THE STATE OF SOUTH CAROLINA
In The Supreme Court

Certiorari to the Court of Appeals
Appeal from Edgefield County
Court of Common Pleas
William P. Keesley, Circuit Court Judge

Opinion No. 2015-UP-174 (S.C. Ct. App. filed April 1, 2015)

Appellate Case No. 2015-001342

TOMMY S. ADAMS, #311901 . . . . . Respondent,

v.

STATE OF SOUTH CAROLINA . . . . . Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESTATEMENT OF QUESTION PRESENTED

Has Petitioner established that certiorari is warranted to review the unpublished unanimous per curiam decision of the Court of Appeals holding that Adams was denied the effective assistance of counsel during trial, in which the state's case relied on uncorroborated testimony of the alleged victim and irrelevant, inadmissible, and prejudicial testimony by a law enforcement officer?

ADDITIONAL SUSTAINING GROUNDS

Was Adams denied the effective assistance of counsel during trial due to numerous other instances of deficient and prejudicial conduct?[1]

STATEMENT OF THE CASE

Adams was convicted in Edgefield County, South Carolina, of lewd acts on a child and criminal sexual conduct with a minor (1st degree). The State's evidence during trial consisted solely of uncorroborated testimony by the alleged victim (hereinafter "AW"), who was thirteen years old at the time of trial, and an investigating officer. AW testified, in an "utterly emotionless, blank" fashion, Appendix ("App.")[2] 340, that Adams, her stepfather, sexually molested her beginning in September 1999 when she was seven years old. App. 39. She testified that he committed lewd acts on 15-20 occasions and engaged in sexual penetration 3-4 times. App. 41-42. According to AW, the abuse ended on Christmas Eve

[1]Because the Court of Appeals found the improper admission of character evidence to be dispositive, the Court declined to address these remaining issues. Supreme Court Appendix ("S.Ct. App.") 111.

[2]"App." refers to the Appendix filed before the Court of Appeals.

2002, when she was ten years old, because she repeatedly physically resisted Adams' efforts to pull her pants down. App. 43.[3]

AW's mother separated from Adams in February 2003. App. 47. In April 2003, AW first alleged to her mother that she had been abused and law enforcement was called. App. 50. The allegation was made in the context of AW learning from her mother that her real father had committed suicide. App. 44. When her mother told AW that Adams had been a "good father," AW alleged that he had abused her. App. 45. Her mother took her to her family doctor and she also saw a doctor at the recommendation of the state and law enforcement, App. 50, but neither testified as no evidence of abuse was found. Thereafter, AW sent Adams a Father's Day card expressing her love for him. App. 61.

Virginia Bledsoe, a former investigator for the Edgefield County Sheriff's Office, interviewed AW and Adams. She testified that Adams denied the allegations, but he made

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[3]Amanda Salas, M.D., an expert in forensic and child and adolescent psychiatry, testified in post-conviction relief ("PCR") proceedings that AW's testimony that she physically fought off the abuse when she was in a home alone with Adams was "improbable."

> I find it improbable that a child who physically is not at a developmental stage to engage in a physical confrontation would fight back with a lot of physical aggression unless the aggressor had provoked them to that point and initiated the aggression.

App. 277. In particular:

> I would not expect it to happen under those circumstances where they knew there was nobody there coming to rescue them save them or make them safe.

App. 278. Likewise, AW's lack of any manifested symptoms consistent with abuse, App. 272, continued behavioral symptoms caused by the trauma of having to physically fight off an abuser, App. 278, and continued voluntary contact with Adams, App. 279, called into doubt the credibility of AW's testimony.

"odd statements" when he "mentioned something about he talked frankly with his children–his older children–about sex." Specifically, Bledsoe testified Adams told AW: "Your cooter belongs to your daddy, and if anybody wants to touch that or bother that, you need to tell them to ask me." App. 67.[4] During cross-examination, Bledsoe testified that she believed AW. App. 70.[5]

Although defense counsel had informed the jury during opening statements that "you're going to hear two totally different stories" and "[t]here's going to be two people saying two different things," App. 35, Adams did not testify. The defense evidence presented was brief testimony from Adams' first wife, Sharon Adams, and his children from the 22-year marriage with her: Leslie Adams Boyce, Tommy Adams, Jr., and Cody Adams. Ms. Boyce's husband also testified. App. 87-107. The defense witness testimony was generally that Adams is a loving, affectionate father, and no one in the family ever observed any inappropriate conduct or sign of abuse.

As set forth in detail in the argument below, the state's closing argument relied heavily on Bledsoe's testimony concerning Adams' "vile" statements to assert "malice" in Adams' heart, "his attitude," and "his true colors."

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[4]The State throughout the petition refers to the statement in question as the "turtle comment," *see, e.g.,* Petition at 6, 12, while also trying to explain that "[t]he word 'cooter' is a red herring" *id.* at 11 n.1. The State is simply having an argument with itself on this point. Adams agrees that "[a]ny interchangeable synonym," *id.*, does not change the legal analysis. Specifically, if the statement had been "Your [vagina] belongs to your daddy, and if anybody wants to touch that or bother that, you need to tell them to ask me," it would still be irrelevant and inadmissible evidence. Adams will not engage in fancy or rewrite the case, however, and will use the exact language used.

[5]At defense counsel's request, the court instructed the jury to ignore Bledsoe's opinion of AW's truthfulness. App. 78.

The jury began deliberations at 2:58 p.m. While the jury was out, it was disclosed that there had been communication between the jury foreperson and a bailiff, who answered the question of whether "it had to be a hundred percent" affirmatively. App. 153-54. Defense counsel did not object or request any curative action and none was taken. App. 154. Following a jury request to "continue tomorrow," the jury was excused for an overnight recess at 5:14 p.m. App. 155. Deliberations continued from 9:00-10:31 a.m., when the jury returned with verdicts of guilty. App. 162.

Additional relevant evidence will be discussed in the argument below.

Argument

Petitioner has failed to establish – and has failed to even attempt to do so – that certiorari is warranted to review the unpublished unanimous per curiam decision of the Court of Appeals holding that Adams was denied the effective assistance of counsel during trial, in which the state's case relied on uncorroborated testimony of the alleged victim and irrelevant, inadmissible, and prejudicial testimony by a law enforcement officer.

Pursuant to Rule 242, SCACR, this Court's certiorari review is not available simply for the correction of perceived error. Specifically, the rule provides:

> (b) Considerations Governing Review. A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered:
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> (1) Where there are novel questions of law.
>
> (2) Where there is a dissent in the decision of the Court of Appeals.
>
> (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.

> (4) Where substantial constitutional issues are directly involved.
>
> (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

None of these circumstances are present here and the State makes no argument otherwise. Instead, the State simply argues that the Court of Appeals "erred" in its analysis, *see* Petition at 6, 9, 11, and "departed from the standard of review," Petition at 11. Even assuming for the sake of argument that the Court of Appeals "erred," which it did not, that would not amount to a "special and important" reason warranting this Court's certiorari review.

Furthermore, the State's Petition contains numerous factual errors and essentially "makes up" facts that do not appear in the record of this case and, in some instances, as addressed below, are directly contrary to the actual facts before this Court. For example, according to the State in its "Statement of Facts":

> [C]ounsel testified Adams' statement was admissible because it was a statement given by the accused that could be and was reasonably interpreted as an admission of guilt to the underlying offense. Counsel noted the statement was harmful but was open to a neutral and positive meaning.

Petition at 7-8 (citations omitted).[6] The representation that counsel believed the statement to be an admission of guilt is false. Counsel did not say the statement "could be and was reasonably interpreted as an admission of guilt to the underlying offense."

Likewise, the State includes in its "Statement of Facts" that "counsel testified to making the tactical decision to 'counterpunch,'" citing App. 336, the State's arguments and

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[6]The State cites to Appendix 77-78, 85-86. There is nothing even remotely relevant to these statements on those pages of the Appendix, which are actually part of the trial transcript. The State is apparently attempting to cite pages 77-78 and 85-86 of the PCR transcript, which can be found in the Appendix at 336-37 and 344-45.

that this was a "tactical decision" to allow inadmissible evidence to be admitted. Petition at 8. Counsel did not say anything about "counterpunch[ing]" in his testimony and he did not say that he made a tactical decision to allow inadmissible testimony into evidence "in order to attack and convert the State's evidence as a sword for the defense's case." Petition at 14. What counsel actually said in response to the State's questions bears no similarity to the State's revisionist statement of "facts" here.

Q . . . . Do you recall what your thinking was at that time, why you didn't object?

A I think there's a couple of things. One, I didn't think it was objectionable. It was a statement of the accused. I think both sides get to interpret its meaning as they choose. The jury ultimately has to make that decision.

Also, the intent was when the case began that Mr. Adams was going to testify. So he certainly was going to clear that up when he took the stand. So I felt like that would be clarified, if it needed to be clarified, when he testified.

And I think we certainly had the ability to argue to the jury or have them understand that it wasn't a statement that Ms. Wren's body was his play thing, if you will.

App. 336. On cross-examination, counsel further testified as follows:

Q Mr. Huff, starting specifically with the "your cooter belongs to your daddy" comment, did you believe that was basically a confession by Mr. Adams?

A No.

Q To either criminal sexual conduct with a minor or lewd acts?

A Confession of nothing. Confession would have to be a recognition of guilt and admission that you've committed a crime. I did not view that statement as being that at all.

Q Did you view it as relevant, even, to the offenses?

A Relevant, yes. Because the State would have the ability to put the spin on it that they would desire. There's a difference between -- when it comes to admissibility, I think

in trial work the actions, conduct, statements of people, specifically the defendant, is nothing more than paint. And I think both the defense and the prosecution paint the picture they want with the same paint samples they've got.

Q If you can keep some of the prosecution's paint out, you like to keep it out, right?

A If we can, certainly. Sometimes some of their paint helps us, sometimes it hurts us.

Q Did "your cooter belongs to daddy" help in this case?

A. Mrs. Norris, I don't know how to answer that. I would lean towards saying no, but it depends on how the jury took it. And there a lot of times are things that come into evidence at trial that one party thinks will help their side when it may wind up helping the other.

As a general statement in this case, would I have preferred that comment not to have been in evidence? Yes. Did I think it was going to come in? Yes. Did I think we could explain it and give it a neutral and positive meaning? Yes, did that as well.

App. 344-45. He also conceded that if the evidence was objectionable, "[a]s to whether or not it could be a strategic choice to allow it in, I would generally say no." App. 378. Specifically, he conceded that if Adams' statements were not admissible and were "detrimental," his failure to object "well may warrant . . . a new trial." App. 378.

Given these circumstances, the State clearly has made no showing that certiorari is warranted. Even assuming that this Court were to grant certiorari to engage in error correction, the State's arguments fail just as they did in the Court of Appeals.

In reviewing the Circuit Court's findings, this Court must affirm the Court of Appeals' decision because there is no evidence of probative value supporting the PCR court's denial of relief. *Palacio v. State*, 333 S.C. 506, 512, 511 S.E.2d 62, 65 (1999); *see also Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989). The Court must also affirm the

Court of Appeals' decision because the PCR judge's decision was controlled by an error of law. *Pierce v. State*, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000).

The test for a Sixth Amendment claim of ineffective assistance of counsel requires a court to examine the facts of the case to determine "whether counsels' conduct so undermined the proper functioning of the adversarial process that one cannot rely upon the trial as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). The *Strickland* standard is satisfied if a petitioner establishes both that his attorney's representation "fell below an objective standard of reasonableness" measured "under prevailing professional norms," *id.* at 688, and that the petitioner was "prejudiced" by his attorney's substandard performance, *id.* at 692. The focus is upon "reasonable probability," such that "[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* at 694. Specifically, Adams was required to show "there is a reasonable probability that at least one juror would have struck a difference balance." *Wiggins v. Smith*, 539 U.S. 510, 537 (2003); *Milke v. Ryan*, 711 F.3d 998, 1019 (9th Cir. 2013). *See also Council v. State*, 380 S.C. 159, 179 n.7, 670 S.E.2d 356, 366 n.7 (2008) (holding in ineffective assistance of counsel case: "We cannot say beyond a reasonable doubt that the undiscovered mitigating evidence, taken as a whole, would not have influenced at least one juror to recommend a life sentence"); *Vail v. State*, 402 S.C. 77, 91, 738 S.E.2d 503, 511 (Ct. App. 2013) (holding in ineffective assistance of counsel case: "[W]e cannot find the admission of the inadmissible hearsay was harmless beyond a

reasonable doubt"). As the Court of Appeals appropriately found, Adams met his burden of proof.

Specifically, in order to be admissible at trial, evidence must be relevant, meaning that it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Evidence which is not relevant is not admissible." Rule 402, SCRE. Even relevant evidence must be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . ." Rule 403, SCRE.

Statements of the defendant, like all other evidence, must meet these requirements in order to be admissible in evidence. For example, in *State v. Cheeseboro*, 346 S.C. 526, 550, 552 S.E.2d 300, 313 (2001), this Court held that a capital murder defendant's rap song, which included lyrics referencing no fingerprints or evidence left in a pool of blood, was inadmissible. These references were "too vague in context to support the admission of this evidence." Whatever "minimal probative value" this evidence may have had was "far outweighed by its unfair prejudicial impact as evidence of appellant's bad character, i.e. his propensity for violence in general." Likewise, in *State v. Jenkins*, 322 S.C. 414, 416, 472 S.E.2d 251, 252 (1996), this Court held that a burglary defendant's statement to a police officer that he set up a "school of burglary" in which he taught others to commit burglaries, was inadmissible as the defendant denied involvement in the crime charged and "there was no evidence that the crime petitioner was charged with was in any way related to this scheme."

Here, however, counsel failed to object to Detective Bledsoe's testimony that Adams admitted to telling AW, the alleged victim in the case: "Your cooter belongs to your daddy, and if anybody wants to touch that or bother that, you need to tell them to ask me." App. 67. These general comments were inadmissible because they were neither relevant nor material to the crimes charged, *see State v. Nelson*, 331 S.C. 1, 15-16, 501 S.E.2d 716, 723-724 (1998), nor statements that could be construed as conveying an admission of guilt, *see State v. Tufts*, 355 S.C. 493, 499, 585 S.E.2d 523, 525 (Ct. App. 2004). Nonetheless, without objection from the defense, these statements were admitted.

In *Nelson*, a criminal sexual conduct and lewd act on a minor case involving a three year old child, the trial court admitted evidence that the defendant possessed children's toys, videotapes of children's television shows, children's books, and similar items. An expert testified that pedophiles often possessed these types of items. The trial court admitted the evidence as relevant to a "personality characteristic," i.e., relevant to prove the defendant was a pedophile. For the same reasons, the trial court admitted the defendant's statements to a police officer that he "was uncomfortable around adult women" and that "he had fantasies about children." 331 S.C. at 15, 501 S.E.2d at 723. This Court found reversible error because "only those parts of a confession or statement made to police which are relevant and material to the crime charged should be received into evidence." 331 S.C. at 16, 501 S.E.2d at 724. The defendant's "general sexual attitudes were not relevant or material to the crime charged because they were admitted to show character." *Id.*

In *Tufts*, a criminal sexual conduct case, the Court of Appeals distinguished *Nelson* in holding that the defendant's admission, in context, that "he had a problem with his sexual

desires could be construed as a confession and was there admissible." 355 S.C. at 496, 585 S.E.2d at 524. The defendant, an orthopedic technician, was questioned by a police officer following an allegation that he had sexually assaulted a patient during a medical examination. The defendant denied the allegation and left. Only minutes later, he returned and informed the police officer that he had previously been arrested on a similar allegation. When the officer responded "that it sounded like he may have a problem, [the defendant] stated that he knew he a problem with his sexual desires." *Id.* Admission of this statement was not improper because the "statements were not admitted to show his character; instead, they were admitted as a confession to the specific crime charged." 355 S.C. at 497, 585 S.E.2d at 525. The trial court properly found that the defendant's "comment regarding his sexual desires was sufficiently related to the officer's questioning about the specific crime to support the inference that [the defendant] chose to convey his confession in that manner." 355 S.C. at 498, 585 S.E.2d at 525. As the Court of Appeals observed in *Tufts*:

> [T]here are many ways in which a suspect may choose to implicate himself in a crime. When asked of his guilt, he might simply nod affirmatively, or he might offer a complete recounting of the entire crime.

355 S.C. at 499, 585 S.E.2d at 525. In *Tufts*, the context of the admission of a "problem with his sexual desires" could be determined to be an admission of guilt.

In this case, however, Adams' statement could not reasonably be interpreted, in context, to be an admission of guilt or wrongdoing. This was clear from Bledsoe's incident report.

> We told [Adams] of the allegations of child sexual abuse of [AW]. Tommy Adams denied any sexual contact. He did stated [sic] he talks openly about sex with the older children. He is referring to AW, Cody, and Tommy

> Adams. Cody and Tommy Adams are his children by a prior marriage. He said he had said things like Tessa his 7 year old already had boobs. He was speaking of breasts. Mr. Adams stated he'd tell the kids don't have sex until you are married and your cooter belongs to your daddy. If they want to touch you tell him to ask me first. He was talking about [AW] vagina. Mr. Tommy Adams denied any sexual contact.

App. 402. Nonetheless, counsel did not move in limine to exclude these statements or object when the state called Bledsoe to testify for the sole purpose of offering these statements. App. 67.

"[T]he failure to object to this clearly inadmissible evidence was ineffective assistance of counsel" not explained by a valid trial strategy. *Holman v. State*, 381 S.C. 491, 493, 674 S.E.2d 171, 172 (2009). Here, counsel did not even purport to have a strategic reason for the failure to object.

> I didn't think it was objectionable. It was a statement of the accused. I think both sides get to interpret its meaning as they choose. The jury ultimately has to make that decision.

App. 336. While he gave further testimony that he thought this evidence could be explained, if need be, in anticipated testimony from Adams and that objecting before the jury could raise a "red flag to the jury," App. 336-37, the bottom line is that he simply did not view the evidence as objectionable.[7] He conceded, however, that he would have preferred to keep the evidence out if possible, App. 345, and that the statement was a "[c]onfession of nothing," App. 344.

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[7]As the Court of Appeals found, even assuming counsel did not object to avoid raising a "red flag" before the jury, counsel's conduct would still be deficient because this issue could have been litigated outside the presence of the jury. S.Ct. App. 111 (citing *Dawkins v. State*, 346 S.C. 151, 157, 551 S.E.2d 260, 263 (2001), and *Matthews v. State*, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002)). *See also Vail*, 402 S.C. at 88-89, 738 S.E.2d at 509-10.

The PCR court, in an order written entirely by Petitioner's counsel, simply found that counsel "provided a rational explanation as to why he did not object" to this testimony. App. 455. While it may be "rational" to decline objection when one does not view the testimony as objectionable, counsel clearly misunderstood the very basics of the rules of evidence. As set forth above, simply because a statement is a statement of the defendant does not make it admissible.

Here, Adams' statement that he told AW "your cooter belongs to daddy," was not even arguably a confession to the crimes charged or relevant to them. Admission of this testimony was unquestionably detrimental though, as the State turned this statement into essentially a character assassination in closing arguments. Specifically, the State relied heavily on the "cooter" statement to convince the jury that this "vile" statement was indicative of Adams' character and, therefore, his guilt:

> What did he tell Virginia Bledsoe? What a vile thing to say. He's just been talked to by this investigator about allegations of sexual misconduct that he's alleged on this child. And what does he tell the investigator from the Sheriff's Office? "Your cooter belongs to your daddy," because he's using this child as his sexual plaything.
>
> You can bet it belonged to him. He considered it his personal property, because he was using it for his own sexual benefit and lust. Yes, it belonged to him, and he showed that. It didn't belong to anybody else in the world. "If anybody else wants to come and touch you or do anything else, they've got to talk to me, because the cooter belongs to me."
>
> He's even telling this investigator that. What an inappropriate thing, and it shows what's in his heart, malice.

App. 134-135. *See also* App. 136 ("It belongs to him").

> She could sure tell you exactly when it started, when he started dragging her back there in that bedroom, and molesting her, and using her for his own lust and satisfaction, because it belongs to him.
>
> He couldn't even resist throwing that in in front of this investigator after she's telling him what he's been accused of. That's his attitude. That's his true colors, and it came out right then. He couldn't even cover it up when he was talking to the police, because that's what he believes.

App. 138. *See also* App. 139 ("[T]his child is his plaything, because it belongs to him").

In asserting that the Court of Appeals "erred" in finding that counsel's conduct was deficient, the State asserts:

> Adams' contention that the statement was not relevant to the underlying charges is patently absurd. A reasonable facial interpretation shows Adams' comment was material to the evidence and testimony presented at trial. Certainly, a proclamation of dominion and control to an eleven-year old child victim regarding her sexual autonomy implied an ability to stifle disclosure.

Petition at 10. The problem, however, is that the State was not making any argument about "stifl[ing] disclosure" during the trial. Instead, as set forth above, the solicitor relied heavily on the "cooter" statement to convince the jury that this "vile" statement was indicative of Adams' character and, therefore, his guilt. Second, the State made a contradictory argument in the Court of Appeals: "[a] reasonable facial interpretation shows Petitioner's comment was material to motive." S.Ct. App. 93. Third, the State still has not made a showing or even argument of how this statement is one of "dominion and control" or how that would be admissible in any event.

The State, alternatively argues for the first time that counsel's statement in opening "opened the door to the admissibility of the statement on other grounds." Petition at 10. Of course, the State ignores the fact that counsel's opening statements were not "evidence." *See*

McManus v. Bank of Greenwood, 171 S.C. 84, 89, 171 S.E.2d 473, 475 (1933) ("statements of fact appearing only in argument of counsel will not be considered"). The State does not bother to even attempt to explain what these alleged "other grounds" are or include any actual argument or citation to the record or any law. Presumably, the State is referring to counsel's statements that the defendant would testify. First, as set forth below, counsel provided ineffective assistance in making these statements. Second, even if Adams had testified, his character would not have been in evidence until after his testimony or presentation of other character evidence. *See State v. Council*, 335 S.C. 1, 12 n.6, 515 S.E.2d 508, 514 n.6 (1999) ("An accused must introduce evidence of his character at trial before the prosecution can attack it. See Rule 404(a), SCRE. Here, because appellant never testified or offered other evidence of his good character, his character was never an issue"). Third, again, Adams' "cooter" statement was simply not indicative of character. Even according to the police report of this statement, the context was simply Adams "tell[ing] the kids don't have sex until you are married and your cooter belongs to your daddy." App. 402.[8]

Immediately following the State's argument that the "cooter" statement was inculpatory and admissible, the State makes the incredible argument that the statement was not prejudicial. Specifically, the State declares: "A general desire for a parent to safeguard a child's virtue certainly does not insinuate criminal behavior." Petition at 10-11. That is

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[8]As set forth below, the statement was made to three "kids" at the same time with AW's mother present. Thus, the State is simply engaging in further misconduct by making these false and misleading arguments. *See Giglio v. United States,* 405 U.S. 150, 153 (1972) ("A 'prosecutor's deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice'"); *Riddle v. Ozmint*, 369 S.C. 39, 47-48, 631 S.E.2d 70, 75 (2006) (same).

preciously the point. As the Court of Appeals properly found, by admission of Adams' statement, and the focus on that by the Solicitor in arguments, "[t]he State used Adams' statement in its closing argument as evidence of Adams' bad character to prove he was guilty as charged." S.Ct. App. 111.

The State also asserts on the question of prejudice that the Court of Appeals "departed from the standard of review" and improperly shifted the burden of proof to the State. Petition at 11-12. This is patently false. There is no probative evidence supporting the PCR court's finding of no prejudice. Moreover, the Court of Appeals explicitly cited Adams' burden in its finding of prejudice: "the PCR court erred in finding Adams failed to prove prejudice." S.Ct. App. 111. In doing so, the court explicitly relied on this Court's case law. *Id.* (citing *Smith v. State*, 386 S.C. 562, 566, 689 S.E.2d 629, 631 (2010)).

Finally, the State acknowledges that the State's entire case at trial "hinged on the credibility of the minor" alleged victim. Petition at 12. The State then asserts as "important" that, in sentencing, the trial court commented: "As I sit here today, however, I completely agree with the verdict of the jury." App. 173. The State then cites *State v. Cutro*, 332 S.C. 100, 117, 504 S.E.2d 324, 332 (1998) with the parenthetical: "The trial judge, not this Court, is in the best position to be the arbiter of [the witness'] credibility." Petition at 12. Once again, the State misses the point. The question before this Court in determining whether there was prejudice due to counsel's deficient conduct has nothing to do with the question of whether the trial court or the jury found the alleged victim to be "credible." The proper test, under *Strickland v. Washington,* 466 U.S. 668 (1984), is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would

have different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. "Under *Strickland*, the assessment of prejudice is an objective inquiry that 'should not depend on the idiosyncracies of the particular decisionmaker,' which 'are irrelevant to the prejudice inquiry.' 466 U.S. at 695, 104 S.Ct. 2052." *Harris v. Thompson*, 698 F.3d 609, 648 (7th Cir. 2012). In other words, the trial court's view of the credibility of the alleged victim is irrelevant because whether there is prejudice under *Strickland*, focuses only on whether there is a reasonable probability of a different result with "reasonable jurors, acting as factfinders." *Haney v. United States*, ___ A.3d ___, 2015 WL 4477835, *5 (D.C. Ct. App. Jul. 23, 2015).

Under this standard, the prejudice is especially clear "[w]here, as here, the very matter as to which defense counsel has been ineffective becomes one of the linchpins of the prosecutor's closing." *Commonwealth v. Alvarez*, 740 N.E.2d 610, 618 (Mass. 2000). Likewise, the prejudice is clear, in light of the complete lack of evidence corroborating the alleged victim's testimony of abuse and the lengthy jury deliberations in this case.

Additional Sustaining Grounds

Certiorari should also be denied because Adams was denied the effective assistance of counsel during trial due to numerous other instances of deficient and prejudicial conduct.

A. Failure to rebut the state's misrepresentation of the nature of Adams' statement.

Even assuming Adams' statement of "your cooter belongs to daddy" was relevant and admissible, counsel was ineffective in failing to investigate and to present testimony from Adams' sons, Tommy Adams, Jr., and Cody Adams, establishing, as even Bledsoe's incident

report and testimony admitted, that these comments were made only in the parental context of educating his children about sexual matters.

Both Tommy, Jr., and Cody testified during trial, but they were not asked about this statement. In PCR, however, both testified that they were present, along with AW and her mother, for a family discussion when Adams made the statement to AW. As Tommy, Jr., described:

> [W]e were discussing the birds and the bees story as some people put it, and it was taken out of context the way that he said it. He didn't mean it as it was his. It was that if anybody was to come to date [AW] or anything like that, that she was supposed to come to him and ask him because he was her father, just like he would do the same with us.

App. 289-90. Cody's recollection was similar:

> Daddy was having a talk to us about sex because Daddy had taken me and Tommy to work with him one day and I had found a condom and I didn't know what it was, and he told us that he would sit us down and talk to us about it, and we all sat down in the living room and talked about it.
>
> And when he said that, he was saying it because he doesn't want people to harm [AW]. He didn't want other men to just take control of her. He was protecting her as he was protecting all of us.

App. 293. Cody recalled that he was around eleven years old at the time and AW was around ten. App. 295.

Counsel's conduct was deficient. Even in attempting to explain away his failure to object to Bledsoe's testimony, counsel explained that his intent was to have Adams to testify and clarify the statement "if it needed to be clarified." App. 336. Counsel also testified that "we certainly had the ability to argue to the jury or have them understand that it wasn't a statement that [AW's] body was his play thing." App. 336.

The PCR court found that "trial counsel articulated valid strategic reasons for not calling Applicant's two boys as rebuttal witnesses," App. 453, and counsel "had no way of knowing that his client would ultimately choose not to testify and thereby eliminating Applicant's opportunity to clear up the context of the comment through his testimony," App. 456-57.

Counsel's explanations for not presenting this testimony are not valid strategic reasons and, indeed, are explanations that ring hollow. First, the boys did testify for the defense during trial. They simply were not asked about this topic. Second, counsel's explanations are clearly "hindsight" because counsel advised Adams not to testify and never mentioned Adams' statement in closing. Likewise, even assuming, Adams had testified and counsel had made these arguments, counsel's conduct was still deficient in failing to present this testimony from Tommy, Jr., and Cody on this matter to corroborate the anticipated testimony of Adams or to stand on their own without his testimony. The prejudice from the failure to rebut Bledsoe's testimony and defuse the state's reliance on Adams' statement as evidence of guilt is the same as addressed above.

B. Eliciting testimony from Detective Bledsoe that she believed the alleged victim and failing to move for a mistrial.

Testimony from a state expert or law enforcement officer in a criminal sexual conduct case that the alleged victim's symptoms of rape or sex abuse trauma are genuine, *State v. Dawkins*, 297 S.C. 386, 393, 377 S.E.2d 298, 302 (1989), or that they believe the alleged victim's account of events, *State v. White*, 361 S.C. 407, 415-416, 605 S.E.2d 540, 544 (2004), is unquestionably improper. *State v. Kromah*, 401 S.C. 340, 358-60 & n.7, 737

S.E.2d 490, 500 & n.7 (2013); *State v. Jennings*, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011); *State v. McKerley*, 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012). Counsel's failure to object to testimony of this nature is deficient and prejudicial conduct, especially where "[t]here is no valid claim of overwhelming evidence of . . . guilt." *Smith v. State*, 386 S.C. 562, 569, 689 S.E.2d 629, 633 (2010). When defense counsel actually elicits testimony of this nature, the prejudice or "devastating impact" is heightened because the improper bolstering of the alleged victim's credibility "came in as part of what was supposed to be petitioner's defense." *Ingle v. State*, 348 S.C. 467, 472, 474, 560 S.E.2d 401, 403, 405 (2002).

Here, in cross-examining Detective Bledsoe, counsel opened the door to her testimony that she believed AW.

Q Okay. Now, you have investigated other sex abuse cases before, right?

A Yes, sir, I have.

****

Q Okay. And you are aware, based upon your experience, that some of these allegations are true?

A Yes, sir.

Q And, you're also aware that some of the allegations are false?

A Yes, sir.

Q Okay. And you're also aware that some of these allegations sometimes are made just before or just after a Family Court domestic action is filed, right?

A Yes, sir.

Q Okay. Now, you investigated this case based upon what people told you, right?

A Yes, sir.

Q Okay. And you assume that what people tell you when they – in one of these type of child sex abuse cases, you're assuming that what they're telling you is true?

A Yes, sir. And I believe what [AW] has told me on this case.

App. 69-70. Counsel moved to strike the answer as "not responsive" to the question. App. 70. The trial court held, however, that counsel "invited that answer." App. 71. The trial court did, however, offer a curative instruction. App. 74. Counsel did not object to the instruction and did not move for a mistrial. App. 77. The court instructed the jury, as follows:

> All right, ladies and gentlemen, let me clear a couple a things up before we move forward. I supposed that it is somewhat obvious that there may be people who on different sets of facts and other situations have made accusations against people that are not people [sic] and that some people have made accusations against other people that are true.
>
> It will be your job in this case to determine what it is that the State has proven beyond a reasonable doubt. That's your job to determine that on the facts of this case.
>
> Now, with regard to the last statement by the witness, I am going to instruct you to disregard anything that you may have heard this witness say regarding whether or not she believes or does not believe any other witness. That is a matter for you. It is not for a witness to tell you who they believe. It is for you to decide who you believe.

App. 77-78.

Counsel's conduct was deficient and prejudicial in eliciting Bledsoe's bolstering testimony and in failing to timely move for a mistrial on this basis. While the PCR court found that counsel "could not know how the Investigating Officer was going to respond to his question," App. 457, this is clearly not supported by the record as the trial court

determined that "her answer . . . flows naturally from the line of questioning that you were just following," App. 72. Likewise, this Court made clear in *White* that cross-examination of a witness "as to whether she had cases in which she did not believe the alleged victim," 361 S.C. at 415-16, 605 S.E.2d at 544, opens the door to this bolstering testimony. Clearly, cross-examination about whether the witness is merely assuming the truth of the allegations opens this same door.

Moreover, the issue is not simply that counsel elicited the testimony, but that counsel did not seek a mistrial at the appropriate time. Counsel later recognized the deficiency in his failure to move for mistrial because he asserted this ground as a basis for granting a new trial in his post-trial motions. App. 179.

While the jury did receive a curative instruction, it was inadequate to cure the error.

> An instruction to disregard incompetent evidence usually is deemed to have cured any 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. Dempsey, 340 S.C. 565, 532 S.E.2d 306 (Ct. App. 2000) (citing *State v. Johnson*, 334 S.C. 78, 512 S.E.2d 795 (1999)) (emphasis added). "[O]n the facts of [this] particular case," Adams was prejudiced by Bledsoe's improper testimony and the curative instruction was inadequate to cure the error. The only proper evidence for the State was the testimony of AW. As addressed above, there was no valid purpose for the State to even present Bledsoe's testimony, as Adams' statements to her were not relevant and were improperly used as a character assassination by the State. Adding to that testimony that Bledsoe believed AW, it is unlikely that the jury could unring that bell and properly disregard this

testimony. Improper corroboration, in the context of a charge of criminal sexual conduct with a minor stepdaughter and the state's case is built almost solely on the testimony of the minor alleged victim, has a "devastating impact." *State v. Barrett*, 299 S.C. 485, 487, 386 S.E.2d 242, 243 (1989).

C. Advising Adams not to testify after informing the jury that he would testify, or, alternatively, failing to properly advise Adams at all with respect to whether he should testify.

Counsel provided ineffective assistance in essentially promising the jury in opening statements that Adams would testify and then failing to produce that testimony. Counsel asserted:

> I am confident that you're going to hear two totally different stories, and you're going to have to sit in judgment. And there's not going to be any DNA. There's not going to be any videotapes. There's not going to be any of that.
>
> There's going to be two people saying two different things.

App. 35. In PCR, counsel conceded that he "misstated" the case in opening and should have said the jury would hear two different "versions" rather than two different "people." App. 370. He also conceded that the jury could have understood his statements as a promise that Adams would testify. App. 371.

Counsel's conduct was both deficient and prejudicial as Adams did not testify. Adams testified in PCR that he did not do so because counsel advised him not to. His family members corroborated this testimony. Specifically, Adams testified that counsel had advised him prior to trial that he did not want him to testify. App. 321. Likewise, Adams, his ex-wife, and his three children from this prior marriage, all testified that counsel told Adams at

a recess that he would not call him to testify because he thought Adams would get upset and get "red" in the face. App. 286, 291, 295, 299-300, 321. Adams acknowledged, however, that counsel told him that the decision was Adams' to make, but Adams followed counsel's advice. App. 321.

Counsel, on the other hand, testified: "[I]t certainly was my intention and understanding that Mr. Adams was always going to testify in the case." App. 334. *See also* App. 332. He expressed being "somewhat surprised that he made the decision not to testify, even though I felt that the State's case was weak." App. 334. Counsel acknowledged, however, that he would never respond to a client's question when asked, "What should I do?" App. 338. Likewise, he has never advised a client that "you should not testify," or "you should testify." App. 351. "I never tell them, 'I'm advising you to do this or that.' . . . I don't do that." App. 352. "I don't tell them my opinion . . . ." App. 353. "I'm not going to tell any client that, . . . 'In my opinion, you shouldn't testify.'" App. 355. No exception is made, even if the client is intellectually disabled or has a low IQ. App. 354.

Counsel's conduct was deficient. Counsel's testimony that he did not advise Adams that he should not testify is simply not credible in light of the contradictory testimony by numerous witnesses. Nonetheless, the PCR court found counsel's testimony "to be credible" and rejected Adams' testimony. App. 458.

Assuming that counsel's testimony on this point was credible and believable, counsel's conduct was still deficient by his own admission in that counsel did not advise Adams whether he should or should not testify. Likewise, counsel did not assert any trial

strategy for failing to advise Adams. He simply does not advise his clients at all on this front.

> If there's any part, I think, of a criminal trial where a lawyer brings a person to the edge of the diving board and then turns around and steps back, it's at that moment. We don't push them in the water and we don't hold them back. We've trained them, hopefully, in trial preparation of how to testify. We've covered what they intend to testify about. We've prepared them. But we've got to let them fly or not fly on their own. To do one or the other, to push them or hold them back, I think a lawyer oversteps his bounds.

App. 354.

Counsel's conduct was deficient by his own admission. Advising the defendant concerning the law and providing the benefit of counsel's training, education, and experience is the essence of what attorneys do in providing the "assistance of counsel." The Sixth and Fourteenth Amendment entitlements to the effective assistance of counsel is "a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is represented by experienced and learned counsel." *Johnson v. Zerbst,* 304 U.S. 458, 462-463 (1938). Failure to advise the defendant or provide any opinion at all "renders meaningless defense counsel's vital function as an adviser." *Alvord v. Wainwright*, 469 U.S. 956, 960 (1984) (Marshall, J., with whom Brennan, J., joined, dissenting). The American Bar Association, Standards of Criminal Justice, which are "guides to determining what is reasonable," *Strickland*, 466 U.S. 688, provide:

> After informing himself or herself fully on the facts and the law, the lawyer should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome.

Standard 4-5.1(a). Likewise, the South Carolina Rules of Professional Responsibility provide:

> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Rule 2.1, RPC, Rule 407, SCACR. "[I]f counsel believes that it would be unwise for the defendant to testify, counsel may, and indeed should, advise the client in the strongest possible terms not to testify." *United States v. Teague*, 953 F.2d 1525, 1535 (11th Cir. 1992). Conversely, where counsel believes the defendant should testify, counsel should "advise the client in the strongest possible terms" to do so, because "[a] client is entitled to straightforward advice expressing the lawyer's honest assessment." Comment to Rule 2.1, RPC, Rule 407, SCACR. *See, e.g., Carter v. Lee*, 283 F.3d 240, 251 (4th Cir. 2002) (Counsel were not ineffective in advising the defendant that he should testify in his capital trial) (citing *Teague*).[9]

Adams was prejudiced by counsel's deficient conduct in failing to ensure Adams would testify in this case. First, as trial counsel conceded, there was no real downside to

---

[9]This situation is analogous to situations where the defendant receives a plea offer from the state. It is not enough for counsel simply to inform the client of the offer. Counsel must advise the defendant with counsel's opinion on whether the offer should be accepted or rejected. *See, e.g., Boria v. Keane*, 99 F.3d 492, 495 (2nd Cir. 1996) (Counsel ineffective in drug case for failing to advise client concerning the advisability of accepting the state's plea bargain offer even though counsel believed that "his client's decision to reject the plea bargain was suicidal"). Counsel's failure to offer his opinions to his client is "extremely troubling," *Young v. Zon*, 827 F. Supp. 2d 144, 158 (W.D.N.Y. 2011), because "the failure to give *any* advice [is] entirely contrary to the minimum professional norms of practice," *id.* at 162 (emphasis in original). *See also Hicks v. Howton*, 675 F. Supp. 2d 1050 (D. Ore. 2009).

Adams doing so. Counsel believed that Adams was innocent, App. 326, and recognized that the state's case rested entirely on AW's "assertion that he did it with nothing to back that up or support it," App. 328. Second, Adams' testimony included his specific denial of the allegations. App. 315. Third, Adams' testimony included his explanation of the "cooter" comment. App. 317. Consistent with the testimony of his sons, Adams testified that the comment was made in the context of sex education or "the birds–and–bees talk" with his sons and AW's mother present. App. 317. "I didn't mean any other thing than they had my protection to keep their virginity." App. 318. He informed Bledsoe of this because she "asked me if my kids knew about sex." App. 316.

Likewise, in the context of counsel's promise to the jury in opening that Adams would testify, the prejudice from the failure to testify is heightened. Indeed, counsel highlighted the failure in closing argument by asserting that "[t]his is what we sometimes call a he said-she said type of case" without corroborating DNA or medical evidence. Adams was prejudiced because the jury could only infer from counsel's failure to deliver Adams' testimony that Adams had something to hide or that counsel did not believe he would be a credible witness. In other words, despite counsel's promise in opening that the jury would hear from "two people saying two different things," App. 35, in this "he said–she said" case, App. 121, only "she" testified. Thus, "he" never got his say and this was due to counsel's deficient and prejudicial conduct.

"[L]ittle is more damaging than to fail to produce important evidence that had been promised in an opening." *Anderson v. Butler,* 858 F.2d 16, 17 (1st Cir.1988). *See, e.g.*, *Ouber v. Guarino*, 293 F.3d 19 (1st Cir. 2002) (counsel ineffective in drug trafficking case

for promising the jury four times in the opening to call the defendant as a witness, but then failing to keep those promises); *English v. Romanowski*, 602 F.3d 714 (6th Cir. 2010) (counsel ineffective in assault with intent to commit murder case for failing to adequately investigate prior to informing the jury in opening statements that the defendant's girlfriend would be called as a witness to corroborate the claim of self-defense); *U.S. ex rel. Hampton v. Leibach*, 347 F.3d 219 (7th Cir. 2003) (counsel ineffective in sexual assault and robbery case for failing to investigate and interview exculpatory eyewitnesses and for making promises in his opening statement to the jury that he did not keep).

D. Failure to object, request that the jurors and bailiffs be questioned, and failure to request that the jurors be returned to court for proper instructions following improper communications between jurors and the bailiffs.

Under the Sixth and Fourteenth Amendments, a defendant in a criminal trial is guaranteed a fair trial by an impartial jury. In order to fully safeguard this protection, it is required that the jury render its verdict free from outside influences of whatever kind and nature. *State v. Johnson*, 302 S.C. 243, 250, 395 S.E.2d 167, 170 (1990). Not every conversation between a juror and a bailiff will prejudice the defendant, but when there has been such a communication, "a new trial must be granted unless it clearly appears that the subject matter of the communication was harmless and could not have affected the verdict." *State v. Cameron*, 311 S.C. 204, 208, 428 S.E.2d 10, 12 (Ct. App. 1993) (quoting *Holmes v. United States*, 284 F.2d 716, 718 (4th Cir. 1960)).

In this case, the following exchange occurred on the record after approximately one and a half hours of deliberation, App. 360-61:

THE COURT: Ma'am, come up front, please. You're Ms. Watson?

MS. WATSON: Yes, sir.

THE COURT: All right, raise your right hand.

(The witness was sworn.)

THE COURT: Okay. Now, something happened back there with the jury asking you a question. Is that what happened?

MS. WATSON: Well, I was standing with the other Bailiff back there, and they came out and asked if it had to be a hundred percent, and she told them yes.

THE COURT: Okay. The other Bailiff, Ms. Scurry, told them yes?

MS. WATSON: We told them yes, uh-huh.

THE COURT: All right. And that was all that was said?

MS. WATSON: That's all.

THE COURT: Okay. And I'll hear from counsel. Anything you want to say?

App. 153-54. Defense counsel responded only:

> Judge, I think Ms. Scurry said what the law is. Of course, it more properly should have been Your Honor. But I'm sure nothing was done intentionally. But we've got no position for that.

App. 154. No corrective action was taken. App. 154-55.

Counsel's conduct was deficient. If inquiry had been made, the court would have learned that the jury wanted to know if it had to be a unanimous vote, which is indicative that the jury was hung. Specifically, the jury foreperson testified in the PCR hearing that she was asking whether all twelve had to be unanimous. App. 306. Indeed, it was even reported in the media that "[t]he jury was deadlocked, we are told, with a nine guilty to three innocent voting" apparently when the question was asked of the bailiffs. App. 258.

If trial counsel had requested proper inquiry and additional instruction following the disclosure that the jury was hung, the jurors would have been provided a proper *Allen*[10] charge instruction informing jurors that they should "approach the evidence with an open mind and consider the opinions of their fellow jurors," in an attempt to reach a verdict, *State v. Williams*, 386 S.C. 503, 510, 690 S.E.2d 62, 65 (2010), but that they should not give up an honestly held opinion and change their mind "if it would do violence to [their] conscience," *Green v. State*, 351 S.C. 184, 195, 569 S.E.2d 318, 323-324 (2002). Thus, there is a distinction between the short answer the bailiff gave from the complete instructions the trial court would have given had the court made additional inquiry and properly instructed the jury. *Blake by Adams v. Spartanburg General Hosp.*, 307 S.C. 14, 17, 413 S.E.2d 816, 818 (1992).

Adams was prejudiced by counsel's deficient conduct. The jury was hung in this case that hinged solely on the credibility of the minor alleged victim, who testified in an "utterly emotionless, blank" fashion, App. 340, and whose testimony was completely uncorroborated by any other proper evidence. While the bailiff was correct that it had to be "a hundred percent" or "unanimous," "the bailiff's remarks were not offset by a statement that each juror should not surrender his conscientious convictions merely to reach an agreement." *Blake*, 307 S.C. at 17, 413 S.E.2d at 818. In these circumstances, there is no assurance that "the communication was harmless and could not have affected the verdict." *Cameron*, 311 S.C. at 208, 428 S.E.2d at 12. In other words, there is "reason to suppose outside influences" entered into deliberations and impacted the verdict. *Blake*, 307 S.C. at 17, 413 S.E.2d at

[10]*Allen v. United States*, 164 U.S. 492 (1896).

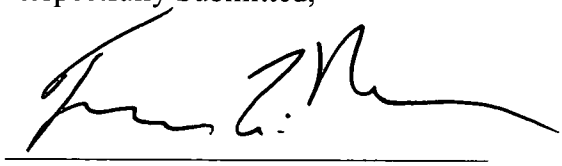
818. *See also Weaver v. Thompson*, 197 F.3d 359, 365-66 (9th Cir. 1999). Counsel's conduct was deficient and prejudicial. *Workman v. State*, 412 S.C. 428, 771 S.E.2d 636 (2015) (counsel ineffective for failing to object to a coercive *Allen* charge); *Dawson v. State*, 352 S.C. 15, 572 S.E.2d 445 (2002) (same).

In addressing this issue, however, the PCR court concluded: "The testimony of the two jurors at the PCR hearing fail to show that the jury's deliberations were somehow affected or that juror's [sic] changed their minds in response to this question and answer." App. 460. This is simply not true and is directly contradicted by the testimony. The foreperson testified that she related to all the jurors that the bailiff said it had to be "a hundred percent." App. 307. The foreperson (and, therefore, the other jurors) understood from this that the jurors were not leaving until everyone agreed. App. 307. More specifically, one juror, Warrena Mathis, who also testified in the PCR, understood it to mean "we wasn't going to leave until we found him guilty. We were going to stay there." App. 309. After an overnight recess and continued deliberations, she changed her vote from not guilty to guilty because of that understanding. App. 309.

Conclusion

Wherefore, for the foregoing reasons, this Court should deny the State's petition for writ of certiorari.

Respectfully Submitted,



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August 17, 2015.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
AUG 19 2015
S.C. SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Edgefield County
Court of Common Pleas
William P. Keesley, Circuit Court Judge

Opinion No. 2015-UP-174 (S.C. Ct. App. filed April 1, 2015)

Appellate Case No. 2015-001342

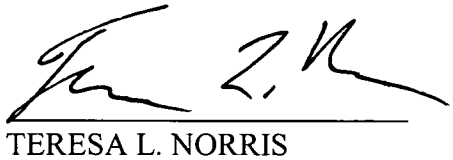
TOMMY S. ADAMS, #311901 ..... Respondent,

v.

STATE OF SOUTH CAROLINA ..... Petitioner.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Return to the Petition for Writ of Certiorari and the Motion to Exceed Page Limit has been served upon Respondent's counsel by first class mail, postage prepaid, addressed to counsel of record, J. Walt Whitmire, Post Office Box 11549, Columbia, South Carolina 29211.



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August 17, 2015