

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
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.

Reply Brief of Petitioner

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IN REPLY

I. Motion to Amend.

The State's brief, at pp. 7-8, discussing the standard of review, completely overlooks this Court's holding in *Mangal v. State*, regarding procedural matters. *Mangal* reminded, "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." 421 S.C. 85, 91-92, 805 S.E.2d 568, 571 (2017). Although Mr. Love did not have benefit of *Mangal* at his PCR hearing, he followed the procedures subsequently outlined by this Court in *Mangal*. "[O]ur 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; *see also Winkler v. State*, 418 S.C. 643, 795 S.E.2d 686 (2016) (the Circuit Court abused its discretion in denying defendant's second motion for additional time).

The State makes two arguments regarding prejudice. First, the State objected because the amendment was made the day of the hearing. PCR applications are commonly amended on the day of the hearing. The amendment pertains to error that is readily apparent in the trial record, meaning little or no additional investigation was required. If the State really needed more time to address this amendment, then a continuance would have been appropriate. Mr. Love filed his PCR application on April 20, 2015, and the court below convened the evidentiary hearing on February 17, 2016, only ten months later. This Court can take judicial notice that many PCR cases languish in the trial courts for much longer.

Second, the State argues, “[T]he allegation is based on the conduct of the solicitor, Bryna Seay, who was not available to the parties as a witness [at] the evidentiary hearing due to medical issues.” State’s Brief, at p. 10; *see also* A. at 660, lines 5-7. Mr. Love does not dispute that Ms. Seay was unavailable for a legitimate reason.¹ Ms. Seay’s unavailability, however, would have been a reason to continue the evidentiary hearing rather than denying Mr. Love his right to amend his PCR application, particularly in light of the fact that this case was not languishing on the docket. The “adjudicative power of the court carries with it the inherent power to control the order of its business to safeguard the rights of litigants.” *State v. Langford*, 400 S.C. 421, 429, 735 S.E.2d 471, 475 (2012); *see also Winkler, supra*. Under the circumstances of this case, the PCR court abused its discretion by not allowing the amendment. The State did not suffer any prejudice.

II. Improper Closing Argument.

The State’s brief, at p. 12, argues, “[T]he solicitor suggested the jurors could be instruments of justice for the victim by finding the defendant guilty, which is permissible.” This argument completely ignores the fact that the prosecutor suggested to the jurors that they had an obligation under the “oath that you have taken” to find Korey Love guilty of murder and write the final chapter of the victim’s life (A. 473, lines 19-22), which is very much like the argument in *Brown v. State* where 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).

¹ Howard Steinberg was available for the hearing and testified that he and Ms. Seay both were ready to try the case. A. 600, lines 8-11.

The State's brief, at p. 12, relies on *State v. Rice*, 375 S.C. 302, 336, 652 S.E.2d 409, 426 (Ct. App. 2007), *overruled on other grounds by State v. Byers*, 392 S.C. 438, 710 S.E.2d 55 (2011). It is difficult to reconcile *Rice* with *Brown*, so this Court might want to consider the continued validity of *Rice*. In *Rice*, the Court of Appeals "observe[d] the trial court properly clarified that the prosecutor asked the jury to give the victim's wife peace and the victim justice. *Id.* 375 S.C. at 336, 652 S.E.2d at 426. The Court of Appeals distinguished this situation from where a prosecutor argues the jurors "owed" justice to a victim. *Id.* As seen, the prosecutor in Mr. Love's case argued the jurors owed the victim a duty under their oath.

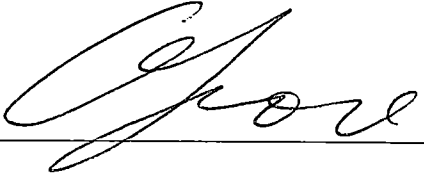
The State's brief, at p. 12-13, also relies on *Smith v. State*, 375 S.C. 507, 523, 654 S.E.2d 523, 532 (2007), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). *Smith* involved a prosecutor "improperly used the pronoun 'I' in his closing argument." 375 S.C. at 523, 654 S.E.2d at 532. Because "these comments were limited and did not recur throughout his argument," the Court did not require a new trial. *Id.* Misuse of the pronoun "I" is a far cry from arguing the jurors' oath requires them to be "instruments of justice" for a crime victim.

As set forth in his opening brief, at pp. 11-12, Mr. Love demonstrated prejudice because the State's case against him was not overwhelming. *See Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). "The solicitor's emotional plea," linked to the jurors' oath, to do justice for the victim "is reasonably likely to have had a substantially stronger impact than would be the case in a trial where there was additional, independent evidence of the defendant's guilt." *Tappeiner v. State*, 416 S.C. 239, 253-54, 785 S.E.2d 471, 478 (2016).

CONCLUSION

For the reasons set forth in Mr. Love's Brief of Petitioner and this reply, 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.

Respectfully Submitted,

By 

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February 14, 2019.

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Korey Lamar Love,..... Petitioner,

v.

State of South Carolina, Respondent.

Certificate of Service

I certify that I have served a copy of the Reply 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

Lindsey McCallister, Esquire
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Columbia, SC 29211-1549



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February 7, 2019

The Honorable Daniel E. Shearouse
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S.C. SUPREME COURT

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

Dear Mr. Shearouse:

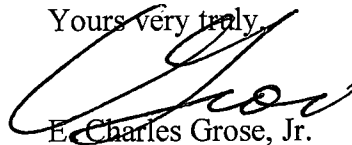
Enclosed please find fifteen copies of Mr. Love's Reply Brief, one of which is not bound, along with a Certificate of Service.

This Court's order dated February 11, 2019 extended the time to file the Reply Brief until February 17, 2019, which was a Sunday. I understand that deadline rolls over to today because Monday, February 18, 2019 was President's Day. Please let me know if my understanding is not correct.

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, Jr.

cc: Mr. Korey Love
Lindsey A. McCallister, Esquire

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TO:

The Honorable Daniel E. Shearouse
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