

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

**RECEIVED**

**Mar 22 2024**

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

S.C. SUPREME COURT

Case No. 2015-CP-23-02618

Korey Lamar Love, ..... Petitioner,

v.

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

**Notice of Appeal**

Korey Lamar Love, appeals the order of the Honorable Daniel D. Hall, dated, November 29, 2023, dismissing his application for post-conviction relief. This appeal is taken from the order of Judge Hall dated February 1, 2024, filed on February 23, 2024, denying Mr. Love’s Rule 59(e), SCRPC motion.

By s/E. Charles Grose, Jr.

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March 22, 2024  
Greenwood, South Carolina

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STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF GREENVILLE )

IN THE COURT OF COMMON PLEAS  
THIRTEENTH JUDICIAL CIRCUIT

24 FEB 29 AM 10:14  
BRIAN BRYANT / 00061150

Korey Lamar Love, )  
 )  
Applicant, )  
v. )  
State of South Carolina, )  
 )  
Respondent. )  
\_\_\_\_\_ )

Case No.: 2015-CP-23-2618

ORDER DENYING APPLICANT'S  
RULE 59 MOTION

This Court issued a final order of dismissal in the captioned post-conviction relief (PCR) action on November 13, 2023. That order was filed on November 29, 2023. Petitioner filed a Rule 59, SCRPC, motion on December 21, 2023,<sup>1</sup> seeking to amend the judgment. This Court DENIES the motion for the following reasons:

1. Applicant first sets out the standard of review for ineffective assistance of counsel claims in PCR. (Motion, p. 1). This Court agrees that *Strickland v. Washington*, 466 U.S. 668 (1984), controls the analysis. The Court applied the *Strickland* test to the facts of this case. (Order of Dismissal, p. 8 and pp. 10-13). There is no disagreement as to the *Strickland* standard, and no cause to review the order on this point. Applicant further cites to the standard of review for appellate purposes. (Motion, p. 2). That standard of review is inapplicable to these proceedings. This action was remanded to the circuit court for consideration of one additional ineffective assistance of counsel allegation. *See Love v. State*, 428 S.C. 231, 834 S.E.2d 196 (2019). Again, Applicant does not present any cause to reconsider the order on this point.

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<sup>1</sup> Applicant asserted in his motion that he received the order on December 1, 2023 (Motion, p. 1). Rule 59 (e), SCRPC, requires that a motion to alter or amend be served within ten days of receipt. The certificate of service for the motion reflects it was served on Respondent on December 11, 2023. Thus, the motion appears to have been timely made.

2. Applicant next asserts that it was a violation of S.C. Code § 17-27-80 and the Separation of Powers doctrine under the state constitution for this Court to delegate responsibility to the Attorney General's Office to draft the order of dismissal. (Motion, pp. 2-4). Notably, Applicant's objection is not timely. A proposed order was requested by the Court and was circulated among counsel prior to this Court's acceptance. *See Fishburne v. State*, 427 S.C. 505, 516, 832 S.E.2d 584, 589 (2019) (providing a "proposed order should be transmitted to opposing counsel" for review and that counsel "should ... alert preparing counsel and the PCR court as to any deficiencies in the proposed order."). Further, counsel for Applicant was notified of Respondent's submission of the proposed order by email of November 6, 2023, and again provided a copy of the proposed order. The process was open and fair and followed the guidance set by our Supreme Court in *Fishburne*. Even so, should the Court entertain the argument on the merits, Applicant's argument would fail.

First, Applicant is mistaken that S.C. Code Ann. § 17-27-80 limits the ability of a PCR court to accept and consider proposed orders. There is simply nothing in the statute that prohibits the process which has been recognized by our Supreme Court to be historically acceptable:

We recognize the prevailing party often prepares a proposed order for the PCR court. *See Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004) ("[I]t is common practice for judges to ask a party to draft a proposed order for the sake of efficiency.").

*Fishburne*, at 516, 832 S.E.2d at 589. *See also* Rule 5(b)(3), SCRCPP (providing requirements for serving proposed orders). Further, as noted above, Applicant was fully aware of the open process and involved in each step.

Second, the record had been fully developed for determination of Applicant's one remanded issue. The Court not only held an additional evidentiary hearing on March 10, 2023, but also, at Applicant's request, allowed post-hearing briefing. Applicant provided a letter on July 17, 2023, in

lieu of a formal brief. The State submitted its brief on September 29, 2023.<sup>2</sup> (See Order of Dismissal, p. 1). It is simply impossible to find that Applicant was denied the opportunity to have his position presented and heard.

Third, there is no possibility of a violation of the separation of powers between the judicial and executive branches. See S.C. Const. Art. I, § 8. The proposed order becomes the Court’s order when accepted by the Court. Applicant’s reliance on *Langford v. State*, 400 S.C. 421, 735 S.E.2d 471 (2012), (Motion, p. 3), is misplaced. In *Langford*, our Supreme Court held S.C. Code Ann. § 1-7-330 unconstitutional given its provision that control of the criminal case docket “ ‘shall be exclusively vested in the circuit solicitor and the solicitor shall determine the order in which cases on the docket are called for trial.’ ” *Langford*, at 435, 735 S.E.2d at 435 (quoting section 1-7-330). Our Supreme Court found that provision demonstrated a “complete invasion into the court’s domain.” *Id.* In stark contrast, the process here does not confer any judicial authority on the prevailing party at all. The language offered in a post-hearing submission is not proprietary. As the history of this case demonstrates, the Court gave careful consideration to the evidence, the post-hearing briefing, and the proposed order which followed the points in the post-hearing briefing. This Court has considered the evidence and argument many times now. That this Court agreed (and still agrees) with Respondent’s arguments and not Applicant’s arguments does not show any abdication of judicial authority; it shows quite the opposite.

Fourth, Applicant complains of procedure, he does not complain of substance. He asserts the proposed order language essentially prevented the Court from considering his “similar

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<sup>2</sup> The Assistant Attorney General who handled the hearing for the State was, at the time of Applicant’s post-hearing filing, no longer with the Office. The undersigned granted new counsel for the State additional time to become familiar with the record in order to prepare the State’s brief.

conclusions” argument on appealing to the emotions of jurors. (Motion, p. 5). This cannot be squared with the materials before the Court. Again, the Court received and reviewed Applicant’s memo with this same assertion on “similar” arguments, and Respondent’s response, *before* the proposed order was ever submitted.

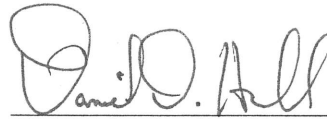
But again, this Court does not consider the objection to the proposed order process to be timely. However, even had it been, this Court provided full and fair opportunity for each party to be heard before making its decision. The order of dismissal constitutes this Court’s opinion. The order includes the findings of facts that this Court finds relevant, and the conclusions of law that this Court determined. Applicant does not present any cause to reconsider the order on this point.

3. Lastly, Applicant suggests that this Court has not considered his “proposed amendment” or “the proper scope of remand,” or his post-trial argument. (Motion, p. 6). Again, this cannot be reconciled with the record. This Court specifically acknowledged the “proposed amendment,” the “proper scope of remand,” and Applicant’s post-trial argument in the order. (Order of Dismissal, pp. 1-4). The Court also reviewed, however, the history of this case including the arguments on appeal that occasioned the remand, along with our Supreme Court’s interpretation of the issue remanded, to determine the basis of the allegation to be adjudicated. (Order of Dismissal, pp. 2-8). Applicant’s arguments were considered but rejected for the reasons expressed in the order. Even so, the nub of Applicant’s argument for error rests on whether the “opportunity to do justice” reference in the State’s closing argument was improper. This Court carefully reviewed the comment in context and found that it was not. (*See* Order of Dismissal, p. 10: “The solicitor did not ask the jury to place themselves in the shoes of the victims, nor did she appeal to the jury to decide the case on an emotional basis.”). Therefore, Applicant failed to show deficient

performance under *Strickland*. (Order of Dismissal, pp. 8- 11).<sup>3</sup> Applicant does not present any cause to reconsider the order on this point.

**THEREFORE**, for all the foregoing reasons, this Court finds and concludes that Applicant has failed to show cause to revisit the Court's order of November 13, 2023. The motion to alter or amend is DENIED.

IT IS SO ORDERED this 1<sup>st</sup> day of February, 2024.



DANIEL D. HALL  
Presiding Judge

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<sup>3</sup> The Court found the lack of *Strickland* deficient performance determinative. (Order of Dismissal, p. 12). Applicant does not argue any particular point on the Court's alternative ruling on the lack of *Strickland* prejudice, (*see* Order of Dismissal, pp. 12-14), and that alone is cause not to revisit that portion of the order.



ALAN WILSON  
ATTORNEY GENERAL

February 6, 2024

24 FEB 29 AM 10:14  
Brice Garrett CDD GUL SC

The Honorable Brice Garrett  
Greenville County Clerk of Court  
305 E. North Street  
Greenville, South Carolina 29601

Re: Korey Lamar Love v. State of South Carolina  
Case No. 2015-CP-23-2618

Dear Ms. Garrett:

Enclosed please find the original Order Denying Applicant's Rule 59 Motion signed by the Honorable Daniel D. Hall in reference to the above-mentioned case for filing in your office.

Thank you for your assistance in this matter, and please do not hesitate to contact me should you have any questions or concerns.

Sincerely,

Melody J. Brown  
Senior Assistant Deputy Attorney General

MJB/abb  
Enclosure

cc: E. Charles Grose Jr., Esquire (with copy of enclosure)

Rec  
12/1/2023

23 NOV 29 AM 10:59  
Bruce Garrett, Clerk, SC

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF GREENVILLE )  
  
Korey Lamar Love, 353157 )  
 )  
Applicant, )  
v. )  
State of South Carolina, )  
 )  
Respondent. )

IN THE COURT OF COMMON PLEAS  
THIRTEENTH JUDICIAL CIRCUIT

Case No.: 2015-CP-23-2618

ORDER OF DISMISSAL

ENTERED COMPUTER

The captioned post-conviction relief action was previously dismissed by Order filed on April 4, 2016. The action is again before the Court on remand from the Supreme Court of South Carolina for consideration of one additional ineffective assistance of counsel allegation. *See Love v. State*, 428 S.C. 231, 834 S.E.2d 196 (2019). As a result of the remand, a hearing was held on March 10, 2023, and additional testimony was taken. At the conclusion of the hearing, at Applicant's request, this Court determined it would receive post-hearing briefing from both parties. Applicant provided a letter on July 17, 2023, in lieu of a formal brief. The State requested additional time to prepare a brief which this Court allowed.<sup>1</sup> The State submitted its brief on September 29, 2023. After consideration of the record and argument of counsel, this Court DENIES relief for the reasons set out in detail in this order.

*General Procedural History*

Applicant is presently confined in the South Carolina Department of Corrections at the Kershaw Correctional Institution pursuant to orders of commitment from the Greenville County Clerk of Court. A Greenville County grand jury indicted Applicant at a January 2011 term for

<sup>1</sup> The Assistant Attorney General who handled the hearing for the State was, at the time of Applicant's post-hearing filing, no longer with the Office. The undersigned granted new counsel for the State additional time to become familiar with the record in order to prepare the State's brief.

Kershaw

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., Esq. A jury trial was held November 5-8, 2012. The Honorable Edward W. Miller presided. The jury found Applicant guilty as charged. (Trial Tr. 506-511). Judge Miller sentenced him 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. (Trial Tr. 504). Applicant timely appealed.

Assistant Appellate Defender Benjamin J. Tripp, of the South Carolina Commission on Indigent Defense, Division of Appellate Defense, perfected the appeal in the form of an *Anders*<sup>2</sup> brief. After the required review, the Court of Appeals dismissed the appeal. *State v. Love*, Unpublished Opinion No. 2014-UP-177 (S.C. Ct. App. filed April 23, 2014). The Court of Appeals subsequently issued the remittitur on May 19, 2014.

#### *The Post Conviction Relief Action and Appeal*

Applicant, through counsel, filed his initial postconviction relief (PCR) application on April 20, 2015. Applicant did not raise a claim alleging ineffective assistance of counsel for failing to object to a portion of the State's closing argument which is the subject of this remand proceeding. Rather, Applicant's PCR counsel handed a proposed amendment to the State's attorney at the scheduled evidentiary hearing and moved to amend. Applicant's offered amendment, in relevant part, alleged trial counsel was ineffective for:

Failing to object to the improper closing argument of the solicitor which imper[missably] appeal[e]d [...to...] the passion of the

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<sup>2</sup> *Anders v. California*, 386 U.S. 738 (1967).

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...

(PCR App. at 638).<sup>3</sup>

In the prior order of dismissal filed on April 4, 2016, this Court denied relief on all claims. This Court also formally denied the motion to amend for being late, finding that Applicant had failed to provide adequate notice of the amendment. (2016 Order of Dismissal, at 2). Applicant then filed a motion to alter or amend and argued, in relevant part, that:

“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).

(Rule 59 Motion, at 13-14). This Court denied the motion by order filed October 6, 2016. As noted above, Applicant appealed. In his submissions to the Supreme Court of South Carolina, Applicant presented the following question:

*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?”

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<sup>3</sup> The proposed amendment was not filed with the Greenville County Clerk of Court and is not a part of the public record for this action. The citation used here refers to the PCR appeal appendix which Applicant filed with his petition in the Supreme Court of South Carolina. Those filings are in the public record. *See* Appellate Case No. 2016-002233. Additionally, though the trial transcript in its entirety is before the Court, later citations in this order will, for consistency, refer both to the PCR appeal appendix transcript copy, and the trial transcript pages.

(Petition for Writ of Certiorari, filed May 3, 2017, at 2).

On June 27, 2018, our Supreme Court granted certiorari review only on the referenced question presented. In his subsequent briefing, Applicant focused on the denial of the request to amend, and argued, on the merits, that the solicitor made a “Golden Rule” argument and trial counsel was ineffective for failing to object. (Appellate Case No. 2016-002233, Brief of Petitioner, at 1 and 7-11; *see also* Respondent’s Post Hearing Brief, Attachment 1, at 1 and 7-11).

In deciding the matter, our Supreme Court focused on the motion to amend process, finding that specific consideration should be given to certain circumstances surrounding requests to amend and provided guidance in how to evaluate such motions. *Love*, 428 S.C. at 242, 834 S.E.2d at 201. As to the motion offered in this action, the majority found that that “[l]ittle to no prejudice would result to the State if this amendment were granted....” *Id.* The majority “remand[ed] to the PCR court ... to receive evidence and argument and consider this ground on the merits,” but cautioned that its “decision to remand this issue to the PCR court is purely procedural and should in no way be construed as a suggestion to the PCR court as to how it should rule on the merits.” *Id.*, at 243, 834 S.E.2d at 202 (emphasis in original). The dissent agreed with the majority that “it was error not to permit the amendment challenging the State’s closing argument as a Golden Rule violation.” *Id.*, at 245, 834 S.E.2d at 203 (Kittredge, J., dissenting).<sup>4</sup> However, the dissent would have “accept[ed] [Applicant’s] invitation to resolve the appeal on the merits,” and found that “there was no Golden Rule argument” and “counsel was not deficient in failing to object.” *Id.*

#### *The Hearing Following Remand*

At the remand hearing held March 10, 2023, trial counsel, Fletcher Smith, Esq., testified

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<sup>4</sup> While there was unanimity on the amendment to the application issue, the dissent, with Justice Kittredge writing and Justice Hearn joining, would have “affirm[ed] the PCR court in result.” *Id.*, at 245, 834 S.E.2d at 203.

that he did not think the cited argument “rose to the level of a golden rule violation.” (March 10, 2023 Remand Hearing Transcript, at 7). On redirect, Mr. Smith, upon questioning by Applicant’s counsel, stated, “[t]he role of the jury is to follow the instructions of the judge and apply the law as they see it to the facts of the case.” (March 10, 2023 Remand Hearing Transcript, at 8). He agreed with Applicant’s counsel that meant the jury would “determine whether the burden of proof had been met” as part of its role. (March 10, 2023 Remand Hearing Transcript, at 8).

Applicant asserted at the close of the hearing a concern that the State was “characterizing” the ineffective assistance claim as based solely on “a golden rule argument” and asked to submit briefs on the issue. (March 10, 2023 Remand Hearing Transcript, at 9). As set out previously, this Court has received the post hearing submissions which have been reviewed in detail, and will address first, in its findings below, the parameters of the allegation.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

In addition to carefully considering the record and the arguments presented by counsel, this Court has also had the opportunity to consider the testimony presented at the remand hearing and 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).

##### *The Allegation on Remand and Requested Relief*

In his July 25, 2023, letter, Applicant argued that his “claim is broader” than a complaint the solicitor made a Golden Rule argument “and includes the Solicitor’s improper appeal to the jurors emaciations [sic] and improper appeal to decide the case on matters other than the elements of the crime.” (Letter, at 1). Applicant then cited to two cases in support of his assertion that the

solicitor made an improper “Golden Rule” argument, *State v. Reese*,<sup>5</sup> and *Brown v. State*.<sup>6</sup> (Letter, at 2). Applicant continued his argument citing “[o]ther cases” that have “reach[ed] similar conclusions” where there is an “appeal[] to emotions” or the prosecutor requests that “the jurors ... decide the case on something other than the elements of the crimes.” (Letter, at 2). Applicant asserted that “the Solicitor sought for the jurors to abandon their impartiality, write the final chapter of Mr. Bass’ life, and do justice for Mr. Bass rather than base their verdict on proof that Mr. Love committed the crime.” (Letter, at 3). Applicant contends that the argument was improper, and trial counsel should have objected. (Letter, at 3). He further argues that there was not “overwhelming evidence of Mr. Love’s guilt,” and that “[t]here is a reasonable probability” of a different result at trial but for counsel’s deficient performance in not objecting to the solicitor’s argument. (Letter, at 3).

Respondent counters that Applicant has consistently rested his assertion of error on a Golden Rule argument basis, and that should be the basis of the allegation here. This Court agrees with Respondent.

Despite Applicant’s assertions generally challenging the parameters of the allegation, it is difficult to see that any argument was offered regarding this ineffective assistance of counsel claim other than counsel failed to object to the State’s argument as an improper Golden Rule argument. Applicant has consistently asserted in this Court and in our Supreme Court that the argument was an improper Golden Rule argument. *See* Rule 59 motion, at 13-14; *Love*, at 246, 834 S.E.2d at 203 (dissent noting that Applicant “devoted much of his brief to the merits of the Golden Rule argument”); *see also* Respondent’s Post Hearing Brief, Attachment 1, Brief of Petitioner. Indeed,

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<sup>5</sup> 370 S.C. 31, 633 S.E.2d 898 (2006).

<sup>6</sup> 383 S.C. 506, 680 S.E.2d 909 (2009).

that was the basis for the question that the Supreme Court granted certiorari review on, considered as an offered amendment, and remanded for consideration. For Applicant to raise other arguments in expansion of the claim wrongly asks this Court to exceed the limited scope of the relief allowed by the remand. *See Prince v. Beaufort Mem'l Hosp.*, 392 S.C. 599, 605, 709 S.E.2d 122, 125 (Ct. App. 2011) (court's authority to act is limited by parameters of remand). This Court agrees with Respondent that much of Applicant's argument on the alleged incorrect "characterization" of the claim can be attributed to the definition of a "Golden Rule" argument. Not surprisingly, different verbiage may be found among the relevant cases, but a good guide is how our Supreme Court has defined the argument:

Jurors are sworn to be governed by the evidence, and it is their duty to consider the facts of the case impartially. 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), *overruled on other grounds by State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009) (emphasis added) (citations omitted). A "Golden Rule" type argument" is one asking the jury "to 'speak for' the victim ... to set aside their impartiality and, instead consider the evidence from the subjective position of the ... victim." *Brown v. State*, 383 S.C. 506, 516–17, 680 S.E.2d 909, 915 (2009). In essence, though precise wording may differ, the concern remains whether the perspective is skewed by an argument such that emotion displaces impartiality. *See Von Dohlen v. State*, 360 S.C. 598, 610, 602 S.E.2d 738, 744 (2004) (acknowledging that an argument asking to view the evidence from the victim's position may not be labeled a "Golden Rule" argument, but if it appeals to emotion and affects impartiality, it is a "Golden Rule" argument and improper). To the extent that Applicant is attempting to show *Strickland* prejudice by separate examples of prejudice from other types of

arguments generally, that does not support his assertion of “mischaracterization” of the claim. Rather, that merely suggests the context of a prejudice review which is not at issue. Thus, this Court finds that Applicant’s allegation was raised and presented as one alleging ineffective assistance of trial counsel for failing to object to the solicitor’s improper “Golden Rule” argument. It is treated as such here.

*Ineffective Assistance Claim*

This Court is guided by the familiar test: To show a violation of the Sixth Amendment, an applicant must show that counsel’s representation fell below an objective standard of reasonableness, and but for counsel’s error, there is a reasonable probability that the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *Simpson v. Moore*, 367 S.C. 587, 595–96, 627 S.E.2d 701, 706 (2006). “A reasonable probability is a probability sufficient to undermine confidence in the outcome” of the trial. *Strickland*, at 694. It is presumed that counsel made all decisions in exercise of reasonable judgment. *Strickland*, at 689.

This Court finds that trial counsel credibly testified that he understood what constituted a Golden Rule argument; he simply did not consider the argument at issue to be one. (March 10, 2023 Remand Hearing Transcript, at 8). Having reviewed the argument in total, this Court agrees with counsel. The record confirms that the argument was *not* a Golden Rule argument.

In making his claim of error, Applicant stops short in his quotation of the paragraph from the trial transcript which, when read in full, reflects:

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 *and you heard a lot about reasonable doubt and the judge is gonna tell you what reasonable doubt is. Reasonable doubt means you must be firmly convinced of defendant’s guilt and if you’re firmly convinced then you should convict him, it doesn’t mean that you can have a doubt or any doubt and just decide to find*

*him not guilty, that's not what it means at all because if that were the case there would never be a criminal defendant convicted in any court anywhere. Your doubt must be reasonable, you must be firmly convinced of his guilt.*

(PCR App./Trial Tr., at 473-74) (emphasis added). In reading even further, the transcript shows the solicitor's reference to reasonable doubt was tied to her expansive argument on credibility. (PCR App./Trial Tr., at 474-75). (See also PCR App./Trial Tr., at 471-72, solicitor's closing, acknowledging some minor inconsistency in testimony from State's witnesses, but noting, "They were all consistent" about Love's involvement, and arguing "You're the judge of ... sincerity" and p. 474, urging the jury "to consider [Love's] credibility, his believability, just like you do all the other witnesses...").

To fairly assess the complained of portion, the argument must be considered in context, and not just the immediate context, but in context of the entire trial record. *Reese*, 370 S.C. at 38, 633 S.E.2d at 901. The portion in italics has been omitted from Applicant's quotation and argument, but it critically places in focus the argument that trial counsel heard in making his decision whether to object.<sup>7</sup> And, the argument that follows confirms the reasonableness of his assessment.

Simply, the solicitor never divorced the request for justice from the evidence and the State's

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<sup>7</sup> Further, in reading the entirety of the closing arguments, it is notable that the solicitor objected to a portion of defense counsel's argument, and the trial judge instructed not to "personalize" the argument. (PCR App./Trial Tr., at 460). It would appear the solicitor was focused on *not* personalizing the comments. Further, the solicitor's argument started out noting the importance of credibility determinations in this case, acknowledging "people who had information and never came forward ... who were up to no good" and "simply did "unconscionable things," then spent extensive time reviewing the evidence and urging credibility findings to be made in favor of the State's witnesses for specific evidence and logic based reasons. (PCR App./Trial Tr., at 461-75).

burden of proof.<sup>8</sup> The solicitor did not ask the jury to place themselves in the shoes of the victim, nor did she appeal to the jury to decide the case on an emotional basis. The solicitor simply asked the jury to administer justice – the very responsibility that the jurors held. This argument is directly in line with that in *State v. Rice*, 375 S.C. 302, 652 S.E.2d 409 (Ct. App. 2007), *overruled on other grounds by State v. Byers*, 392 S.C. 438, 710 S.E.2d 55 (2011).<sup>9</sup>

In *Rice*, the Court of Appeals held that the solicitor’s request to give the victim justice did not violate *Reese* or the Golden Rule:

... the prosecutor merely asked the jury to do the duty that was already required of them. The prosecutor’s comment did not call for the jurors to put themselves in the victim’s place and did not rise to the level of a Golden Rule argument.

*Rice*, at 336, 652 S.E.2d at 426.

This precedent from 2007 was in place for the 2012 trial. Applicant cannot show counsel’s representation in not objecting – when viewed in context of the remaining record and the existing, guiding precedent at trial – was contrary to the exercise of “reasonable professional judgment.” *Strickland*, 466 U.S. at 690. Indeed, this is precisely the same conclusion offered by the dissent in the appeal in this case. The two justices who dissented would have found trial counsel not deficient

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<sup>8</sup> Indeed, even the solicitor’s final remarks undoubtedly support that interpretation, *i.e.*, that the solicitor depended upon the evidence to show Applicant should be held accountable:

Evidence comes in all forms, ladies and gentlemen, and the evidence in this case is not pretty but it proves that that man (indicating the defendant) killed somebody and I ask you to hold him responsible today. Thank you.

(PCR App./Trial Tr., at 475).

<sup>9</sup> *State v. Rice* was overruled by *State v. Byers* to the extent it is read to require a “precise procedure of making an objection followed by a motion to strike” to preserve under the contemporaneous objection rule. *Byers*, 392 S.C. at 445, 710 S.E.2d at 58.

in his representation based on the record, arguments, and the holding in *Rice*. 428 S.C. at 246, 834 S.E.2d at 203. This Court agrees with that reasoning and conclusion.

Applicant's reliance on *Reese* and *Brown* is misplaced and they are quickly distinguishable. In both cases, the solicitor pointedly requested the jury "speak" for the victim, *i.e.*, abandon their responsibility to be impartial. *Reese*, 370 S.C. at 37, 633 S.E.2d at 901; *Brown*, 383 S.C. at 516-17, 680 S.E.2d at 915. There was no such appeal to the jury here. Rather, the solicitor remained steadfast that the jury look at the evidence, and *if* convinced beyond a reasonable doubt, to convict. (See Attachment 2, PCR App./Tr. Transcript at 473-74). Again, that is only fairly read to reference the jury's duty, not as a call to abandon that duty. *Rice, supra*. See also *Bedford v. Collins*, 567 F.3d 225, 234 (6th Cir.2009) ("Nothing prevents the government from appealing to the jurors' sense of justice, or from connecting the point to the victims in the case" though it "may not urge jurors to identify individually with the victims...") (citations omitted); *People v. Hedelsky*, 412 N.W.2d 746, 748-49 (Mich. App. 1987) (rejecting defendant's claim that prosecution's argument "there should be 'some meaning to [victim's] death' and 'a sense of justice after he had died,'" was improper where "entire closing argument ... shows that the prosecutor asked the jury to examine all of the evidence and, if the evidence indicated defendant's guilt beyond a reasonable doubt, a guilty verdict would provide a sense of justice for the tragic death of an innocent bystander"). Moreover, *Rice* was a direct appeal case. Here, the *Strickland* test controls.<sup>10</sup> Applicant has failed in his burden of showing deficient performance.

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<sup>10</sup> To show a violation of the Sixth Amendment, an applicant must show that counsel's representation fell below an objective standard of reasonableness, and but for counsel's error, there is a reasonable probability that the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *Simpson v. Moore*, 367 S.C. 587, 595-96, 627 S.E.2d 701, 706 (2006). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. *Strickland*, at 694.

The presumption that trial counsel made all decisions the exercise of reasonable judgment is well established. *Strickland*, at 689. It is equally well established that reasonable attorneys can disagree on the decisions made during trial, including whether to object or not object. *Id.* (“There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.”). Further still, appellate courts “should not assume the prosecutor means a remark to have its most damaging meaning....” *United States v. Doss*, 630 F.3d 1181, 1195 (9th Cir. 2011). It follows, nor must counsel.

Like *Rice*, the argument was not an improper one – it was not a Golden Rule argument error. Thus, given the leniency afforded counsel, and the reasonable interpretation of the comments when viewed in context, and the controlling precedent, Applicant has failed to show that trial counsel rendered deficient performance.

That counsel is not deficient ends the *Strickland* inquiry. 466 U.S. at 700 (“Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim.”). It does here. However, even if this Court should find that the comments were improper (which they were not), and trial counsel was deficient in representation in failing to objection (which he was not), this Court would find that the three sentences requesting justice had no prejudicial effect on the jury’s ability to remain neutral and come to an unbiased guilty verdict. *See Von Dohlen*, 360 S.C. at 609, 602 S.E.2d at 744 (“review of a solicitor’s closing argument is based upon the standard of whether his comments so infected the trial with unfairness as to make the resulting conviction a denial of due process”). In other words, Applicant would still not be entitled to any relief.

The judge instructed Applicant’s jury that: they must “accept and apply the law as” the judge instructed, (p. 475); “the jury is the sole and exclusive judge of the fact,” (p. 476); the jury

“must determine the credibility or believability of the witnesses ... and” that it was their “duty as jurors to evaluate the evidence” and its weight, (p. 477); “you are the sole judges of the facts in this case and of the believability of any and all of the witnesses,” (p. 478) “the burden [is] on the State to prove the defendant guilty,” and “guilt” must be “proven by evidence satisfying you, the jury, of guilt beyond a reasonable doubt,” (p. 478); and, that its “verdict cannot be based on sympathy, passion, prejudice, emotion, or any other consideration which is not in evidence,” underscoring that the jury had “no enemies to punish ... and no friends to reward,” (p. 484). (*See* PCR App./Trial Tr. 475-84). Again, *Rice* is instructive:

If the prosecutor’s request had reached that level of impropriety, the trial court’s overall instructions to the jury effectively cured any potential prejudice. The judge stressed the State had the burden of proving Rice guilty beyond a reasonable doubt. He instructed the jury to consider only the competent evidence before them, based on the witnesses, exhibits made part of the record, and stipulations between counsel. The judge explained that, as jurors, they were sworn to accept and apply the law exactly as he stated it to them. It was their duty to decide the effect, the value, weight, and truth of the evidence presented during the course of the trial. He charged them to assess the credibility of witnesses who testified during trial and to evaluate the evidence to determine its truthfulness.

We conclude the trial court adequately set forth the proper test for determining the issues. Any error in failing to give a specific curative instruction was harmless.

*Rice*, 375 S.C. at 336, 652 S.E.2d at 426. *See also Strickland*, at 694 (when “making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law”).

Second, the comment was limited, tied to the jury’s duty, was not emphasized, and was not the closing salvo. The vast majority of the argument reviewed the evidence, and the State embraced its burden of proof, repeatedly acknowledging the jury’s role to determine credibility

and weight. *See Von Dohlen*, at 613, 602 S.E.2d at 746 (“single comment, although improper, did not so infect the trial with unfairness as to make the resulting conviction a denial of due process”). Additionally, the record well supports that the jury had extended deliberations and requested review of specific evidence to consider during deliberations. (*See* PCR App./Trial Tr. 486-98).

But again, this Court finds and concludes that Applicant has failed in his burden of showing deficiency in representation. In the alternative, however, this Court finds and concludes that Applicant has not met his burden of showing prejudice. Applicant is not entitled to any relief.


### CONCLUSION

For the above stated reasons, this Court finds that Applicant failed to carry his burden of proof in showing a constitutional violation that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

### IT IS THEREFORE ORDERED:

1. Applicant’s application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant is remanded to the custody of Respondent for completion of his sentence.

AND IT IS SO ORDERED this 13<sup>th</sup> day of November, 2023.



DANIEL D. HALL  
Presiding Judge

Copy mailed to  
Attorney General/Charles Grase  
on 11 / 28 / 2023