

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Beaufort County

Honorable Thomas A. Russo, Circuit Court Judge

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ANTHONY G. LINTON,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000793

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PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT  
PETITIONER

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**ISSUE PRESENTED**

Did the PCR judge err in refusing to find trial counsel ineffective in failing to object to the assistant solicitor's closing argument that improperly appealed to the emotions of the jurors, finding that the failure to object to the improper argument was a valid trial strategy?

## STATEMENT

In January of 2010, the Beaufort County Grand Jury indicted Petitioner, Anthony Glenn Linton, for criminal sexual conduct with a minor first degree, indictment #2010-GS-0013. On March 29, 2011, Petitioner proceeded to jury trial before the Honorable Michael G. Nettles. Ian Deysach and Mathew Walker represented Petitioner at trial. Meredith Bannon and Carra Henderson prosecuted the case. The jury returned a verdict of guilty. Judge Nettles sentenced Petitioner to twenty-seven (27) years in prison. A timely notice of intent to appeal was filed and the direct appeal perfected. On October 31, 2012, the South Carolina Court affirmed the sentence and conviction. State v. Linton, No. 2012-UP-595 (S.C.Ct.App. October 31, 2012). (App. pp 447-448). A petition for rehearing was filed on November 15, 2012, and then denied on December 19, 2012. Petitioner chose not to file a petition for writ of certiorari with the South Carolina Supreme Court and by order dated March 13, 2013, the Court dismissed the appeal.

On April 24, 2013, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return on May 29, 2014. An amended application was served on October 13, 2015. On October 12, 2017, an evidentiary hearing was held before the Honorable Thomas A. Russo. James K. Falk represented Petitioner at the PCR hearing. Ruston Neely represented the State. In a written order signed April 4, 2018, Judge Russo denied relief and dismissed the application. A timely notice of intent to appeal was served on April 27, 2018. This petition for writ of certiorari follows.

## ARGUMENT

**The PCR judge erred in refusing to find trial counsel ineffective in failing to object to the assistant solicitor's closing argument that improperly appealed to the emotions of the jurors, finding that the failure to object to the improper argument was a valid trial strategy.**

During closing argument the assistant solicitor told the jury, "This has been an emotional case and that's the beauty of having a jury. You'll get to use your emotions. You get to figure out with your brains and reason and your emotions – what you think happened, to help us. Think about emotions. Minor felt pain and abandonment when the defendant was molesting her. And she felt terror yesterday as she stood in this courtroom shaking, unable to speak above a whisper and unable to look at Anthony Linton." (App. p. 385, lines 6-14). Trial counsel failed to object.

In the PCR application Petitioner alleged that counsel was ineffective in failing to object to, move for a mistrial or request a curative instruction based on the inflammatory and prejudicial remarks of the solicitor during closing argument. (App. p. 457). During the PCR hearing Petitioner specifically testified that trial counsel was ineffective in failing to object when the assistant solicitor told the jury in closing argument to use their emotions to decide the case. (App. p. 483, line 11 – p. 484, lines 1-11).

During the PCR hearing trial counsel was asked about the portion of the assistant solicitor's closing argument found on page 385, lines 6-14. (App. p. 498, lines 9-23). PCR counsel asked trial counsel, "Would it be your opinion looking at it now, that that might be an appeal to emotion in this case?" (App. p. 498, lines 24-25). Trial counsel answered, "Absolutely. I mean, it comes out and says it." (App. p. 499, line 1). Trial counsel confirmed that he did not object to the argument. (App. P. 499, lines 2-4). PCR counsel then asked, "Was

that a calculated decision?" (App. p. 499, line 5). Trial counsel answered, "No, that was a mistake. I would have to say that's a mistake." (App. p. 499, lines 6-7).

During cross-examination the State asked trial counsel, "You argued pretty extensively about the Solicitor's use of the word emotion. Are you sure that wasn't trial strategy to allow that in so you could argue emotion? Because you argue it pretty strenuously for over just a page." (App. p. 499, lines 17-21). Trial counsel answered, No, I mean – I mean, I think it shows that I recognized that she brought it up and that I had to counter it, but I don't think I would have really wanted to get into that battle of saying, you should use emotion or not use emotion. I don't see how that helps me, but I do feel like – it looks like when I stood up, I felt like the first thing I needed to deal with was that appeal to emotion." (App. p. 499, line 22 – p. 500, lines 1-3).

In the order of dismissal the PCR judge wrote:

Applicant alleges Counsel was deficient for failing to object to the solicitor's comments regarding emotions during her opening and closing arguments. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of prejudice, that course should be followed. Strickland, 466 U.S. at 670. Based on the transcript, this Court agrees with the Court of Appeals' ruling and finds the evidence against Appellant was overwhelming and any error of counsel would not have prejudiced Applicant. Therefore, Applicant cannot prove prejudice where the evidence against him was overwhelming. Id.

Further, Counsel used the solicitor's emotional argument in Applicant's defense during his own closing argument. This Court finds Counsel's failure to object was a reasonable trial strategy and will not use the benefit of hindsight to find Counsel's decision at trial unreasonable. "Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). "The question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 88, 131 S.Ct. 770, 778, 178 L.Ed. 2d 624 (2011).

Accordingly, this Court finds Applicant failed to prove Counsel was deficient for not objecting to the solicitor's remarks because he strategically used those arguments in his own closing argument. Further, this Court also finds Applicant failed the testimony prejudiced Applicant such that there was a reasonable probability the result of the trial would have been different had it been excluded because the evidence against Applicant was overwhelming. Accordingly, this Court denies and dismisses this allegation.

The PCR judge erred. Trial counsel's failure to object to the assistant solicitor's improper statements in closing argument, asking the jury to decide the case based upon emotion and asking the jury to place themselves in the shoes of the victim, constituted prejudicial ineffective assistance of counsel in this emotional case. The failure to object was not a valid trial strategy, as confirmed by trial counsel.

First, the assistant solicitor's argument in closing improperly appealed to the jurors' emotions and constituted a "Golden Rule" violation. In Tappeiner v. State, 416 S.C. 239, 252, 785 S.E.2d 471, 478 (2016), the South Carolina Supreme Court wrote:

Further, the solicitor's remarks regarding whether the jurors would want Tappeiner babysitting their children or relatives improperly appealed to the jurors' emotions, rather than the evidence in the record. *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"). Thus, we further find there is evidence in the record to support the PCR court's finding that trial counsel was deficient in failing to object to the solicitor's emotional appeal at the conclusion of its closing arguments.

The comments in the present case directly telling the jury to decide the case based on emotion, are more prejudicial than the indirect comments found improper in Tappeiner.

In Brown v. State, 383 S.C. 506, 515-16, 680 S.E.2d 909, 914-15 (2009), the South Carolina Supreme Court wrote:

"A solicitor's closing 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 closing argument must, of course, be based on this principle.’ ” Id. “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).

Asking the jury to think about emotions, the emotions felt by the minor during the assault and at trial is a classic “Golden Rule” violation by asking the jurors to place themselves in the victim’s shoes. Trial counsel was deficient in failing to object to the improper closing argument.

Second, as testified by trial counsel, there was not a valid trial strategy in failing to object to the improper closing argument. Trial counsel testified that his failure to object to the improper closing argument was a mistake. (App. p. 499, lines 6-7). The fact that, in his closing argument, trial counsel stated that the solicitor’s appeal to emotion was improper does not make the failure to object a valid trial strategy. An attorney’s performance is not immunized from 6<sup>th</sup> Amendment challenge by simply labeling the actions as “trial strategy.” Kellogg v. Scurr, 741 F.2d 1099, 1102 (8<sup>th</sup> Cir. 1984).

Trial counsel argued in closing, “I came out here in opening and tried to discourage you from using emotion. And the solicitor has just come out and asked you – appealed to your emotion. And emotion is not facts, emotion is not law, and it’s not something that is an appropriate basis to make a decision on.” (App. p. 387, lines 9-14). Trial counsel also argued, “When she appeals to your emotion, she’s trying to make you angry at Mr. Linton. She’s trying to get you to make a decision based on that emotion as opposed to the facts and the law as you heard them. And what it does is it reduces the burden. She’s trying to get you to think about that

instead of the burden of proof beyond a reasonable doubt, the judge's road map to avoiding a wrongful conviction." (App. p. 387, line 22 – p. 388, lines 1-4). Trial counsel's closing argument does not render the failure to object into some trial strategy. Instead, it simply highlights the highly prejudicial nature of the assistant solicitor's improper comments.


A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Trial counsel was ineffective in failing to object to the assistant solicitor's improper closing argument. There is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. Petitioner was prejudiced by the deficient performance. While on direct appeal the Court of Appeals found the inadmissible hearsay testimony was harmless, in this PCR action the assistant solicitor's improper comments asking the jury to

decide the case based on emotion and asking the jury to think about emotions, the emotions the victim felt - a Golden Rule violation - dilute the State's burden of proof, tell the jury to decide the case on an improper basis and cannot be harmless.

CONCLUSION

Based on the argument above, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

  
Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of December, 2018.

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Honorable Thomas A. Russo, Circuit Court Judge

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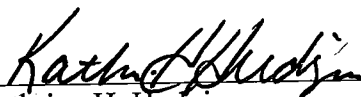
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STATE OF SOUTH CAROLINA,

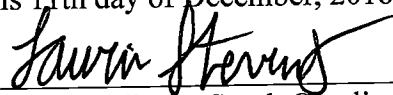
RESPONDENT

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CERTIFICATE OF SERVICE  
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The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Christian Saville, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Anthony Glenn Linton, #345516, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 11th day of December, 2018.

  
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Kathrine H. Hudgins  
Appellate Defender

SUBSCRIBED AND SWORN TO before me    ATTORNEY FOR PETITIONER  
this 11th day of December, 2018.

  
\_\_\_\_\_  
Notary Public for South Carolina (L.S)  
My Commission Expires: July 5, 2027.