THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

APPEAL FROM OCONEE COUNTY
COMMON PLEAS COURT
R. Lawton McIntosh, Circuit Court Judge

Case No. 2014-CP-37-0133
Court of Appeals Appellate Case No.: 2016-1099
Supreme Court Appellate Case No.: 2018_____

Matthew Hinton, ... Petitioner,

v.

State of South Carolina., ... Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) Was counsel ineffective for allowing the introduction of redacted text message conversation where the redaction allowed the applicant's statements to be viewed out of context, making the applicant's comments to appear to be solely for the purpose of concealing the injuries of the child?

2) Was counsel ineffective for failing to cross-examine witness as to the redacted/omitted portion of text conversation which would have shown an innocent basis for the applicant's comments?

3) Was counsel ineffective for failing to ask questions of the applicant on direct about the missing portion of the text conversation, and to otherwise explain the basis for his comments to show the jury a non-incriminating reason for those comments?

4) Was counsel ineffective for failing to object to the solicitor's violation of the golden rule when she called upon the jury to speak for the deceased child?

5) Did the PCR court err in failing to consider the cumulative effect of constitutional errors in its application of the Strickland test?

6) Did the Court of Appeals err in denying the Petitioner's Petition for Writ of Certiorari?

STATEMENT OF THE CASE

Appellant was indicted by the Oconee County grand jury for the offense of homicide by child abuse. His case was called to trial before the Honorable Alexander S. McCaulay, and a jury on February 28, 2011. Gordon Senerius and Brittany Tye represented appellant. Lindsey Simmons was the assistant solicitor. At the conclusion of the trial on March 3, 2011, the jury found appellant guilty of homicide by child abuse. Judge McCaulay sentenced appellant to forty-one years imprisonment. The applicant appealed and after the filing of an Anders Brief, the appeal was dismissed. Appellate Case No.: 2011-187567; Unpublished Opinion No.: 2013-UP-104. Applicant timely filed for post conviction relief on March 4, 2014. A hearing was held on February 9 and 10, 2015, before the Honorable R. Lawton McIntosh. Robert C. Childs, III represented applicant and Walt Whitmire represented the State. An order was entered on March 22, 2016. Applicant timely filed a motion to alter or amend which was subsequently denied. A timely notice of appeal and petition were filed in this Court. Pursuant to Rule 243(l), SCACR, the case was transferred to the Court of Appeals on March 2, 2016. The Court of Appeals denied the petition by Order dated March 27, 2018. A Petition for Rehearing was filed April 8, 2018. The Court of Appeals denied the Petition for Rehearing on May 28, 2018. Pursuant to Rule 242, SCACR, this Petition follows.

PETITION

Relevant Facts Relating to the Offense Charged and Criminal Trial:

Ashley Bright was the mother of applicant's five-month-old child. He and Bright lived together. A. p. 500, 1. 2- p. 501, 1. 3. Bright was working at the Seneca Movie Theater on August 16, 2009, and appellant was staying home in their apartment, and taking care of the child. A. p. 501, 1. 11 - p. 502, 1. 16. Bright remembered that on that August 16, 2009 morning she left for work about 11:30, and she expected to be home between 5:00 and 5:30p.m. A. p. 504, 11. 20-22. Bright testified that on the 16th appellant sent her a text message during the day stating that the child had been "fussy all day and that they were going to lay down and take a nap, and not to wake them." A. p. 507, 11. 1 0-14. Bright testified that the appellant sent her a text message telling her that he did not want her mother coming by the apartment and that if she did, he would leave. A. p. 508-510. During Bright's testimony the jury was not informed that the text message conversation Bright read was redacted to take out Bright's response. A. p. 508-510. The redacted text message was then introduced as a state exhibit with the jury never being informed of the missing content of the text conversation. Bright was then questioned by the solicitor about applicant's statements about not wanting her mother to come over. In response Bright characterized it as odd, unusual and completely out of the blue, stating that the applicant had never had any problem with her mother before. A. p. 403; 426-427; 509.

Through text messages Bright told appellant to leave the door unlocked so she

could enter while they were sleeping. A. p. 509, 11. 1-22. When Bright got home she checked on appellant and the child every forty-five minutes while they were sleeping. A. p. 511, 11. 14-21. Bright said that when she checked on them at about 10:00 in the evening: "I noticed she was breathing a little heavy, but that wasn't uncommon, either." A. 516, 11. 17-24. She said between 10:45 and 11:00 that appellant woke up and told her: "[Child] wasn't breathing, for me to call 9-1-1." A. 516, 11. 21-23. Bright recalled that while she was on the telephone with 9-1-1, appellant was trying to do CPR. A. 517, ll. 1-17.

EMS transported the child to Oconee Medical Center and then to Greenville Memorial Hospital. While at the Greenville Memorial Hospital. Bright said appellant explained: "He was giving her [the child] a shower and she slipped, and when she did, he grabbed her by one leg and one arm across her chest and pulled her up into his chest and that her head hit his clavicle." A. 519, 11. 9-24. Bright's testified that appellant later told her if she would take the rap for this, that she wouldn't get very much jail time because she had no previous criminal history. A. 521, 11. 11-17. Bright maintained she told appellant she had "no idea how these injuries happened and I wasn't responsible and I was not going to jail for something I didn't do."1 A. 521, 11. 18-23.

Seneca police officer Ted Roundy testified that the investigation revealed the child "was suffering some head trauma in the brain." He offered that the child also had broken bones. A. 542, 1. 6- 543, 11. 1. 10. Roundy testified that appellant told him he was giving the child a bath and "she kicked and slipped out of my grasp. I caught her by, by

her leg and abdomen and jerked her up. She fussed for maybe three minutes." A. 549, 11. 10-20. On cross-examination Roundy acknowledged appellant appeared very upset at the hospital. However, appellant was arrested following the autopsy for child abuse in the death of the child. A. 555, ll. 9-23 ; A. 559, 11. 11-24.

Donna Eller, the child's grandmother, testified appellant told her he dropped the child in the shower while giving her a bath, "and he did say that she hit her mouth." Eller testified she did not ask appellant why he did not immediately seek help "because I was so mad at him I just tried to steer clear and stay away from him." A. 585, 11. 19-21. Desmond Holland was appellant's downstairs neighbor at the apartment complex. Holland maintained that on August 16, 2009, he heard a loud noise upstairs "and it sounded like a TV or something falling ... so I walked upstairs and knocked on the door and nobody came, so I knocked again. I stayed there for about three minutes. All I heard was the dog scratching and the baby whimpering." A. 632, 11. 12-15.

Doctor Brett Woodard, the pathologist, conducted an autopsy on the child on August 20, 2009. He testified the child had a large bruise on the center of her chest and bruises around the spine and the back part of the skull and the scalp. A. 701, 1. 2- p. 711, 1. 3. Doctor Woodard opined that: "Some component of torsion or twisting of the head, coupled with a sudden blow to the head, was how the injury was produced." Doctor Woodard said the child would have been unconscious, "and within a short time a coma would occur where she would be unarguable ... " A. 711, 11. 12-22. Doctor Woodard also said that it should have been apparent something was seriously wrong with the

child. A. 712, 11. 2-6.

Appellant testified in his own defense. He described to the jury how the child was injured. Appellant said he took a shower with the child and when he went to dry her off: "She kicked and turned, and everything after that just went in slow motion. It was, I grabbed her leg, grabbed her on her chest and just jerked up, I guess because I was scared. I didn't want her to fall completely down ... I just know when she fell I was, I was in shock, and I just, just remembered yanking her back ... the only thing I know is she struck her head ... on my collarbone because I had a bruise right there." A. 752, 1. 3- p. 753, 1. 21. Appellant testified he knew how to do CPR from being in the service. In this case the 9-1-1 operator told him how to do CPR on a baby. He later learned at the Oconee Hospital that the child had bleeding in the brain. A. 757, 1 - p. 760, 1. 25. Appellant explained to the jury that the whole situation was complicated because he had broken his right hand three weeks before this incident and it was still healing. A. 766, 1. 5 - p. 767, 1. 6. Appellant still had a half-cast on his hand at the time. A. 767, 11. 7-17.

In closing the solicitor argued the applicant's comments about Bright's mother as evidence of guilt. A. 389, l. 13-14. The solicitor closed her argument by calling on the jury to speak for the victim. A. 823, l. 17-24. The jury returned a verdict of guilty.

[Additional facts in Argument Section]

ARGUMENT

I. REDACTION OF EXCULPATORY INFORMATION FROM STATE'S EXHIBIT AND COUNSEL'S FAILURE TO PROVIDE THE JURY WITH THE MISSING CONTENT TO ALLOW THE JURY TO EVALUATE THE APPLICANT'S STATEMENTS IN CONTEXT.

During the applicant's criminal trial the state introduced evidence of text messages between the applicant and Ashley Bright on the day of the incident. A. 508; 776. Portions of their conversation through text messages were introduced by the solicitor first having Bright read a redacted version of the conversation and then by introducing a redacted version as a state exhibit. A. 508-510. Both Bright's testimony and the state's exhibit omitted a critical portion of the conversation, Bright's response to the applicant's statement about his not wanting Bright's mother to come over to the apartment. The state used the applicant's statement out of context as evidence that the applicant was trying to conceal the injuries to the child, arguing that there was no other reason for such a statement, and that it was completely "out of the blue".

Bright's response, which the state redacted, indicated a common understanding in their conversation that the applicant's statement was based on the mother's drug abuse issue. Showing a common understanding between Bright and the applicant, her response was essential to the jury understanding the meaning of the applicant's comments. When read in context with Bright's response, applicant's motivation for his comments could be easily understood as completely innocent, rather than evidence of a sinister motive to cover up a crime, as the state repeatedly portrayed. Defense counsel failed to object to the introduction of the text conversation with the exculpatory portion

removed. Counsel further failed to cross-examine Bright about the omitted portion of the conversation. Counsel further failed to question the applicant on direct about the missing portions of the conversations, or to have the applicant give an explanation for his comments.

Bright's response in the text message conversation was essential to understanding the basis for the applicant's comments. Redacting out Bright's response changed the entire complexion of the applicant's comments, and allowed the solicitor to repeatedly cast the nature of the applicant's statements as incriminating which, could not have been done but for the redaction. Counsel failed to object to the introduction of the redacted messages without the contemporaneous introduction of the omitted parts that were necessary for a complete understanding of the applicant's comments. [1]

The state offered the redacted text messages in attempt to show that the applicant was trying to keep the child's injuries from being discovered by Bright's mother. The state specifically asked Bright if the message about her mom seemed odd. 78. Bright testified that it did and explained that he never had a problem with her coming over before. Bright testified that it was "out of the blue" and "very odd" and that the applicant "never had a problem with her coming over." A. 403; 426-427; 509;

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[1]PCR Complaint, issue #24: "Trial counsel was ineffective and deficient in failing to object to testimony of Plaintiff tenting victim's mother regarding Plaintiff not wanting victim's grandmother to come over without a proper foundation and failing to cross-examine victim's mother on that issue." Order of Dismissal, A. p. 44; 1017.

PCR Motion Alter or Amend issue#10, page 2, addresses the PCR court's lack of specific findings as well as its ruling in regards to counsel's failures relating to the introduction of only the redacted text message conversation. A. 1052-1053.

The clear message to the jury was that there was no other possible reason for the applicant not wanting Bright's mother to come over other than to conceal the injury and thus show a guilty mind, which the solicitor went on to argue in closing. A. 510. The underacted message, however, contained Bright's response indicating some understanding that the statement was based on the mother's drug or alcohol abuse. Contrary to a major part of the state's theory of the case, this showed a completely innocent reason for the applicant's statement, so the state simply redacted it out of existence. A. 403; 426-427; 509.

The redacted portion of the message was important to refute the state's theory of the case. The complete text contradicted Bright's testimony about her not understanding why the applicant did not want her mother coming over to the apartment. It clearly countered Bright's claim that the applicant's statements were odd or out of the blue. Without the introduction of the redacted portion of the conversation the only conclusion that the jury could come to would be that the applicant's statements were evidence of guilt. There was no other explanation apparent in the conversation from what the jury heard. The prejudice is obvious.

The prejudice was compounded by the state continuously referring to the text messages throughout its case. The jury was repeatedly drawn back to the text messages as being central to the state's case. A. 507; 508; 509; 510; 529; 531; 550; 558; 575; 600; 601. In closing argument the state specifically went back to the text messages arguing that the statement about Bright's mom not coming over was evidence of guilt: "What

innocent person says this to the mother of his child?" A. 821, l. 13-14.

Despite several opportunities, defense counsel failed to have the redacted portion of the text messages introduced to show an innocent basis for applicant's comments about Bright's mother. Procedurally, defense counsel had at least three different opportunities in which to introduce the exculpatory portion of the messages. First, the redacted portion was admissible under Rule 106, SURE, which provides: "When a writing, or recorded statement, or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part of any other writing or recorded statement which ought in fairness to be considered . . . . . contemporaneously with it." Rule 106, SURE. The party seeking to introduce the remainder of a written or recorded statement can require the remainder to be introduced at the same time the other part of the written or recorded statement is introduced. Notes to Rule 106, SURE. The right to offer the full substance of a conversation extends to oral communications as well. State v. Cabrera-Pena, 361 S.C. 372, 605 S.E.2d 522 (S.C., 2004).

In Caber-Pena the supreme court held that where the state elects to use a witness to elicit portions of a conversation (and incriminating statements therein) made by a defendant, the rule of completeness requires the defendant be permitted to inquire into the full substance of that conversation. State v. Cabrera-Pena, 361 S.C. 372, 605 S.E.2d 522 (S.C., 2004).

Rule 106 is based on the rule of completeness and seeks to avoid the unfairness

inherent in the misleading impression created by taking matters out of context. Interpreting Rule 106 the court stated: "Rule 106 [of the Federal Rules of Evidence] is a procedural device governing the timing of completion evidence; the Rule is 'primarily designed to affect the order of proof'. It means that the adverse party need not wait until cross-examination or rebuttal. As such, the Rule reduces the risk that a writing or recording will be taken out of context and that an initial misleading impression will take hold in the mind of the jury." Cabrera-Pena *quoting* State v. Taylor, 333 S.C. 159, 170, 508 S.E.2d 870, 876 (1998). Here, counsel allowed the state to introduce the applicant's statement out of context and create an initial misleading impression in the mind of the jury.

Rule 106 is specifically intended to clarify any misconceptions the admission of a partial statement would give. That portion of a statement which explains or clarifies the previously admitted portion should be introduced. *See* State v. Taylor, 333 S.C. 159, 171, 508 S.E.2d 870, 876 (1998); *see also* State v. Gay, 343 S.C. 543, 541 S.E.2d 541 (2001). Here, the redacted excerpt of Bright's response explains and clarifies the previously admitted portions of the applicant's comments. Without Bright's response in the conversation the jury was left with no innocent explanation for applicant's comments. Accordingly, the redacted portion of the text message conversation (Bright's response) was necessary for an understanding of applicant's statement and, in fairness to Hinton, should have been admitted contemporaneously pursuant to Rule 106, SURE. Counsel failed to properly object or move to have the omitted portion introduced.

Counsel compounded the failure to immediately use Rule 106 to introduce the missing part of the text conversation by failing to cross-examine Bright about her redacted comments. This was his second opportunity to admit the missing portion of the text conversation. Proper cross-examination could have brought out Bright's response and would have put the applicant's statements in a non-incriminating light shortly after the jury heard the redacted version. As a third and last opportunity to provide the jury with an innocent explanation for the statement counsel could have examined the applicant, who took the stand and testified during the trial. Despite having heard the emphasis the state placed on the applicant's statement throughout the state's case-in-chief, counsel still failed to question the applicant about his reason behind the text messages. This was the last opportunity to allow the jury to hear an innocent basis for the statements. Counsel failed to give the applicant an opportunity to explain his comments. On at least three occasions counsel could have required the introduction of the redacted portion of the messages. Counsel's failure to offer any innocent explanation of the applicant's statements allowed the state to cast the applicant's statements as inculpatory. In light of no other explanation being apparent once Bright's comments had been redacted, this was a compelling part of the state's case.

At the PCR hearing defense counsel was questioned about the state's use of the redacted text messages and Bright's testimony which was in essence that Bright didn't know of any reason why the applicant would say that he didn't want her mother

coming over. A. 168-171; 605-606. Notes from the defense file indicated that prior to trial the applicant had explained that he didn't want Bright's mother to come over because she "was on pills." R. 542-543. Counsel therefore was clearly aware of the basis for applicant's statement prior to trial. What the applicant had told counsel prior to trial was consistent with Bright's response which was redacted from the texts. The underacted conversation shows that when the applicant told Bright that he didn't want her mother coming over Bright responded: "Even if she's sober?" A. 543-544, l. 9-112, l. 12. Bright's response shows not only her recognition of an innocent explanation for applicant's comment, but also shows that Bright's testimony about applicant never having had a problem with Bright's mother to be untrue. The value of the missing portion of the conversation therefore extended even further as a means of challenging Bright's credibility. Counsel failure to introduce the missing portions of the text messages prevented the defense from making challenging a critical part of the state's case. A. 372-373; 543.

At the PCR, neither the solicitor nor defense counsel could explain why Bright's response was redacted from the state's exhibit, or left out of Bright's testimony. A. 173; 405-406; 686-687. Defense counsel was unable to give any strategy for not introducing the underacted message to establish an innocent basis for the applicant's statement, or to use it in cross-examination to contradict Bright's testimony. A. 173. Counsel agreed that Bright's response, which was redacted, would have refuted the state's allegation that the only reason applicant could have for not wanting Bright's mother over was to

conceal the child's injuries. A. 232-233; 687-686. The presumption of adequate representation based on a valid trial strategy disappears when trial counsel acknowledges there was no trial strategy in mind. *See* Smith, 386 S.C. at 568, 689 S.E.2d at 633. Here, there was no strategy in allowing the state to keep out Bright's response, or not introducing it through cross-examination of Bright, or on direct with the applicant. Counsel's failure therefore constitutes error.

In the circuit court's order the court found that the applicant had sent "inflammatory text messages to the child's mother where he demanded that Ms. Bright's mother not visit or enter the apartment on the afternoon of the incident. He even threatened to leave if Ms. Bright's mother entered the apartment." A. 9. The PCR court completely ignored the effect the redaction of the text messages had on the complexion of the applicant's statements. Presumably, without knowing Bright's response, the jury interpreted the letter the same way, finding it as evidence of guilt. Absent some evidence of an otherwise innocent intent, the only conclusion the jury could draw was that it was inculpatory. As it was a direct statement from the applicant, the jury could only have given it a tremendous amount of weight. The prejudice is overwhelming. The two-prong test under Strickland is met.

II. THE GOLDEN RULE VIOLATION

The state closed in argument to the jury with "Today is the day to speak for [victim]. I once read that children are our only hope for the future. But we are their only hope for their present and their future. Matthew Hinton robbed his daughter of her

present. He robbed his daughter of a future, a future that was limitless. He took it all away. Today is the day for justice for [victim]. and the day of reckoning for Matthew Hinton." A. 823. At the PCR defense counsel testified that he did not think that the solicitor's statement was objectionable. A. 329-332.

At the PCR hearing the court initially reserved the Golden Rule issue for later comment. A. 408; 414-415; 420. When the court discussed the issue during the PCR hearing it stated that the solicitor's argument "was a clear violation of the golden rule" under State v. Reese, 359 S.C. 265, 597 S.E.2d 169. A. 422, l. 4-6. The court then went on to distinguish the case from Reese and deny relief based on a finding of overwhelming evidence in the present case. A. 422-428. In its written order the court minimized the issue finding that the solicitor's comment was only a "technical violation" of the golden rule. A. 50-51. The court went on to deny relief finding that there was overwhelming evidence of guilt. The court's reasoning is flawed.

Violation of the golden rule:

A review of a solicitor's closing argument is based upon the standard of whether his comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. *See* Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974); State v. Caldwell, 300 S.C. 494, 504, 388 S.E.2d 816, 822 (1990). A trial judge is allowed broad discretion in dealing with the range and propriety of closing arguments to the jury. State v. Raffaldt, 318 S.C. 110, 114-15, 456 S.E.2d 390, 393 (1995). An appellate court will not disturb a trial court's ruling regarding closing argument unless there is an abuse of

discretion. State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). An abuse of discretion occurs when the trial court's ruling is based on an error of law. State v. Foster, 354 S.C. 614, 621, 582 S.E.2d 426, 429 (Ct.App.2003); State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000); State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 793-94 (Ct.App.2003). To warrant reversal, the appellant must prove both abuse of discretion and resulting prejudice. State v. Sierra, 337 S.C. 368, 373, 523 S.E.2d 187, 189 (Ct.App.1999).

"A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002); *accord* Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998); *see also* State v. Cooper, 334 S.C. 540, 553, 514 S.E.2d 584, 591 (1999) ("A solicitor's closing argument must be carefully tailored so it does not appeal to the personal biases of the jurors."); State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981) (holding that because the solicitor's duty is not to convict the defendant but to see justice done, the solicitor's closing argument must be "carefully tailored" to not appeal to personal bias of juror nor calculated to arouse his passion or prejudice"); State v. Rudd, 355 S.C. 543, 548, 586 S.E.2d 153, 156 (Ct.App.2003) ("A solicitor's closing argument must be carefully tailored so it does not appeal to the personal biases of the jurors."). Specifically, the solicitor asking the jurors to put themselves in the place of the victim is improper and constitutes reversible error. State v. McDaniel, 320 S.C. 33, 38, 462 S.E.2d 882, 884

(Ct.App.1995). This is known as the Golden Rule Argument.

The Golden Rule Argument "ask[s] the jurors to become advocates for the plaintiff or victim and to ignore their obligation to exercise calm and reasonable judgment." Black's Law Dictionary 700 (7th ed.1999); *see also* John W. Reis, Improper Jury Argument: Gilding the Lustre of the Golden Rule, 69-JAN Fla. B.J. 60, 60 (1995) ("The traditional notion of the Golden Rule, though not contained in any rule of evidence or procedure, holds that a lawyer shall not urge the jury members, either in a civil or criminal case, to imagine themselves or their family members or friends in the place of the offended litigant or victim and to render their verdict from that perspective."). Although the forbiddance of Golden Rule Arguments began in civil trials to hinder the plaintiff from urging the jury to put itself in the place of the victim in order to obtain higher damages, the prohibition has now been made applicable to criminal actions. 75A Am.Jur.2d Trial § 650 (1991); *see* Lucas v. State, 335 So.2d 566, 568 (Fla.Dist.Ct.App.1976) (holding that "[t]he technique of asking jurors to place themselves in the position of the victim has been held to be improper in both criminal and civil cases").

"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." 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. Johnson v. State, 263 Ga.App. 443, 587 S.E.2d 775, 781 (2003).

Golden Rule Arguments are generally improper and may constitute reversible error. State v. McHenry, 276 Kan. 513, 78 P.3d 403, 410 (2003); *see also* State v. Prevatte, 356 N.C. 178, 570 S.E.2d 440, 476 (N.C.2002) ("Arguments that ask the jurors to place themselves in the victim's shoes are improper."); Velocity Express Mid-Atlantic, Inc. v. Hugen, 266 Va. 188, 585 S.E.2d 557, 565 (2003) (ruling "plaintiff's repeated requests to the jury that it apply the `Golden Rule' were prejudicial and constitute[d] reversible error").

Prejudice from the violation of the golden rule:

The relevant question is whether the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). In Tappeiner v. State, 2013-001885, addressing a golden rule violation, the supreme court stated: "In keeping their closing arguments within the record, solicitors additionally must tailor their remarks "so as not to appeal to the personal biases of the jury" or "arouse the jurors' passions or prejudices." Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). Accordingly, solicitors should avoid comments that ask jurors to place themselves in the victim's—or another party's—shoes, because those types of comments tend to "'completely destroy all sense of impartiality of the jurors.'" Brown v. State, 383 S.C. 506, 515–16, 680 S.E.2d 909, 914 (2009) (*quoting* State v. Reese, 370 S.C. 31, 38, 633 S.E.2d 898, 901 (2006))." Here the

solicitor called upon the passion of the jury, telling them to speak for the victim. The solicitor's comments were a clear violation of the golden rule. Defense counsel had no valid strategy for failing to object and at least requesting a curative instruction, if not a mistrial.

Calling upon the passions of the jury was prejudicial, the solicitor's timing made it even more so. The solicitor's violation of the golden rule was the last thing said to the jury. It was intended by the solicitor as the last driving punch, a crescendo, the grand finale, after which the solicitor rested. Under similar facts it was found important that the golden rule violation was the last thing heard by the jury: "Moreover, the emotional plea was the very last thing the jury heard before beginning its deliberations, and connected the jurors personally to the alleged abuse in the case. Thus, the comment was likely at the forefront of the jurors' minds when beginning their discussions." Tappeiner v. State, Opinion No. 27632 (SC May 4, 2016) at 11. *Cf.* Brown, 383 S.C. at 512, 517, 680 S.E.2d at 912, 915 (finding the solicitor improperly appealed to the jurors' emotions during closing argument when telling them to "speak up" for the child victim and "make sure that the perpetrator is punished"). Here, the last thing that the solicitor did was to call upon the jury to speak for the child. As in Tappeiner, this comment was burned into the forefront of the jurors' minds. The impact is apparent.

In determining whether relief from a golden rule violation is warranted under Strickland the court must look to the record as a whole. In Tappeiner the court stated: "Indeed, in determining prejudice, we frequently consider whether there is other direct

or circumstantial evidence supporting the conviction, notwithstanding trial counsel's deficient performance. *See* Brown, 383 S.C. at 518, 680 S.E.2d at 916 (finding that the solicitor's improper appeal to the jury's emotions was not prejudicial in light of the fact that there were four unrelated, adult witnesses to the defendant's rape of the child victim, as well as other direct evidence that a rape occurred); Simmons, 331 S.C. at 338, 503 S.E.2d at 166 (stating that appellate courts must consider the impropriety of the solicitor's argument in the context of the entire record, including whether there is overwhelming evidence of the defendant's guilt)."

Here the state made its case against Hinton by circumstantial evidence. Unlike in Brown, or other cases finding overwhelming evidence, there were no eyewitnesses, no confession, and no direct evidence. The applicant testified and gave an alternate version of the cause of injuries. In Tappeiner the court said: "Similarly, given the lack of physical evidence, the solicitor's emotional plea that Tappeiner was a bad actor and could not be trusted to watch the jurors' own family members 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 at 11. Here, the record fails to show overwhelming evidence of guilt to negate the impact of the solicitor's call upon the juror's to speak for the victim. Applying Tappeiner, the applicant was prejudiced by counsel's failure to object or request a curative instruction. He has therefore met his burden under the Strickland analysis.

III. CUMULATIVE EFFECT OF CONSTITUTIONAL ERRORS

Applicant sought to have the PCR court consider the cumulative effect of prejudice in its Strickland analysis.[2] During the hearing the PCR court apparently considered there to be numerous issues that would constitute error as it discussed the question of whether the overall effect of cumulative errors could constitute prejudice. A. 420-428. These errors included counsel's failure to impeach Desmond Holland who concealed that he knew Bright from high school. A. 17; 142; 245-246; 292-293; 371. Counsel's failure to realize that the audio recording of Desmond Holland the state provided in discovery cut off halfway through his interview. A. 257-258. Counsel's failure to object to the testimony of Bright indicating that the applicant had a prior criminal history. A. 18; 42-43; 223-224. Counsel's failure to introduce evidence of the wet towel which corroborated applicant's testimony of an accident occurring during a shower. A. 606; 613-615.

Despite numerous issues, after a brief discussion the court stated "the pervasiveness of the alleged errors is not such as to make relief available to the applicant." A. 428, l. 5-7. In its written order the court subsequently declined to consider cumulative error stating only that the applicant had failed to meet his burden. A. 54. The written order fails to address the issues specifically and, appears to deny relief as a matter of law as it ended its analysis with its interpretation of the Fourth Circuit holding in Fisher v Angelone as holding that "a cumulative effect analysis is

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[2]PCR Motion to Alter or Amend, issue #45, A. 1019.

inappropriate." The court's interpretation of Fisher's holding as an absolute bar to a cumulative analysis is in error. The ruling expressly allows a cumulative analysis of constitutional error to establish prejudice under Strickland:

> [The petitioner] relies, in part, on cases considering the cumulative effect of matters actually determined to be constitutional error. In these cases, however, the courts in question merely aggregated all of the actual constitutional errors that individually had been found to be harmless, and therefore not reversible, and analyzed whether their cumulative effect on the outcome of the trial was such that collectively they could no longer be determined to be harmless. Thus, legitimate cumulative-error analysis evaluates only the effect of matters actually determined to be constitutional error, not the cumulative effect of all of counsel's actions deemed deficient.

Fisher at 852, n.9. As a result, the PCR court erred in failing to consider the cumulative effect of the issues presented herein in its Strickland analysis based on its reliance on Fisher.

In relying on its misinterpretation of Fisher the PCR court also overlooked more recent cases from our own supreme court. Four years after the ruling in Fisher, our supreme court held: "When counsel's deficiency is so pervasive as to render a particularized prejudice inquiry unnecessary, a defendant may be relieved of his burden to show prejudice. Green v. State, 351 S.C. 184, 196, 569 S.E.2d 318, 324 (2002). Whether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina. *Id.* at 197, 569 S.E.2d at 324-25. In addition, the court is not prevented from considering the cumulative effect of issues found to be prejudicial when making its Stickland analysis, under Fisher or South Carolina law.

In Simpson v. Moore, because the court found only one instance of error, there was no need to conduct a cumulative-error analysis. The record simply did not contain "several errors" for the judge to cumulatively assess. The court in Simpson therefore held that the PCR court did not err in failing to conduct such an analysis under the specific facts presented. Simpson's holding was based on the lack of multiple errors that would support a cumulative prejudice analysis. The court ruled simply that the facts did not support it, not that the law prohibits it. *See* Simpson v. Moore, 627 S.E.2d 701, 367 S.C. 587 (S.C., 2006). A reading of Green and Simpson indicate a willingness to consider a cumulative error analysis under the appropriate facts. This is consistent with the holdings of a majority of federal courts. The PCR court therefore erred in failing to consider the cumulative effect of error in the applicant's case in its overall Strickland analysis. This Court, in its analysis of prejudice, should consider the cumulative effect of all constitutional errors.

CONCLUSION

Based on the foregoing the Court should grant the petition and allow briefing in this case.

Respectfully submitted,

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June 15, 2018.

RECEIVED

JUN 18 2018

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM OCONEE COUNTY
COMMON PLEAS COURT
R. Lawton McIntosh, Circuit Court Judge

Case No. 2014-CP-37-0133
Court of Appeals Appellate Case No.: 2016-1099
Supreme Court Appellate Case No.: 2018_____

Matthew Hinton, ... Petitioner,

v.

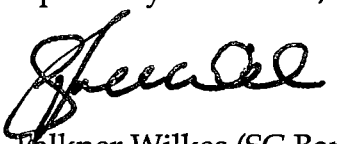
State of South Carolina., ... Respondent.

CERTIFICATE OF COUNSEL

I certify that the Petition herein is based on the procedure allowed pursuant to Rule 242, SCACR, and that the Court of Appeals was presented with a timely Petition for Rehearing which has been denied making the decision of the Court of Appeals final and subject to review pursuant to Rule 242, SCACR.

I further certify that the Appendix has been redacted in accordance with this Court's rules on the redaction of private data and personal identifiers.

Respectfully Submitted,



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CERTIFICATE

I certify that on June 15, 2018, I served the Appellant's PETITION FOR WRIT OF CERTIORARI and CERTIFICATE OF SERVICE on the Respondent by placing a copy of same in the United States Mail, first class postage prepaid, as indicated below:

Alan McCrory Wilson, Atty. Gen.
Megan Harrigan Jameson, Asst. Atty. Gen.
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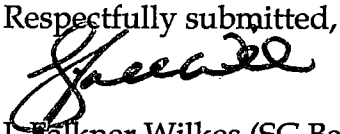
Respectfully submitted,



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July 15, 2018.

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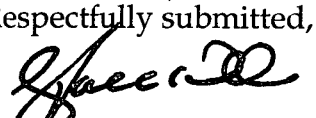
Respectfully submitted,



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