

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Horry County

Honorable H. Steven DeBerry IV, Circuit Court Judge

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SCOTT RICHARD ROWAN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000449

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PETITION FOR WRIT OF CERTIORARI  
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JESSICA M. SAXON  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR PETITIONER

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S.C. SUPREME COURT

**INDEX**

INDEX ..... i

ISSUE PRESENTED .....1

STATEMENT OF THE CASE.....2

ARGUMENT

The PCR court erred in denying Petitioner relief where trial  
counsel failed to object to the improper and highly prejudicial  
“Golden Rule” argument made by the State in opening statements  
during which the solicitor explicitly and repeatedly requested that  
the jury imagine what it would be like to be the alleged victims. ....6

CONCLUSION.....11

### **ISSUE PRESENTED**

Did the PCR court err in denying Petitioner relief where trial counsel failed to object to the improper and highly prejudicial “Golden Rule” argument made by the State in opening statements during which the solicitor explicitly and repeatedly requested that the jury imagine what it would be like to be the alleged victims?

## STATEMENT OF THE CASE

Petitioner was indicted during the February 2016 term of the Horry County grand jury for one count of second degree criminal sexual conduct with a minor and one count of third degree criminal sexual conduct with a minor. App. 734-737. The State, represented by Mary Ellen Walter and George Martin, called the case to trial on April 9-12, 2018, before the Honorable Larry B. Hyman, Jr., and jury. Petitioner was represented by John M. Hilliard and Sara Brinson. App. 55.

At trial the State alleged that Petitioner sexually abused his stepdaughters, J.H. and A.R. when both girls were under the age of sixteen. A.R., the older of the two sisters, alleged that when she was fourteen years old Petitioner would give her alcohol and marijuana and then fondle her breast. App. 401-405. J.H. alleged that Petitioner began giving her marijuana around the age of nine, and alcohol and pills around the age of eleven. She alleged that after giving her the substances Petitioner would fondle her breast and thighs. J.H. testified that the abuse escalated to hand jobs and oral sex before Petitioner forcibly raped her numerous times starting at the age of fourteen. App. 238-249. Petitioner testified in his own defense and adamantly denied sexually abusing the girls. App. 611-613.

The jury found Petitioner guilty as indicted. App. 713-714. Judge Hyman sentence Petitioner to fifteen years imprisonment on each count, sentences to run consecutively. Petitioner timely appealed his conviction and sentence. His direct appeal was dismissed pursuant to Anders v. California<sup>1</sup> in an unpublished opinion. State v. Rowan, Op. No. 2020-UP-142 (S.C. Ct. App. filed May 20, 2020). Petitioner filed an application for post-conviction relief on October 28, 2020. App. 740-746. The State filed a return on March 4, 2021. App. 747-754.

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<sup>1</sup> 386 U.S. 738 (1967)

PCR Counsel Christopher Geel filed an amended PCR application on November 30, 2022, alleging ineffective assistance of trial counsel for, *inter alia*, failure to object the solicitor's improper "golden rule" argument. App. 755. The comments at issue occurred at the end of the State's opening argument where Solicitor Martin stated,

But I want to ask something from y'all here today. While all of this is going on, your job is going to be watching what takes place here on this witness stand, nothing else. And imagine for a second when you're doing that how difficult and how embarrassing it would be to talk with a member of your family or your closest friends, people who have known you for a very, very long time, they know all of your dark secrets, and to talk with them about your personal, intimate details of your sex life.

Now, take that a step further and imagine that you're here today in this setting, in this courtroom, in that chair, talking to 14 total strangers who you've never met before, who don't know the personal details of your life, and having to talk with them about intimate details of your sex life.

Now, take it one step further where you're in here today in that seat talking to 14 total strangers about how your stepfather inappropriately touched you, kissed you, your first kiss, fondled you and raped you. Sure, there is going to be some nervous laughter, there is going to be some uncomfortable moments for all of us. But I want you to think about that.

And after hearing the facts, hearing the evidence from that stand, after having the judge instruct you on the law, and after hearing from us in our closing arguments on how we think you should interpret that law, justice will be served here this week. And Scott Rowan will be guilty. Thank you.

App. 222-223.

Counsel Hilliard did not object to the State's improper argument. Instead, during his opening statement, Counsel Hilliard told the jury,

And the solicitor, the prosecutor in the case has said, imagine, if you will, the difficulty that the prosecutrix, the witness, the person who's making these allegations, imagine if you will, how that is to come there and testify.

So to that same end, imagine if you will, an innocent man sitting here with his fate in the hands of 12 strangers who will ultimately make a decision. It's going to be your job. So it's a high stakes situation for all involved, there's no question about that.

App. 224-225.

An evidentiary hearing was held on November 30, 2022, before the Honorable H. Steven DeBerry, IV. The State was represented by Chelsey Marto. Petitioner was represented by Counsel Geel. Unfortunately, by the time of the evidentiary hearing Counsel Hilliard had passed away. The State called Counsel Brinson, who sat second chair during Petitioner's trial, and Solicitors Walter and Martin to testify at the hearing. App. 756-757; App. 760, ll. 14-25.

Counsel Brinson testified that she assisted Counsel Hilliard in preparing for trial and argued one motion. She confirmed she sat second chair and was present for the entire trial. App. 761, ll. 10-23. She testified that she felt the solicitor's opening statement was objectionable and she remember talking to Counsel Hilliard about the remarks. According to Counsel Brinson, Counsel Hilliard believed if "they can do it, then we can do it." She stated that he "thought the benefit of being able to do it in his opening statement outweighed the benefit of objecting to it in Mr. Martin's opening statement." App. 764, l. 11-App. 765, l. 7. On cross-examination Counsel Brinson agreed that the argument by the solicitor was objectionable and that it was a Golden Rule argument which was improper. She stated that both she and Counsel Hilliard were surprised by the remarks and that Counsel Hilliard told her after the fact that he did not object so that he could ask the jury to put themselves in the place of the defendant. App. 770, l. 14-App. 773, l. 6.

Solicitor Walter testified that she recalled the Golden Rule argument that was made during the State's opening. She stated that she gave "very different openings" so she would not say the argument was improper. She conceded it was not language that she would have used but stated she did not think it swayed the jury at that point in the trial. App. 788, ll. 2-20. Solicitor Martin conceded that he made a Golden Rule argument during his opening statement and stated

that the comments may have been objectionable but were not improper. He testified that based on his experience since then, “certain things could have been phrased better.” He did not believe that his opening statement impacted the outcome of the trial. App. 797, l. 16-App. 798, l. 9. On cross-examination Solicitor Martin testified he did not think the use of the word “imagine” was proper but stated he did not directly ask the jury to put themselves in the shoes of the victim. He maintained that he did not directly ask the jury to put themselves in the shoes of the victim and thus the comments he made were not improper but merely poorly phrased. App. 800, l. 3-App. 801, l. 10.

Counsel Geel argued that the solicitor’s opening statement inviting the jury to imagine what the process would be like for the alleged victims was explicitly a Golden Rule argument that was prohibited. App. 802, l. 7-App. 803, l. 3. The State responded that while Solicitor Martin had admitted he would not use those same words, Counsel Hilliard had decided not to object so that he would have additional leeway in his opening argument which the State felt was “reasonable.” The State also argued that the remarks did not impact the outcome at trial. App. 809, l. 24-App. 810, l. 12.

The PCR court took the matter under advisement. App. 812, ll. 14-16. An order of dismissal was filed on March 14, 2023. Regarding the Golden Rule argument, the PCR court found that Petitioner “had not met his burden of proof concerning this allegation. This Court finds that none of the highlighted portions were so crucial as to undermine the results of the proceedings.” App. 823.

## ARGUMENT

The PCR court erred in denying Petitioner relief where trial counsel failed to object to the improper and highly prejudicial “Golden Rule” argument made by the State in opening statements during which the solicitor explicitly and repeatedly requested that the jury imagine what it would be like to be the alleged victims.

Solicitor Martin’s opening statement was an inflammatory and impermissible Golden Rule argument. He specifically and repeatedly asked the jury to imagine what it would be like to be in the position of the alleged victims having to discuss intimate details of their sex life and the alleged abuse at the hands of their stepfather. The argument was wholly improper as it asked the jurors to set aside its impartiality and instead consider the case from the subjective position of the alleged victims. Counsel Hilliard’s failure to object to the argument was deficient performance that prejudiced Petitioner and that was not excused by any strategic decision. The PCR court’s ruling “that none of the highlighted portions were so crucial as to undermine the results of the proceedings” was not supported by the record.

“A solicitor’s...argument must be carefully tailored so as not to appeal to the personal biases of the jury.” Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). “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.” Id. at 609–10, 602 S.E.2d at 744. ““ While the solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done.”” State v. Northcutt, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) (quoting State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981)). ““The solicitor’s... argument must, of course, be based on this principle.”” Id.

“Jurors are sworn to be governed by the evidence, and it is their duty to consider the facts of the case impartially.” State v. Reese, 370 S.C. 31, 38, 633 S.E.2d 898, 901 (2006)<sup>2</sup> (internal citations removed). “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.” Id. “Specifically, the solicitor asking the jurors to put themselves in the place of the victim is improper and constitutes reversible error.” State v. Reese, 359 S.C. 206, 271, 597 S.E.2d 169, 174 (Ct.App.2004)<sup>3</sup> *citing* State v. McDaniel, 320 S.C. 33, 38, 462 S.E.2d 882, 884 (Ct.App.1995). “The ‘Golden Rule’ argument, suggesting to jurors as it does that they put themselves in the shoes of one of the parties, is generally impermissible because it encourages the jurors to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence.” Id. *citing* 75A Am.Jur.2d Trial § 650 (1991). Regardless of the nomenclature used, any argument that importunes the jurors to places themselves in the victim's shoes is disallowed Golden Rule Argument. Id. *citing* Johnson v. State, 263 Ga.App. 443, 587 S.E.2d 775, 781 (2003). Golden Rule arguments are per se objectionable as they have no legal relevance to any of the real issues in a case. Arnold v. E. Air Lines, Inc., 681 F.2d 186, 199 (4th Cir. 1982), on reh'g, 712 F.2d 899 (4th Cir. 1983).

“On appeal, the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt.” Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). “Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and

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<sup>2</sup> Overruled in part on other grounds by State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009)

<sup>3</sup> Affirmed in part, reversed in part by State v. Reese, 370 S.C. 31, 633 S.E.2d 898 (2006)

the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument.” Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). “The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.” Id.; see State v. Hornsby, 326 S.C. 121, 129, 484 S.E.2d 869, 873 (1997) (“A denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice.”).

Undoubtedly, a criminal sexual conduct with a minor trial is, from the outset, extremely emotionally charged. In such cases the State must act with extreme care and refrain from further arousing the passions and prejudices of a jury by making improper argument. In Petitioner’s case however, the State chose to make an improper emotional appeal to the jury during its opening statement. At the end of his opening statement the solicitor used “you” or a form of “you” twenty-one times in asking the jury to imagine themselves in the place of the alleged victims. This was an improper and prejudicial Golden Rule argument that asked the jury to abandon its oath of impartiality and to view the matter from the perspective of the alleged victims.

The record is clear that Counsel Hilliard failed to object to the State’s improper argument. During the PCR hearing Counsel Brinson testified that Counsel Hilliard told her, after the fact, that he believed it would have been more beneficial to make some form of a Golden Rule argument in his opening than it would be to object. Although not articulated in the order of dismissal, it is presumable that the PCR court found this to be a strategic decision. While our appellate courts give deference to strategic decisions, the decision to employ a certain strategy must be sound. A strategy will be deemed unreasonable under the Sixth Amendment if the reasons given for the strategy are not sound. Stone v. State, 419 S.C. 370, 384, 798 S.E.2d 561,

569 (2017). Given the evident impropriety of the solicitor's remarks, and the fact that all parties are forbidden from making Golden Rule arguments, such a "trial strategy" cannot be construed as valid or reasonable under the Sixth Amendment. See *Brown v. State*, 383 S.C. 506, 680 S.E.2d 909 (2009). Counsel Hilliard was deficient for failing to object to the Golden Rule argument where in the solicitor asked the jurors over twenty times to imagine what it would be like to be the alleged victims in the case.

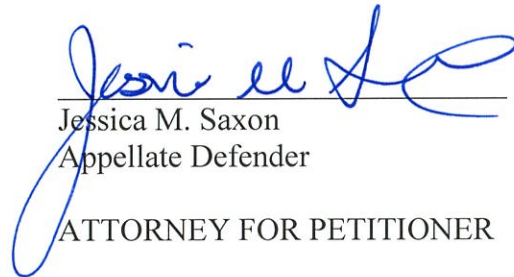
The PCR court found, without citing to any facts or evidence in the record, that the remarks by the solicitor were not so crucial as to undermine the results of the trial. Apparently, this was a finding that Petitioner could not show prejudice. This finding was not supported by the record. The case was entirely based on the credibility of the witnesses. There was no direct forensic evidence that Petitioner abused his stepdaughters. The jury was tasked with choosing who to believe and instead of looking at the witnesses and evidence impartially, they were repeatedly encouraged from the beginning to look at the case from the perspective of the alleged victims. Further, because there was no objection, there was no curative instruction from the trial judge that could have potentially eased the impact of the improper comments. Being told over twenty times during opening statements to imagine what it was like for the alleged victims aroused the passions and prejudices of the jury from the outset and denied Petitioner a fair trial.

The record establishes that the State made an improper, highly emotional, Golden Rule argument during its opening statement. The repeated appeal to the jurors to imagine what it would be like to be in the position of the alleged victims stripped the jury of neutrality. The failure of Counsel Hilliard to object to the remarks was deficient performance which prejudiced Petitioner as the case hinged on witness credibility and there was no overwhelming evidence of

guilt. Petitioner has established ineffective assistance of counsel. Accordingly, this Court should find the PCR erred in denying Petitioner relief.

**CONCLUSION**

Based on the foregoing argument, Petitioner respectfully requests that this Court grant the petition for writ of certiorari to allow full briefing on this issue.

  
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Jessica M. Saxon  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 18<sup>th</sup> day of September, 2023.