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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Common Pleas

APPEAL FROM GREENVILLE COUNTY
The Honorable Daniel D. Hall, Circuit Court Judge

KOREY LAMAR LOVE..... PETITIONER

V.

STATE OF SOUTH CAROLINA. ..... RESPONDENT.

Appellate Case No. 2024-000462

RETURN TO PETITION FOR WRIT OF CERTIORARI

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I.

There is no merit to Petitioner's allegation that Judge Hall erred in not allowing further amendment. Judge Hall addressed the issue as it was raised which was consistent across the litigation including Petitioner's briefing to this Court in the prior PCR appeal. At any rate, Judge Hall considered the argument as reflecting disagreement on definitions, not substance, and addressed the critical point of the argument. Petitioner has had ample opportunity to present claims and argue his case. No further relief is warranted. 8

II.

There is no merit to Petitioner's allegation that Judge Hall erred in not finding trial counsel ineffective based on a failure to object to the State's closing argument when the record of the argument supported trial counsel's opinion that the argument was not of such character to warrant objection. 10

III.

Petitioner failed to timely object to the proposed order process and the issue is not preserved for appeal. Even so, there is no merit to argument as the process was not improper. 11

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PETITIONER'S 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?

(Pet. 1).

STATEMENT OF THE CASE

Petitioner, Korey Lamar Love, 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. He returns to this Court seeking review of the denial of post-conviction relief after remand proceedings that allowed him to address an additional claim.[1]

Direct Appeal Summary for Facts of the Crime/ Investigation Leading to Petitioner

This Court previously summarized the basic facts of the crime and investigation leading to Petitioner as follows:

> On January 27, 2007, at approximately 1:30 a.m., Isaac Bass (Victim) completed his shift at the Greenville Wendy's on Pleasantburg Drive and exited the restaurant through the self-locking back door. Victim was immediately confronted by an armed

[1] The prior PCR appeal proceedings are in Appellate Case No. 2016-002233.

> assailant, who attempted to rob Victim. Victim called for help, and a struggle ensued. Victim broke free from the assailant and attempted to run away; however, the assailant shot Victim in the neck. The assailant and a cohort fled the scene. Victim got to his feet, walked around the side of the Wendy's, and banged on the drive-thru window. Because he was shot in the neck, Victim was unable to call for help. Victim made his way towards the street and flagged down a passing vehicle. The driver saw Victim on the side of the road and observed two men sprinting away from the Wendy's. The driver stopped to provide Victim assistance; however, Victim did not survive.
>
> Because there was no physical evidence linking the case to any suspect, the case went unsolved for a few years. In 2010, Detective Collis Flavell was assigned to the case. Detective Flavell informed Victim's parents he was working the case, and the community soon became involved in raising reward money and asking people to come forward with information. As a result of these efforts, Detective Flavell received a tip suggesting law enforcement investigate certain members of the Love family.
>
> Following an investigation, Korey Love was arrested and indicted for murder, attempted armed robbery, possession of a weapon during the commission of a violent crime, and possession of a pistol by a person under the age of eighteen. At trial, the State's case was built upon the testimony of several people who explained Love's involvement in Victim's murder. …

Love v. State, 428 S.C. 231, 234–35, 834 S.E.2d 196, 197–98 (2019).

Trial and Direct Appeal

A Greenville County grand jury indicted Petitioner at a January 2011 term for possession of a pistol by a person under 18 years of age (2010-GS-23-4508), attempted armed robbery (2010-GS-23-4509, count 1), possession of a weapon during commission of a violent crime (2010-GS-23-4509, count 2), and murder (2010-GS-23-4510). (App. 506-511). Fletcher N. Smith, Jr., Esq., represented Petitioner on the charges.

A jury trial was held November 5-8, 2012. The Honorable Edward W. Miller presided. The jury found Petitioner guilty as charged. (App. 498-499). 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. (App. 504). Petitioner 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*[2] 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.

Post Conviction Relief Action: Initial Hearing and Order

Petitioner, through counsel,[3] filed his initial postconviction relief (PCR) application on April 20, 2015. (App. 512-517). The State made its return on July 17, 2015, filed July 21, 2015. (App. 518-522). An evidentiary hearing was scheduled for February 17, 2016. (App. 524). The Honorable Daniel D. Hall presided. At the beginning of the hearing, Petitioner's PCR counsel handed a proposed amendment to the State's attorney and moved to amend. (App. 538-539). Petitioner'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 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…

(App. 638).[4]

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[2] *Anders v. California*, 386 U.S. 738 (1967).

[3] Present counsel for Petitioner, Mr. Grose, represented Petitioner during the circuit court PCR action; during the prior PCR appeal; and during the remand proceedings.

[4] The proposed amendment was not filed with the Greenville County Clerk of Court and is not a part of the public record.

Judge Hall did not allow the amendment at the hearing, finding that Petitioner failed to give sufficient notice of the claim for the State to respond. (App. 539).

In the order of dismissal filed on April 4, 2016, Judge Hall denied relief on all claims, and memorialized that he had denied the motion to amend because "the late amendment did not provide adequate notice to opposing counsel." (App. 646). Judge Hall also noted that he had denied Petitioner's renewed request to amend at the conclusion of the hearing. (App. 646 n.2). Petitioner filed a motion to alter or amend on April 12, 2016, and requested a ruling on his ineffective assistance of counsel allegation regarding the solicitor's closing argument as referenced in the rejected amendment. Petitioner 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).

(App. 669-670). The State filed a return to the motion on April 26, 2016, noting the amendment attempts had been denied. (App. 674). By order filed October 6, 2016, Judge Hall denied the motion. (App. 676). Petitioner appealed. (App. 680).

First PCR Appeal

In his submissions to this Court in the prior appeal, Petitioner presented multiple questions for consideration including the following:

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?"

(App. 707).

On June 27, 2018, this Court granted certiorari review only on the referenced question presented. In his subsequent briefing, Petitioner 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. (App. 784-789). On October 2, 2019, this Court reversed and remanded. (App. 823-834).[5]

In deciding the matter, the majority disagreed with denial of the motion to amend and found that the State would have suffered "[l]ittle to no prejudice" had it been allowed. (App. 831). 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." (App. 831-832) (emphasis in original). Two justices dissented, but agreed with the majority that "it was error not to permit the amendment challenging the State's closing argument as a Golden Rule violation." (App. 833-834). The dissent simply would have affirmed in result and found that "there was no Golden Rule argument" and "counsel was not deficient in failing to object." (App. 833-834).

PCR Hearing Following Remand

At the remand hearing held March 10, 2023, trial counsel, Fletcher Smith, Esq., testified that he did not think the cited argument "rose to the level of a golden rule violation." (App. 842). On redirect, Mr. Smith, upon questioning by Petitioner'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." (App. 843). He agreed with Petitioner's counsel that meant the jury would "determine whether the burden of proof had been met" as part of its role. (App. 843).

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[5] Reported at 428 S.C. 231, 834 S.E.2d 196 (2019)

As to the issue itself, Petitioner expressed a concern at the close of the hearing 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. (App. 844). Judge Hall allowed the post-hearing briefing from both parties. (App. 844). Applicant provided a letter on July 17, 2023, in lieu of a formal brief. (App. 846-848). The State submitted its brief on September 29, 2023. (App. 850-861). Judge Hall issued an order of dismissal on November 13, 2023, filed November 29, 2023. (App. 886-899). Petitioner filed a motion to alter or amend pm December 21, 2023, (App. 902-907). Judge Hall denied the motion by order filed February 23, 2024. (App. 928-932). Petitioner appealed and filed his petition for review on July 22, 2024. This return follows.

STANDARD OF REVIEW

The "standard of review in PCR cases depends on the specific issue before" the appellate court. *Smalls v. State*, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839–40 (2018). Appellate courts will "defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." *Id.* Further, an appellate court will "afford great deference to a PCR court's credibility findings. *Frierson v. State*, 423 S.C. 257, 262, 815 S.E.2d 433 (2018). However, appellate courts "review questions of law de novo, with no deference to trial courts." *Smalls,* 422 S.C. at 180-181, 810 S.E.2d at 839.

ARGUMENT

Respondent submits that, as an initial point, Judge Hall correctly found the issue before him was a "Golden Rule" argument which was consistent with the way the issue had been referenced in prior proceedings. He then considered counsel's reason not to object to the cited portion of the State's argument. The record supports Judge Hall's decision finding counsel was not deficient in his representation. Petitioner's argument to the contrary, and his argument

challenging the proposed order process, which was not timely objected to, are insufficient to support the grant of further review. The petition should be denied.

I.

There is no merit to Petitioner's allegation that Judge Hall erred in not allowing further amendment. Judge Hall addressed the issue as it was raised which was consistent across the litigation including Petitioner's briefing to this Court in the prior PCR appeal. At any rate, Judge Hall considered the argument as reflecting disagreement on definitions, not substance, and addressed the critical point of the argument. Petitioner has had ample opportunity to present claims and argue his case. No further relief is warranted.

In his July 25, 2023, letter, Petitioner argued that his "claim is broader" than a simple complaint that 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." (App. 846). Petitioner then cited to two cases in support of his assertion that the solicitor made an improper "Golden Rule" argument, *State v. Reese*,[6] and *Brown v. State*.[7] (App. 847). He continued his argument noting "[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." (App. 847). Petitioner 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." (App. 848).

Judge Hall specifically considered the way the issue has been handled not only in post-hearing briefing, but also during the prior appeal. (App. 891-892). Judge Hall reasoned that, in light of this ample record, "it is difficult to see that any argument was offered regarding this

[6] 370 S.C. 31, 633 S.E.2d 898 (2006).

[7] 383 S.C. 506, 680 S.E.2d 909 (2009).

ineffective assistance of counsel claim other than counsel failed to object to the State's argument as an improper Golden Rule argument." (App. 891). Notably, it was the "Golden Rule" argument that Petitioner invited this Court to rule upon in the prior PCR appeal. (*See* App. 833-834). Further, Judge Hall reasonably concluded that the tension appeared more in definition than substance, and used this Court precedent to guide his review:

> 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). (App. 892). (*See also* App. 892, finding error is in "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)."). Judge Hall rightly focused on the fact that "the concern remains whether the perspective is skewed by an argument such that emotion displaces impartiality." (App. 892, citing *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)). Simply, Judge Hall did not consider the arguments separate or inconsistent, but part and parcel of the same. (App. 892-893). Notably, in denying Petitioner's Rule 59 motion, Judge Hall found that:

> …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.

(App. 931).

Therefore, even if Petitioner could show error, and Respondent maintains he cannot, Petitioner can show no prejudice to warrant any additional review.

II.

There is no merit to Petitioner's allegation that Judge Hall erred in not finding trial counsel ineffective based on a failure to object to the State's closing argument when the record of the argument supported trial counsel's opinion that the argument was not of such character to warrant objection.

The standard test for ineffective assistance of counsel claim was not at issue: "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)." (App. 893). Petitioner failed to show deficiency in representation. Judge Hall credited trial counsel clear testimony "that he understood what constituted a Golden Rule argument; he simply did not consider the argument at issue to be one." (App. 893; *see also* App. 842). Judge Hall also noted first that Petitioner did not place the closing argument excerpt that he relied upon in context. (App. 893). In context, the comment was linked to reasonable doubt tying the comments directly back to the evidence before the jury, (App. 893), and also noted that "the transcript shows the solicitor's reference to reasonable doubt was tied to her expansive argument on credibility. (App. 894). Judge Hall resolved that "[t]o 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." (App. 894). In Judge Hall's view (and apparently in defense counsel's view), "the solicitor never divorced the request for justice from the evidence and the State's burden of proof." (App. 894-895). An appeal to administer justice did not steer the jurors *away* from their rightful task, but *toward* "the very responsibility that the jurors held." (App.

895, citing *State v. Rice*, 375 S.C. 302, 336, 652 S.E.2d 409, 426 (Ct. App. 2007) (no error where "the prosecutor merely asked the jury to do the duty that was already required of them"). He further observed that the dissenting justices from the first appeal, who would have addressed the issue instead of remanding, similarly found not deficiency citing *Rice.* (App. 895).

Petitioner, though, continues to rely on *Reese* and *Brown* though these cases are distinguishable most notably for the specific request to "speak" for the victim. *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* App. 473-474). The evidence remained the focus in tandem with the jurors' duty to carefully consider and weigh that evidence. Like *Rice*, the argument was not improper. Thus, given the leniency afforded counsel,[8] the reasonable interpretation of the comments when viewed in context, and the controlling precedent, Judge Hall did not err in finding Petitioner failed to carry his burden of proving deficient performance. Thus, the judge properly denied relief.[9]

III.

Petitioner failed to timely object to the proposed order process and the issue is not preserved for appeal. Even so, there is no merit to argument as the process was not improper.

Petitioner included an objection to the proposed order process in his Rule 59 motion. (App. 903-905). However, Judge Hall found that his complaint was only lodged well after the court had announced his decision, requested a proposed order, and even after Petitioner's counsel had

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[8] The presumption that counsel has made his trial decisions in the exercise of reasonable judgment is well established. *See Strickland,* at 689.

[9] Judge Hall also made a ruling in the alternative that if the comments should be found to be objectionable, Petitioner also failed to carry his burden of showing *Strickland* prejudice. (App. 897-899). The alternative ruling is not challenged in the petition.

reviewed the order under the process advised in *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."). (App. 929). Further, the process of presenting arguments to the PCR court had been open and fair and all arguments had been fully developed, specifically in post-hearing submissions. (App. 929-930). As Judge Hall noted, Petitioner's counsel was also notified of Respondent's submission of the proposed order by email of November 6, 2023, and again provided a copy of the proposed order. (App. 929). Again, "the process was open and fair and followed the guidance set by our Supreme Court in *Fishburne*." (App. 929). Even so, should the Court entertain the argument on the merits, Petitioner's argument would fail.

First, Petitioner is incorrect to suggest that S.C. Code Ann. § 17-27-80 limits a PCR judge's ability to request a proposed order, a process that this Court has expressed recognized:

> 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), SCRCP (providing requirements for serving proposed orders).

Second, there is no question that a hearing was held and the positions of the parties specifically set out in detail before the PCR court. (*See* App. 930, Order Denying Applicant's Rule 59 Motion, "It is simply impossible to find that Applicant was denied the opportunity to have his position presented and heard."). Further, though Petitioner asserts that the order was not the result of "collaborative effort," (Pet. 12), he does not deny that he was provided a copy of the order prior to signing in accordance with *Fishburne*. (*See* App. 929, Order Denying Applicant's Rule 59 Motion, "The process was open and fair and followed the guidance set by our Supreme Court in

Fishburne."). Notably, Petitioner basically complains about form, not substance. He points to no incorrect fact or law in the order; or alleges that he was not allowed to respond or make his own argument; and this is understandably so since that did not happen here.

Third, Petitioner is wrong to suggest a separation of powers issue. *See* S.C. Const. Art. I, § 8. The proposed order, whether the process should be considered, nonetheless becomes the Court's order when accepted by the Court. *See Jefferson v. Upton*, 560 U.S. 284, 293-94 (2010) ("verbatim adoption of findings of fact prepared by prevailing parties" should be treated as findings of the court though recognizing it had "also criticized that practice.") (citing *Anderson v. Bessemer City*, 470 U.S. 564, 572 (1985)). *See also Burr v. Jackson*, 19 F.4th 395, 406-407 (4th 2021) (applying deference when review of adopted order shows transparent process and state court adjudication though noting proposed order practice has been ' " strongly criticized' "); *Bryant v. Stirling*, No. 9:16-cv-1423-DCN-MHC, 2022 WL 10686835 *12 n. 6 (D.S.C. April 19, 2022) (though complete adoption criticized, still, "the disposition of a petitioner's constitutional claims in such a manner is unquestionably and 'adjudication' by the state court."). That the PCR court agreed with the arguments the State presented is no sign that the PCR court abdicated its judicial function.

But again, the PCR court did not consider the objection to the proposed order process to be timely. Thus, the issue should be considered unavailable for review here. *State v. Mitchell*, 330 S.C. 189, 195, 498 S.E.2d 642, 645 (1998) (acquiescence to a ruling results in inability to complain on appeal). Even had it been, though, the PCR court provided full and fair opportunity for each party to be heard before making its decision. Further, the order includes the findings of facts that this Court finds relevant, and the conclusions of law that this Court determined. Further still, the ruling was made after a hearing and post-hearing submissions. Without doubt, the issue was well in focus for the PCR court. Petitioner has failed to show any error, much less error warranted relief. *See generally Hall*, 360 S.C. at 365, 601 S.E.2d at 341 (2004) (affirming even after criticizing the

proposed order practice where "the evidence sufficiently indicates that the PCR judge spent an adequate amount of time reviewing the order before adopting it").

CONCLUSION

Based on the foregoing, the State asks this Court to deny the petition.

Respectfully submitted,

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