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**S.C. SUPREME COURT**

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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

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Appellate Case No. 2024-000462

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Korey Lamar Love,.....Petitioner,

v.

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

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**Petition for Writ of Certiorari**

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## QUESTIONS PRESENTED

### *Question I*

Did the PCR court err by limiting Korey Love's amendment to his PCR application to consideration of the "golden rule," when this Court remanded for the PCR court to determine whether Mr. Love was entitled to post-conviction relief if the Solicitor's comments violate the Golden Rule or are otherwise improper?

### *Question II*

Did the PCR court err by finding the Solicitor's closing argument did not violate Korey Love's due process right to a fair trial?

### *Question III*

Should this Court require post-conviction relief judges to draft the final orders in PCR cases in order to ensure the findings of fact and conclusions of law, required by S.C. Code Ann. § 17-27-80, are those of the court, rather than an advocate, and to preserve the separation of powers between the judicial branch and executive branch as required by S.C. Const. Art. I, § 8?

## STATEMENT OF THE CASE

In January 2011, the Greenville County Grand Jury indicted Korey Love for murder, attempted armed robbery, and possession of a pistol by someone under eighteen years of age for the shooting death of Isaac Bass. A. 506-11. On January 27, 2007, Mr. Bass was killed after leaving work at the Wendy's restaurant on Pleasantburg Drive in Greenville, South Carolina.

From November 5-8, 2012, the State tried Love before the Honorable Edward W. Miller and a jury. Bryna S. Sey and Howard L. Steinberg represented the State. Fletcher N. Smith, Jr. represented Love. The jurors convicted on all counts. Judge Miller sentenced Love to fifty years' imprisonment for murder, twenty years' imprisonment for attempted armed robbery, and five years' imprisonment for possession of a pistol by someone under eighteen years of age. The sentences are concurrent. A. 498-504.

Love appealed his convictions and sentences to the Court of Appeals. Benjamin J. Tripp of the Appellate Defense Division represented Love and filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). Donald J. Zelenka represented the State. The Court of Appeals dismissed Love's appeal. *State v. Love*, Unpublished Memorandum Opinion 2014-UP-177 (Filed April 23, 2014).

On April 8, 2015, Love filed his application for post-conviction relief (hereinafter "PCR"). The Honorable Daniel D. Hall convened an evidentiary hearing on February 17, 2016. Love submitted a post-hearing memorandum in support of his PCR application. A. 622-44. By written order dated March 23, 2016, Judge Hall dismissed Love's application for post-conviction relief. A. 645-56. On April 8, 2016, Love served a Rule 59(e), SCRCPC motion. A. 657-71. The State filed a return to the motion. A. 673-75. By written order dated September 23, 2016, Judge Hall denied this motion. A. 676-77.

Love appealed to this Court and raised the following questions:

- 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?
- 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?
- 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?
- 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?

- 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?
- VI. Did Korey Love receive prejudicial, ineffective assistance of trial counsel when trial counsel when his trial counsel failed to request a correct jury instruction that did not shift the burden of proof on alibi?
- VII. Did Korey Love receive prejudicial, ineffective assistance of trial counsel when trial counsel when his trial counsel elicited testimony from his client that he had been incarcerated for 2 ½ years prior to trial?
- 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?”
- IX. Is Korey Love entitled to a new trial based on the cumulative error doctrine?

A. 700-30. The State responded to the petition (A. 732-56), and Mr. Love replied (A. 758-71).

On June 27, 2018, this Court granted, in part, and denied, in part, the petition to consider 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?”

A. 773. On September 26, 2018, Love filed his Brief of Petitioner. A. 774-90. The State responded on January 28, 2019 (A. 793-810) and Mr. Love replied on February 14, 2019 (A. 813-19).

This Court considered the case without oral argument and issued a published opinion on October 2, 2019. A. 823-34. This Court held, “The PCR court first erred in summarily denying Love’s motion to amend without separately considering each proposed amendment in light of Rule 15(a), SCRCP,” and “the PCR court erred in finding the State

would be prejudiced by the granting of the amendment alleging trial counsel was ineffective for failing to object to the solicitor's comments to the jury." *Love v. State*, 428 S.C. 231, 243-44, 834 S.E.2d 196, 202 (2019). The Remittitur issued on October 18, 2019. A. 835.

On remand, Judge Hall convened an evidentiary hearing on March 10, 2023. A. 836-45. Mr. Love submitted a post-hearing letter on July 17, 2023 (A. 846-48), and the State submitted a post hearing brief on September 29, 2023 (A. 849-84). By written order dated November 13, Judge Hall dismissed the application (A. 886-99). On December 11, 2023, Mr. Love served his Rule 59(e), SCRCP motion. A. 900-27. Judge Hall denied the Rule 59(e) motion on February 1, 2019. A. 928-32. This petition for a writ of certiorari follows.

#### **STATEMENT OF FACTS**

On January 27, 2007, at 1:30 a.m., someone shot and killed Isaac Bass after he left work at Wendy's. The Wendy's did not have interior or exterior security cameras. A. 64-68, 70, 76-77, 97. Without any forensic evidence identifying a perpetrator, the prosecution relied heavily on the testimony of co-defendant, Eric Jarod Ransom, in its prosecution of Korey Love.

Ransom is Korey Love's stepbrother. Ransom's mother married Korey Love's father, Jerome Love. A. 356-578. Ransom claimed Love brought up robbing the Wendy's in a conversation at a basketball court where Ricky Simmons, Rashad Simmons, and Dontavius Sullivan were also present. Ricky and Rashad Simmons, sometimes referred to as "the twins," also claimed this conversation took place. A. 266-68, 310-11.

Despite initially saying, “I can’t really remember like what happened,” Ransom ultimately claimed Love came to his house, and the two walked to the Wendy’s on January 27, 2007. When they got to the Wendy’s drive-thru, Love supposedly said he was going to rob someone. Ransom claimed Love crept up on Mr. Bass, pulled a gun, and pointed it in Mr. Bass’s face. According to Ransom, Mr. Bass got away, and Love shot Mr. Bass while he was trying to get back inside Wendy’s. Ransom claimed both he and Love then ran away. A. 359-67.

Ricky and Rashad Simmons claimed they were standing by the mailbox at their house when they heard a gunshot, and, shortly after, Love and Ransom showed up, appearing “anxious, upset.” A. 271-72, 318-19. Ransom did not recall seeing Ricky and Rashad Simmons that night. A. 359-67.

Korey Love testified in his own defense that he was at home, where he, his brother Kendel, and father Jerome Love, lived with Demetrius Antoine<sup>1</sup> Jackson and Leslie Jackson and their young children. A. 430-39. Korey Love testified that Kendel Love, Jerome Love, Demetrius Jackson, and Leslie Jackson were all home, and with him, at the time of the incident. A. 429-39. Ms. Jackson confirmed Korey Love’s alibi. A. 405-12. A records custodian confirmed that Jerome Love got off work early enough that he could have been home at the time of the incident. A. 401-05. Trial counsel did not call Jerome Love and Demetrius Jackson to testify as alibi witnesses.

During closing, the solicitor argued:

This is your opportunity to do justice in this case under the oath that you have taken. You can be instruments of justice for Isaac Bass. His death was not the final chapter of his life, this trial is the final chapter of his life....

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<sup>1</sup> Mr. Jackson’s family and friends call him by his middle name, “Antoine,” and he is sometimes referred to as “Antoine” in the record.

A. 473, lines 19-22. Trial counsel did not object.

### STANDARD OF REVIEW

Under the first prong of *Strickland v. Washington*, a defendant “must show that counsel’s representation fell below an objective standard of reasonableness,” which must be judged under “prevailing professional norms.” 466 U.S. 668, 688 (1984). “The first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (internal quotations omitted). “If the State contends the alleged deficiency resulted from a strategic decision made at trial, counsel must articulate a valid reason for employing a certain strategy.” *Freiburger v. State*, 413 S.C. 243, 247, 775 S.E.2d 391, 393 (Ct. App. 2015); *cf. Ingle v. State*, 348 S.C. 467, 560 S.E.2d 401 (2002).

The second prong of *Strickland* requires a defendant establish this deficiency prejudiced him. “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.” *Strickland*, at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* “In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel’s error had on the outcome of the trial.” *Smalls v. State*, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018)<sup>2</sup> (citing *Strickland*, 466 U.S. at 695-96 (explaining that the court must analyze how individual errors of counsel affect the important factual findings in a particular case)).

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<sup>2</sup> See also *Thompson v. State*, 423 S.C. 235, 245, 814 S.E.2d 487, 492 (2018) (adhering to *Smalls*).

This Court’s “standard of review in PCR cases depends on the specific issue before” it. *Mangal v. State*, 421 S.C. 85, 91-92, 805 S.E.2d 568, 571 (2017) (“*Mangal I*”). The appellate 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.” *Id.* “Questions of law are reviewed de novo, and [the appellate court] will reverse the PCR court’s decision when it is controlled by an error of law.” *Id.*

## ARGUMENTS

### *Question I*

**Did the PCR court err by limiting Korey Love’s amendment to his PCR application to consideration of the “golden rule,” when this Court remanded for the PCR court to determine whether Mr. Love was entitled to post-conviction relief if the Solicitor’s comments violate the Golden Rule or are otherwise improper?**

In the prior appeal, this Court stated:

Here, the claim Love sought to add centered upon one passage in the trial transcript, specifically the solicitor's statement to the jury that “[y]ou can be instruments of justice for [Victim]. His death was not the final chapter of his life, this trial is the final chapter of his life.” Certainly, the State is well-acquainted with claims asserted by applicants in PCR cases that solicitors' comments (opening statements, closing arguments, or otherwise) violate the Golden Rule or are otherwise improper.

*Love v. State*, 428 S.C. 231, 242, 834 S.E.2d 196, 201 (2019)

The Amended Application for Post-Conviction Relief (“PCR”) alleged trial counsel was ineffective for failing to object to the improper closing argument of the Solicitor which impermissibly appealed to the passion of the jurors:

This is your opportunity to do justice in this case under the oath that you have taken. You can be instruments of justice for Isaac Bass. His death was not the final chapter of his life, this trial is the final chapter of his life....

Amended PCR Application, ¶ 11(a)(10), A. 638.

The PCR court impermissibly placed restraints on Mr. Love’s claim during the remand. The order of dismissal—drafted by the Attorney General’s Office—adopts the State’s position: “Respondent counters that Applicant has consistently rested on his assertion of error on a Golden Rule argument basis.” A. 891. The order of dismissal—drafted by the Attorney General’s Office—the concludes, “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.” *Id.* And, “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.” A. 892. Treating Mr. Love’s claim in this limited manner defies this Court’s opinion allowing the amendment and remanding for consideration of the amendment.

Limiting the scope of Mr. Love’s amendment to his PCR application allowed the Attorney General’s Office and the PCR court to ignore this portion for Mr. Love’s post-hearing argument:

Other cases reach similar conclusions when the Solicitor appeals to the emotions of the jurors or otherwise asks the jurors to decide the case on something other than the elements of the crime. *See, e.g. Fortune v. State*, 428 S.C. 545, 837 S.E.2d 37 (2019) (prosecutor engaged in prosecutorial misconduct by stating, during closing argument, that it was his job to “present the truth,” that he had a statutory duty to screen cases and would have dismissed the case if he had determined defendant was not guilty, and that job of defense attorneys was to manipulate the truth, shroud the truth, and confuse jurors); *Tappeiner v. State*, 416 S.C. 239, 785 S.E.2d 471 (2016) (solicitor's query to jury during closing argument, asking if jurors would want defendant babysitting their children or relatives, was improper appeal to jurors' emotions); *Vasquez v. State*, 388 S.C. 447, 698 S.E.2d 561 (2010) (solicitor's references to domestic terrorism and terror attacks of 9/11 in case involving Muslim defendant but not terrorism rendered resulting

death sentence in violation of defendant's due process rights); *Gilchrist v. State*, 350 S.C. 221, 565 S.E.2d 281 (2002) (prejudice flowed from counsel's erroneous failure to object to opening statement); *Simmons v. State*, 331 S.C. 333, 503 S.E.2d 164 (1998) (ineffectiveness in failing to object to solicitor's closing argument, which improperly injected parole considerations into jury's sentencing decision and equated finding of guilty with recommendation of mercy with much lighter sentence or acquittal).

Here, 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 the verdict on proof that Mr. Love committed the crime. The testimony presented during the first PCR hearing demonstrated that the State did not present overwhelming evidence of Mr. Love's guilt. Mr. Love, accordingly, was prejudiced by trial counsel's failure to object to the Solicitor's closing argument. There is a reasonable probability that, but for trial counsel's errors, the jurors verdict would have been different.

A. 846-48, 905-07, 925-27.

This Court, accordingly, should grant the writ and consider the issue.

### *Question II*

**Did the PCR court err by finding the Solicitor's closing argument did not violate Korey Love's due process right to a fair trial?**

As pointed out above, 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 the verdict on proof that Mr. Love committed the crime. This Court has held:

A solicitor's closing argument must be carefully tailored not to appeal to the personal biases of the jury. The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom.

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) (citing *Von Dohlen v. State*, 360

S.C. 598, 602 S.E.2d 738 (2004) (internal citations omitted)). In *Reese*, Willie Earl Reese was on trial for the murder of his wife Teresa Reese. During the closing argument, the Solicitor argued, “In this system of justice that we have in this type of case, . . . . Who speaks for Teresa Reese? And I submit to you that that question can be answered and will be answered today.” 370 S.C. at 37, 633 S.E.2d at 901. Mr. Reese moved for a mistrial, contending the argument “exceeded the bounds of permissible argument, personalized the issue to the jury, and injected inflammation and passion into the trial.” *Id.* This Court concluded, “The solicitor's argument indisputably asked jurors to abandon their impartiality and view the evidence from Teresa’s viewpoint.” *Id.*, 370 S.C. at 38, 633 S.E.2d at 902.

In *Brown v. State*, the Solicitor argued for the jurors to “speak up for” the child victim in a first-degree criminal sexual conduct with a minor case. 383 S.C. 506, 512, 680 S.E.2d 909, 912 (2009). Finding this argument to be an improper “Golden Rule” argument, this Court concluded, “The solicitor’s remarks imploring the jurors to ‘speak for’ the victim undeniably asked the jurors to set aside their impartiality and, instead, consider the evidence from the subjective position of the child victim.” *Id.*, 383 S.C. at 516-17, 680 S.E.2d at 915. This Court additionally concluded, “[A]lthough we do not believe trial counsel was disingenuous in articulating a trial strategy to explain his failure to object to these comments, we find this ‘strategy’ cannot be construed as a valid one *given the evident impropriety of the solicitor's remarks.*” *Id.* (emphasis added).

As discussed above, this Court has a long history of correcting improper arguments by solicitors. *See, e.g. Fortune, Tappeiner, Gilchrist, Simmons.* In all of these cases, prosecutors asked jurors to decide the cases on emotion or otherwise abandon their

impartiality and deiced the case on something other than the burden of proof. Her, 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 the verdict on proof that Mr. Love committed the crime. This Court, accordingly, should grant the writ and consider the issue.

### *Question III*

**Should this Court require post-conviction relief judges to draft the final orders in PCR cases in order to ensure the findings of fact and conclusions of law, required by S.C. Code Ann. § 17-27-80, are those of the court, rather than an advocate, and to preserve the separation of powers between the judicial branch and executive branch as required by S.C. Const. Art. I, § 8?**

“S.C. Code Ann. §17-27-80 (1976), requires the PCR court to ‘make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented.’” *McCray v. State*, 305 S.C. 329, 330, 408 S.E.2d 241, 241 (1991). *See also Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992). The PCR court did not do that, but rather delegated the responsibility of drafting the order to the Attorney General’s Office. Compare Order of Dismissal (A. 886-99) with State’s proposed order (A. 910-23). The reasoning in the proposed order is entirely that of an advocate and not an independent judicial officer, which violates the separation of powers. S.C. Const. Art. I, §8. In capital cases, this Court “strongly encourage[s] PCR judges to draft their own findings of fact and conclusions of law.” *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004). The admonition in *Hall* is consistent with the lower court’s responsibility to “safeguard the rights of litigants.” *State v. Langford*, 400 S.C. 421, 429, 735 S.E.2d 471, 475 (2012).

This Court recently expressed its ongoing frustration with the validity of final orders in PCR cases during the oral argument in *Kevin S. Epting v. State*, Appellate Case

No. 2017-000696, on November 21, 2019, at 11:17 – 13:05.<sup>3</sup> One Justice referred to the Attorney General’s Office drafting the final PCR order as “the classic case of the fox guarding the henhouse,” observed PCR applicants have the right to have their issues litigated, and called on the criminal defense bar “to fix this problem.” Another Justice stated the entire Court shares these concerns.

In *Fishburne v. State*, this Court recognized the significant issues involved in drafting PCR orders:

[B]ecause the United States Constitution’s Sixth Amendment guarantee to a defendant’s right to effective assistance of counsel is engrained in PCR cases, we cannot continue to permit a party’s procedural shortcoming—such as the failure to file a Rule 59(e) motion—to prevent this Court from remanding claims of ineffective assistance of counsel when the PCR court’s order does not comply with section 17-27-80.

427 S.C. 505, 516, 832 S.E.2d 584, 589 (2019). *Fishburne* set a lofty goal for “[t]he preparation and finalization of a PCR order [to be] a collaborative effort.” 427 S.C. at 516, 832 S.E.2d at 589 (2019). The final order in this case was not a “collaborative effort.”

Here, the final order is an advocacy position drafted by “the fox guarding the henhouse,” rather than true judicial findings of fact and conclusions of law. Korey Love’s PCR case illustrates exactly why a PCR court should not delegate the judicial function of drafting final PCR orders to an advocate. The time has arrived for this Court to require judges to draft the final orders in PCR cases. This Court, accordingly, should grant the writ and consider the issue.

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<sup>3</sup> <http://media.sccourts.org/videos/2017-000696.mp4>. *Epting* involved the Attorney General’s Office drafting the final order, the PCR judge signing the order that failed to address all the issues, and the applicant’s attorney not filing a Rule 59(e), SCRCF motion. On December 4, 2019, this Court dismissed *certiorari* as improvidently granted.

## CONCLUSION

For the foregoing reasons, this Court should grant the writ and consider the questions presented.

Respectfully submitted,

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