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THE STATE OF SOUTH CAROLINA
In The Supreme Court

S.C. SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Daniel D. Hall, Circuit Court Judge

Appellate Case No. 2016-002233

Korey Lamar Love,.....Petitioner,

v.

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

**REPLY TO THE STATE'S RETURN TO THE
PETITION FOR WRIT OF *CERTIORARI***

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STANDARD OF REVIEW

This Court recently clarified the proper standard of review in post-conviction relief (“PCR”) cases “depends on the specific issue before” the Court. *Mangal v. State*, No. 2016-000610, 2017 WL 3045812, at 3 (S.C.S.Ct. July 19, 2017). This Court will “defer to a PCR court’s findings of fact and will uphold them if there is any evidence in the record to support them.” *Id.* This Court will “not defer to a PCR court’s rulings on questions of law. Questions of law are reviewed *de novo*, and [this Court] will reverse the PCR court’s decision when it is controlled by an error of law.” *Id.* “On review of a PCR court’s resolution of procedural questions arising under the Post-Conviction Procedure Act or the South Carolina Rules of Civil Procedure, [this Court] appl[ies] an abuse of discretion standard.” *Id.*

In its Return to Petition for Writ of *Certiorari* (hereinafter “Return”), the State conflates the different standards for reviewing findings of fact and conclusions of law.

ARGUMENTS

Question I

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

Four essential facts are not in dispute. First, “trial counsel mentioned during opening arguments that he would call Jerome Love and Demetrius Jackson as [alibi] witnesses.” Return at 9. Second, trial counsel did not call these witnesses during Mr. Love’s jury trial. *Id.* Third, all of the reasons trial counsel articulated for not calling these witnesses were known to him *before opening arguments*. A. 546-63, 583, 589-93. Fourth, during closing arguments, the Solicitor exploited trial counsel’s failure to call

these witnesses as alibi witnesses. A. 473, lines 12- 19. The PCR court, accordingly, found, “[T]rial counsel articulated valid reasons that he did not call Kendel Love, Jerome Love, or Demetrius Jackson as alibi witnesses.” A. 648-51. This Court must “defer to a PCR court’s findings of fact” and uphold that finding “if there is any evidence in the record to support” it. *Mangal* at 3.

This Court, however, is not required to defer the PCR court’s legal conclusion that it was a valid trial strategy for trial counsel to promise to call these witnesses, knowing about their unreliability *when he made his opening statement*. 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)); *Freiburger v. State*, 413 S.C. 243, 247, 775 S.E.2d 391, 393 (Ct. App. 2015) (“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.”). Trial counsel’s conduct undermined the credibility of the defense and contributed to his client’s conviction.

The State argues, “[O]pening statements do not constitute evidence as the PCR court correctly noted.” Return at 9. While this statement is technically accurate, it overlooks the role of attorneys in persuading jurors and is not relevant to the question before this Court. As this Court recognized, the choice of a particular attorney “could determine the action.” *Hagood v. Sommerville*, 362 S.C. 191, 198, 607 S.E.2d 707, 710 (2005). Additionally, it ignores the reality that the jurors could determine the alibi defense based on the lack of evidence—the failure to call Jerome Love and Demetrius Jackson—just as the Solicitor argued they should do during closing arguments.

Likewise, the argument that calling these witnesses would have failed to “establish a complete alibi defense,” Return at 8, misses the point and is not relevant to the question before this Court. As discussed in the Petition for Writ of *Certiorari*, at 10-13, trial counsel’s failure to deliver on his promise to call these alibi witnesses undermined the credibility of the defense and contributed to his client’s conviction.

Finally, the State repeats the same arguments to support trial counsel’s decision not to call Jerome Love and Demetrius Jackson as alibi witnesses as responses to both Question I and Question II of Mr. Love’s Petition for Writ of *Certiorari*. Return at 6-11. The State never addresses how those arguments and the PCR court’s finding these witnesses are unreliable impacts the legal analysis applicable to Question I. Convincing the PCR judge to find these witnesses unreliable as a defense to Question II proves trial counsel’s deficient performance during opening statements when he promised to call these witnesses, *knowing their unreliability when he made his opening statement*.

Question II

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

As seen, the facts relied upon by the State to justify trial counsel not calling Kendel Love, Jerome Love, and Demetrius Jackson prove the deficient performance alleged in Question I, and the State has failed to articulate how these factual determinations do not box in the State on Question I. A conclusion by this Court that the record contains facts to support the PCR court’s ruling on this question, *Mangal* at 3, militates in favor of granting relief on Question I.

Question III

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

The facts are not in dispute. The State acknowledges trial counsel told the jurors he would prove Mr. Love's alibi and agrees that this statement is an incorrect statement of the law. Return at 11-12. The State, however, does not offer any case holding it is a valid trial strategy for a defense attorney to intentionally misstate the law to the jurors; nor could it. *See Freiburger; Ingle, supra.*

The State argues Mr. Love can show no prejudice as the trial judge's instruction to the jury stated the burden of proof." Return at 12. Trial counsel, however, never disputed knowing the burden of proof. Rather, trial counsel informed the jurors, "Mr. Love does not have to prove this case, Mr. Love is not asking for those advantages in this case." A. 58. He also told the jurors, "[I]f I don't prove what I said I'm gonna prove then find [Mr. Love] guilty." A. 63. The State does not offer any case holding that it is a valid trial strategy for trial counsel to as instruct the jurors to reject the trial judge's instruction on the burden of proof; nor could it. *See Freiburger; Ingle, supra.*

Question IV

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

This question asks this Court to determine whether it is burden shifting to instruct jurors, "[I]n order to establish an alibi *it must be shown* that the defendant was at another specified place at the time the crime was committed." A. 483. Mr. Love believes the instruction contained in Ralph King Anderson, Jr., South Carolina Request to Charge—

Criminal, 2007, § 6-19, A. 642-44, is the correct statement of the law. This question is purely a legal issue, and this Court is not bound by the PCR judge's conclusion of law.

Mangal at 3.

Question V

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

Mr. Love raised this question as both ineffective assistance of trial counsel and appellate counsel because it is not clear whether trial counsel preserved this issue for appeal. The State argues, “[T]rial counsel made an objection but appellate counsel did not raise the issue on appeal.” Return at 14. If this Court concludes trial counsel preserved this issue for appeal, then this Court can resolve this legal question under the rubric of ineffective assistance of appellate counsel. *Mangal* at 3.

Question VI

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

If this Court concludes that the trial judge's jury instruction on alibi shifted the burden of proof, then trial counsel was ineffective for failing to request the instruction contained in Judge Anderson's book as it was in publication at the time of Mr. Love's jury trial. Once again, this question is purely a legal issue, and this Court is not bound by the PCR judge's conclusion of law. *Mangal* at 3.

Question VII

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

Once again, the facts are not in dispute. The state acknowledged trial counsel called attention to Mr. Love's 2 ½ year pre-trial incarceration during Mr. Love's direct examination and closing arguments. Return at 16. The State did not offer any legal argument to counter Mr. Love's contention that emphasizing Mr. Love's incarceration injected improper character evidence into the trial. *See* Rule 404(a), SCRE; *Geter v. State*, 305 S.C. 365, 367, 409 S.E.2d 344, 345 (1991); *State v. Tate*, 288 S.C. 104, 341 S.E.2d 380 (1986).

The State's argument that trial counsel had a trial strategy to portray Mr. Love as a victim is not persuasive. Trial counsel could portray Mr. Love as a victim of false statements to the police and perjured trial testimony by the co-defendant and other adverse witnesses without mentioning his client's lengthy pre-trial incarceration. The purported trial strategy, therefore, is neither reasonable nor valid. *See Freiburger; Ingle, supra.*

Question VIII

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

This Court "encourage[s] trial courts in PCR cases to use the discretion [this Court] grant[s] them on procedural matters to find reasonable ways—within the flexibility of our Rules—to reach the merits of substantial issues." *Mangal* at 7. Mr. Love moved to amend PCR application prior to the evidentiary hearing. The State cannot

show prejudice from the amendment. The error is contained on the trial record. Trial counsel and one of the prosecutors were available to testify as witnesses at the PCR hearing. The PCR court abused its discretion by not allowing the amendment and reaching the merits of the issue. *Id.* a 3.

On the merits, Mr. Love asks this Court to determine whether it is legally permissible for a Solicitor to argue the jurors should be “instruments of justice” for a victim of a crime. This question is purely a legal issue, and this Court is not bound by the PCR judge’s conclusion of law. *Mangal* at 3.

Question IX

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

Citing *Green v. State*, 351 S.C. 184, 569 S.E.2d 318 (2002) and *Simpson v. State*, 367 S.C. 587, 627 S.E.2d 701 (2006), the State contends application of the cumulative error doctrine in PCR cases is an unresolved issue in South Carolina. Return at 19.

A finding of prejudice under *Strickland*¹ requires that a petitioner “show that there is a reasonable probability that, but for counsels’ unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. This test is not, however, an outcome determinative inquiry. Thus, “a defendant need *not* show that counsel's deficient conduct more likely than not altered the outcome in the case.” *Id.* at 693 (emphasis added). Likewise, the prejudice test of *Strickland* “is not a sufficiency of evidence test.” *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).²

¹ *Strickland v. Washington*, 466 U.S. 668 (1984).

² In *Kyles*, the Court reviewed a Petitioner’s claim that the state did not disclose evidence favorable to the defense in violation of the rule established in *Brady v. Maryland*, 373 U.S. 83 (1963), and refined in *United States v. Bagley*, 473 U.S. 667

Relevant Supreme Court precedent holds this Court must apply a cumulative prejudice analysis. *Kyles*, 514 U.S. at 436 (the prejudice must be “considered collectively, not item-by-item”). The opinion in *Williams v. Taylor*, 529 U.S. 362, 399 (2000), reveals that the Court considered “the entire postconviction record . . . as a whole and cumulative of mitigation evidence presented originally” in conducting its prejudice analysis and finding counsel ineffective for failing to adequately prepare and present mitigation evidence. “[A]s a whole” implies a cumulative analysis. Likewise, in *Strickland*, the Court stated, “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.” 466 U.S. at 694 (emphasis added). If the Court did not intend a cumulative analysis it would have discussed the prejudice analysis in terms of “individual error” or error-by-error evaluation instead of formulating the prejudice test in light of counsel’s “errors.”³

(1985). In *Bagley*, the Court adopted the standard of *Strickland* for determining “materiality.” Thus, the Court’s discussion in *Kyles* is equally applicable to the analysis of prejudice in resolving claims of actual ineffectiveness of counsel under *Strickland*.

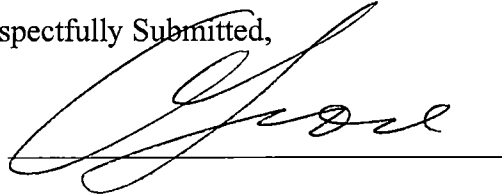
³ Numerous courts, relying on *Strickland*, have held that a cumulative prejudice analysis is appropriate. *See, e.g., Pavel v. Hollins*, 261 F.3d 210 (2nd Cir. 2001); *Richards v. Quarterman*, 566 F.3d 553 (5th Cir. 2009); *Goodman v. Bertrand*, 467 F.3d 1022 (6th Cir. 2006); *Martin v. Grosshans*, 424 F.3d 588 (7th Cir. 2005); *Turner v. Duncan*, 158 F.3d 449 (9th Cir. 1998); *Cargle v. Mullin*, 317 F.3d 1196 (10th Cir. 2003); *Steidl v. Walls*, 267 F. Supp. 2d 919 (C.D. Ill. 2003); *United States ex rel. Madej v. Schomig*, 223 F. Supp. 2d 968 (N.D. Ill. 2002); *Espinal v. Bennett*, 588 F. Supp. 2d 388 (E.D.N.Y. 2008); *Saranchak v. Beard*, 538 F. Supp. 2d 847 (M.D. Pa. 2008); *In re Gay*, 968 P.2d 476 (Cal. 1998); *McIntosh v. State*, 941 So. 2d 1 (Fla. Dist. Ct. App. 2006); *People v. Briones*, 816 N.E.2d 1120 (Ill. App. Ct. 2004); *State v. Taylor*, 968 S.W.2d 900 (Tenn. Crim. App. 1997); *Mata v. State*, 141 S.W.3d 858 (Tex. Ct. App. 2004); *State ex rel. Humphries v. McBride*, 647 S.E.2d 798 (W. Va. 2007); *State v. Thiel*, 665 N.W.2d 305 (Wis. 2003).

CONCLUSION

For the reasons set forth in Korey Love's Petition for Writ of *Certiorari* and this reply, this Court should grant the writ and consider the questions presented.

Respectfully Submitted,

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