

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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SEP 26 2018

S.C. SUPREME COURT

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

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Appellate Case No. 2016-002233

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Korey Lamar Love,..... Petitioner,

v.

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

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**Brief of Petitioner**

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## QUESTION PRESENTED

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?"

## 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 Mr. 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 Mr. Love. The jurors convicted on all counts. Judge Miller sentenced Mr. Love to terms of imprisonment of fifty years for murder, twenty years for attempted armed robbery, and five years for possession of a pistol by someone under eighteen years of age. The sentences are concurrent. A. 498-504.

Mr. Love appealed his convictions and sentences to the Court of Appeals. Benjamin J. Tripp of the Appellate Defense Division represented Mr. 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 Mr. Love's appeal. *State v. Love*, Unpublished Memorandum Opinion 2014-UP-177 (Filed April 23, 2014).

On April 8, 2015, Mr. Love filed his application for post-conviction relief (hereinafter “PCR”). The Honorable Daniel D. Hall convened an evidentiary hearing on February 17, 2016. Charles Grose represented Mr. Love. Karen Ratigan represented the State. Mr. 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 Mr. Love’s application for post-conviction relief. A. 645-56. On April 8, 2016, Mr. Love served a Rule 59(e), SCRCR 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.

Mr. Love timely served a notice of intent to appeal. On May 1, 2017, Mr. Love filed his petition for writ of *certiorari* raising the following issues:

- 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 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 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?

On September 15, 2017, the State filed its response to Mr. Love's petition for a writ of *certiorari*. On October 19, 2017, Mr. Love filed his reply. By written order dated June 27, 2018, this Court granted the writ as to Question VIII and denied the writ as the other questions. This brief 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 Mr. 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 Mr. 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, Mr. Love supposedly said he was going to rob someone. Ransom claimed Mr. 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 Mr. Love shot Mr. Bass while he was trying to get back inside Wendy’s. Ransom claimed both he and Mr. 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, Mr. 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.

During closing argument, the solicitor argued:

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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.

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....

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

### STANDARD OF REVIEW

Under the first prong of *Strickland v. Washington*, the 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); *see also Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). “Decisions made in ignorance of relevant, available information cannot be characterized as strategic.” *Weik v. State*, 409 S.C. 214, 236, 761 S.E.2d 757, 768 (2014).

The second prong of *Strickland*, requires a defendant establish that 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) (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)). “In addition, the PCR court should consider the strength of the State’s case in light of all the evidence presented to the jury.” *Id.* (citing *Jones v. State*, 332 S.C. 329, 333, 504 S.E.2d 822, 824 (1998) (“In deciding whether Jones was prejudiced, we must bear in mind the strength of the government’s case ...,” and “we must consider the totality of the evidence before the jury.”)). “In general, the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice.” *Id.* “Ordinarily, the existence of ‘overwhelming evidence’ does not automatically preclude a finding of prejudice.” *Id.* 422 S.C. at 189, 810 S.E.2d at 844. “[F]or the evidence to be ‘overwhelming’ such that it categorically precludes a finding of prejudice . . . the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of ‘a reasonable probability ... the factfinder would have had a reasonable doubt’ cannot possibly be met.” *Id.* 422 S.C. at 191, 810 S.E.2d at 845.

On appeal, this Court’s “standard of review in PCR cases depends on the specific issue before” the Court. *Mangal v. State*, 421 S.C. 85, 91-92, 805 S.E.2d 568, 571 (2017). This Court will “defer to a PCR court’s findings of fact and will uphold them if there is any evidence in the record to support them.” *Id.* This Court will “not defer to a PCR court’s rulings on questions of law” which “are reviewed de novo.” *Id.* “On review of a PCR court’s resolution of procedural questions arising under the Post-Conviction Procedure Act or the South Carolina Rules of Civil Procedure, [this Court applies] an abuse of discretion standard.” *Id.*

## ARGUMENT

**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?"**

As seen above, during closing argument, 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....

A. 473, lines 19-22. Trial counsel did not object. As will be discussed below, this argument was improper and prejudicial.

Prior to the commencement of the evidentiary hearing, Mr. Love served an amended PCR application, which included an allegation of ineffective assistance of counsel for failing to object to this portion of the State's closing argument. A. 636-41. At the beginning of the evidentiary hearing, counsel for Mr. Love announced, "I have an amended [PCR] application that I would like to hand up. It adds some matters that were on the record but not included in the original application." Counsel proffered the proposed amended application and "move[d] to be allowed to amend under the liberal [] rules of civil procedure that allow amendments, even amendments during and after trial in a civil case." The State objected to the amendment, and the PCR judge sustained the objection. Counsel indicted Mr. Love "would proffer testimony or proffer parts of the record that relate to the amendment" to preserve the issue for appeal. A. 538-39. Mr. Love questioned trial counsel about this portion of the solicitor's closing argument, and trial counsel acknowledged he did not object. A. 570. At the close of his case and again at the close of all evidence, Mr. Love moved to amend his PCR application to conform to

evidence, but the PCR judge denied his motion. A. 595-96; 612. Mr. Love's post-trial brief and Rule 59(e), SCRCP motion renewed the request to amend the application. A. 632-34, 668-70.

As seen above, this Court reviews procedural questions under an abuse of discretion standard. *Mangal*, 421 S.C. at 91-92, 805 S.E.2d at 571. In *Mangal*, this Court reminded the bench and bar that our state's procedural rules allow for liberal amendments to pleadings when no prejudice results to the opposing party. *Id.* 421 S.C. 85, 95-96, 805 S.E.2d at 573 (citing *Simpson v. Moore*, 367 S.C. 587, 627 S.E.2d 701 (2006), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018); *Harvey v. Strickland*, 350 S.C. 303, 566 S.E.2d 529 (2002); and Rule 15, SCRCP).

This Court recently reminded, "the Sixth Amendment guarantee of effective assistance of counsel is a 'bedrock principle in our justice system.'" *Mangal*, 421 S.C. at 99, 805 S.E.2d at 575 (citing *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Simmons v. State*, 416 S.C. 584, 788 S.E.2d 220 (2016)). In South Carolina, the Uniform Post-Conviction Procedure Act, S.C. Code Ann. § 17-27-10, *et. seq.*, is the first opportunity for a person convicted of a crime to investigate, develop, and present allegations of ineffective assistance of trial counsel. "[T]he interests of justice require PCR courts to be flexible with procedural requirements *before* PCR applicants suffer procedural default on substantial claims. Such flexibility is consistent with the purpose and spirit of our Rules of Civil Procedure." *Id.* (emphasis supplied by court). This Court, accordingly, "encourage[s] trial courts in PCR cases to use the discretion [it] grant[s] them on procedural matters to find reasonable ways—within the flexibility of our Rules—to reach

the merits of substantial issues.” *Id.* 421 S.C. at 100, 805 S.E.2d at 576; *see also* Rule 15, SCRCP. S.C. Code Ann. 17-27-90 expressly authorizes consideration of a “supplemental or amended application.” Section 17-27-70(a) further provides:

At any time prior to entry of judgment the court may, when appropriate, issue orders for amendment of the application or any pleading or motion, for pleading over, for filing further pleadings or motions, or for extending the time of the filing of any pleading. In considering the application, the court shall take account of substance, regardless of defects of form.

Here, the State was not prejudiced by the proposed amendment. *Mangal, supra*; *see also Foggie v. CSX Transp., Inc.*, 313 S.C. 98, 22, 431 S.E.2d 587, 590 (1993) (“the party opposing the motion has the burden of establishing prejudice”). The Solicitor’s improper closing argument is contained in the trial record. Mr. Love offered an amended PCR application at the beginning of the evidentiary hearing. Mr. Love questioned trial counsel about the prosecutor’s argument, and the State had an opportunity to cross-examine him. One of the prosecutors testified at the evidentiary hearing. The court below, therefore, abused its discretion by not allowing Mr. Love to amend his PCR application. *Mangal, supra*; *see also Soil & Material Engineers, Inc. v. Folly Assocs.*, 293 S.C. 498, 361 S.E.2d 779 (Ct. App. 1987) (denial of subcontractor’s motion to amend pleading to conform to the proof was an abuse of discretion).

Turning to the merits of the claim, the first inquiry under *Strickland* is whether trial counsel was deficient for not objecting to the solicitor’s argument, *i.e.* whether the closing argument was improper. As this Court has observed:

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).

Trial counsel, therefore, was deficient for not objecting to the improper “Golden Rule” argument imploring to jurors to abandon their impartiality and become instruments of justice for Isaac Bass.

The second inquiry under *Strickland* is whether Mr. Love suffered prejudice from the Solicitor’s improper “Golden Rule” argument. Comparing *Reese* and *Brown* is instructive. In *Reese*, this Court held the improper argument to be prejudicial because “[w]hether Reese had the required malice aforethought for murder was a question for the jury,” meaning “the evidence of Reese’s guilt was not overwhelming, and the solicitor’s improper Golden Rule argument deprived Reese of a fair trial.” 370 S.C. at 39, 633 S.E.2d at 902. In *Brown*, this Court concluded Brown did not establish prejudice resulting from his trial counsel’s deficient performance because “there was overwhelming evidence of Brown’s guilt” including “four eyewitnesses who testified to seeing Brown commit the sexual misconduct against the child,” “two audio-taped statements given by Brown in which he admitted to ‘accidental’ or ‘possible’ penetration of the child,” and an inculpatory statement by Brown to his wife. 383 S.C. at 518, 680 S.E.2d at 916.

As this Court recently reminded in *Smalls*, “for the evidence to be ‘overwhelming’ such that it categorically precludes a finding of prejudice . . . the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of ‘a reasonable probability ... the factfinder would have had a reasonable doubt’ cannot possibly be met.” *Id.* 422 S.C. at 191, 810 S.E.2d at 845. No

such evidence existed in this case. The prosecution relied on witnesses with motives to avoid their own culpability in Isaac Bass' murder. Korey Love had an alibi, corroborated by other witnesses.

This Court has held failure to object to an improper closing argument to ineffective assistance of counsel requiring a new trial when prejudice is established. *See e.g., Vasquez v. State*, 388 S.C. 447, 698 S.E.2d 561 (2010); *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2004) (trial counsel formed deficiently by failing to object to solicitor's "golden rule argument" at penalty phase); *see also 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).

### CONCLUSION

Because Korey Love received prejudicial ineffective assistance of counsel when his trial counsel failed to object to the prosecution's closing argument imploring to jurors to abandon their impartiality and become instruments of justice for Isaac Bass, this Court should grant Mr. Love post-conviction relief and remand to the Court of General Sessions for a new trial. In the alternative, this Court should remand to the Court of Common Pleas for the consideration of this issue. *See, e.g., Simmons, supra* (remanding application for post-conviction relief for additional consideration by trial).

(signature on next page)

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September 17, 2018  
Greenwood, South Carolina

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

S.C. SUPREME COURT

Appellate Case No. 2016-002233

Korey Lamar Love,.....Petitioner,

v.

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

Certificate of Service

I certify that I have served a copy of the Brief of Petitioner on the State of South Carolina by placing a copy in the US Mail, postage prepaid, on the date reflected below, addressed to

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September 24, 2018

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SEP 26 2018

S.C. SUPREME COURT

The Honorable Daniel E. Shearouse  
Clerk, Supreme Court of South Carolina  
P.O. Box 11330  
Columbia, SC 29211

Re: *Korey Love v. State of South Carolina*  
Appellate Case No. 2016-002233

Dear Mr. Shearouse:

Enclosed please find fifteen copies of Mr. Love's Brief of Petitioner, one of which is unbound, along with a certificate of service. Also enclosed please find thirteen copied of the Appendix.

Thank you for your attention to this matter. If you have any questions or require additional information, please do not hesitate to contact me.

With kindest regards, I am

Yours very truly,

*E. Charles Grose*

E. Charles Grose, Jr.

By: *Laura Wingard*  
*paralegal*

cc: DeShawn H. Mitchell, Esquire  
Mr. Korey Love