

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

The Honorable Daniel D. Hall, Circuit Court Judge

Appellate Case No. 2016-002233

KOREY LAMAR LOVE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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STATEMENT OF THE CASE

Petitioner is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Greenville County. During its January 2011 term, the Greenville County Grand Jury indicated Petitioner 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 Petitioner. On November 5, 2012, Petitioner proceeded to trial before the Honorable Edward W. Miller and a jury. The jury convicted Petitioner of all charges. Judge Miller sentenced Petitioner to concurrent terms of five years for possession of a pistol by a person under eighteen years of age, twenty years for attempted armed robbery, five years for possession of a weapon during commission of a violent crime, and fifty years 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.

On April 20, 2015, Petitioner filed an application for post-conviction relief. Respondent made its return on July 17, 2015, requesting an evidentiary hearing be convened. An evidentiary hearing was held on February 17, 2016, at the Greenville County Courthouse. Petitioner 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.

Petitioner did not testify at the PCR hearing. However, the following people testified:

¹ Anders v. California, 386 U.S. 738 (1967).

Kendel Love, Petitioner's brother, assistant solicitor Howard L. Steinberg, and Petitioner's trial counsel, Fletcher N. Smith, Jr., Esquire. On March 15, 2016, Petitioner emailed a post-hearing memorandum in support of his application for PCR to Judge Hall.

Thereafter, Judge Hall denied Petitioner's PCR application by written order filed April 4, 2016. Petitioner subsequently filed a motion to alter or amend, dated April 8, 2016. Respondent filed a return to Petitioner's motion to alter or amend dated April 18, 2016. Judge Hall denied Petitioner's 59(e) Motion and it was filed October 6, 2016.

Petitioner filed a timely notice of appeal. This return to petition for writ of certiorari follows.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact and conclusions of law receive great deference during appellate review. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The proper standard of review of a post-conviction relief decision is whether "any evidence of probative value" exists to sustain the lower court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (emphasis added). However, appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. 115, 386 S.E.2d 624. Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or

omission of counsel was unreasonable. Strickland, 466 U.S. at 689. “[E]very effort be made to eliminate the distorting effects of hindsight” and to evaluate counsel’s decisions at the time they were made. Strickland, 466 U.S. at 689. Accordingly, courts must be wary of second-guessing counsel’s tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). 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. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

ARGUMENT

In his application for post-conviction relief, Petitioner alleged his trial counsel was ineffective for the following reasons: (1) promising the jurors that Jerome Love and Demetrius Jackson would testify as alibi witnesses, despite knowing these witnesses were unreliable and impeachable, and then failing to call them as witnesses, a failure pointed out by the State in closing; (2) failing to call Kendel Love, Jerome Love, and Demetrius Jackson as alibi witnesses when these witnesses supported Korey Love's alibi, a failure pointed out by the State in closing; (3) trial counsel promised during his opening statement the defense would prove the alibi defense and shifted the burden to the defense; (4) failed to object to a jury instruction that shifted the burden of proof on alibi; (5) failed to request a correct jury instruction that did not shift the burden of proof on alibi; (6) elicited testimony from his client that he had been incarcerated for two years prior to trial. Additionally, Petitioner alleged his appellate counsel was ineffective for failing to appeal a jury instruction that shifted the burden of proof on alibi. Moreover, Petitioner alleged the PCR court erred by not allowing Petitioner to amend his PCR application to allege prejudicial, ineffective assistance of trial counsel for not objecting to the Solicitor's "Golden Rule" argument urging the jurors to "be instruments of justice for Isaac Bass." Finally, Petitioner alleged he is entitled to a new trial based on the cumulative error doctrine. However, after carefully considering all of these allegations, the PCR judge denied Petitioner's PCR, correctly finding Petitioner failed to meet his burden of proof in showing he is entitled to relief.

- A. There is evidence of probative value in the record to support the PCR judge's finding Petitioner failed to meet his requisite burden of proof of establishing trial counsel was ineffective for promising the jurors that Jerome Love and Demetrius Jackson would testify as alibi witnesses, despite knowing these witnesses were unreliable and impeachable, and then failing to call them as witnesses, a failure pointed out by the State in closing.**

Petitioner alleges trial counsel was ineffective for promising to call certain witness in his opening statements but never actually calling them during trial even when he knew the witnesses were unreliable and impeachable. During opening statements of Petitioner's trial, Petitioner's counsel made statements that he was going to call Petitioner's father, Jerome Love and Demetrius Jackson as witnesses during the trial. (App.p.59). Trial counsel ended up not calling these witnesses to testify. During Petitioner's evidentiary hearing, trial counsel was questioned about his decision to not call the two men as witnesses when he had told the jury he would call them. Initially, trial counsel testified his strategy was to argue alibi and to challenge the creditability of the State's witness. (App.p.649). Additionally, trial counsel testified Petitioner told him to contact alibi witnesses and he did so. (App.p.649). Furthermore, trial counsel testified Jerome Love and Demetrius Jackson, the two parties mentioned in opening statements, were on standby at trial as potential alibi witnesses. (App.p.649). 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 Petitioner. Trial counsel testified he had Demetrius Jackson under subpoena but decided not to call him because he had a prior conviction that could be used to impeach him. (App.p.649). After hearing this testimony, the PCR court found Petitioner had not meet his burden of proving either that trial counsel's performance was deficient or that he was prejudiced as a result. (App.p.650). The court noted trial counsel articulated valid reasons that he did not call Jerome Love or Demetrius Jackson as alibi witnesses at Petitioner'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.

Additionally, the PCR court found there was not a reasonable probability that these witnesses would not have affected the outcome of the Petitioner's trial. Furthermore, the PCR court found the Petitioner had failed to show these witnesses, when combined with the rest of the defense case, would have established a complete alibi defense. See Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (finding 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.).

Petitioner also submitted affidavits from Jerome Love and Demetrius Jackson which claimed that each party saw Petitioner at home that night during the time of the crime that was committed. (App.p.618-620). In reviewing the affidavits, the PCR court found them to not be compelling evidence. Additionally, the PCR court found even if these witnesses had been called in the defense case, they would have been easily attacked with impeachable evidence by the State given their prior convictions. (App.p.651). Finally, the PCR court found Jerome Love and Demetrius Jackson would have merely added at best been cumulative testimony to Leslie Jackson, another witness who testified at trial to what these witnesses purported to claim in their affidavit. As such, the PCR court found there was no reasonable probability that calling additional alibi witnesses would have changed the outcome of the Petitioner's trial.

It is clear from the PCR record there is probative value in the record to support the PCR court's finding. It is true trial counsel mentioned during opening arguments that he would call Jerome Love and Demetrius Jackson as witnesses. However, opening statements do not constitute evidence as the PCR court correctly noted. 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."). Furthermore, trial counsel decided during the course of trial that he would not call the two parties as witnesses. Trial counsel employed a trial strategy that he believed could still be executed without calling Jerome Love and Demetrius Jackson. Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland, 466 U.S. at 688-689. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. Id. at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such

conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). Accordingly, there is evidence of probative value to support the PCR court's ruling.

B. There is evidence of probative value in the record to support the PCR judge's finding Petitioner failed to meet his requisite burden of proof of establishing trial counsel was ineffective failing to call Kendel Love, Jerome Love, and Demetrius Jackson as alibi witnesses when these witnesses supported Korey Love's alibi, a failure pointed out by the State in closing.

Petitioner next alleges trial counsel was ineffective for failing to call Kendel Love, Jerome Love, and Demetrius Jackson as alibi witnesses. As previously mentioned, the PCR court found that trial counsel was able to establish his trial strategy of arguing alibi defense. Additionally, the court found the testimony of Jerome Love and Demetrius Jackson cumulative testimony to Leslie Jackson who did testify. (App.p.651) Furthermore, Kendel Love testified at the PCR hearing to essentially the same thing Leslie Jackson could have attested to. Moreover, trial counsel testified he did not call Kendel Love as an alibi witness at trial because he would not have been a good witness because he was "wishy-washy". (App.p.649). He further testified Jerome Love and Demetrius Jackson were unreliable and impeachable. Here, trial counsel articulated a trial strategy in not calling these witnesses. The trial strategy articulated by trial counsel in this case was held to be reasonable in Stokes v. State, 308 S.C. 546, 419 S.E. 2d 778. In Stokes, trial counsel stated he chose not to use certain witnesses at trial because, "in his judgment at the time, their testimony would not have been of value to the Petitioner's case.". Stokes, 308 S.C. at 548, 419 S.E.2d at 779. The Supreme Court affirmed the lower court's ruling "trial counsel adequately put forth a defense by calling the only witness whom he believed to be credible and supportive of the defense strategy." Id.

In Edwards v. State, this Court held that "[a] witness's credibility and demeanor is crucial to an attorney's trial strategy, and an attorney cannot be said to be deficient if there is evidence to

support his decision to not call a witness with serious credibility questions.” Edwards v. State, 392 S.C. 449, 458, 710 S.E.2d 60, 65 (2011). In Jackson v. State, this Court held that counsel was not deficient for failing to call a witness at trial when corroboration of the defendant’s statement was more credible through the testimony of another witness and the witness’ credibility would have been an issue if he testified. Jackson v. State, 329 S.C. 345, 351-52, 495 S.E.2d 768, 771 (1998). Accordingly, there is evidence of probative value to support the PCR court’s ruling.

C. There is evidence of probative value in the record to support the PCR judge’s finding Petitioner failed to meet his requisite burden of proof of establishing trial counsel was ineffective when he promised during his opening statement the defense would prove the alibi defense and shifted the burden to the defense.

Petitioner next alleges trial counsel shifted the burden to the defense in proving his alibi defense. Here, the PCR court found Petitioner failed to meet his burden of proving trial counsel made improper comments in his opening comments. Trial counsel testified that, during his opening statement, he said he would prove the Applicant’s alibi. (App.p.651). Additionally, he testified he would call as witnesses several alibi witnesses. (App.p.651). He further testified his strategy in opening argument was to take a powerful position that they were going to prove their defense. (App.p.651). Trial counsel testified he did not mislead the jury because he put up an alibi defense. (App.p.). In finding Petitioner failed to meet his burden, the PCR court found trial counsel executed his strategy of presenting an alibi defense through the testimony of Petitioner who testified at his own trial and Leslie Jackson. (App.p.652). The PCR court ultimately concluded that trial counsel’s arguments to the jury do not constitute evidence. (App.p.652).

Here, as previously mentioned trial counsel’s purpose in telling the jury he was going to prove this case was a strategy to take a powerful position that they were going to prove their

defense. (App.p.651). Moreover, trial counsel cannot shift the burden of proving an alibi defense. 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. State v. Bealin, 201 S.C. 490, 23 S.E.2d 746 (1943). Here, trial counsel comments merely fell in line with his strategy that he was going to show the jury that Petitioner had a valid alibi defense, one in which he executed on by calling the Petitioner and Leslie Jackson to testify. Furthermore, Petitioner can show no prejudice as the trial judge's instruction to the jury stated the burden of proof. In his instruction, the trial judge told the jury "There is no burden on the defendant to prove an alibi, the burden 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." (App.p.483). Here, the trial judge correctly stated the law and Petitioner suffered no prejudice as a result. Accordingly, there is evidence of probative value to support the PCR court's ruling.

D. There is evidence of probative value in the record to support the PCR judge's finding Petitioner failed to meet his requisite burden of proof of establishing trial counsel was ineffective for failing to object to a jury instruction that shifted the burden of proof on alibi.

Petitioner also alleges trial counsel was ineffective for failing to object to a jury instruction that shifted the burden of proof for an alibi defense. Petitioner specifically alleges that trial counsel should have objected to the following portion of the jury instruction: "it must be shown that the defendant was at another specified place at the time the crime was committed."(App.p.483). Petitioner contends this portion of the jury instruction shifted the burden. However, Petitioner contention is without merit. The PCR court found that Petitioner failed to meet his burden of proving trial counsel should have objected to the alibi jury instruction. (App.p.653). In coming to this conclusion, the PCR court noted trial counsel testified

he believed the trial judge's alibi charge was consistent and not objectionable. (App.p.653-654). Trial counsel also testified he did not believe the alibi charge was burden shifting.

In State v. Robbins, this Court held to establish an alibi, the accused must show that he was at another specified place at the time the crime was committed, thus making it impossible for him to have been at the scene of the crime." State v. Robbins, 275 S.C. 373, 271 S.E.2d 319 (1980). Here, the trial judge instructed the jury on the correct law. Moreover, when considering a jury instruction courts look at it in its entirety. "In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct.App.2003). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." Id. at 318, 577 S.E.2d at 464; State v. Jackson, 297 S.C. 523, 377 S.E.2d 570 (1989) (recognizing that jury instructions must be considered as a whole and if as a whole, they are free from error, any isolated portions that might be misleading do not constitute reversible error). A jury charge that is substantially correct and covers the law does not require reversal. State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996). The trial court is required to charge only the current and correct law of South Carolina. Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004). "The law to be charged must be determined from the evidence presented at trial." State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). "The substance of the law is what must be charged to the jury, not any particular verbiage." Adkins, 353 S.C. at 318-19, 577 S.E.2d at 464. "A request to charge a correct statement of the law on an issue raised by the indictment and the evidence presented at trial should not be refused." State v. Austin, 299 S.C. 456, 458, 385 S.E.2d 830, 831 (1989). "However, if the trial judge refuses to give a specific charge, there is no

error if the charge actually given sufficiently covers the substance of the request.” Id. Accordingly, there is evidence of probative value to support the PCR court’s ruling.

E. Petitioner did not receive ineffective assistance of appellate counsel as the jury instruction in question did not shift the burden of proof on the alibi defense.

Petitioner also alleges that appellate counsel was ineffective for failing to appeal a jury instruction that shifted the burden of proof on the defense of alibi. During the trial judge’s jury charge, he gave the following portion of his instruction regarding an alibi defense: “Mere denial of presence at the scene of a crime does not constitute an alibi.”. In the trial court’s next sentence, they stated the following: “There is no burden on the defendant to prove an alibi the burden 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.” (App.p.483). Trial counsel objected to the portion of the jury instruction that noted “mere denial”. At the PCR hearing, trial counsel testified that he voiced an objection out of an abundance of caution” regarding the “mere denial” language of the charge. (App.p.654). He further testified the trial judge explained the charge was proper because Petitioner “can’t just say he wasn’t there, he’s gotta specify where he was.”.(App.p.654). The PCR court found there was no error in trial counsel failing to further challenge the jury instruction because it was a proper charge on the defense of alibi. (App.p.654). Additionally, the PCR court found Petitioner could not prove he suffered any prejudice from the jury charge. (App.p.654).

Here, trial counsel made the objection but appellate counsel ultimately did not raise the issue on appeal. Petitioner is unable to prove appellate counsel was deficient for failing to raise this issue because as found by the trial court, the jury instruction the Petitioner now challenges was proper. As previously mentioned this Court has held to establish an alibi, the accused must show that he was at another specified place at the time the crime was committed, thus making it

impossible for him to have been at the scene of the crime.” State v. Robbins, 275 S.C. 373, 271 S.E.2d 319 (1980). This court statement of the law is what the trial court charged to the jury. “Appellate counsel is not required to raise every nonfrivolous issue that is presented by the record.” Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990). While raised below and therefore arguably “nonfrivolous” the issue clearly lacks merit for purposes of appeal. Furthermore, trial counsel testified that he believed the trial judge’s alibi charge was consistent and not burden shifting and only objected out of an abundance of caution. (App.p.653-654). Petitioner suffered no prejudice as his claim would not have been successful on appeal. Accordingly, Petitioner failed to meet his burden of proof in alleging his appellate counsel was ineffective.

F. There is evidence of probative value in the record to support the PCR judge’s finding Petitioner failed to meet his requisite burden of proof of establishing trial counsel was ineffective for failing to request a correct jury instruction that did not shift the burden of proof on alibi.

Petitioner also alleges his trial counsel was ineffective for failing to request a correct jury instruction that did not shift the burden of proof on the alibi defense. This argument is without merit. Petitioner’s argument rests on the idea that the jury instruction given by the trial judge did not clearly and correctly set forth who the burden was on to show the alibi defense. The trial judge gave the following instruction concerning alibi defense:

Now, the defendant has 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 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.**

(App.p.483)

In this case the trial judge correctly stated what is required to show an alibi defense. More importantly, the trial judge told the jury that the burden of proof was on the State to prove the Petitioner was actually present. As previously mentioned, 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. State v. Bealin, 201 S.C. 490, 23 S.E.2d 746 (1943). Here, the trial judge gave correct jury instructions to the jury and was trial counsel was not deficient in requesting some other instruction as the instruction given not burden shifting. Accordingly, there is evidence of probative value to support the PCR court's ruling.

G. There is evidence of probative value in the record to support the PCR judge's finding Petitioner failed to meet his requisite burden of proof of establishing trial counsel was ineffective for eliciting testimony from Petitioner that he had been incarcerated for two years.

Petitioner also alleges his trial counsel was ineffective for eliciting testimony from his client that he had been incarcerated for two years because it implied bad character evidence. The PCR court found Petitioner failed to meet his burden of proving trial counsel should not have elicited testimony that Petitioner had been incarcerated prior to trial. (App.p.652-653) During the PCR hearing, trial counsel testified his strategy in noting the Petitioner had been in jail for two and a half years was to show the Petitioner was the victim and had been falsely accused. (App.p.653). Furthermore, in trial counsel's opening statement, he noted Petitioner had been indicted "for approximately two and a half years." (App.p.653). During his direct examination of the Petitioner, trial counsel asked if he had been in jail for two and a half years and Petitioner said yes. (App.p.653). The PCR court found that counsel's performance was not deficient or that Petitioner was prejudiced by this strategy. (App.p.653). Additionally, the PCR court found clearly a part of trial counsel's strategy, as he reemphasized the Petitioner's lengthy imprisonment during his closing argument. The PCR court concluded especially when combined

with an alibi defense, this was a reasonable trial strategy. (App.p.653). Here, trial counsel employed a strategy in representing Petitioner he thought would be effective. In making a fair assessment of attorney performance, a court must make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689. There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and the "[applicant] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id. Further, on review, this Court "gives great deference to a PCR judge's findings where matters of credibility are involved." Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010) (citing Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993)). Moreover, the PCR court found Petitioner failed to demonstrate he suffered any prejudice as the result of trial counsel's mention of his two and a half year incarceration. (App.p.653). The PCR court noted a State witness testified she visited Petitioner in jail after he was arrested on these charges. (App. p.238).

Accordingly, there is evidence of probative value to support the PCR court's ruling.

H. The PCR court did not err by not allowing Petitioner to amend his PCR application.

Petitioner next alleges the PCR court erred by not allowing Petitioner to amend his PCR application to include an allegation that trial counsel was ineffective for not objecting to the Solicitor's "Golden Rule" argument. This argument is without merit.

Prior to testimony being taken in the PCR hearing, Petitioner attempted to amend his application by handing up an amendment that included some matters not included in the original application. (App.p.538). Included in this amendment was an allegation that trial counsel was ineffective for failing to object to the Solicitor's "Golden Rule" argument urging the jurors to "be

instruments of justice” for the victim. (App.p.634). Respondent objected to these amendments explaining to the court the case had been scheduled for more than a month and Petitioner had filed his original application some ten months prior. (App.p.538). Respondent continued in arguing the amendment had only been presented to her twenty minutes before the actual PCR hearing was to take place. (App.p.538). The PCR judge ultimately decided to not allow the amendment considering it had just been given to Respondent and they did not have an opportunity to respond. (App.p.539).

In this case, refusing to allow the Petitioner to proceed with his amended application was well within the authority of the court. Rule 15(a) of the South Carolina Rules of Civil Procedure state the following:

A party may amend his pleading once as a matter of course at any time before or within 30 days after a responsive pleading is served or, if the pleading is one to which no responsive pleading is required and the action has not been placed upon the trial roster, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within fifteen days after service of the named amended pleading, whichever period may be the longer, unless the court otherwise orders. Rule 15(a), SCRCF

Here, it is within the discretion of the judge to allow an amendment to a pleading if justice requires it and it does not prejudice the other party. In this case, the PCR judge decided not to allow Petitioner’s amendment because Respondent had only been shown them twenty minutes prior to the hearing. The PCR court concluded that Respondent did not have an opportunity to respond to these amendments.

Notwithstanding, Petitioner is unable to show prejudice as trial counsel should not have objected because the solicitor comments to the jury did not constitute the “Golden Rule”. South

Carolina's courts prohibit the use of the "Golden Rule argument," in which jurors are urged to place themselves in the position of a party, a victim, or a victim's family member and decide the case from that perspective. State v. Reese, 370 S.C. 31, 633 S.E.2d 898 (2006) (overruled on other grounds by State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009)). In this case, the solicitor told the jury to be instruments of justice for the victim. Here, the solicitor never told the jury to place themselves in the position of the victim. The solicitor simply asked the jury to decide the case and find the Petitioner guilty. Accordingly, the Petitioner can not show he was prejudiced by trial counsel failure to object as there was no violation of the "Golden Rule".

I. Petitioner is not entitled to a new trial as South Carolina has not established a cumulative error doctrine for PCRs.

Petitioner also alleges he is entitled to a new trial based on the cumulative error doctrine. This argument is without merit.

In Green v. State, 351 S.C. 184, 196-97, 569 S.E.2d 318, 324-25 (2002), this Court expressly declined to address whether a PCR applicant is entitled to relief based upon the supposed cumulative effect of trial counsel's alleged errors. See Simpson v. State, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006) (recognizing that "[w]hether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina" and holding that "[b]ecause the PCR court found that only one of Simpson's allegations had merit, there was no need to conduct a cumulative-error analysis").

A number of other jurisdictions, including the Fourth Circuit Court of Appeals, have held a cumulative effect analysis is inappropriate and that the correct analysis focuses upon each individual allegation of ineffective assistance. See Fisher v. Angelone, 163 F.3d 835, 852-53 (4th Cir. 1998); Wainwright v. Lockhart, 80 F.3d 1226 (8th Cir. 1996); Jones v. Sotts, 59 F.3d

143, 147 (10th Cir. 1995). As the Fourth Circuit Court of Appeals explained in Fisher v. Angelone:

Fisher argues that the cumulative effect of his trial counsel's individual actions deprived him of a fair trial. We disagree. Having just determined that none of counsel's actions could be considered constitutional error, see Lockhart v. Fretwell, 506 U.S. 364, 369 n. 2 (1993) (“[U]nder Strickland v. Washington, 466 U.S. 668 674 (1984), an error of constitutional magnitude occurs in the Sixth Amendment context only if the defendant demonstrates (1) deficient performance and (2) prejudice, it would be odd, to say the least, to conclude that those same actions, when considered collectively, deprived Fisher of a fair trial. Not surprisingly, it has long been the practice of the Fourth Circuit individually to assess claims under Strickland v. Washington.” See, e.g., Hoots v. Allsbrook, 785 F.2d 1214, 1219 (4th Cir. 1986) (considering ineffective assistance claims individually rather than considering their cumulative impact). In fact, in Arnold v. Evatt, 113 F.3d 1352 (4th Cir 1997), cert. denied, 522 U.S. 1058, 118 S. Ct. 715 (1998), the Fourth Circuit recently rejected a similar request to review the alleged errors of a trial court cumulatively rather than individually. See Id. at 1364 (“Based on the findings of this court concerning the individual claims of error, we reject this claim.”).

To the extent this Court has not specifically stated that ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively, we do so now. In so holding, we are in agreement with the majority of our sister circuits that have considered the issue.

Id. (footnote omitted). See Meuller v. Angelone, 181 F.3d 557, 586n.22 (4th Cir. 1999) (“Petitioner also urges us to consider the cumulative effect of his ineffective assistance of counsel claims rather than whether each claim, considered alone, establishes a constitutional violation. This argument is squarely foreclosed by our recent decision in Fisher, 163 F.3d [...at] 852-53 [...]”). Therefore, the Federal bench has correctly decided that prejudice must be considered on an individual, not a collective basis. Fisher, 163 F.3d at 852.

As a result, cumulative error analysis would be inappropriate on these facts under any interpretation of the law. Because Petitioner has failed to meet his burden to show deficiency

and prejudice in any of his allegations, he is not entitled to relief in this forum. Certiorari should therefore be denied, and the PCR Court's findings should be affirmed.

CONCLUSION

For the foregoing reasons, the Petition should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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September 15, 2017

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
Court of Common Pleas
The Honorable Daniel D. Hall, Circuit Court Judge

Appellate Case No. 2016-002233

Korey Lamar Love, Petitioner,

v.

State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

I, DeShawn H. Mitchell, certify that I have today served the within Return to Petition for Writ of Certiorari upon Petitioner by depositing a copy of the same in inter-agency mail and addressed to:

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

I further certify that all parties required by Rule to be served have been served. This 15th day of September, 2017.



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