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STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas (PCR)

The Honorable William P. Keesley, Post-Conviction Relief Judge
The Honorable John C. Few, Trial Judge

Unpublished Opinion No. 2016–UP–515 (S.C.Ct.App. filed December 14, 2016)

Tommy S. Adams,

Petitioner,

v.

State of South Carolina,

Respondent.

Appellate Case No. 2017-000739

# BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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## PETITIONER'S STATEMENT OF ISSUES ON APPEAL

I. 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, due to counsel's failure to rebut the state's misrepresentation of the nature of Adams' statement.

II. Adams was denied the effective assistance of counsel due to counsel's 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.

(Brief of Petitioner, p. 1).

## RESPONDENT'S COUNTER PRESENTATION OF ISSUES ON APPEAL

I. Did the Court of Appeals err in affirming the PCR judge's ruling that counsel was not ineffective in choosing not to present additional testimony to give additional evidence of context to Petitioner's relevant and admissible statement where that ruling is fully and fairly supported by probative evidence?

II. Did the Court of Appeals err in affirming the PCR judge's ruling that counsel was not ineffective in failing to insist on further investigation and juror inquiries regarding a singular bailiff comment that was reported to the trial court during deliberations and reasonably assessed to need no further action at that time apart from the instruction that any jury inquiry must be directed to the trial judge?

## STATEMENT OF THE CASE

Petitioner is not currently in the South Carolina Department of Corrections but is on bond pending appeal.[1] He was indicted at the September 2003 term of the Edgefield County Grand Jury for Lewd Act on a Child Under Sixteen (2003-GS-19-0416), and Criminal Sexual Conduct with a Minor—1st Degree (2003-GS-19-0418). James B. Huff, Esq., represented Petitioner on the charges.

A jury trial was held October 12-14, 2005, before the Honorable John C. Few. After a break in deliberations overnight, and over an hour's deliberations the following morning, the jury returned with a verdict finding Petitioner guilty as charged. (PCR App. pp. 163-164). Judge Few sentenced Petitioner to fifteen (15) years imprisonment for the lewd act and thirty (30) years, consecutive, for the CSC conviction. (PCR App.p. 173). Petitioner filed a Motion for a New Trial on or about June 23, 2006, (PCR App. pp.176-182), which was denied on July 10, 2006, (PCR App.p.183).

A timely Notice of Appeal was filed and an appeal perfected. Appellate counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). (PCR App. pp. 184-198). After review of the brief and record, the South Carolina Court of Appeals affirmed. (PCR App. p. 199).

On February 23, 2009, Petitioner filed an Application for Post-Conviction Relief. (PCR App. pp. 200-220). Respondent filed its Return on July 7, 2009. (PCR App. pp. 222-226).

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[1] Petitioner was admitted to bond pending appeal when the Court of Appeals initially granted a new trial. This Court reversed that decision, but the appeal bond remains in effect at this time. The bond, as modified on February 9, 2017, provides Petitioner "is required to report to the Edgefield County Sheriff's Office for detention and transfer to the South Carolina Department of Corrections **within ten days of the date the appeal is remitted to the circuit court.**" (emphasis in original).

Applicant was represented in the action by Teresa L. Norris, Esq. PCR counsel filed amendments to the application dated October 19, 2010, (PCR App. pp. 227-234); November 30, 2010, (App. pp. 236-245); and December 2, 2010, (PCR App. pp. 247-259). An evidentiary hearing was convened on December 2, 2010, before the Honorable William P. Keesley. (PCR App. p. 260). Judge Keesley denied and dismissed the application for relief by Order dated September 12, 2011, filed October 7, 2011. (PCR App. pp. 441-464). Petitioner appealed.

On April 1, 2015, the South Carolina Court of Appeals, in an unpublished opinion, found "counsel was ineffective in failing to object to the admission of Adams' statement to police because it was improper character evidence," and reversed the conviction. (PCR App. p. 527). This Court reversed the grant of relief finding:

> Because Adams' statement could be interpreted, and was interpreted by the solicitor, as circumstantial evidence of Adams' control over and sexual use of the victim, the statement was relevant. Rule 401, SCRE (evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence). It was not inadmissible character evidence that Adams had a propensity to commit criminal sexual conduct with a minor or lewd acts. *See State v. Holder,* 382 S.C. 278, 676 S.E.2d 690 (2009) (the term "character" refers to a generalized description of a person's disposition or an aspect of an individual's personality that is usually described as a "propensity" to engage or not engage in various forms of conduct). *Cf. State v. Nelson,* 331 S.C. 1, 501 S.E.2d 716 (1998) (where children's toys, videos, photographs depicting young girls, and other evidence seized from the defendant's bedroom could only invite the jury to infer the defendant was acting in conformity with his pedophilia when he committed the crimes with which he was charged, the evidence should not have been admitted). Further, trial counsel articulated a reasonable trial strategy for not objecting because he expected Adams to testify that the statement was made during a conversation in which he was advising the victim not to let anyone touch her inappropriately. *Matthews v. State,* 350 S.C. 272, 565

> S.E.2d 766 (2002) (where counsel articulates a valid reason for employing certain strategy, the conduct will not be deemed ineffective assistance of counsel). Accordingly, we hold the court of appeals erred in reversing the PCR judge's finding that trial counsel was not ineffective in failing to object to Adams' statement to police.

*Adams v. State*, 2016 WL 1588795, at *1 (S.C. Apr. 20, 2016). (See also PCR App. pp. 674-676). This Court observed by footnote that it was not resolving whether "counsel was ineffective in failing to elicit testimony from Adams and/or his sons to explain the context of the statement." *Id.* Further, because the Court of Appeals had only addressed one issue in the appeal, this Court remanded to the Court of Appeals to rule on the remaining issues. *Id.* (See also p. 676).

On December 14, 2016, the Court of Appeals issued another unpublished opinion and affirmed the PCR court's denial of relief. (PCR App. p. 677-679). Petitioner petitioned for rehearing, (PCR App. pp. 680-685), which was denied on February 23, 2017, (PCR App. p. 695). Petitioner filed his petition for writ of certiorari in this Court on March 29, 2017. Respondent filed a return on May 16, 2017. By Order of November 15, 2017, this Court granted the petition as to Questions IA and II, but denied review on the remaining questions. Petitioner filed his Brief of Petitioner on December 19, 2017. This Brief of Respondent follows.

## RESPONDENT'S STATEMENT OF FACTS

Petitioner was convicted of sexually abusing the victim, his stepdaughter. The abuse took place over a number of years, from September 1999 through December 2002. The State presented two witnesses – the victim who testified about the abuse, and an investigator who testified about Petitioner's statements during the investigation after the victim's report of abuse.

At trial, the victim testified Petitioner first abused her in September of 1999, when she was seven years old, while her mother was on a trip to Canada. (PCR App. p. 37; pp. 39-40). She further testified the abuse had continued at various times when her mother was out of the home on other business trips, errands or shopping trips. (PCR App. pp. 40-41). The victim testified Petitioner digitally and vaginally penetrated her several times, and made her perform oral sex on him on one occasion. (PCR App. pp. 41-42). She testified that she became insistent that her mother would not leave her, then eventually told her mother about the abuse when her mother commented Petitioner had been a "good father" to the victim. (PCR App. pp. 43-45).[2]

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[2] Petitioner asserts in his Brief that the victim "testified, in an 'utterly emotionless, blank' fashion," quoting the characterization of former defense counsel at the PCR hearing. (Brief of Petitioner, p. 3; see also PCR App. p. 340). Petitioner has also included in the appendix a newspaper article which reported the victim was "[r]ather stoic, but brave in her testimony…." (PCR App. p. 258). Neither characterization is particularly relevant as this Court does not reweigh the evidence presented at the PCR, much less the evidence presented at trial. See, *e.g.*, *Caprood v. State*, 338 S.C. 103, 109–10, 525 S.E.2d 514, 517 (2000) ("The existence in the record of 'any evidence' of probative value is sufficient to uphold the PCR judge's ruling."); *State v. Wilson*, 345 S.C. 1, 6-7, 545 S.E.2d 827, 829-30 (2001) ("This Court does not re-evaluate the facts based on its own view" rather "credibility was an issue for the jury's consideration").

Even so, in the same vein, Petitioner also included reference in his statement of facts to testimony of an expert in forensic and child adolescent psychiatry, Dr. Salas, who testified for Petitioner at the PCR hearing. (Brief of Petitioner, p. 3 n. 1). He indicates Dr. Salas would think at least a portion of the victim's testimony was not credible based on physical descriptions of

The investigator, Virginia Bledsoe, testified, when confronted during a non-custodial interview, Petitioner "denied the allegations, but made some odd statements," which included that he "talked frankly with his children – his older children – about sex," and made a reference to his youngest daughter having "big boobs for her age," and that he had told the victim, "[y]our coater [sic] belongs to your daddy, and if anybody wants to touch that or bother that, you need to tell them to ask me." (PCR App. p. 67).

Petitioner pointedly cross-examined the victim and the investigator. (PCR App. pp. 46-50; pp. 60-64; pp. 68-70; pp. 78-80). Petitioner also presented five family witnesses (Petitioner's ex-wife, three of his children, and one son-in-law) who testified the victim did not previously complain of abuse or demonstrate a change in character, and that she had what appeared to be a good relationship with Petitioner. (PCR App. pp. 87-110). Petitioner did not testify, as is his right.

The jury, after significant deliberations, and with one request for an overnight break, ultimately found Petitioner guilty as charged. (PCR App. pp. 153-157; pp. 162-163).

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fighting. Id. As then Circuit Court Judge Few correctly instructed the jury at the trial: "It is not for a witness to tell you who they believe. It is for you to decide who you believe." (PCR App. p. 78). It is not proper for this Court, or a jury, to consider. *Cf. State v. Douglas,* 367 S.C. 498, 521, 626 S.E.2d 59, 71 (Ct. App. 2006), *aff'd in part, rev'd in part*, 380 S.C. 499, 671 S.E.2d 606 (2009) ("Improper bolstering occurs when an expert witness is allowed to give his or her opinion as to whether the complaining witness is telling the truth, because *that is an ultimate issue of fact and the inference to be drawn is not beyond the ken of the average juror.*") (emphasis added). Petitioner's insinuation the victim is not to be believed is not only contrary to the findings of the jury, but also clearly irrelevant to the instant review as a matter of law.

## ARGUMENT

## I.

**The Court of Appeals properly and correctly affirmed the PCR judge's ruling that counsel was not ineffective in choosing not to present additional testimony to give context to Petitioner's relevant and admissible statement. The trial record shows the investigator's trial testimony reflected the investigator did give the context in relating the statement during her testimony, and, given its context, counsel considered the statement as "not the damaging evidence the State was making it out to be...."**

This issue turns on whether trial counsel's assessment of the testimony in the context of the events and testimony at trial was reasonable. However, the contrast in argument headings alone demonstrates Petitioner either overlooks or discounts a critical fact: the record shows the investigator did not misrepresent any portion of the statement given to her and gave the context as given to her. The investigator related, during her investigation after allegations of sexual abuse, that Petitioner stated he spoke with his children "frankly" about sex, and made "odd statements" about the children. Petitioner now claims counsel should have presented the context of the original statement through his sons; however, any such "context" does nothing to assuage the relevancy and potency of the statement given to the investigator. Petitioner consistently confuses the statement related, *i.e.,* what Petitioner said to the investigator, with the statement originally made to the children (which he previously denied but now does not). It is incorrect to argue the investigator misrepresented the context of the statement given to her, or even the background context given to her for the original statement. The relevant testimony follows:

> A: He denied the allegations, but he made some odd statements to me that day.
>
> Q: What were those statements?

> A. He mentioned his younger daughter, which she was very young. I don't remember her age at that time. He mentioned something about he talked frankly with his children - - his older children - - about sex, and he said that he had commented that her boobs - - she had big boobs for her age, and she was a small child.
>
> And he also made a comment that day that he told [AW], his older child - - his stepchild - - that "Your ["cooter"] belongs to your daddy, and if anybody wants to touch that or bother that, you need to tell them to ask me."

(PCR App. p. 67, lines 3-17).

In his initial PCR application, Petitioner first "maintain[ed] that such a statement was never made." (PCR App. p. 218). In his later amendments, he added in the alternative that if the statement should be found admissible, then counsel failed to present witnesses to give the statement context. (PCR App. pp. 229, 238 and 249). He alleged his sons could "establish[] that these comments were made only in the non-criminal, parental context of educating Applicant's children about sexual matters." (PCR App. p. 249).

At the PCR hearing, trial counsel testified that he did not object to the statement as he thought the statement admissible (and it was, consistent with this Court's prior ruling in this appeal). (PCR App. p. 336).[3] He testified that "both sides get to interpret its meaning as they

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[3] Petitioner again argues counsel was ineffective in not objecting and that the statements were not relevant and not admissible. (Brief of Petitioner, p. 7). This Court has already decided this issue against Petitioner:

> Because Adams' statement could be interpreted, and was interpreted by the solicitor, as circumstantial evidence of Adams' control over and sexual use of the victim, the statement was relevant. Rule 401, SCRE (evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence).

choose." (PCR App. p. 336; see also pp. 372-373, jury would ultimately interpret). He testified the comment could be "clear[ed] ... up primarily when Mr. Adams testified and that standing alone," but again, "it's not subject to only one interpretation." (PCR App. p. 337). Ultimately, though, Petitioner chose not to testify, which surprised trial counsel. (PCR App. p.338). At trial, counsel called Petitioner's sons, (TJ, CA), to speak to Petitioner's character and interactions with his children, but counsel did not question the children about the prior comment. When asked why at the PCR hearing, trial counsel responded:

> Again, as to them specifically, I think at that point I would have probably still felt that it was not the damaging evidence that the State was making it out to be as to whether or not - - as to why I did not specifically ask them to clarify it, as I sit her today, I can't give you an answer....

(PCR App. pp. 338-339).

When Petitioner's PCR counsel asked trial counsel if he believed the comment "help[ed] in this case," counsel responded:

> ... 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

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(PCR App. p. 675).

Attempts to continue to argue this issue should be rejected. See *Koon v. State,* 358 S.C. 359, 364, 595 S.E.2d 456, 459 (2004), *overruled on other grounds by State v. Gentry,* 363 S.C. 93, 610 S.E.2d 494 (2005) ("Because petitioner previously litigated and lost this argument before the Court of Appeals and on certiorari to this Court, petitioner should be precluded from making the same argument in his *Austin* brief.") (citing *Jinks v. Richland County,* 355 S.C. 341, 585 S.E.2d 281 (2003).

> 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.

(PCR App. p. 345; see also p. 372).

The trial transcript shows that the Solicitor inferred from the comment an expression of ownership for personal use, (see, for example, PCR App. pp. 134-135), while trial counsel argued the evidence presented demonstrated "a loving father .. spending time with the kids...a wonderful relationship" marred only by accusations on the heels of "a domestic action pending..." (See PCR App. pp. 124-127).

At the PCR hearing, Petitioner testified as to the terms used in speaking with his children, that it was just his way of talking, and found the terms to sound "more innocent" than medical terminology. (PCR App. p. 318). Petitioner also presented testimony from the sons, Mr. Tommy Adams, Jr., and Mr. Cody Adams. Both confirmed Petitioner made the original statement to them, and testified the statement was made in context of a discussion regarding the "birds and the bees" and out of "protecti[on]." (See PCR App. pp. 289 and 293). Counsel confirmed that he had considered with Petitioner what these witnesses could offer and discussed possible testimony. (See PCR App. p. 331, 361).

The PCR judge resolved Petitioner failed to carry his burden of proof in regard to his issues counsel was ineffective for failing to present the testimony from Mr. Adams Jr. and Mr. Cody Adams. (PCR App. p. 453). The PCR judge found trial counsel "did not call Applicant's two boys as rebuttal witnesses based on trial counsel's discussion with Applicant as to what the Applicant's two boys would testify to and based on trial counsel's strategy, and the belief that Investigator Bledsoe's testimony was not the damaging evidence that the State was making it out

to be." (PCR App. pp. 452-453). The Court concluded Petitioner failed to demonstrate "counsel was deficient in that choice of tactics." (PCR App. p. 453). Further, the Court concluded trial 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." (PCR App. pp. 456-457).

The Court of Appeals resolved the issue as follows:

> As to whether trial counsel was ineffective for not calling Adams' two sons to testify as to the circumstances surrounding his statement: *Brown v. State*, 375 S.C. 464, 481, 652 S.E.2d 765, 774 (Ct. App. 2007) ("[W]here counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." (alteration in original) (quoting *Watson v. State*, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006))).

(PCR App. p. 678).

"On certiorari in a PCR action, the Court applies the 'any evidence' standard of review." *Terry v. State*, 394 S.C. 62, 66, 714 S.E.2d 326, 328 (2011) (quoting *Cherry v. State,* 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). The reviewing court "will affirm if any evidence of probative value in the record exists to support the findings of the PCR court." *Id. See also Holden v. State*, 393 S.C. 565, 573, 713 S.E.2d 611, 615 (2011) ("In reviewing the PCR judge's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision."). Given the record, there was probative evidence supporting the ruling; thus, the Court of Appeals reasonably and logically affirmed. Further, Petitioner failed to show the beneficial impact of having either one of his sons testify to the manner in which Petitioner discussed AW's genitalia where such discussion, in such terms, *i.e.,* possessiveness, is logically suspect.

"An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense." *Wiggins v. Smith,* 539 U.S. 510, 521 (2003) (citing *Strickland v. Washington*, 466 U.S. 668, 673 (1984)). A PCR "applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence." Rule 71.1 (e), SCRCP. See also *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

"[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance...." *Strickland*, 466 U.S. at 689. *Holden,* 393 S.C. at 572, 713 S.E.2d at 615 ("There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case.") (quoting *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007)). "[F]air assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Butler v. State*, 286 S.C. 441, 445, 334 S.E.2d 813, 815 (1985) (quoting *Strickland*, [466 U.S. at 690]). Further, the petitioner "must show there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different." *Franklin v. Catoe*, 346 S.C. 563, 571, 552 S.E.2d 718, 723 (2001). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the proceeding. *Strickland*, 466 U.S. at 694.

When the issue is analyzed within this legal framework, and in light of the record before the PCR court, the record well-supports relief was not warranted. Petitioner shows neither an

error of law nor an absence of probative facts supporting the PCR judge's ruling as affirmed by the Court of Appeals. Petitioner is due no relief.

"Where evidence produced during PCR proceedings is cumulative to or does not otherwise aid evidence introduced at trial, no prejudice results from counsel's failure to bring it forward." *Edwards v. State*, 392 S.C. 449, 459, 710 S.E.2d 60, 66 (2011). Tommy Adams, Jr. testified the comment was taken out of context and that ***he understood it to mean*** Petitioner did not want anyone to date AW or "anything like that" without Petitioner's permission. (PCR App. pp. 289-90). That testimony confirms the statement was made, and made using the terms that denote ownership that raised a red flag to the investigator.

Cody Adams testified similarly that the statement was made, and it was his impression that Petitioner did not want men to harm AW and he was "protecting" the children:

> 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.

(PCR App. p. 293). Again, for a third time, testimony would confirm Petitioner's possessive comment. Even so, the "new" testimony on purported "context" was cumulative and not distinguishable from one plain reading of Petitioner's comment in the context the trial witness provided. But to Petitioner's detriment, if given a negative inference, the sons would confirm the statement made – and made in those terms. Notably, although both sons claimed Petitioner "protected" all of his children in the same manner, neither testified Petitioner made similar possessive, peculiar comments as to them. Petitioner confirmed in his PCR testimony the term would not apply to boys. (PCR App. p. 323). Also absent was testimony from the sons regarding

a possible traditional gender approach to mitigate an unflattering interpretation of Petitioner's statement. Moreover, Petitioner is suggesting the "context" is also the sons' impression of what Petitioner really meant. Lacking knowledge of Petitioner's state of mind, this would be improper testimony. Rule 602, SCRE ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."). *Cf. State v. Garcia*, 334 S.C. 71, 76, 512 S.E.2d 507, 509 (1999) ("...while the present state of the declarant's mind is admissible as an exception to hearsay, the reason for the declarant's state of mind is not."). At any rate, no amount of context would limit the fact that Petitioner commented on one child's breasts and spoke, possessively, of another child's private areas, especially when such comments were repeated during an abuse investigation. Thus, as this Court has previously determined in this very case, the statement was properly submitted to the jury: "Because Adams' statement could be interpreted, and was interpreted by the solicitor, as circumstantial evidence of Adams' control over and sexual use of the victim, the statement was relevant." (PCR App. p. 675; see also *Adams v. State,* 206 WL 1588795 (S.C. Apr. 20 2016)). Petitioner cannot carry his burden of proof either on counsel performance, or, critically, on prejudice. See *Edwards*, 392 S.C. at 456, 710 S.E.2d at 64 (to show *Strickland* prejudice, a petitioner "must demonstrate that this deficiency prejudiced him to the point that he was deprived of a fair trial whose result is reliable").

The record shows probative evidence supports the PCR judge's findings, and the PCR judge's conclusion was reasonable based on those findings. Thus, the Court of Appeals properly and correctly affirmed the PCR judge's decision. This Court should likewise affirm the Court of Appeals.

## II.

**The Court of Appeals did not err in affirming the PCR judge's ruling that counsel was not ineffective in failing to insist on further investigation and juror inquiries regarding a singular bailiff comment that was reported to the trial court during deliberations and reasonably assessed to need no further action at that time apart from the instruction that any jury inquiry must be directed to the trial judge?**

The Court of Appeals resolved the issue as follows:

> As to whether trial counsel was ineffective for not objecting following improper communication between jurors and the bailiffs: *State v. Cameron*, 311 S.C. 204, 207-08, 428 S.E.2d 10, 12 (Ct. App. 1993) ("The mere fact, however, that some conversation occurred between a juror and a court official would not necessarily prejudice a defendant."); *Brown*, 375 S.C. at 481, 652 S.E.2d at 774 ("[W]here counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." (alteration in original) (quoting *Watson*, 370 S.C. at 72, 634 S.E.2d at 644)).

(PCR App. p. 679).

Given there is probative evidence supporting the PCR judge's ruling, there is no error in the Court of Appeals ruling.

Before deliberations began, the trial judge charged the jury on the procedure for reaching a verdict after it reached a unanimous verdict. (PCR App. p. 151, "All 12 of you must agree…"). The trial judge also instructed the jury the bailiffs would serve as their conduits during the course of deliberations. (PCR App.pp.151-152). Deliberations began at 2:58 p.m. (PCR App.p.152). At an undisclosed time (trial counsel testified in the PCR proceedings that it was approximately 4:30, PCR App. p. 360), Bailiff Watson approached the bench with a concern. Ms. Watson testified under oath that she was approached by the foreperson. The extent of the communication was put on the record:

> 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: Okay, all right. So who came out, the forelady?
>
> Ms. Watson: Yes.
>
> The Court: All right. **And that was all that was said?**
>
> Ms. Watson: That's all .

(PCR App.pp.153-154) (emphasis added).

Counsel took no position stating. "Judge, I think [Bailiff 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." (PCR App.p.154) (emphasis added). The trial judge instructed Bailiff Scurry on the proper procedure to follow. (PCR App.p.155). Following the proper procedure, after approximately two hours of deliberating, the foreperson informed the judge that it was the jury's desire to be discharged for the night to resume deliberations on the following day, specifically the jury queried, "May we continue tomorrow?" (PCR App. p. 155). The jury did not report a deadlock or impasse of any kind. Deliberations resumed the follow day and guilty verdicts were returns at 10:31 am. (PCR App.p.162). The jury was polled and no juror indicated dissent. (PCR App. pp. 163-164).

At the PCR hearing, the jury foreperson, Phoebe Oliphant, testified she had difficulty

recalling the deliberations of Petitioner's trial. (PCR App. p. 305). Ms. Oliphant testified, though, that her "one hundred percent" inquiry regarded the judge's charge on rendering a unanimous verdict. (PCR App. p. 306; see also p. 151). She clarified the question arose from her personal lack of experience as juror. (PCR App. p. 306). She testified, "I mean, I just like was wondering, you know, what do we need to do and how do we need to do it. Because I mean, like I said, I never have been on it before so I don't know what to expect. And I want to say the right thing because I don't want to put nobody in a place, ... and jeopardize their life for misunderstanding...." (PCR App. p. 306). She stated she shared the brief communication with rest of the panel. (PCR App. p. 307).

Juror Warrena Mathis also testified to inchoate memories of the deliberations. She testified she did not recall the specific disclosure of the bailiff communication, but understood that they would have to stay until a guilty verdict, indicating she changed her vote. (PCR App. p. 309). The problem with the testimony is that the jury did not stay and agree, but specifically *asked* to return the next day and deliberations resumed. (See PCR App. p. 155).

In regard to the communication, trial counsel testified "there's momentum in trials just like there is on a football field." (PCR App. p. 351). He testified the jury had deliberated for an hour and a half when the bailiff testified as to the communication. (PCR App. p. 361). The disclosure left counsel with the impression the "jury was having trouble making a unanimous decision." (PCR App. p. 341). Counsel further elaborated his strategy was "to just leave it alone, that I felt like we were gaining momentum with the jury, that they were really having to struggle on this case." (PCR App. p. 342). Counsel reasoned an *Allen* charge was not appropriate at that juncture of the trial. (PCR App. p. 362). Counsel noted, "I'm not going to know how they see

the entire case because we are never going to know what a jury thinks." (PCR App. p.373).

The PCR judge found Petitioner's allegation was without merit given "there has been no showing by [Petitioner] that the outcome of his trial would have been different if any objections or requests of questioning the jurors and bailiffs had been made." (PCR App. p. 460). Further, as the Court of Appeals noted, counsel expressed a reasonable strategy in hopes that the "momentum" would continue to the benefit of his client.

"A defendant in a criminal prosecution is constitutionally guaranteed a fair trial by an impartial jury." *State v. Salters*, 273 S.C. 501, 504, 257 S.E.2d 502, 504 (1979). Where there are improper communications, '"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, 207-08, 428 S.E.2d 10, 12 (1993) (quoting *Holmes v. United States,* 284 F.2d 716, 718 (4th Cir.1960)). "The mere fact, however, that some conversation occurred between a juror and a court official would not necessarily prejudice a defendant." *Id.,* (citing *State v. Goodwin,* 250 S.C. 403, 405, 158 S.E.2d 195, 197 (1967)).

In *State v. Cameron*, this Court held a bailiff's private miscommunication to the foreperson constituted reversible error where the bailiff misled the jury regarding the judge's sentencing discretion. 311 S.C. at 208, 428 S.E.2d at 12. This Court noted the miscommunication, "tended to lessen the jury's sense of responsibility by implying that if they rendered a verdict of guilty without mercy, the judge had some discretion in sentencing." *Id.*

Here, the brief communication was utterly harmless. Unlike the *Cameron* jury that considered a matter outside of its province, the scope of the communication here concerned one juror's request to be reassured on the definition of "unanimous," and, though it should have come

from the judge, it was correct. (See PCR App. p. 154). And, again unlike *Cameron*, the private communication was disclosed to the trial judge prior to the jury rendering a verdict. At trial, counsel immediately noted the communication was neither suspicious nor was it inaccurate, and counsel reasonably interpreted the occurrence as a positive omen. Further, the disclosure of what was said well-demonstrates there was no indication of meddling in reaching the verdict, but was simply a brief, and correct, affirmation of what "unanimous" meant. This contrasts significantly with comments found to warrant a new trial, such as those in *Blake by Adams v. Spartanburg Gen. Hosp.*, 307 S.C. 14, 16, 413 S.E.2d 816, 817 (1992). In that case, "a bailiff made comments to a juror urging the jury to reach a verdict. The bailiff allegedly made statements to the effect that the trial judge did not like a hung jury, and that a hung jury places an extra burden on taxpayers." *Id.* There was no such urging at all in this case. Petitioner's assertion "there is a distinction between the short answer the bailiff gave from the complete instructions the trial court would have given," (Brief of Petitioner, p. 14), merely concedes the difference from *Blake by Adams*.

The essence of the communication here was no more than confirmation of the definition of unanimous. And, though the foreperson was not questioned at trial, she was questioned at the PCR hearing and, though her memory was dimmed by time, she basically confirmed what was reported at trial. Whether from a dictionary or a bailiff, the affirmance of the definition was correct, and no prejudice attached to the brief exchange. See generally *State v. Harris*, 340 S.C. 59, 64, 530 S.E.2d 626, 628 (2000) ("Courts have almost uniformly found no prejudice to the defendant when the dictionary definition did not vary from the ordinary meaning of the words or from the meaning contained in the trial court's instructions.").

Additionally, the record reflects the trial judge took steps at trial to prevent an actual prejudicial communication from occurring. After the foreperson's communication was disclosed, the trial judge instructed the jury ***must*** pose any question to him in writing:

> ... Well, would you mind going back there and tell Ms. Scurry [the bailiff] that if the jury asks any more questions - - and this is the procedure that should always be followed - - to tell the foreperson to write the question down and then, without looking at the question, bring it directly to the presiding Judge.
>
> Ms. Watson: Okay.
>
> The Court: It's always best for nobody else to say anything to the jury.

(PCR App. pp. 154-155).

The procedure was properly followed and the jury sent a note to request an overnight release and to resume deliberations the next day. (See PCR App. p. 155). The panel returned the following day, resumed deliberations (which continued over an hour), found Petitioner guilty, and were individually polled on the verdicts. (PCR App. pp. 162-164). The record supports the PCR judge's findings. See generally *State v. Hunter*, 320 S.C. 85, 89, 463 S.E.2d 314, 316 (1995) (finding evidence of alleged juror intimidation unconvincing where the complaining juror neglected to disclose the misconduct to the trial judge during the course of the deliberations.).

As such, the PCR judge reasonably concluded the vague, time strained PCR testimony from the jurors – Ms. Mathis' testimony in tension with the recorded facts from the trial –was unpersuasive to show that either individual jurors' verdicts or the collective verdict was negatively affected. Furthermore, counsel's decision not to request individual examination, or a premature and needless *Allen* charge, was a matter of sound trial strategy – especially where there

was no expression by the jury that it was deadlocked. (See PCR App. p. 362, trial counsel at PCR testified to general discussion with Petitioner, "whether we felt it was positive or negative for the defense," but "certainly don't think an Allen charge would have been appropriate at this point in time. But I don't think we discussed anything as to what the Court might do."). To the contrary, the record shows the jury never reached a deadlock and requested only to take an overnight break in the deliberations in the late afternoon. See generally *Buff v. S.C. Dep't of Transp.*, 342 S.C. 416, 422, 537 S.E.2d 279, 282 (2000) ("consent to continue deliberations may be implied by jury conduct).

Further still, counsel discussed his decision with Petitioner. Trial counsel explained that he spoke very briefly with Petitioner as to whether or not they should do anything about the jury comment or leave it alone and that the decision was to just leave it alone, because trial counsel felt like they were gaining momentum with the jury, and that the jury was really having to struggle on this case. (PCR App. pp. 341-342). Petitioner's argument to the contrary is a classic yet prohibited argument grounded in hindsight, fueled by the belief that something else should have been tried since the jury ultimately did convict. See *Carter v. Lee*, 283 F.3d 240, 249 (4th Cir. 2002) (quoting *Strickland*, 466 U.S. at 689) ("Because it may be tempting to find an unsuccessful trial strategy to be unreasonable, 'a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.'").

Given the probative evidence of record supporting the PCR judge's decision, the Court of Appeals properly affirmed his ruling. This Court should affirm the Court of Appeals.

## CONCLUSION

For the reasons stated above, this Court should affirm the decision of the South Carolina Court of Appeals.

Respectfully submitted,

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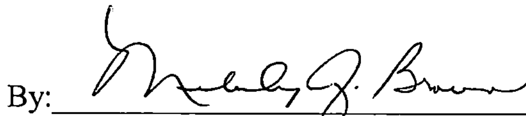
By: 

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Columbia, South Carolina.

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STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas (PCR)

The Honorable William P. Keesley, Post-Conviction Relief Judge
The Honorable John C. Few, Trial Judge

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Unpublished Opinion No. 2016–UP–515 (S.C.Ct.App. filed December 14, 2016)

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Tommy S. Adams,

Petitioner,

v.

State of South Carolina,

Respondent.

Appellate Case No. 2017-000739

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**PROOF OF SERVICE**

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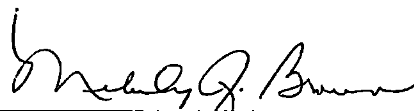
I, Melody J. Brown, counsel for the Respondent, certify that I have served the Brief of Respondent on the Petitioner by depositing two (2) copies of the same via U.S. mail, first class, postage prepaid, one to each of his attorneys of record, addressed as follows: Teresa L. Norris, Esq., 101 Meeting Street, 5th Floor, Charleston, SC 29401; and to E. Charles Grose, Jr., Esq., 404 Main Street, Greenwood, SC 29646.

This 23rd day of January, 2018.



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