judge.

6 *****END OF TRANSCRIPT OF RECORD*****

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1
2
3 CERTIFICATE OF REPORTER

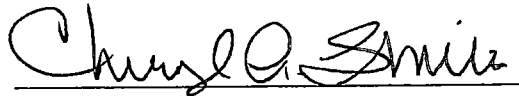
4 STATE OF SOUTH CAROLINA)

5 COUNTY OF GREENVILLE)
6

7 I, CHERYL A. SMITH, Official Court Reporter for the
8 Thirteenth Judicial Circuit of the State of South Carolina,
9 do hereby certify that the foregoing is a true, accurate
10 and complete Transcript of Record of the proceedings had
11 and evidence introduced in the trial of the captioned case,
12 relative to appeal, in the Court of Common Pleas for
13 Greenville County, South Carolina, on the 17th day of
14 February, 2016.

15 I do further certify that I am neither of kin,
16 counsel, nor interest to any party hereto.

17
18 November 21, 2016
19
20

21 
22

23 Cheryl A. Smith, CVR-M

24 Court Reporter
25

Appendix 616

yo nigga first of all I just wanna apologize to you. I didn't mean for it to turn out like this. I meant to help you. I tried to cause you any harm. I meant to help you. I tried to remove you from the whole situation even if I had to go down myself. It didn't matter to me just as long as I could get you off. That's my words. I tried to talk the fall for us but they wasn't trying to hear that. When they first came and got me, WEAS let me see Ricky, Rashad, and Rashad's statements. So I kind of knew what they said. They was calling you a killer. So I told them you was never there. And that you had nothing to do with it. I told them it was me. But it was too many people against you. Ricky, Rashad, Rashida. Then my mom and Saleem. Then the person who called in the anonymous tip, that person said they got all the information from Rome. But I still stuck with the same story. And I wasn't gonna to let us both go down. So when I got to the court I stuck with the same story. I kept you out of it. But once I saw everybody's full statements, I knew it wasn't anything I could do. They told me to stop trying to save you because I couldn't. And I know it was true. But they wanted me to give Rashida up but I wouldn't. They wanted me to give Pamo up for the gun but I didn't. Then they wanted me to plea guilty for Voluntary Manslaughter. I didn't want to go down and I was already in the hole. I was since day one. But that's when I ended up letting them play me. I sat down and re-did my statement but I did it how they said would be best. But they never said I had to testify so I thought I was playing them. And they told me they would drop the murder if I plea guilty to Attempted Armed Robbery. So I ran with that. Then all of a sudden they gave me a paper signed by the judge that said if I didn't testify the murder would be still charged in me. I messed up man. I thought I was playing them but they played me. They had me re-do that statement in my favor so the judge would like me. I know you heard some of the lies when I hit the stand. That wasn't me. It was what they wanted. They wanted to help me. The cards just got reversed. I tried to save you but in the end they saved me. I'm sorry man. You know I would never hurt you intentionally. But I messed up when I only meant to help. True story. The other day at the case, is when you told me that we're still brothers no matter what. Those words almost brought tears to my eyes. I don't deserve that kind of love from you nigga because I know I slipped. I'm sorry man. I don't know what else to say. I love you though believe it or not. I just got caught in a trap when I only meant to help you. Stay up nigga. I love you.

Appendix 617

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Appendix 618

STATE OF GEORGIA)

) AFFIDAVIT OF DEMETRIUS JACKSON

COUNTY OF GWINNETT)

Demetrius Antoine Jackson, being first duly sworn, swears and affirms that the following is true to the best of my knowledge:

1) I am a citizen and resident of Gwinnett County, State of Georgia. My address is 1394 Branch Drive, Tucker, Georgia 30084. I am 38 years of age. Most people who know me call me Antoine.

2) On January 26-27, 2007, I lived in Greenville, South Carolina. I lived with my wife Leslie Jackson and our four children, who all were under eight years of age at the time. Korey Love lived with us, along with his father Jerome Love and brother Kendel Love. Korey and Kendel had a strict curfew.

3) I was employed at the Bonefish Grill on Woodruff Road as a kitchen manager. Jerome Love also worked at the Bonefish Grill. On Friday nights, we closed at 11:00 p.m., so we would have gotten off work around midnight.

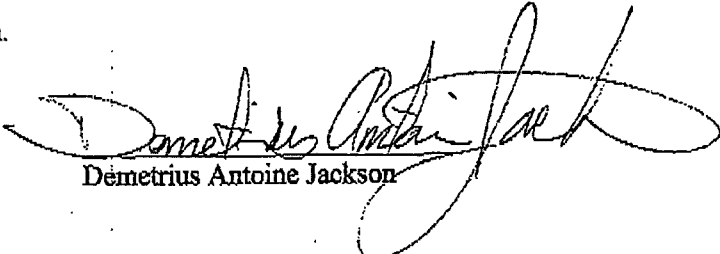
4) When we got home that night, Korey, Kendel, Leslie and the other children were at home.

5) I provided this information to Fletcher Smith. During Korey's jury trial, November 5-8, 2012, I was available to testify as a witness.

6) I am currently employed at the Village Tavern in Alpharetta, Georgia as a server. I have worked at this restaurant as a cook and a server and will be going through the management-training program. One of my co-workers recently died, and I am not able to get off work and come to South Carolina on Wednesday, February 17, 2016.

7) I agree to provide a deposition.

Further affiant sayeth naught.


Demetrius Antoine Jackson

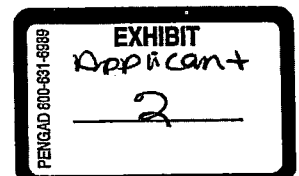
Sworn to and subscribed before me

this 16th day of February, 2016


NOTARY PUBLIC FOR GEORGIA

My Commission Expires: 09/01/2019

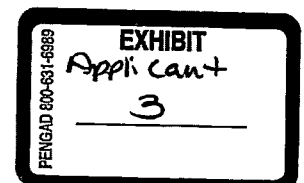
Cherrell Green
NOTARY PUBLIC
Cobb County, GEORGIA
My Comm. Expires
9/1/2019



STATE OF CALIFORNIA)
) AFFIDAVIT OF JEROME LOVE
COUNTY OF SAN BERNARDINO)

Jerome Love, being first duly sworn, swears and affirms that the following is true to the best of my knowledge:

- 1) I live at 2020 South Euclid Avenue #2, Ontario, California 91762. My date of birth is September 5, 1971. I am 44 years old. Korey Love is my son.
- 2) On January 26-27, 2007, Korey, my other son Kendel, and I lived with Demetrius (Antwan) and Leslie Fuller in Greenville, South Carolina. Antwan and Leslie had four young children.
- 3) I had a strict curfew that Korey and Kendel had to observe. The latest they could be out Monday through Thursday was 10:30 p.m., Friday and Saturday was 1:00 a.m., and Sunday was 10:00 p.m.
- 4) Antwan Fuller and I worked at the Bonefish Grill on Woodruff Road in Greenville. Because I didn't have a car, Antwan would give me a ride home. When we got off work, Antwan and I would either go straight home or stop at convenience store near where we lived to get a six-pack of beer and then go home. When I got home, the first thing I always did was check on Korey and Kendel. They would either be asleep or playing a video game. If they were still up, I would tell them to go to bed.
- 5) On January 26, 2007, I clocked out from work at 11:56 p.m. When I got home that night, Korey, Kendel, Leslie and all the other children were at home. Fletcher Smith was aware of this information.
- 6) Jalesa Neal never overheard a conversation between me and Korey about Korey being involved in Isaac Bass' murder at the Wendy's on Pleasantburg Drive in



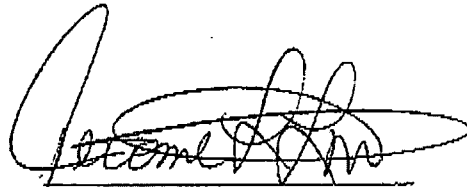
Greenville. I know that Jalesa Neal never overheard such a conversation because Korey never told me he was responsible for or in any way involved in the murder of Isaac Bass at the Wendy's on Pleasantburg Drive. Fletcher Smith was also aware of this information.

7) I was in Greenville, South Carolina November 5-8, 2012 and available to testify during Korey's jury trial. When I came to the courtroom, Mr. Smith told me he didn't need me that day but he would call me when it was time to testify. Mr. Smith never called me to testify.

8) I currently work two jobs. I am a supervisor for material handling at Great China Empire, which is a clothing importer and exporter. I am also a forklift operator through a temp agency called Workforce Solution.

8) I am not able to travel to Greenville, South Carolina on February 17, 2016. I agree to provide a deposition if necessary.

Further affiant sayeth naught.


Jerome Love

Sworn to and subscribed before me

this 16th day of February, 2016

Daniel Jordan
NOTARY PUBLIC FOR CALIFORNIA

My Commission Expires: June 8, 2019

*All attached
Certificate*

CALIFORNIA JURAT WITH AFFIANT STATEMENT**GOVERNMENT CODE § 8202**

- ☒ See Attached Document (Notary to cross out lines 1-6 below)
☐ See Statement Below (Lines 1-6 to be completed only by document signer[s], not Notary)

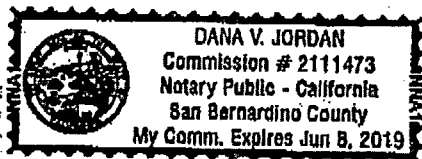
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Signature of Document Signer No. 1

Signature of Document Signer No. 2 (if any)

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California

County of San Bernardino

Subscribed and sworn to (or affirmed) before me

on this 16th day of February, 2016
 by Date Month Year

(1) Jerome L. Love

(and (2) _____),

Name(s) of Signer(s)

proved to me on the basis of satisfactory evidence
 to be the person(s) who appeared before me.

Signature Dana V. Jordan

Signature of Notary Public

Seal

Place Notary Seal Above

OPTIONAL

Though this section is optional, completing this information can deter alteration of the document or fraudulent reattachment of this form to an unintended document.

Description of Attached Document

Title or Type of Document: Affidavit of Jerome Love Document Date: February 16, 2016
 Number of Pages: 2 Signer(s) Other Than Named Above: Same as above

Appendix 623

Anders v. California, 386 U.S. 738 (1967). Donald J. Zelenka represented the State. On April 23, 2014, 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. This Court convened an evidentiary hearing on February 17, 2016 and denied Love's request to amend his application. A copy of the Amended Application is attached. This memorandum follows.

II. Factual Background.

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

Ransom is Korey Love's stepbrother. Ransom's mother married Korey's father, Jerome Love. Tr. 356-578. Ransom claimed Korey 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. Tr. 266-68, 310-11.

Although claiming, "I can't really remember like what happened," Ransom claimed Korey 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, Korey supposedly said he was going to rob someone. Ransom claimed Korey crept up on Mr. Bass, pulled a gun, and pointed it in Mr. Bass' face. According to Ransom, Mr. Bass got away and Korey shot Mr. Bass

Appendix 624

while he was trying to get back inside Wendy's. Ransom claimed they both ran away. Tr. 359-67.

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

Korey Love testified in his own defense that he was at home, where he, his brother Kendell, and father, lived with Demetrius and Leslie Jackson and their young children. Tr. 430-39. Ms. Jackson confirmed Korey's alibi. Tr. 405-12. A records custodian confirmed the time that Korey's father, Jerome Love, got off work at the Bonefish Grill, where he worked with Mr. Jackson. Tr. 401-05.

III. Standard of Review.

Under *Strickland*, the defendant "must show that counsel's representation fell below an objective standard of reasonableness," which must be judged under "prevailing professional norms." *Id.* at 688. 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. State bar publications can be evidence of the prevailing professional norms of a jurisdiction. *Padilla v. Kentucky*, 559 U.S. 356, 367 (2010).

Appendix 625

“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 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 v. Washington*, 466 U.S. 668 (1984). Certainly, 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). In most cases, the reason for abandoning one issue is to enable counsel to focus on the more meritorious issues, since a “brief that raises every colorable issue runs the risk of burying good arguments.” *Jones*, 463 U.S. at 752-53. 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

Appendix 626

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. This is not a correct articulation of the law").

IV. Argument.

A. Alibi Witnesses.

During his opening statement, trial counsel promised:

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're going to bring in a lady by the name of Leslie Jackson who had a curfew on this young man because he, his dad and his other brother had been homeless and he worked, his dad worked at Bonefish [Grill] with Leslie Jackson's husband. We're gonna bring those people into this courtroom and they're gonna testify right from (indicating) that witness stand. Leslie Jackson gonna testify to you that she was at home with her children that night and that Korey Love had no key to get in the house, that if he missed his curfew he would not even be able to get back in the house without some adult know it. We will bring his dad in here Mr. Jerome Love and Mr. Jerome Love will testify that when he got off a [sic] 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

Appendix 627

this case that not only that they enforced strict rules but these kids had a curfew to be in at night.

Tr. 58, line 12 – 59, line 11.

Leslie Jackson and Korey Love testified about the alibi. Tr. 430-39, 405-12. Trial counsel never called Jerome Love or Demetrius Antoine Jackson¹ to the witness stand. Both provided affidavits detailing their testimony. Kendell Love, Korey's brother who testified at the evidentiary hearing, also would have supported the alibi defense, but trial counsel did not call him as a witness.

During closing arguments, the prosecution called attention to trial counsel not calling Jerome Love and Demetrius Jackson as 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.

Tr. 473, lines 12- 19.

During the post-conviction hearing, trial counsel testified it is important to make a strong opening statement, it is important for counsel to maintain credibility with the jurors, and this case turned on the credibility of the witnesses presented by the prosecution and defense. Counsel also testified Jerome Love and Demetrius Jackson would not have been good witnesses based on their reliability and individual backgrounds. Jerome Love, purportedly, made racial statements during telephone calls

¹ Mr. Jackson's family and friends call him by his middle name, "Antoine." The trial record refers to him as "Demetrius."

Appendix 628

with his son that were recorded by the jail.² Demetrius Jackson has a prior criminal record. Trial counsel acknowledged that he was aware of *all* of this information prior to making his opening statement.

Trial counsel's performance was deficient for promising the jurors witnesses that ultimately did not testify. Counsel lost credibility with the jurors. PCR Application, ¶ 11(a)(2). The prosecution, as seen, capitalized on counsel's failure to present these witnesses. Our Supreme 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).³

"[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). See e.g. *Ouber v. Guarino*, 293 F.3d 19 (1st Cir. 2002) (counsel ineffective in drug

² Trial counsel was not clear whether Solicitor's Office produced the actual recordings of the calls or merely summarized the content. During the evidentiary hearing, no witness provided a clear explanation about why the calls were even relevant.

³ 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).

Appendix 629

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). Prejudice results when witness credibility is the central issue in the case. *E.g. Dawkins v. State*, 346 S.C. 151, 551 S.E.2d 260 (2001).

Counsel had two options to avoid this loss of credibility. First, he could have called Jerome Love and Antoine Jackson just as he had promised during his opening statement. PCR Application, ¶ 11(a)(3). Their testimony would have supported the alibi defense. Both were available. Second, if trial counsel was concerned about the quality of testimony these witnesses would have provided, he should not have named these witnesses during his opening statement. PCR Application, ¶ 11(a)(2). He should have informed the jurors about the alibi defense and let the jurors know it would be supported by the testimony of only the witnesses that actually would be called to testify.

B. Burden of Proof for Alibi.

As seen in Subsection A above, trial counsel promised he would prove the alibi defense. In addition to those burden-shifting statements, trial counsel also 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 and

Appendix 630

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.

Tr. 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.

Tr. 63, lines 2-12. These statements shifted the burden to the defense. PCR Application,

¶ 11(a)(1). Trial counsel's performance was deficient because it removed the requirement that the State prove each element of its case, including identity. *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Given trial counsel's failure to call the alibi witnesses identified in his opening statement, these statements invited the jurors to convict Korey Love.

The trial judge later 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.

Tr. 483, lines 8-17.

Appendix 631

After the jury charge, trial counsel objected to the use of the term “mere denial” in alibi instruction, and the trial judge overruled the objection. Tr. 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.” Tr. 483.

Trial counsel is ineffective by not objecting to an incorrect, burden shifting jury instruction on alibi. PCR Application, ¶ 11(a)(6). *See e.g. 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). 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).

Appendix 632

Trial counsel, additionally, was ineffective by not requesting a correct instruction on the law. *See e.g. Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1995) (trial counsel provided ineffective assistance by failing to request alibi charge). Ralph King Anderson, Jr., *South Carolina Requests to Charge - Criminal*, 2007, § 16-9 regarding alibi, a copy of which is attached, which is a more clear and more correct statement of the law of alibi.

Finally, trial counsel's objection did not preserve this issue for appellate review. If, however, the State contends that the objection preserved this issue, then appellate counsel was ineffective for not raising the issue on appeal. PCR Application, ¶ 11(b)(1).

C. Mr. Love's Pre-trial Incarceration.

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." Tr. 430, lines 204. During closing argument, trial counsel reminded the jurors "this man has been in jail two and a half years." Tr. 453, line 10. This evidence implied bad character evidence about Korey Love. PCR Application, ¶ 11(a)(4) and (5). 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)).

D. Allegations of Amended Application.

Korey Love maintains he should have been allowed to proceed on his Amended Application about which included the following claims, about which testimony was presented without objection. This Court should consider these claims and grant relief.

Appendix 633

1. Failing to call Jerome Love (Applicant's father) to contradict Jalesa Neal's testimony.

The prosecution called Jalesa Neal, Jarod Ransom's brother, to testify about overhearing a conversations between Korey and Jerome Love where Korey allegedly admitted he had robbed, shot, and killed someone at the Wendy's. Tr. 221-25. Trial counsel was ineffective for not calling Jerome Love to refute these allegations. Amended PCR Application, ¶ 11(a)(8). *See* affidavit of Jerome Love and legal authority cited in Section IV(A), *supra*.

2. Failing to preserve for appellate review requiring the State to play substantially all of Rashida Peters's recorded statement, under the rule of completeness, because that Statement contained *Brady* material.

Prior to the prosecution calling Rashida Peter's, the trial judge heard the a defense request that the State be required to play the entire recording of Ms. Peter's statement because it contained information favorable to the defense, including *Brady* material. The defense relied on the Rule of Completeness. Rule 106, SCRE and *State v. Cabrera-Pena*, 361 S.C. 372, 605 S.E.2d 522 (2004). The trial court judge mistakenly believed the Rule of Completeness is a "civil rule." Tr. 231-236.

Although defense counsel correctly stated this objection, his performance was deficient when he did not renew it when the State played only a portion of the recording. Tr. 246. Amended PCR Application, ¶ 11(a)(9). *McHam v. State*, 404 S.C. 465, 746 S.E.2d 41 (2013). The failure to play the entire tape was prejudicial because the juror did not know the entire circumstances surrounding the statement. As seen, credibility was crucial in this case.

Appendix 634

3. Solicitor's Closing Argument.

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....

Tr. 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). Amended PCR Application, ¶ 11(a)(10).

4. Failing to appeal the trial judge's exclusion of substantially all of Rashida Peters's recorded statement, which was admissible under the rule of completeness and because contained *Brady* material.

As seen in Subsection D(2) above, Korey Love contends that trial counsel did not properly preserve this issue for appeal. If the State contends that the issue was properly preserved for appeal, the appellate counsel was ineffective for not briefing the issue. Amended PCR Application, ¶ 11(b)(2)

V. Cumulative Error.

If this Court concludes these deficiencies, standing alone, are insufficient to order a new trial, then this Court must apply a cumulative error analysis because the deficiencies taken together also combined to deny Horton 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

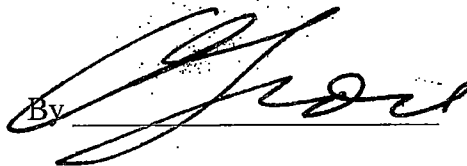
Appendix 635

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).

VI. Conclusion.

The Court should grant Mr. Love’s application for post-conviction relief, vacate his convictions and sentences, and order a new trial.

Respectfully submitted,

By 

E. Charles Grose, Jr.
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(864) 538-4466

Counsel for Applicant

March 15, 2016
Greenwood, South Carolina

Appendix 636

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF Greenville)

Korey Love, SCDC # 353157)

Full name and prison number (if any) of Applicant.)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

AMENDED APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention McCormick Correctional Institute
2. Name and location of Court which imposed sentence The Honorable Edward Miller,
Presiding Judge, Greenville County Court of General Sessions
3. Name(s) of co-defendant(s) (if any) Eric Jarod Ransom.
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed: 2010-GS-23-4508, 4509, and 4510
5. The date upon which sentence was imposed and the terms of the sentence: On November 8, 2012, Judge Miller sentenced Applicant to 50 years for murder, 20 years for attempted armed robbery, 5 years for possession of a firearm during the commission of a violent crime, and 5 years for possession of a pistol by someone under 21 years of age.

Appendix 637

6. Check whether a finding of guilty was made:
 - (a) after a plea of guilty. n/a
 - (b) after a plea of not guilty. X
 - (c) after a plea of nolo contendere. n/a
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes.
8. If you answered "yes" to (7), list:
 - (a) the name of each Court to which you appealed: S. C. Court of Appeals
 - (b) the result in each such Court to which you appealed: Convictions and sentences affirmed.
 - (c) the date of each such result: April 23, 2014
 - (d) if known, citations of any written opinion or orders entered pursuant to such results: Unpublished Opinion Number 2014-UP-177.
9. If you answered "no" to (7), state your reasons for not so appealing: n/a
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
 - (a) Applicant was denied the right to effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, during his jury trial to determine his guilt or innocence.
 - (b) Applicant was denied the right to effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, during the appeal of his conviction and sentence.
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
 - (a) Trial counsel's performance was both unreasonable and prejudicial. See *Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's acts or omissions included, but are not limited to, the following:
 - 1) During opening statement and closing argument, making burden shifting

Appendix 638

comments that conveyed to the jurors that Applicant had the burdern of proving his defense, includning his alibi.

2) During opening statements, promising the jurors that the defense would call certain alibi witnesses, which trial counsel never called to testify, thereby undermining the defense's credibility with the jurors.

3) Not calling witness that supported Applicant's alibi defense.

4) During direct testiony, eliciting from the Applicant that he had been incarcerated on these charges for 2 ½ years.

5) Emphasizing during closing argument that the Applicant had been incarcerated for 2 ½ years on these charges.

6) Failing to make a specific objection the trial court judge's instrucing the jurors "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."

7) During juror deliberations, failing to object to the trial court judge answering a question from the jurors by providing factual information.

8) Failing to call Jerome Love (Applicant's father) to contradict Jalesa Neal's testiony.

9) Failing to preserve for appellate review requiring the State to play substantially all of Rashida Peters's recorded statement, under the rule of completeness, because that Statement contained *Brady* material.

10) Failing to object to the improper closing argument of the solcitor which imperpisibly appeald the the passion of the jurors:

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....

Revised 3/2003

Appendix 639

11) Failing to request Ralph King Anderson, Jr., South Carolina Requests to Charge - Criminal, 2007, § 16-9 regarding alibi, a copy of which is attached, which is a more clear and more correct statement of the law of alibi.

(b) Counsel's performance on direct appeal was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's acts or omissions included, but are not limited to, the following:

1) Failing to appeal the trial court judge's instructing the jurors "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."

2) Failing to appeal the trial judge's exclusion of substantially all of Rashida Peters's recorded statement, which was admissible under the rule of completeness and because contained *Brady* material.

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? No.
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No.
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No.
- (d) any other petitions, motions or applications in this or any other Court? No.

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application: n/a

- (a) the specific nature thereof: n/a
- (b) the name and location of the Court in which each was filed: n/a
- (c) the disposition thereof: n/a
- (d) the date of each such disposition: n/a
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition: n/a

Appendix 640

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
No.
15. If you answered "yes" to (14) identify:
(a) which grounds have been presented: n/a
(b) the proceedings in which each ground was raised: n/a
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented: n/a
17. Were you represented by an attorney at any time during the course of:
(a) your arraignment and plea? No.
(b) your trial, if any? Feltcher Smith, 112 Wakefield Street, Greenville, SC 29601
(c) your sentencing? Fletcher Smith
(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Benjamin John Tripp, S.C. Commission on Indigent Defense, PO Box 11589, Columbia, SC 29211-1589
(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Only the undersigned counsel with regard to this petition.
18. If you answered "yes" to one or more parts of (17), list: *See No. 17, supra.*
19. State clearly the relief you seek in filing this application:
The Court should vacate the convictions and sentences and order a new trial.
20. Are you now under sentence from any other court that you have not challenged?
No.

(signature on next page)

Appendix 641

Respectfully submitted,

By 

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Counsel for Applicant

2/16, 2016
Greenwood, South Carolina

Defenses

the actor lawfully acted in self-defense, defense of another, defense of necessity, or defense of duress. This section does not preclude the admission of testimony on battered spouse syndrome in other criminal actions. This testimony is not admissible when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge.”); *see also Smith v. State*, 486 S.E.2d 819, 823 (Ga. 1997).

§ 6-18 Self-Defense – Bad Blood

There has been evidence in this case regarding bad blood or ill feelings between the parties. If there is bad blood existing between two citizens, and there have been antecedent threats between them, that would not give either one of them in itself the right to injure the other.

If there are ill feelings between you and me—if you had received word that I expected to injure you—the effect would be you would have a right to judge more harshly my conduct than you would otherwise. If we are friends, and I happen to meet you on the street, and I put my hand in my pocket to get my pocket knife with no bad intent, ordinarily you would not be justified in concluding I was trying to get a weapon out with which to kill you or to do you serious bodily harm. If there is a violent feeling between us, and I put my hand in my pocket to get something, you would be justified in interpreting that act of mine more harshly than in the case of friends. If you receive threats of harm, and you meet the person who made them, you can judge more harshly in determining whether there is any necessity to act in defense of your safety.

It is for you to judge under all the facts whether the State has proven the defendant guilty beyond a reasonable doubt.

➤ *State v. Hardin*, 114 S.C. 280, 103 S.E. 557 (1920); *see also State v. Schmidt*, 288 S.C. 301, 342 S.E.2d 401 (1986) (stating that evidence concerning hard feelings between child’s family and defendant’s family was relevant; because defendant’s entire defense was that he did not commit alleged act of criminal sexual conduct with minor in first degree and that child’s story was concocted by her parents because of “vendetta” against him, error in excluding such evidence denied defendant fair and impartial trial).

§ 6-19 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.

Defenses

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.

- *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) ("An alibi charge places no burden on a criminal defendant but emphasizes that it is the State's burden to prove the defendant was present and participated in the crime."); *Riddle v. State*, 308 S.C. 361, 418 S.E.2d 308 (1992) (stating failure to give alibi charge where defendant claims to be at another place is reversible error); *State v. Schrock*, 283 S.C. 129, 133, 322 S.E.2d 450, 452 (1984) ("It is not incumbent upon an accused person to prove that he was somewhere else at the time and place of the crime. By bringing the case, the State assumes the burden of proving that the accused was at the scene of the crime when it happened and that he committed the criminal act.") (citations omitted); *State v. Diamond*, 280 S.C. 296, 312 S.E.2d 550 (1984) (concluding mere denial of defendant's presence at scene of drug transaction did not constitute alibi and thus did not warrant alibi instruction); *State v. Robbins*, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980) ("A charge on the defense of alibi is not required when an accused person merely denies committing the criminal act."); *Id.* (determining an alibi charge is required when there is evidence the defendant could not have performed the criminal act because he was in another place at the time of its commission, thus making it impossible for him to have been at the scene of the crime); *State v. Moore*, 245 S.C. 416, 140 S.E.2d 779 (1965) (holding that notwithstanding the defendant's interposing of the defense of alibi, the burden of establishing the offense charged rested upon the State); *State v. Bealin*, 201 S.C. 490, 23 S.E.2d 746 (1943) (ruling alibi is not "affirmative defense" in sense that an accused has the burden of proof); *State v. Floyd*, 174 S.C. 288, 177 S.E. 375 (1934) (holding the State has burden of disproving a defendant's alibi); *State v. McGhee*, 137 S.C. 256, 135 S.E. 59 (1926) (finding it was error to instruct jury that alibi is affirmative defense which must be proved by a preponderance of the evidence); *State v. Des Champs*, 134 S.C. 179, 181, 131 S.E. 420, 420 (1926) (Cothran, J., concurring) ("[T]he so-called 'affirmative defense' of alibi is not an affirmative defense at all. It is simply evidence adduced by the defendant to sustain his plea of not guilty; that he did not commit the crime for the reason that he was not at the scene of the crime at the time of the occurrence. The burden was upon the state to prove beyond a reasonable doubt that the defendant was present at the scene of the crime and actually committed it. If the defendant offers evidence which generates a reasonable doubt in the minds of the jury that he was at the scene of the crime when it was committed, which of course would result from evenly balanced evidence upon this point, he should be acquitted."); *State v. Harry*, 321 S.C. 273, 281 n.3, 468 S.E.2d 76, 81 n.3 (Ct. App. 1996) (rejecting criminal appellant's argument that his conviction should be reversed due to allegedly improper comment by the solicitor regarding the defendant's failure to call alibi witnesses upon issue preservation grounds and additionally noting the circuit judge charged the jury that "there is no burden placed upon the defendant to prove an alibi. The burden is on the state to prove that he was

Defenses

actually present at the scene of the crime and he actually participated or committed the offense.”); *see also State v. Mayfield*, 235 S.C. 11, 25, 109 S.E.2d 716, 725 (1959) (“Alibi is not an affirmative defense imposing upon the accused the burden of its proof. It does not require testimony of the accused or of witnesses produced by him. It may be established as well by the testimony of witnesses for the prosecution. If the nature of the crime is such that the presence of the accused at the place and time of its commission is essential to his guilt, the burden is upon the State to prove beyond a reasonable doubt that he was then and there present. Where the evidence, taken as a whole, whether adduced by the prosecution or by the accused, is sufficient to raise in the minds of the jury a reasonable doubt as to his presence at the scene of the crime, he is entitled to acquittal.”).

Appendix 645

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

Korey Lamar Love,
S.C.D.C. No. 353157,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

C.A. No. 2015-CP-23-2618

SCANNED

Rec 4/11/2016

ORDER OF DISMISSAL

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed April 20, 2015. The Respondent made its return to the PCR application on July 17, 2015. An evidentiary hearing was held on February 17, 2016 at the Greenville County Courthouse. The Applicant was present and represented by E. Charles Grose, Jr., Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

Prior to the commencement of the PCR hearing, counsel for the Applicant made three motions. First, counsel requested a continuance to investigate a letter received by the Applicant, arguing it was newly-discovered evidence. This Court denied the motion, as the Applicant came into possession of this letter in 2012. Second, counsel requested to hold the record open in order to have depositions of two purported alibi witnesses (who had also given affidavits). This Court denied the motion, as the hearing date was well known by the parties and these witnesses could have been deposed in advance of the hearing if they were unable to appear. This Court, however, allowed the affidavits to be admitted into evidence.¹ Third, counsel requested to

¹ Applicant's Exhibits 2 and 3.

amend the PCR application. This Court denied the motion, finding the late amendment did not provide adequate notice to opposing counsel.²

Kendel Love, assistant solicitor Howard L. Steinberg, and the Applicant's trial counsel, Fletcher N. Smith, Jr., Esquire testified at the PCR hearing. The Court had before it the trial transcript, the Greenville County Clerk of Court records, the South Carolina Department of Corrections records, the PCR application, the return, the appellate records, and Applicant's Exhibits 2 and 3.³

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the January 2011 term of the Greenville County Grand Jury for possession of a pistol by a person under 18 years of age (2010-GS-23-4508), attempted armed robbery (2010-GS-23-4509, count 1), possession of a weapon during commission of a violent crime (2010-GS-23-4509, count 2), and murder (2010-GS-23-4510). He was represented by Fletcher N. Smith, Jr., Esquire.

After the State called the case to trial, the Applicant was found guilty. On November 8, 2012, the Honorable Edward W. Miller sentenced the Applicant to concurrent terms of 5 years for possession of a pistol by a person under 18 years of age, 20 years for attempted armed robbery, 5 years for possession of a weapon during commission of a violent crime, and 50 years for murder.

² This Court also notes the Applicant's counsel – at the close of the case – moved under Rule 15(b), SCRPC to conform the pleadings to the evidence presented and this Court denied that motion.

³ Applicant's Exhibits 1 and 4 were marked for identification but not moved into evidence. As such, they are not a part of the court record and cannot be considered by this Court.

Appendix 647

A notice of appeal was filed at the South Carolina Court of Appeals. Benjamin J. Tripp, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal in the form of an Anders⁴ brief. The Court of Appeals dismissed the appeal. State v. Love, Op. No. 2014-UP-177 (S.C. Ct. App. filed April 23, 2014). The Remittitur was sent on May 19, 2014.

ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel.
 - a. "During opening statement and closing argument, making burden shifting comments that conveyed to the jurors that Applicant had the burdern [sic] of proving his defense, includning [sic] his alibi."
 - b. "During opening statements, promising the jurors that the defense would call certain alibi witnesses, which trial counsel never called to testify, thereby undermining [sic] the defense's credibility with the jurors."
 - c. "Not calling witness that supported Applicant's alibi defense."
 - d. "During direct testiony [sic], eliciting from the Applicant that he had been incarcerated on these charges for 2 1/2 years."
 - e. "Emphasizing during closing argument that the Applicant had been incarcerated for 2 1/2 years on these cahrges [sic]."
 - f. "Failing to make a specific objection the trial court judge's instructing [sic] the jurors '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.'"
 - g. "During juror deliberations, failing to object to the trial court judge answering a question from the jurors by providing factual information."
2. Ineffective assistance of appellate counsel.
 - a. Failing to appeal the trial court judge's instructing [sic] the jurors '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.'"

⁴ Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, “[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

A.

This Court finds the Applicant failed to meet his burden of proving trial counsel did not call alibi witnesses and properly present an alibi defense.

Kendel Love, the Applicant's younger brother, stated he was 12-13 years old in 2007 and that he, the Applicant, and his father lived with Demetrius Jackson's family at that time. Love stated he and the Applicant had a curfew while they were staying at the Jacksons' home and that it was 10:30 p.m. on weekdays and 12:00-1:00 a.m. on weekends. Love stated an adult would have known if the Applicant had not observed the curfew. Love stated on cross-examination that he knew the Applicant was home on the night in question because he "was always there."

Trial counsel testified the defense strategy was to argue alibi and to challenge the credibility of the State's witnesses. Trial counsel testified the Applicant and Leslie Jackson each testified at trial as to the Applicant's alibi. Trial counsel testified the Applicant told him to contact alibi witnesses and that he talked to them. Trial counsel testified he did not call Kendel Love as an alibi witness at trial 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 him 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 Applicant. 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.⁵ Trial counsel testified he believed he could make an alibi argument through just the Applicant and Leslie Jackson.

Assistant solicitor Howard Steinberg testified he was one of the two prosecutors on this

⁵ Trial transcript, pp.399-400.

Appendix 650

case. Steinberg testified he turned over full discovery to trial counsel, which included recordings of phone calls made from the Applicant to family members while he was in jail. Steinberg testified he would have cross-examined and attempted to impeach Jerome Love with these calls if he had testified at trial. Steinberg testified he saw Jerome Love outside of the courthouse and noted the State had agreed – after a prior meeting with trial counsel and the trial judge – not to arrest him on a pending arrest warrant during the Applicant's trial.

This Court finds the Applicant did not meet his burden of proving either that trial counsel's performance was deficient or that he was prejudiced as a result. This Court finds trial counsel articulated valid reasons that he did not call Kendel Love, Jerome Love, or Demetrius Jackson as alibi witnesses at the Applicant's trial. See Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding where trial counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel). As such, trial counsel's performance cannot be deemed deficient.

Regardless, this Court finds the Applicant cannot demonstrate he was prejudiced because Kendel Love, Jerome Love, or Demetrius Jackson did not testify. This Court finds there is no reasonable probability that these witnesses would not have affected the outcome of the Applicant's trial. See Johnson v. State, 325 S.C. at 186, 480 S.E.2d at 735. Initially, this Court finds the Applicant has failed to show these witnesses, when combined with the rest of the defense case, would have established a complete alibi. See Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (finding that trial counsel's failure to present a purported alibi witness was not ineffective when that witness's testimony was insufficient to establish an alibi defense); State v. Robbins, 275 S.C. 373, 271 S.E.2d 319 (1980) (holding that since an alibi derives its potency as a defense from the fact that it involves the physical impossibility of the

defendant's guilt, a purported alibi which leaves it possible for the defendant to be the guilty person is no alibi at all). This Court finds Kendel Love was not a credible or compelling witness because, while he stated the Applicant would have been home on the evening of the crime, he could not explain why he recalled that particular date. Though this Court examined the affidavits from Jerome Love and Demetrius Jackson, it does not find such to be compelling evidence. In any event, even if these witnesses had been called in the defense case, they would have been easily attacked with impeachable evidence by the State. This Court finds Jerome Love and Demetrius Jackson would have merely added – at best – cumulative testimony to Leslie Jackson. As such, this Court finds there is no reasonable probability that calling additional alibi witnesses would have changed the outcome of the Applicant's trial. See Johnson v. State, 325 S.C. at 186, 480 S.E.2d at 735.

B.

This Court finds the Applicant failed to meet his burden of proving trial counsel made improper comments in his opening statement.

Trial counsel testified that, during his opening statement, he said he would prove the Applicant's alibi. Trial counsel confirmed his opening statement also noted the names of several alibi witnesses, including Kendel Love, Jerome Love, and Demetrius Jackson. Trial counsel testified his strategy in opening argument was to take a powerful position that they were going to prove their defense. Trial counsel testified he did not mislead the jury because he put up an alibi defense.

This Court finds the Applicant did not meet his burden of proving either that trial counsel's performance was deficient or that he was prejudiced as a result. In his opening argument, trial counsel stated the defense was going to prove the Applicant was not guilty

because he was home on the night of the murder. (Trial transcript, p.58). Trial counsel noted they were going to call alibi witnesses: Leslie Jackson, Jerome Love, and Demetrius Jackson. (Trial transcript, pp.58-59). As explained supra, trial counsel did not call Jerome Love or Demetrius Jackson as witnesses but presented the alibi defense through the testimony of the Applicant and Leslie Jackson. This Court finds trial counsel was not deficient in making these comments in his opening argument. It is axiomatic that counsel's arguments to the jury do not constitute evidence. See Ex parte Morris, 367 S.C. 56, 64, 624 S.E.2d 649, 653 (2006) ("It is well established that counsel's statements regarding the facts of a case and counsel's arguments are not admissible evidence."); South Carolina Dep't of Transp. v. Thompson, 357 S.C. 101, 105, 590, S.E.2d 511, 513 (Ct. App. 2003) ("Arguments made by counsel are not evidence."). Trial counsel was merely staking out a strong position in opening argument. This was not deficient representation. See, e.g., Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) ("There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case."). This Court finds there was no error because trial counsel did present an alibi defense to the jury. Regardless, the Applicant failed to demonstrate he suffered any prejudice. As discussed supra, any testimony from Jerome Love or Demetrius Jackson would have been cumulative to Leslie Jackson's testimony. The Applicant cannot demonstrate there was a reasonable probability that trial counsel's statement that he would call these individuals – which was ultimately not the case – affected the outcome of the Applicant's trial. See Johnson v. State, 325 S.C. at 186, 480 S.E.2d at 735.

C.

This Court finds the Applicant failed to meet his burden of proving trial counsel should

not have elicited testimony that the Applicant had been incarcerated prior to trial.

Trial counsel testified his strategy in noting the Applicant had been in jail for 2.5 years was to show the Applicant was the victim and had been falsely accused.

This Court finds the Applicant did not meet his burden of proving either that trial counsel's performance was deficient or that he was prejudiced as a result. During trial counsel's opening argument, he noted the Applicant had been indicted "for approximately two and a half years." (Trial transcript, p.57). During his direct examination of the Applicant, trial counsel asked if he had been in jail for 2.5 years and the Applicant said yes. (Trial transcript, p.430). Trial counsel testified he chose to emphasize this point because he wanted to show the Applicant had been falsely accused and this would help the idea of his victimization. This Court finds that, especially when combined with an alibi defense, this was a reasonable trial strategy. See Roseboro v. State, 317 S.C. at 294, 454 S.E.2d at 313; see also Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) ("Courts must be wary of second-guessing counsel's trial tactics."). This Court finds this was clearly a part of trial counsel's strategy, as he reemphasized the Applicant's lengthy imprisonment during his closing argument. (Trial transcript, p.453). This Court finds the Applicant failed to demonstrate he suffered any prejudice as the result of trial counsel's mention of his 2.5-year incarceration. This is especially true, as a State witness also noted in her testimony that she visited the Applicant in jail after he was arrested on these charges. (Trial transcript, p.238). See Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625.

D.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to the alibi jury instruction.

Trial counsel testified he believed the trial judge's alibi charge was consistent and not

objectionable. Trial counsel testified he did not believe the alibi charge was burden-shifting.

This Court finds the Applicant did not meet his burden of proving either that trial counsel's performance was deficient or that he was prejudiced as a result. The trial judge charged the jury on the defense of alibi. (Trial transcript, p.483). While trial counsel voiced an objection "out of an abundance of caution" regarding the "mere denial" language of the charge, the trial judge explained the charge was proper because "he can't just say he wasn't there, he's gotta specify where he was." (Trial transcript, p.485). This Court finds there was no error in trial counsel not further challenging the jury charge because it was a proper charge on the defense of alibi. See State v. Peer, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct. App. 1996) (holding a trial court has a duty to give a requested instruction that correctly states the law applicable to the issues and is supported by the evidence). Similarly, the Applicant cannot prove he suffered any prejudice from this jury charge because it was a proper instruction on the defense of alibi.

E.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to the manner in which the trial judge responded to a jury question.

Trial counsel confirmed the trial judge answered the jury's question by sending back the name of the twin brother at issue. Trial counsel testified the trial judge did so because the jury did not want to listen to the twins' testimony again.

This Court finds the Applicant did not meet his burden of proving either that trial counsel's performance was deficient or that he was prejudiced as a result. During jury deliberations, the jury sent out a note: "Which twin says [Applicant] shot [victim] because [victim] saw [Applicant]'s face? Did Ricky or Rashad say that first? Can you answer that for us

without us listening to the twins' testimony again?" (Trial transcript, p.495). After discussion with the parties, the trial judge asked the bailiff to tell the jury the testimony would be replayed. (Trial transcript, p.497). After a pause and discussion, the trial judge noted "the foreperson says all they wanna know is the name of the person who said it." Over trial counsel's objection, the trial judge stated "just gonna tell 'em Rashad Simmons." (Trial transcript, p.497). As trial counsel objected, his performance cannot be deemed ineffective. Regardless, the Applicant failed to demonstrate he suffered any prejudice from the trial judge acquiescing to the jury's request to simply have the name of the witness rather than listening to two witnesses' testimony. This Court finds there is no reasonable probability that answering the jury's question in this manner changed the outcome of the Applicant's trial. See Johnson v. State, 325 S.C. at 186, 480 S.E.2d at 735.

F.

Accordingly, as to all of the aforementioned issues, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in his representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to

Appendix 656

present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

CONCLUSION

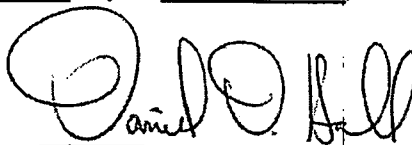
Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 23rd day of March, 2016.



Daniel D. Hall
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina.

Appendix 657

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	
	)	Case No. 2015-CP - 23- 02618
Korey Love, SCDC # 353157	)	
	)	
	)	
v.	)	Rule 59(e), SCRCP Motion
	)	
State of South Carolina	)	
	)	
	)	

To: The Honorable Daniel Hall, Presiding Judge, Thirteenth Judicial Circuit

Pursuant to Rule 59(e), SCRCP, the applicant, Kory Love, moves the Court to reconsider its order dated March 23, 2016, filed on April 4, 2016. Counsel received written notice of entry of this order by letter from the Attorney General's Office dated March 30, 2016 and received on April 1, 2016. This motion is based on the following grounds.

I. Standard of Review.

This Court's Order, at p. 4, incompletely sets forth the standard of review as it applies to this case where the State relied on strategic decisions made by trial counsel. "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)). As will be discussed in more detail below, trial counsel did not advance a valid strategic decision for employing certain strategies. Once the Court considers this legal principle, the need to grant relief becomes apparent.

Appendix 658

II. Grounds for relief addressed in the order.

A. The Alibi Defense (Order Sections A & B).

Korey Love had an alibi for the time of the murder. During his opening statements, trial counsel promised:

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're going to bring in a lady by the name of Leslie Jackson who had a curfew on this young man because he, his dad and his other brother had been homeless and he worked, his dad worked at Bonefish [Grill] with Leslie Jackson's husband. We're gonna bring those people into this courtroom and they're gonna testify right from (indicating) that witness stand. Leslie Jackson gonna testify to you that she was at home with her children that night and that Korey Love had no key to get in the house, that if he missed his curfew he would not even be able to get back in the house without some adult know it. We will bring his dad in here Mr. Jerome Love and Mr. Jerome Love will testify that when he got off a [sic] 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.

Tr. 58, line 12 – 59, line 11.

Leslie Jackson and Korey Love testified about the alibi. Tr. 430-39, 405-12. As seen, trial counsel never called Jerome Love or Jackson to the witness stand. Both provided affidavits detailing their testimony. Kendell Love, Korey's brother who

Appendix 659

testified at the evidentiary hearing, also would have supported the alibi defense, but trial counsel did not call him as a witness.

During closing arguments, the prosecution called attention to trial counsel's failure to call Jerome Love and Demetrius Jackson as 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.

Tr. 473, lines 12- 19.

This Court's findings of fact and conclusions of law in Section A of the order, at pp. 4-7, cannot be reconciled with the findings of fact and conclusions of law in Section B of the order, at pp. 7-8. In Section A, at p. 5 of the order, this Court finds:

Trial counsel testified the defense strategy was to argue alibi and to challenge the credibility of the State's witnesses. Trial counsel testified the Applicant and Leslie Jackson each testified at trial as to the Applicant's alibi. Trial counsel testified the Applicant told him to contact alibi witnesses and that he talked to them. Trial counsel testified he did not call Kendel Love as an alibi witness at trial 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 him 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 Applicant. Trial counsel testified he had Demetrius Jackson under subpoena but decided not to call him. Trial

Appendix 660

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.

This Court then finds that Assistant Solicitor Howard Steinberg had produced recording of jail calls and “would have cross-examined and attempted to impeach Jerome Love with these calls if he had testified at trial.”¹ Order, pp. 5-6. This Court then concludes that “trial counsel articulated valid reasons that he did not call Kendall Love, Jerome Love, and Demetrius Jackson. Order, p. 6. The Court then finds that “Kendel Love was not a credible or compelling witness” and that the affidavits of Jerome Love and Demetrius Jackson are not “compelling evidence.” Order, p. 7.

After making these findings of fact and conclusion of law in Section A of the order, the Court, in Section B, inexplicitly finds that trial counsel was not deficient for promising, during opening statements, to call these very same three witnesses—Kendel Love, Jerome Love, and Demetrius Jackson—as alibi witnesses. This Court’s order never explains why promising to call these three witnesses was a valid strategic decision. *Freiburger* and *Ingle, supra*. Nor could it be a valid strategy because all the information relied on in Section A of this Court’s order was known to trial counsel prior to making his opening statement. The order, at p. 8, states, “Trial counsel was merely staking out a strong position in opening argument.” As discussed below, it is never a reasonable

¹ Neither trial counsel, nor Mr. Steinberg, nor this Court in its order, ever has articulated a valid reason for why these jail calls would be relevant and admissible.

² 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.

Appendix 661

strategy to make promise jurors evidence and then not deliver. The illusion of a “strong position” was exposed, damaging the credibility of the defense in a case where everyone agreed credibility was essential.

Trial counsel’s performance was deficient for promising the jurors witnesses that ultimately did not testify. Counsel lost credibility with the jurors. PCR Application, ¶ 11(a)(2). The prosecution, as seen, capitalized on counsel’s failure to present these witnesses. Our Supreme 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).²

“[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). See e.g. *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

² 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).

Appendix 662

(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). Prejudice results when witness credibility is the central issue in the case. *E.g. Dawkins v. State*, 346 S.C. 151, 551 S.E.2d 260 (2001).

This loss of credibility was extremely prejudicial to Korey Love. During the post-conviction hearing, everyone agreed the case rested on the credibility of the prosecution witnesses vs. the defense witnesses. Counsel had two options to avoid this loss of credibility. First, he could have called Jerome Love and Antoine Jackson just as he had promised during his opening statement. PCR Application, ¶ 11(a)(3). Their testimony would have supported the alibi defense. Both were available. Second, if trial counsel was concerned about the quality of testimony these witnesses would have provided—as this Court found in Section A of the order—then he should not have named these witnesses during his opening statement. PCR Application, ¶ 11(a)(2). He should have informed the jurors about the alibi defense and let the jurors know it would be supported by the testimony of only the witnesses that actually would be called to testify. Trial counsel would have “stak[ed] out a strong position in opening argument” order, p. 8, and not have undermined his own credibility and the credibility of the defense.

Appendix 663

B. Korey Love's Pre-Trial Incarceration (Section C).

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.” Tr. 430, lines 204. During closing argument, trial counsel reminded the jurors “this man has been in jail two and a half years.” Tr. 453, line 10. In his post-hearing brief, at p. 11, Love argued:

This evidence implied bad character evidence about Korey Love. PCR Application, ¶ 11(a)(4) and (5). 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)).

This Court’s order did not address any of this legal authority. Rather, the Court found emphasizing “lengthy imprisonment,” order, p. 8, to be trial strategy consistent with the alibi defense without explaining why it was a valid strategy. 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. 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 valid. *Freiburger* and *Ingle*, *supra*. As will be discussed in Subsection C below, trial counsel very likely operated under the misconception that the defense had the burden of proving the alibi.

Counsel’s performance was both deficient and prejudicial. This Court should order a new trial.

C. Alibi Jury Instruction (Section D).

This Court dismissed 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 might be rooted in the belief, which he expressed during opening statements, that his client had the burden of proving his alibi. Rather than relying on trial counsel's belief, this Court should have analyzed the jury instruction. 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.

Tr. 483, lines 8-17.

After the jury charge, trial counsel objected to the use of the term "mere denial" in alibi instruction, and the trial judge overruled the objection. Tr. 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." Tr. 483.

Trial counsel is ineffective by not objecting to an incorrect, burden shifting jury instruction on alibi. PCR Application, ¶ 11(a)(6). See e.g. *Dandy v. State*, 301 S.C. 303, 391 S.E.2d 581 (1990) (counsel was ineffective for failing to object to self-defense

Appendix 665

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). 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). It can never be a valid strategy not to object to a burden shifting instruction. *Freiburger* and *Ingle*, *supra*.

Trial counsel, additionally, was ineffective by not requesting a correct instruction on the law. *See e.g. Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1995) (trial counsel provided ineffective assistance by failing to request alibi charge). Ralph King Anderson, Jr., *South Carolina Requests to Charge - Criminal*, 2007, § 16-9 regarding alibi, a copy of which was attached to Mr. Love's post-trial brief, which is a more clear and more correct statement of the law of alibi.

Counsel's performance was both deficient and prejudicial. This Court should order a new trial.

Appendix 666

III. Matters not Addressed in the Order.

This Court's order overlooked and failed to address several of Love's grounds for relief.

A. Counsel's opening statement on the burden of proof.

Counsel not only promised to call certain alibi witnesses—Kendel Love, Jerome Love, and Demetrius Jackson—but also shifted the burden of proof from the State to his client. This Court did not address this claim in its order.

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 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.

Tr. 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.

Tr. 63, lines 2-12. These statements shifted the burden to the defense. PCR Application, ¶ 11(a)(1). Trial counsel's performance was deficient because it removed the requirement that the State prove each element of its case, including identity. *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Given trial counsel's

failure to call the alibi witnesses identified in his opening statement, these statements invited the jurors to convict Korey Love. Shifting the burden of proof to counsel's own client can never be a valid strategy. *Freiburger* and *Ingle, supra*. As discussed in Section I above, counsel very likely operated under the misunderstanding that the defense had to prove the alibi.

Counsel's performance was both deficient and prejudicial. This Court should order a new trial.

B. Ineffective assistance of appellate counsel for not appealing alibi instruction.

Trial counsel's objection to the alibi instruction, *see* Section II(C), *supra*, did not preserve this issue for appellate review. If, however, the State contends that the objection preserved this issue, then appellate counsel was ineffective for not raising the issue on appeal. PCR Application, ¶ 11(b)(1).

Due process of law requires that a defendant receive effective assistance of counsel 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 v. Washington*, 466 U.S. 668 (1984). Certainly, 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). In most cases, the reason for abandoning one issue is to enable counsel to focus on the more meritorious issues, since a "brief that raises every colorable issue runs the risk of burying good arguments." *Jones*, 463 U.S. at 752-53. 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

Appendix 668

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. This is not a correct articulation of the law”).

It can never be a valid strategy not to raise a winning issue. *Freiburger and Ingle, supra*.

C. Allegations contained in the amended application.

Korey Love maintains he should have been allowed to proceed on his amended application about which included the following claims, about which testimony was presented without objection. This Court should consider these claims and grant relief.

1. Failing to call Jerome Love (Applicant’s father) to contradict Jalesa Neal’s testimony.

The prosecution called Jalesa Neal, Jarod Ransom’s brother, to testify about overhearing a conversations between Korey and Jerome Love where Korey allegedly admitted he had robbed, shot, and killed someone at the Wendy’s. Tr. 221-25. Trial

Appendix 669

counsel was ineffective for not calling Jerome Love to refute these allegations. Amended PCR Application, ¶ 11(a)(8). *See* affidavit of Jerome Love and legal authority cited in Section IV(A), *supra*.

2. Failing to preserve for appellate review requiring the State to play substantially all of Rashida Peters's recorded statement, under the rule of completeness, because that Statement contained *Brady* material.

Prior to the prosecution calling Rashida Peter's, the trial judge heard the a defense request that the State be required to play the entire recording of Ms. Peter's statement because it contained information favorable to the defense, including *Brady* material. The defense relied on the Rule of Completeness. Rule 106, SCRE and *State v. Cabrera-Pena*, 361 S.C. 372, 605 S.E.2d 522 (2004). The trial court judge mistakenly believed the Rule of Completeness is a "civil rule." Tr. 231-236.

Although defense counsel correctly stated this objection, his performance was deficient when he did not renew it when the State played only a portion of the recording. Tr. 246. Amended PCR Application, ¶ 11(a)(9). *McHam v. State*, 404 S.C. 465, 746 S.E.2d 41 (2013). The failure to play the entire tape was prejudicial because the juror did not know the entire circumstances surrounding the statement. As seen, credibility was crucial in this case.

3. Solicitor's Closing Argument.

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....

Tr. 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

Appendix 670

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). Amended PCR Application, ¶ 11(a)(10).

4. Failing to appeal the trial judge’s exclusion of substantially all of Rashida Peters’s recorded statement, which was admissible under the rule of completeness and because contained *Brady* material.

As seen in Subsection D(2) above, Korey Love contends that trial counsel did not properly preserve this issue for appeal. If the State contends that the issue was properly preserved for appeal, the appellate counsel was ineffective for not briefing the issue. Amended PCR Application, ¶ 11(b)(2)

IV. Cumulative Error.

Additionally, this Court must apply a cumulative error analysis because the deficiencies taken together also combined to deny Kory 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).

As discussed above, trial counsel compounded prejudice on top of prejudice, on top of more prejudice. He made promises in his opening statement that he didn’t keep,

Appendix 671

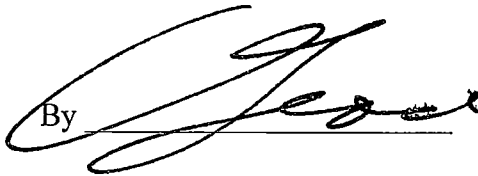
and the prosecution hammered home that point in its closing. He shifted the burden of proving the alibi to Korey Love. He emphasized his client's lengthy incarceration. None of these deficiencies are valid strategies. *Freiburger* and *Ingle, supra*.

Counsel's performance was both deficient and prejudicial. This Court should order a new trial.

V. Conclusion.

The Court should reconsider its order dated March 23, 2016, grant Love's application for post-conviction relief, vacate his convictions and sentences, and order a new trial.

Respectfully submitted,

By 

E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 20646
(864) 538-4466

Counsel for Applicant

April 8, 2016
Greenwood, South Carolina

Appendix 672

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

Korey Love, SCDC # 353157)

v.)

State of South Carolina)
_____)

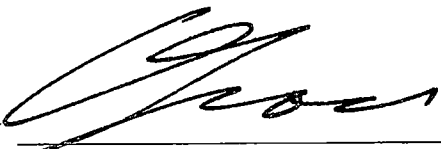
IN THE COURT OF COMMON PLEAS

Case No. 2015-CP - 23- 02618

Rule 59(e), SCRC Motion

I certify that I have served a copy of this pleading on the State of South Carolina by placing a copy in the United States Mail, postage prepaid, on date reflected below, addressed as follows:

Karen C. Ratigan, Esquire
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

By 

E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466

April 8, 2016
Greenwood, South Carolina

Appendix 673

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C.A. No. 2015-CP-23-2618
COUNTY OF GREENVILLE	)	
	)	
Korey Lamar Love,	)	
S.C.D.C. No. 353157,	)	
	)	
Applicant,	)	
	)	RETURN TO MOTION TO ALTER OR
v.	)	AMEND THE ORDER OF DISMISSAL
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

Respondent, by and through undersigned counsel, making its Return to Applicant's Motion to Alter or Amend, would respectfully show unto this Court:

1. The matter is before the Court by way of a post-conviction relief (PCR) action filed April 20, 2015.
2. An evidentiary hearing was held on February 17, 2016 at the Greenville County Courthouse.
3. Applicant was present at the hearing and represented by E. Charles Grose, Jr., Esquire. Kendel Love, assistant solicitor Howard L. Steinberg, and the Applicant's trial counsel, Fletcher N. Smith, Jr., Esquire testified at the PCR hearing.
4. After a full review of the evidence presented at the evidentiary hearing, this Court issued an order dated March 23, 2016 and filed April 4, 2016 denying the application for post-conviction relief.
5. Applicant – through counsel – filed a Motion to Alter or Amend Judgment on April 12, 2016 (an un-filed copy of which was received by Respondent in the mail on the same date). Applicant moves this Court to alter or amend the final order of dismissal.

Appendix 674

6. Respondent submits the order of dismissal properly addressed all of the issues that were raised by Applicant's counsel during the PCR hearing.

7. Respondent submits the final order should not be altered or amended to include rulings upon the issues in the amended PCR application. As this Court denied both (1) Applicant's motion to amend the application and (2) Applicant's motion to conform the pleadings to the evidence, it would be improper for the order of dismissal to include rulings upon those issues.

8. Respondent submits Applicant's request to revise the final order should be denied because this Court fully reviewed and properly ruled upon all issues that were raised at the PCR hearing.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By:


Attorneys for Respondent

April 18, 2016

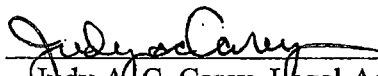
Appendix 675

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	
	)	
	)	2015-CP-23-2618
	)	
KOREY LAMAR LOVE, 353157	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy each of the **Return to Motion to Alter or Amend the Order of Dismissal** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

E. Charles Grose, Jr., Esquire
The Grose Law Firm, LLC
404 Main Street
Greenwood SC 29646

DATED this 18th day of April, 2016.


Judy A. C. Carey, Legal Assistant
For Respondent

Appendix 676

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS	
	)	C.A. No. 2015-CP-23-2618	
COUNTY OF GREENVILLE	)		
	)		
Korey Lamar Love,	)	ENTERED COMPUTER	
S.C.D.C. No. 353157,	)		
	)		
Applicant,	)	ORDER	
	)		
v.	)		
	)		
State of South Carolina,	)		
	)		
Respondent.	)		

FILED - CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2016 OCT 6 PM 2 10

The above-captioned case is a post-conviction relief matter arising from an application filed April 20, 2015. Applicant was represented by E. Charles Grose, Jr., Esquire and Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented Respondent. An evidentiary hearing was convened on February 17, 2016 at the Greenville County Courthouse and the final order of dismissal was signed by this Court on March 23, 2016 and filed April 4, 2016.

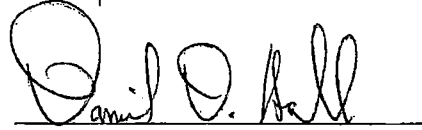
This matter is back before the Court by way of Applicant's Motion to Alter or Amend pursuant to Rule 59(e), SCRCP, filed on April 12, 2016. Respondent made its return to this motion on April 18, 2016.

Based upon careful reconsideration of all of the evidence in this case and upon full consideration of Applicant's motion and supporting memorandum, this Court is not persuaded to alter or amend the judgment. This Court further finds that oral argument would not aid in the reconsideration of the original judgment. This Court finds the previous order of dismissal fully comports with the requirements of Rule 52(a) SCRCP.

IT IS THEREFORE ORDERED:

1. That Applicant's Motion to Alter or Amend is denied and dismissed.

AND IT IS SO ORDERED this 23rd day of September, 2016.

A handwritten signature in black ink, appearing to read "Daniel D. Hall", written over a horizontal line.

Daniel D. Hall
Presiding Judge
Thirteenth Judicial Circuit

Appendix 678

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2015CP2302618

Korey Love vs. South Carolina State Of

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy: ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this .

Court Reporter:

PRESIDING JUDGE - Daniel D Hall

This judgment was entered on the , and a copy mailed first class this , to attorneys of record or to parties (when appearing pro se) as follows:

E. Charles Grose Jr. 404 Main Street Greenwood,
SC 29646

Karen Ratigan

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court