STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BARNWELL COUNTY
Court of Common Pleas

The Honorable Doyet A. Early, III, Trial Judge
The Honorable Robert E. Hood, Post-Conviction Judge

Appellate Case No. 2017-000070

Eric VanCleave.....Applicant,

v.

State of South Carolina.....Respondent.

REPLY TO RETURN BRIEF

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Question I

Did the Post Conviction Relief Court err in failing to grant Eric VanCleave a new trial when defense counsel failed to introduce documentary evidence that supported Mr. VanCleave's defense of alibi?

The State fails to recognize two factors in this case. First, the date on which the alleged abuse occurred is very vague. The dates in two of the indictments are from April 1, 2005 until May 17, 2006. App. at 9, 11. Second, an alibi as to the dates involving the evidence admitted under Rule 404b of the South Carolina Rules of Evidence would also be a vital alibi in this case. As the indictment is vague and the dates alleged by the state are confusing at best, then an alibi for any week-end of that period is a valid alibi. The vagueness of the allegations is not the fault of Eric Vancleave. At trial the witnesses for the State contradicted each other as to the week-end of the alleged abuse. Brother 1 said it occurred around Easter of 2005 or Memorial day of 2005. App. at 187, ll 14-23. Easter of 2005 was March 27, before the date alleged in the indictment. Michael Sanders testified the trip was the week-end before Halloween. App. at 218, ll 11-14.

The State argues that trial counsel contended that the theory of defense counsel "was to point out inconsistencies in the State's witnesses to cause the jury to question their credibility." Return at 8. The alibi unused documents helps achieve this purpose. Agreed that the bank records showing Mr. Vancleave was in West Columbia on October 28th and 29th do not conclusively prove he was not in Barnwell. It does make the fact that he was in Barnwell less likely. As such it was admissible evidence in his defense.

Secondly, the fact that these records show he was in West Columbia area on the week-end in question, also supports his testimony that he was in West Columbia listening to the Carolina-Tennessee football game. The week-end of that game was supported by other documents which trial counsel failed to introduce. The documents that should have been introduced simply show that Mr. Vancleave's testimony was supported by documents. The PCR court nor the trial counsel never gave a reasonable explanation as to why he elected as part of trial strategy not to introduce documents that supported his client's testimony. A statement that the bank records are not strong support of his client's testimony is simply not a legally valid reason for not introducing the records. They supported and gave credibility to Mr. Vancleave's testimony. Counsel is ineffective when he fails to use documents that support the testimony of his client. In this case, it was documents that trial counsel knew before trial that his client had prepared.

As Easter of 2005 was before the date in the indictment, the only other date that the alleged abuse could have happened is Memorial Day of 2005. As noted in the Petition, prior to trial Mr. Vancleave spent time obtaining the records as to where he was on Memorial Day week-end of 2005. This established he was in Bryson City and not Barnwell. Agreed that using a credit card does not mean that he was there. But the jury should make that determination. In *Walker v. State*, 407 S.C. 400, 756 S.E.2d 144 (2014) it was not necessary for the Applicant to prove that the testimony of his girlfriend conclusively proved he was with her on the night in question. All that was required was that if the jury believed her testimony, his alibi was established. Here, if the jury believed Mr. Vancleave used his credit card, his alibi is also established. He could not have been

in Barnwell County.

Question II

Did the Post Conviction Relief Judge err in failing to hold that trial counsel was ineffective for his arguing that the jury should search for the truth and for not objecting to the similar comment by the trial judge?

The State argues the PCR Court correctly found the performance of trial counsel was not deficient for his failure to object to seek the truth charge by trial counsel and his supporting the trial judge's charge by arguing such himself. By failing to object to the charge and telling the jury himself to seek the truth, defense counsel eliminated a complete defense. If the jury did not know whom to believe they are to acquit. Here trial counsel told the jury himself and through the judge, that they were required to find the truth. As noted in the opening Petition, this has been held to be improper since 2000. *State v. Alekesy*, 343 S.C. 20, 538 S.E.2d 248 (2000). The PCR court was simply incorrect in holding the argument of counsel and the charge by the trial judge was not error. It had been error 2000.

The State attempts to minimize this error by making reference to the charge of the trial court as a whole. They ignore that the prejudice of the charge in this case is enhanced by trial counsel, virtually copying the comments of the trial judge, told the jury "if you search for the truth and comeback with the truth, that's all we ask for." App. at 155, ll 9-11.[1] From the comments the jury was told they have to decide if the young men

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In addition to the above statement, trial counsel told the jury in opening statement "In this case there is more than one victim." This comment only enhanced the prejudice.

are being truthful or if Mr. Vancleave is being truthful. As noted, giving the jury two black and white choices eliminates the defense of the jury being unable to decide. Petitioner agrees with the comment in *Gibbs v. State*, 403 S.C. 484, 744 S.E.2d 170 (2013) where this Court said "In evaluating whether PCR applicant has suffered prejudice as a result of a jury charge, the jury charge must be viewed 'in its entirety and not in isolation.'" *Id.* at 495, 744 S.E.2d at 176. But also, the charge must be viewed in conjunction with the argument of counsel who adopted the improper argument. Under the facts of this case, the combined affect is to prejudice the Applicant in his defense.

Question III

Did trial and appellate counsel fail to properly argue at trial and preserve for appeal the issue involving whether the state has proven the other alleged bad act by clear and convincing evidence?

Failure to preserve an argument for review by an appellate court can arise in two different ways. One is to fail to make a proper objection in a timely manner. Here at the pre-trial hearing trial counsel did make a proper objection. App. at 96, l 19 to 100, l 19. He argued in a very general manner that the evidence was not clear and convincing. The second way is to fail to argue the facts to the trial court that would establish the facts are not proven by clear and convincing evidence. In this case, trial counsel did not articulate why the evidence was not clear and convincing as argued in the opening Petition. He never argued there was only one trip and that one of the brothers was not on that trip. He never argued the oldest brother was 19 on the mountain trip and any alleged sexual act to that brother would not be similar.

The State argues that "Trial Counsel testified his strategy was to point out all the discrepencies between the two victim's stories, and he submitted a memorandum in support of his argument." Return at 19. The trial counsel in this case failed to argue the difference or to introduce evidence which would have made the differences even more apparent. If that were his strategy he would have asked Mrs. Wich for proof as to when they went on the trip to Maggie Valley. He would have understood there was only one trip to Maggie Valley and the younger brother was not on that trip. He would have argued that the date on the ticket established that on the date of the Maggie Valley trip the older brother would have been 19 years of age and any similarity between that alleged event and the alleged abuse of the middle brother simply did not exist. If the younger brother were not on the trip, then clearly his testimony was not proven by clear and convincing evidence. Mr. Vancleave recognizes that "When considering whether there is clear and convincing evidence, this court is bound by the trial judge's findings unless they are clearly erroneous." *State v. Kirton*, 381 S.C. 7, 26, 671 S.E.2d 107, 116 (Ct. App. 2008). But that finding by a trial judge is not legally adequate when trial counsel fails to articulate before the trial judge to explain why the other alleged bad acts are not similar.

The State has further argued that Mr. Vancleave did not preserve the argument that the brief of appellate counsel did not properly argue the clear and convincing standard of review. The appellate brief is simply a continuation of the errors of trial counsel in failing to properly convey to the trial court that the other two alleged bad acts were not similar or clear and convincing. Arguably the appellate brief could have corrected any alleged errors by trial counsel in failing to clearly articulate the differences

in the several alleged crimes. As pointed out in the Petition, this did not occur in this case. The brief of appellant continue to confuse the mountain trips by claiming there were two such trips. The errors of the trial counsel were not corrected but perpetuated.

Again the State argues "Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective." Return at 20. But here trial counsel testified he erred in concluding that there were two mountain trips instead of one. App. at 559, ll 15-25. Trial counsel also agreed there was only one trip to the mountains. App. at 607, ll 1-8. He admitted at the PCR hearing that both boys appeared to testify that they were both allegedly abused on the same trip. App. 607, l 19 to 608, l 609, l 1. As testified by trial counsel the record established that the younger brother was not on the Maggie Valley trip. Notwithstanding this clear inconsistency, neither trial counsel nor appellate counsel pointed out that this confusion existed. There can be no valid argument for not pointing out that one brother was not even on the Maggie Valley trip when he testified the alleged abuse occurred.

Question IV

Did the Post Conviction Relief judge err in failing to find prejudice from the errors of trial and appellate counsel?

The State argues that our State has never adopted a cumulative error doctrine. This is not correct. This Court has said "Whether the cumulation of several errors, which by themselves are not prejudicial, would warrant relief is an unsettled question in South Carolina." *Green v. State*, 351 S.C. 184, 197, 569 S.E.2d 318, 324 (2002). In this case the prejudicial errors are intertwined as to attacking the credibility of one or more of the

brothers and therefore a cumulative error analysis is proper. The failure to produce the various documents prepared by Mr. Vancleave helped support his defense as to whether he was with brother № 1on at least one week-end in question.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Petition, this Court should grant the Petition for Writ of Certiorari and grant Eric Vancleave a new trial in this matter.

September 11, 2017

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