

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Appeal from Pickens County

Honorable Edward W. Miller, Circuit Court Judge

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JONATHAN MATTHEW HOLDER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-000057

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BRIEF OF PETITIONER

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## **ISSUE PRESENTED**

Whether the PCR court erred where it found trial counsel provided effective representation where counsel moved for a mistrial because the solicitor asked Petitioner if he was gay and if he was “interested in young boys,” since the Court of Appeals procedurally barred the mistrial issue because counsel did not object the trial court’s curative instruction or renew his mistrial motion?

## STATEMENT

On May 12, 2015, a Pickens County Grand Jury indicted Jonathan Holder, Petitioner, for second-degree criminal sexual conduct with a minor and third-degree criminal sexual conduct with a minor. App. 623 – 626. Petitioner was tried before the Honorable John C. Hayes, III, and a jury, from May 20 – 21, 2015. David Cantrell, Jr., represented Petitioner and Samuel Tooker represented the State. App. 1. Petitioner was convicted as indicted and he was sentenced to concurrent ten year terms of imprisonment, and he was ordered to register as a sexual offender. App. 627 – 628; App. 358, ll. 21-25; App. 352, ll. 11-19. The Court of Appeals affirmed Petitioner’s convictions. *State v. Holder*, Op. No. 2017-UP-239 (S.C. Ct. App. filed June 7, 2017).

On May 15, 2018, Petitioner filed an application for post-conviction relief (PCR). App. 405 – 421. The State made its return September 7, 2018. App. 422 – 429. On October 25, 2019, a hearing was held on the matter before the Honorable Edward W. Miller. Mills Ariail, Jr., represented Petitioner. Taylor Smith represented the State. App. 430. On July 16, 2020, the PCR court issued an order granting PCR.<sup>1</sup> App. 532 – 553. On July 23, 2020, the State filed a motion to alter or amend the judgment. App. 554 – 565. On November 23, 2020, Petitioner filed his response to the State’s motion. App. 566 – 574. The parties reconvened for a hearing on the matter via WebEx on November 30, 2020. App. 575. On January 5, 2021, the court issued an order granting the State’s motion to alter or amend the judgment. App. 608 – 622.

Petitioner filed a petition for writ of certiorari. The State made its return. On June 28, 2022, this Court granted the petition for writ of certiorari. This brief of petitioner follows.

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<sup>1</sup> The order was mistakenly titled, “Order of Dismissal.” App. 532.

## **STANDARD OF REVIEW**

The standard of review in PCR cases depends on the specific issue raised on appeal. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836, 839–40 (2018). The reviewing court must defer to a PCR court’s findings of fact and will uphold them if there is evidence in the record to support them. *Id.* (citing *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)). However, the appellate court reviews questions of law de novo, with no deference to the PCR court. *Id.*

## ARGUMENT

The PCR court erred where it found trial counsel provided effective representation where counsel moved for a mistrial because the solicitor asked Petitioner if he was gay and if he was “interested in young boys,” since the Court of Appeals procedurally barred the mistrial issue because counsel did not object the trial court’s curative instruction or renew his mistrial motion.

The solicitor’s questions were an irrelevant and improper appeal to the prejudices of the jury. The curative instruction was insufficient to overcome the prejudice to Petitioner in this “weak” child sexual abuse case. Trial counsel was constitutionally ineffective when he failed to preserve his mistrial motion.

### ***Relevant facts***

At the time of his trial Petitioner was thirty-three years old and he was the married father of five children. He had no criminal record. App. 224, ll. 5-16; App. 355, ll. 2-8. In 2012, Petitioner worked at the Hampton Psychiatric Residential Treatment Facility (the facility) in Pickens as “direct care staff.” The facility was a place for mentally ill children who “are diagnosed with ODD, bipolar, you name it.” App. 99, ll. 7-19; App. 141, ll. 3-11; App. 135, ll. 20-24.

A fifteen-year-old resident of the facility, Minor 1, was “dissatisfied” with his progress towards release. App. 75, ll. 18-25; App. 142, ll. 11-14. Minor 1 described living at the facility as being “like lockdown.” App. 73, ll. 6-10. According to the Assistant Facility Director, Meghann Harvey, Minor 1 was “a handful.” App. 100, ll. 7-11; App. 132, l. 7. Another staff member, Kevin Sowell, said Minor 1 was heard to say “that he knew what to do to get out.” App. 142, ll. 6-10. Sowell explained that Minor 1 “would lie and manipulate at times.” Sowell agreed that

Minor 1 lied about staff persons on occasions and he said Minor 1 had admitted to Sowell “that he had lied about staff.” App. 144, ll. 5-24.

In June of 2012, Minor 1 claimed that Petitioner sexually assaulted him at the end of May, in locations that were off-camera. Minor 1 claimed that while he was doing chores, Petitioner touched his genitals in the facility’s laundry room and nurse’s station, and performed oral sex on him in the library. Minor 1 alleged the library door remained cracked so that Petitioner could look out. According to Minor 1, Petitioner gave him pizza in exchange for watching Minor 1 masturbate. App. 78, l. 19 – 85, l. 7.

Meghann Harvey claimed that staff persons were told to remain on-camera at all times and she alleged that staying on-camera while with patients had been “an issue” with Petitioner in the past. App. 108, l. 21 – 109, l. 10. Video surveillance footage showed Petitioner and Minor 1 entering the library together on May 31, 2012, and footage also showed Petitioner and Minor 1 going to the laundry room. App. 125, ll. 7-1; App. 103, ll. 10-12; App. 109, l. 14 – 110, l. 13. Trial counsel would later testify that the video footage showed Petitioner step out of the library, “look both ways and then the door would close again.” App. 519, ll. 12-15.

Petitioner testified that he had not touched Minor 1 and said he had done nothing “inappropriate” with Minor 1. App. 240, ll. 14-21; App. 257, ll. 10-20. Petitioner explained that his wife got him pizza and he shared it with other employees. Petitioner agreed he gave pizza to Minor 1 when Minor 1 asked for some. App. 246, l. 2 – 247, l. 20. Petitioner said he tried to stay on-camera while working at the facility, but he explained it was impossible to do so at all times. App. 231, l. 20 – 232, l. 19.

When his time came to cross-examine Petitioner, the solicitor improperly appealed to the prejudices of the jury by exploiting prejudice against homosexual people. The following exchange occurred:

BY MR. TOOKER:

Q. **So are you gay?**

A. **No.**

Q. **Are you interested in young boys?**

A. **No.**

MR. CANTRELL: Your Honor, again, I object.

THE COURT: I sustain the objection.

MR. CANTRELL: There's no foundation.

THE COURT: I sustain the objection.

App. 296, l. 22 – 297, l. 5 (emphasis added). Trial counsel immediately moved for a mistrial. He argued the questioning was “prejudicial,” “irrelevant” and “without foundation.”

[W]e don't know the predisposition of members of the jury. If there is no foundation for such a statement or allegation, we don't know the effect it could have. It was unnecessary. I believe its grounds for a mistrial. I'm not satisfied that Mr. Holder can get a fair trial . . . it would be prejudicial.

App. 297, l. 20 – 298, l. 18. “[W]hy ask that. It just serves to bring up issues that should not be brought up. There is no foundation for it. I think it can be prejudicial, and I don't think it can be undone at this stage.” App. 298, l. 24 – 299, l. 5.

The solicitor responded,

Mr. Cantrell elicited from the defendant that he's married, that he does have several children. He's expecting another child. Candidly, and this is just my personal theory in the case, but it

seems to me like these things happen by virtue of some sort of repression.

App. 299, ll. 7-12.

THE COURT: Some sort of what?

MR. TOOKER: Repression. Repressed—if these things are true—and I’m not—

THE COURT: Well, you’re not a psychiatrist or a psychologist.

MR. TOOKER: No, I’m not.

THE COURT: And have you had your theory [vetted] by someone who has expertise to tell you whether you are going down the right rabbit trail or not?

MR. TOOKER: Absolutely not, sir . . .

App. 299, ll. 13-22.

The court noted that the case must be “based on fact,” and ruled:

Well, I think—I think it was an inappropriate question, quite candidly, because there is nothing without foundation to throw that in. It is—it is just inappropriate. I’m not going to go any further than that. However, I do not feel that it manifests a necessity to grant a mistrial. I’m going to ask the jury to disregard that. If we – if we have another episode like that, then we will bring this two and a half day—or two day trial to a screeching halt. And I think I have said enough on that, too.

...

I will give, even though the defense has not requested it, I want the record to be clear that I’m doing this *sua sponte*, to give the correct—curative instructions and we’ll proceed.

App. 300, l. 22 – 301, l. 14.

The court then instructed the jury,

Members of the jury panel, shortly before you went out, the—Mr. Tooker asked the witness whether or not he was gay. That was not an appropriate question. There is no evidence in this record to support that question. The question is not relevant—the question nor the answer.

So please disregard the fact that the question was asked. Mr. Holder answered it no, so you can disregard that, too. But just disregard—that’s not an issue in this case to any degree whatsoever. So disregard the fact that that question was asked. You may proceed.

App. 301, l. 20 – 302, l. 6.

The solicitor returned to his “personal theory” that homosexuality was equated with pedophilia in his closing argument, when he claimed Minor 1 was credible since he admitted he ejaculated. The solicitor suggested that if Minor 1 had been lying, he would have spun the story to show that he was not gay. “If you’re making this up, and you’re a guy . . . You’re going to say, yeah, he tried to do these things to me. I was like, whoa, Bro, I’m not into that. That’s not what I’m about.” App. 332, l. 20 – 333, l. 5.

When the jury returned verdicts of guilt, the trial court expressed surprise, asking the clerk who read the verdict, “Are you sure that’s what it says?”<sup>2</sup> App. 352, ll. 12-15. Petitioner was convicted as indicted and he was sentenced to concurrent ten year terms of imprisonment, with sex offender registry. App. 627 – 628; App. 358, ll. 21-25; App. 352, ll. 11-19.

On direct appeal, Petitioner argued, “The trial court erred in refusing to declare a mistrial after the solicitor asked, as the trial court called it, the ‘inappropriate question’ that was ‘without foundation’ of whether appellant was gay and ‘interested in young boys’ in a sexual abuse case.” App. 361 – 380. However, the Court of Appeals affirmed Petitioner’s convictions, finding any error was unpreserved since trial counsel did not object to the curative instruction or renew his mistrial motion:

Affirmed pursuant to Rule 220(b), SCACR, and the following authorities: *State v. Rogers*, 361 S.C. 178, 183, 603 S.E.2d 910,

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<sup>2</sup> A second judge, the PCR judge, would later observe that, “this was generally a weak case” against Petitioner. App. 587.

912–13 (Ct. App. 2004) (holding for an issue to be preserved for appellate review, it must be “(1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity” (quoting Jean Hoefler Toal et al., *Appellate Practice in South Carolina* 57 (2d ed. 2002))); *State v. George*, 323 S.C. 496, 510, 476 S.E.2d 903, 911–12 (1996) (“If the trial [court] sustains a timely objection to testimony and gives the jury a curative instruction to disregard the testimony, the error is deemed to be cured.”); *id.* (“No issue is preserved for appellate review if the objecting party accepts the [trial court’s] ruling and does not contemporaneously make an additional objection to the sufficiency of the curative charge or move for a mistrial.”); *State v. Walker*, 366 S.C. 643, 658, 623 S.E.2d 122, 130 (Ct. App. 2005) (“A curative instruction to disregard incompetent evidence and not to consider it during deliberation is deemed to have cured any alleged error in its admission.”).

*State v. Holder*, Op. No. 2017-UP-239 (S.C. Ct. App. filed June 7, 2017).

At his PCR hearing, Petitioner provided the facts surrounding the mistrial motion and explained that the Court of Appeals found trial counsel’s mistrial motion to be unpreserved. App. 455, l. 10 – 458, l. 23. Petitioner noted the voluble reaction in the courtroom to the questioning. App. 478, l. 24 – 479, l. 3; App. 454, ll. 9-16. “[A] couple of people kind of yelled out, my wife being one of them, you know.” App. 478, l. 24 – 479, l. 3. “And [trial counsel] even was floored, the whole court, people were like, ah, you know, gasping that [the solicitor] said something this outlandish.” App. 454, ll. 9-16.

David Alexander, who represented Petitioner on direct appeal, testified that he briefed the mistrial issue because he thought it was a “winnable” issue. App. 483, ll. 11-19. “I thought the merits of it were strong.” App. 484, ll. 1-2. Appellate counsel thought the merits of the issue were strong enough to “get past” possible preservation problems. App. 483, ll. 16-17. Appellate counsel explained that there was no “valid reason” for the solicitor’s questions about whether Petitioner was gay and liked young boys. App. 484, l. 23 – 485, l. 6.

Trial counsel told the PCR court that he moved for a mistrial because he thought the solicitor's questions were "egregious." However, trial counsel said he did not object to the sufficiency of the court's curative instruction because he believed "that was going to be the best that we were getting." App. 506, ll. 8-22; App. 509, ll. 9-10.

PCR counsel argued that the questions let the cat "out of the bag" and the prejudice was not cured by the curative instruction. App. 528, ll. 20-24. The PCR court ruled that Petitioner was entitled to post-conviction relief and initially issued an order granting PCR. App. 529, ll. 13-24; App. 532 – 553. The court found, "Trial counsel was constitutionally ineffective for failing to preserve for appellate review his objection to the State's questions about [Petitioner's] sexuality and his motion for a mistrial." App. 550. "Appellate counsel argued on appeal that Judge Hayes erred in denying trial counsel's motion, and the Court of Appeals affirmed, finding this issue had not been preserved for appellate review." App. 550. "The solicitor's comments, when considered in their totality, show that [Petitioner] was prejudiced by the exchange and that the result of the trial would have been different had trial counsel preserved the issue for appellate review." App. 551.

However, the State filed a motion to alter or amend the judgment in which it argued the trial court's curative instruction prevented any prejudice to Petitioner. App. 554 – 565. Petitioner responded the "fact that trial counsel believed the question prejudicial enough to [Petitioner] to move for a mistrial but failed to reserve such a major issue for appellate review" supported granting PCR. App. 573. The parties reconvened for a hearing on the matter via WebEx. App. 575. The court took the matter under advisement and both parties submitted post-hearing briefs. App. 592, ll. 10-11; App. 595 – 601; App. 602 – 607. The PCR court then issued an order granting the State's motion. App. 608 – 622.

The order stated that Petitioner did not show “a reasonable likelihood that his convictions would have been reversed on appeal even if trial counsel had objected to the trial court’s curative instruction on the basis that the instruction was inadequate to cure the prejudicial effect of the assistant solicitor’s questions, thus preserving the issue for appellate review.” App. 616. “The trial court’s curative instruction cured any error or potential prejudice from the assistant solicitor’s two, brief, successive questions . . .” App. 617. “Notably, [Petitioner] believed the assistant solicitor’s questions would have turned those in the courtroom against the State, not against [Petitioner] himself, because everyone recognized the questions were inappropriate.” App. 617, n. 3.<sup>3</sup>

### ***Discussion***

The solicitor’s improper questions suggested that homosexual people have a propensity to molest children, and so Petitioner must be a “repressed” homosexual who molested Minor 1. The solicitor’s improper questions tapped into a deeply-rooted prejudice that had no bearing on whether Petitioner was guilty of the charged offenses and instead suggested a verdict on an improper basis. The questions were effective because they suggested a motive for crimes that jurors find incomprehensible—criminal sexual conduct with a minor. Counsel thought the questioning egregious enough that he moved for a mistrial, but the Court of Appeals found he did not preserve his motion for appellate review. This was ineffective assistance of counsel.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S.

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<sup>3</sup> The order additionally concluded that Petitioner was “not entitled to post-conviction relief with respect to his claim that trial counsel was constitutionally ineffective for not objecting to the jury instruction that the victim’s testimony did not need to be corroborated.” App. 610. This was because *State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016), was decided after Petitioner’s 2015 trial took place.

668 (1984). The United States Supreme Court has established a two-pronged test to evaluate allegations of ineffective assistance of counsel. A petitioner must prove “that counsel’s performance was deficient” and fell below reasonable professional norms, and the deficient performance prejudiced the petitioner. *Id.* at 687.

Homosexual people have long been vilified, by the law and in society. *See Obergefell v. Hodges*, 576 U.S. 644, 660–61, (2015) (explaining that historically, the argument that “gays and lesbians had a just claim to dignity was in conflict with both law and widespread social conventions.”) *Id.* In the 1980’s, Chief Justice Burger wrote that, “Condemnation of [homosexual] practices is firmly rooted in Judeo-Christian moral and ethical standards.” *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (Burger, C.J., concurring), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003). In *Lawrence v. Texas*, 539 U.S. at 571, the Supreme Court explained that

for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives.

“[D]ata suggest that compared to straight defendants, defendants perceived to be gay face unfair presumptions of guilt in child sexual abuse cases.” Tisha R. A. Wiley, Bette L. Bottoms, *Effects of Defendant Sexual Orientation on Jurors’ Perceptions of Child Sexual Assault*, 33 *Law & Hum. Behav.* 46, 55 (2009). “Surveys reveal that people presume a link between homosexuality and pedophilia.” *Id.* at 47. “One stereotype about gay men generally is that they are oversexed, predatory child molesters who are drawn to boys in particular.” *Id.* at 46. In Wiley and Bottoms’ study, “Jurors made more pro-prosecution decisions in cases involving a gay

versus straight defendant, particularly when the victim was a boy.” *Id.* at 46. “[I]n one survey, 30% of registered voters endorsed a statement that ‘typical behavior for gay men included trying to take advantage sexually of boys and young men.’” *Id.* at 47.

Evidence of homosexuality is not relevant to prove criminal sexual conduct with a minor. Nevertheless, this propensity stereotype is effective disinformation. “[E]vidence of a man’s homosexuality is irrelevant to whether he has a sexual interest in children.” *Com. v. Christie*, 53 N.E.3d 1268, 1271 (Mass. App. Ct. 2016). “The belief that homosexuals are attracted to prepubescent children is a baseless stereotype.” *State v. Bates*, 507 N.W.2d 847, 852 (Minn. Ct. App. 1993). *See also People v. Garcia*, 177 Cal. Rptr. 3d 231, 242 (Cal. App. 4th 2014) (in prosecution for sexual abuse of a child, evidence of defendant’s homosexual orientation was irrelevant and potentially inflammatory). *Compare State v. Huckabee*, 419 S.C. 414, 425, 798 S.E.2d 584, 589 (Ct. App. 2017) (criminal profiling information is propensity evidence and has no place in a criminal trial. This type of testimony unduly tends to suggest a decision on an improper basis).

The solicitor attempted to exploit bias against homosexual persons with his improper questions. As seen, the solicitor told the trial judge it was his personal theory that someone who molested a child did so because he was a “repressed” homosexual. This invidious stereotype the solicitor tapped into was one so pervasive that an educated man like the solicitor believed it himself. The case was tried in rural Pickens County. People in the courtroom noticeably reacted and gasped when the questions were asked; the accusation that Petitioner was a closeted homosexual was apparently more shocking than the accusation that he molested a child. As seen, conflating homosexuality with pedophilia played well enough to the jury that the solicitor

returned to it again in closing argument, when he argued that a straight boy who was lying about being molested by a man would not admit to having ejaculated.

Counsel thought the questions were so improper that a mistrial was required and he objected to the prejudicial nature of the questions and to their relevance. “Evidence which is not relevant is not admissible.” Rule 402, SCRE. “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Rule 403, SCRE. “Unfair prejudice means an undue tendency to suggest decision on an improper basis, such as an emotional one.” *State v. Saltz*, 346 S.C. 114, 127, 551 S.E.2d 240, 247 (2001).

Had counsel properly preserved his mistrial motion, Petitioner’s convictions would have been reversed on direct appeal. “[W]hether to grant or deny a mistrial is within the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion.” *State v. Herring*, 387 S.C. 201, 216, 692 S.E.2d 490, 498 (2009). “The grant of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that the prejudicial effect can be removed in no other way.” *Id.* “Generally, a curative instruction to disregard the testimony is deemed to have cured any alleged error.” *Id.* “[A]n instruction to disregard objectionable evidence usually is deemed to have cured the error in its admission unless on the facts of the particular case it is probable that notwithstanding such instruction the accused was prejudiced.” *State v. Hale*, 284 S.C. 348, 354, 326 S.E.2d 418, 422 (Ct. App. 1985).

“Because a trial court’s curative instruction is considered to cure any error regarding improper testimony, a party must contemporaneously object to a curative instruction as insufficient *or* move for a mistrial to preserve an issue for review.” *State v. Walker*, 366 S.C.

643, 658, 623 S.E.2d 122, 130 (Ct. App. 2005) (emphasis in original). “Generally, the consideration of whether there was any prejudice requires that a motion for mistrial be made after the trial judge attempts to cure the error.” *State v. Craig*, 267 S.C. 262, 268, 227 S.E.2d 306, 309 (1976).

This matter was properly raised as a claim for relief in PCR. Where trial counsel fails to preserve an issue for direct appeal, that issue may properly be raised as a post-conviction relief allegation of ineffective assistance of counsel. *McLaughlin v. State*, 352 S.C. 476, 483, 575 S.E.2d 841, 844 (2003) (“Because this issue was found to be unpreserved on direct appeal, respondent may raise this issue in his PCR proceeding.”). *See also Foye v. State*, 335 S.C. 586, 590, 518 S.E.2d 265, 267 (1999) (“counsel was deficient because he failed to adequately preserve this issue for review.”); *McHam v. State*, 404 S.C. 465, 475, 746 S.E.2d 41, 47 (2013), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018) (“This Court has previously held that an issue that was raised on direct appeal but found to be unpreserved may be raised in the context of a PCR claim alleging ineffective assistance of counsel.”) The issue of whether Petitioner was entitled to a mistrial was raised on direct appeal, but the Court of Appeals found counsel did not preserve the issue since counsel accepted the trial court’s curative instruction and did not contemporaneously make an additional objection to the sufficiency of the curative charge or move for a mistrial. *State v. Holder*, Op. No. 2017-UP-239 (S.C. Ct. App. filed June 7, 2017).

Petitioner was prejudiced by the solicitor’s baseless and improper attempt to show Petitioner molested Minor 1 because he was a repressed homosexual. To demonstrate prejudice, a PCR applicant “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable

probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. Specifically, “[t]o prove prejudice resulting from counsel’s failure to move for a mistrial, an applicant must demonstrate that, had counsel moved for a mistrial, the trial court’s denial of the motion would have amounted to an abuse of discretion.” *Earley v. State*, 418 S.C. 255, 266, 792 S.E.2d 226, 232 (2016). A mistrial was proper due to the highly inflammatory nature of this line of this deliberate questioning. Whether the prosecution intentionally elicits inadmissible evidence is a factor the court considers in determining whether to grant a mistrial. *State v. Ferguson*, 376 S.C. 615, 619, 658 S.E.2d 101, 103 (Ct. App. 2008). Here, the solicitor intentionally posed questions that the trial court correctly recognized were improper.

The trial court’s curative instruction did not correct the improper, inflammatory effect of the solicitor’s questions. The questions invited a verdict based on an invidious stereotype in a case that was dependent upon credibility. As seen, the trial judge expressed surprise at the verdict. The PCR judge also observed it was a “weak” case. The instruction was insufficient to remove the purported causal connection between homosexuality and child sexual abuse from the minds of the jurors. Criminal sexual conduct with a minor is a crime that is vile and incomprehensible to normal people. Yet the solicitor provided a motive for this otherwise incomprehensible crime, a motive which appealed to the passions and prejudices of the jury. As Petitioner observed, there was an audible reaction in the courtroom when the improper questions were asked. The seeds were planted. PCR counsel correctly argued the curative instruction was insufficient.<sup>4</sup>

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<sup>4</sup> Notably, the trial court instructed only that the jury disregard the first question and answer, of whether Petitioner was gay. The question and answer which came right upon its heels, of whether Petitioner was interested in young boys, remained. App. 301, l. 20 – 302, l. 6.

Juror prejudice is already problematic in child sexual abuse cases, even absent the additional prejudice baselessly injected here. *See Kennedy v. Louisiana*, 554 U.S. 407, 439 (2008) (recognizing that child rape is a crime that “in many cases will overwhelm a decent person’s judgment”). The jury’s instruction that the testimony of the victim need not be corroborated also weighs in Petitioner’s favor in a prejudice analysis. App. 348, ll. 3-4. This charge has subsequently been held to be an unconstitutional comment on the facts. *State v. Stukes*, 416 S.C. 493, 495, 787 S.E.2d 480, 481 (2017). Finally, the PCR court’s finding that the improper line of questioning somehow inured to Petitioner’s benefit because many in the courtroom recognized its impropriety is unsupported by the record since Petitioner was convicted. The fact that people were shocked demonstrates prejudice not harmlessness.

Although the court instructed the jury to disregard the question of whether Petitioner was gay, the instruction was insufficient to fully mitigate the solicitor’s link of homosexuality with pedophilia in this “weak” child sexual abuse case. On these unusual facts, Petitioner has established prejudice—the result of the proceeding would have been different had counsel renewed his mistrial motion. *Strickland*, 466 U.S. at 694.

**CONCLUSION**

Based on the foregoing argument, Petitioner respectfully requests that this Court reverse the PCR court and grant Petitioner a new trial.

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