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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The 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Unpublished Opinion No. 2016–UP–515

Tommy S. Adams,

Petitioner,

v.

State of South Carolina,

Respondent.

Appellate Case No. 2017-000739

RETURN TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

PETITIONER'S QUESTIONS PRESENTED

I. Was Petitioner 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 numerous instances of deficient and prejudicial conduct?

II. Was Petitioner denied the effective assistance of counsel during deliberations because counsel failed to object, failed to request that the jurors and bailiffs be questioned, and failed to request that the jurors be returned to court for proper instructions following improper communications between jurors and the bailiffs?

(Petition, p. 1).

RESPONDENT'S COUNTER PRESENTATION OF QUESTIONS PRESENTED

I. (a). 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 context to Petitioner's statement where that ruling is fully and fairly supported by probative evidence?

I. (b). Did the Court of Appeals err in finding Petitioner's allegation of counsel error in failing to object to a curative instruction and moving for a mistrial was not preserved for review on the merits when the allegation was not raised to and ruled upon by the PCR judge?

I. (c). Did the Court of Appeals err in affirming the PCR judge's ruling that counsel properly and correctly advised Petitioner of Petitioner's right to testify where the record supports trial counsel's PCR testimony confirming advice was given but the decision was Petitioner's?

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. (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. (App.p. 173). Petitioner filed a Motion for a New Trial on or about June 23, 2006, (App. pp.176-182), which was denied on July 10, 2006, (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). (App. pp. 184-198). After review of the brief and record, the South Carolina Court of Appeals affirmed. (App. p. 199).

On February 23, 2009, Petitioner filed an Application for Post-Conviction Relief. (App. pp. 200-220). Respondent filed its Return on July 7, 2009. (App. pp. 222-226). Applicant was represented in the action by Teresa L. Norris, Esq. PCR counsel filed amendments to the

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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).

application dated October 19, 2010, (App. pp. 227-234); November 30, 2010, (App. pp. 236-245); and December 2, 2010, (App. pp. 247-259). An evidentiary hearing was convened on December 2, 2010, before the Honorable William P. Keesley. (App. p. 260). Judge Keesley denied and dismissed the application for relief by Order dated September 12, 2011, filed October 7, 2011. (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. (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 App. pp. 674-676).

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. (App. p. 677-679). Petitioner petitioned for rehearing, (App. pp. 680-685), which was denied on February 23, 2017, (App. p. 695). Petitioner filed his petition for writ of certiorari in this Court on March 29, 2017. This return to the petition follows.

RELEVANT LAW

"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." Rule 242 (b), SCACR. General reasons for granting a petition include to review a Court of Appeals decision that: (1) reflects a novel question of law; (2) included a dissent; (3) conflicts with this Court's precedent; (4) addressed a substantial constitutional right; or (5) decided a matter of federal law in a way that conflicts with federal precedent. Id. The foregoing list is not exclusive, and this Court may exercise its discretion in the absence of these facts. However, the record in this case reflects no "special or important reasons" to grant certiorari review for a second appellate review of these ordinary *Strickland* claims. The South Carolina Court of Appeals properly and fairly resolved the claims by application of well-established law to the facts established in the record.

"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.").

"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).

In order to prove deficient performance, the convicted defendant must "show 'that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.'" *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland*, 466 U.S. at 687). Further, "[t]he standard for judging counsel's representation is a most deferential one." *Richter*, 562 U.S. at 105. "[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]).

"In order for counsel's inadequate performance to constitute a Sixth Amendment violation, petitioner must show that counsel's failures prejudiced his defense." *Wiggins*, 539 U.S. at 534 (citing *Strickland,* 466 U.S. at 692). 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. "The likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112 (citing *Strickland*, 466 U.S. at 693). "[W]hile in some instances 'even an isolated error' can support an ineffective-assistance claim if it is 'sufficiently egregious and prejudicial,' it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." *Richter*, 562 U.S. at 111 (citation omitted).

When the questions presented in the petition are 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, and no special or important reason for this Court to grant certiorari. The petition should be denied.

ARGUMENT

I. (a)

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 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...."

At trial, upon questing by the assistant solicitor, Investigator Bledsoe testified to statements made by Petitioner in the non-custodial interview:

> 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."

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

At the PCR hearing, trial counsel testified that he did not object as he thought the statement admissible (and it was, consistent with this Court's prior ruling in this appeal). (App. p. 336). He testified that "both sides get to interpret its meaning as they choose." (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." (App. p. 337). Trial counsel also noted that an objection raises a "red flag" to the jury. (App. p. 337). Ultimately, though, Petitioner chose not to testify, which surprised trial counsel. (App. p.338). At trial, counsel called Petitioner's adult daughter (Boyce), and two of his minor children (TJ, CA), to speak to Petitioner's character and interactions with his children, but counsel did not question any child 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....

(App. p. 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 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. p. 345).

The trial transcript shows that the Solicitor inferred from the comment an expression of ownership for personal use, (see, for example, 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 App. pp. 124-127).

At the PCR hearing, Petitioner presented testimony from Mr. Tommy Adams, Jr., and Mr. Cody Adams. Both confirmed Petitioner made the statement to the children, and testified the statement was made in context of a discussion regarding the "birds and the bees" and out of "protecti[on]." (See App. pp. 289 and 293). Counsel confirmed that he had considered with Petitioner what these witnesses could offer and discussed possible testimony. (See 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. (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." (App. pp. 452-453). The Court concluded Petitioner failed to demonstrate "counsel was deficient in that choice of tactics." (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." (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))).

(App. p. 678).

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 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. (App. pp. 289-90). Cody Adams testified Petitioner did not want men to harm AW. (App. p. 293). The "new" testimony 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 young men 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 witness testified that Petitioner made similar possessive and peculiar comments to them. Also absent was testimony from the sons regarding a possible traditional gender approach to mitigate an unflattering interpretation of Petitioner's statement.

Even so, the record shows probative evidence supports the findings, and the PCR judge's conclusion was reasonable based on those findings. The Court of Appeals properly and correctly affirmed the PCR judge's decision. Certiorari review is not warranted.

I. (b).

The Court of Appeals did not err in finding Petitioner's allegation of counsel error in failing to object to a curative instruction and moving for a mistrial is not preserved for review on the merits.

At trial, counsel cross-examined Investigator Bledsoe noting that some allegations are false, some are made around the time of domestic actions, but that there was generally an "assumption of truth" in investigation. The Investigator responded, "Yes, and I believe what AW has told me on this case." (App. p. 70). Counsel immediately objected and moved to strike the testimony as non-responsive; and, a brief hearing on the matter has held outside the presence of the jury. Counsel apprised the trial judge, "what I have tried to very delicately do is through this witness to put in the jury's mind that some accusations are true, some accusations are false. I have not asked her nor does she have the right to give her opinion sua sponte of who she believes." (App. p. 73). The trial judge found, though the door was opened to the testimony, that a curative instruction was appropriate. (App. pp. 74-76). A stipulation to an appropriate curative instruction was reached. (App.p. 76).

At the PCR hearing, counsel testified he posed a neutral question that he believed would "take away from the State's case." (App. pp. 356-357). The purpose of the question was to attack veracity in the context of motive. (App. p. 357). Counsel testified to his general diligence in trial preparation regarding cross-examination. (App. p. 348).

The PCR judge denied the allegation and found Petitioner failed to meet his burden to prove counsel was ineffective here. The PCR judge found counsel executed his valid trial strategy absent any detriment to Petitioner in light of the judge's thorough curative instruction that directed the jurors to disregard Bledsoe's non-responsive answer. (App.pp. 457-458).

The Court of Appeals resolved the issue as follows:

> As to whether trial counsel was ineffective for eliciting testimony from the investigator that she believed the victim was telling the truth and not moving for a mistrial in response to the testimony: *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (providing that to establish a claim of ineffective assistance of counsel, a PCR applicant must prove trial counsel's performance was deficient and the deficient performance prejudiced the applicant's case); *State v. Herring*, 387 S.C. 201, 216, 692 S.E.2d 490, 498 (2009) ("Generally, a curative instruction to disregard the testimony is deemed to have cured any alleged error."); *Padgett v. State*, 324 S.C. 22, 27, 484 S.E.2d 101, 103 (1997) (finding an issue is not preserved for appellate review when the PCR court does not rule on the issue).

(App. p. 678).

Here, counsel successfully executed his crafted cross-examination of Bledsoe who notably acknowledged she entered an investigation with a presumption of an accused's guilt. (App. p.70). *See State v. Brewington,* 267 S.C. 97, 101, 226 S.E.2d 249, 250 (1976) (citing Rule 608(c), SCRE) ("'On cross-examination, any fact may be elicited which tends to show interest, bias, or partiality' of the witness."). The trial judge's curative instruction negated any detriment:

> All right ladies and gentleman, let me clear a couple a things up before we move forward. I suppose 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 and 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 the case.
>
> Now, with regard to the last statement by the witness, **[the court] is 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.pp.77-78). *See State v. Longworth,* 313 S.C. 360, 371, 438 S.E.2d 219, 225 (1993) ("An instruction to disregard incompetent evidence is usually deemed to cure any error in its admission"). Furthermore, Petitioner received a windfall benefit when the trial judge incorporated a summary of counsel's intended theme of the cross-examinations at issue, that purported victims can make false accusations. (App. p. 73). In fact, in closing, counsel referenced his cross-examination of Investigator Bledsoe to show police involvement does not certify credibility. (App. p. 128). Counsel further expanded upon the pending domestic action between Petitioner and AW as the motive. (App.p. 127).

Even so, the PCR judge did not rule on whether counsel should have argued the curative was insufficient and that a mistrial was warranted. (See App. pp. 457-458). Moreover, PCR counsel did not raise an objection to the lack of a ruling in the objections to the state's proposed order, (see App. pp. 432-433), nor did counsel file a Rule 59 motion requesting a ruling. Thus, the Court of Appeals properly found the issue presented was procedurally barred from review on the merits. *E.g., Marlar v. State*, 375 S.C. 407, 408, 653 S.E.2d 266, 266 (2007) ("The failure to specifically rule on the issues precludes appellate review of the issues."). Certiorari review is not warranted.

I. (c).

The Court of Appeals did not err in affirming the PCR judge's ruling that counsel properly and correctly advised Petitioner of Petitioner's right to testify where the record supports trial counsel's PCR testimony confirming advice was given but the decision was Petitioner's.

Petitioner's assertion of error is in conflict with the exercise of a constitutional right. As the trial judge advised, the exercise of the right is reserved to the defendant: ".... even though you should rely on the advice that is given to you by your lawyer, when it comes down to it, you must make this decision." (App. p. 113). Petitioner suggests counsel is ineffective if he fails to push the client in the direction counsel prefers. (See Petition, pp. 15-17). In particular, he argues counsel was ineffective "in failing to ***ensure*** Adams would testify in this case." (Petition, p. 17) (emphasis added). This is incorrect as a matter of law. *See State v. Rivera*, 402 S.C. 225, 243, 741 S.E.2d 694, 703 (2013) ("It is clear from the record that defense counsel actively thwarted Appellant's desire to testify. Although, as a practical matter, preventing Appellant from testifying may have been an advantageous strategic decision, it had no basis in the law."). The record shows correct advice properly given.

At the PCR hearing, counsel testified that he has never promised a jury that his client was going to testify and in his opening statement here he was not trying to imply that he was promising that Petitioner was going to take the stand. (App. pp. 370-371). Trial counsel testified that Petitioner's story or version could be derived on cross-examination and from the evidence presented. (App. p. 370). Contrary to Petitioner's position, the record is replete with explanations that counsel did dutifully consult with Petitioner, both before trial and after the state's case, specifically discussing the state of the evidence and its relative strength. (See App. pp. 332-335;

p. 338; pp. 349-355). Petitioner conceded in his own PCR testimony that it was Petitioner's decision ultimately. (App. p. 321).

The PCR judge found counsel had "properly advised Applicant of his rights in deciding whether to testify or not testify and that it was the Applicant's decision not to testify." (App. pp. 458-459). Further, the PCR court found trial counsel provided a rational explanation as to the language he used in his opening statement – that there would "be two people saying two different things" – which he indicated as a "misstated ... to some degree" as "even if we put up no witnesses at all, the cross-examination would have given a different version." (See App. p. 35; see also p. 370). The PCR court noted "it is easy as a lawyer to reflect back on a particular argument and see that he could have stated it differently; and this Court appreciates trial counsel's honesty in stating that he believes he misstated himself to some degree in this one comment and should have used the word "versions" instead of "people." (App. pp. 459-60). The Court concluded: "there had been no showing by Applicant that the outcome of his trial likely would have been different if Mr. Huff had not used the challenged language." (App. p. 460).

The Court of Appeals resolved the issue as follows:

> As to whether trial counsel was ineffective for advising Adams not to testify after informing the jury he would testify and not properly advising Adams as to whether he should testify: *Solomon v. State*, 313 S.C. 526, 529, 443 S.E.2d 540, 542 (1994) ("We give great deference to a judge's findings when matters of credibility are involved since we lack the opportunity to directly observe the witnesses."), *overruled on other grounds by State v. Cheeks*, 401 S.C. 322, 737 S.E.2d 480 (2013); *Johnson v. State*, 325 S.C. 182, 188, 480 S.E.2d 733, 735-36 (1997) (finding the trial court's instruction to the jury that it could not consider a defendant's failure to testify cured any potential error from the State's comment on the defendant's failure to testify).

(App. p. 679).

The PCR judge correctly ruled that Petitioner failed to show prejudice. *Simpson v. Moore*, 367 S.C. 587, 598, 627 S.E.2d 701, 707 (2006) (citing *Butler v. State,* 286 S.C. 441, 445, 334 S.E.2d 813, 816 (1985) ("[Defendant] may not simply posit suppositions and speculations in an attempt to establish that counsel was ineffective. Judicial scrutiny of counsel's performance is highly deferential and the court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance...."). There is substantial evidence of probative value supporting the PCR judge's finding counsel was not ineffective for failing to advise Petitioner to testify.

At the PCR hearing trial counsel explained the factors that in his experience are important in deciding whether or not to put the accused on the stand. (App. p . 332). Counsel testified that he and Petitioner discussed what the State had presented and the strength of the State's case when the State rested. (App. pp. 333-334). Trial counsel further testified that when he returned to Court rest his case, it certainly was his intention and understanding that the Petitioner was always going to testify in this case. (App. p. 334). Trial counsel made clear, though, that it was Petitioner's decision, and Petitioner made the decision not to testify. (App. p. 334). In short, the PCR court found trial counsel to be credible. (App. p. 452; pp. 459-160). Credibility determinations are factual determinations rarely disturbed on appeal. *See, e.g., Drayton v. Evatt*, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993) ("We give great deference to a judge's findings where matters of credibility are involved since we lack the opportunity to directly observe the witnesses."). Counsel's testimony is well-supported by other evidence of record and Petitioner can show no cause to challenge the assessment of credibility in these circumstances.

Once again, the record shows probative evidence supports the findings. The Court of

Appeals properly and correctly affirmed the PCR judge's decision. Certiorari review is not warranted.

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)).

(App. p. 679).

Given there is probative evidence supporting the PCR judge's ruling, once again, the Court of Appeals did not err and certiorari is not warranted.

Before deliberations began, the trial judge charged the jury on the procedure for reaching a verdict after it reached a unanimous verdict. (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. (App.pp.151-152). Deliberations began at 2:58 p.m. (App.p.152). At an undisclosed time (trial counsel testified in the PCR proceedings that it was approximately 4:30, 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 .

(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." (App.p.154) (emphasis added). The trial judge instructed Bailiff Scurry on the proper procedure to follow. (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?". (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. (App.p.162). The jury was polled and no juror indicated

dissent. (App. pp. 163-164).

At the PCR hearing, the jury foreperson, Phoebe Oliphant, testified she had difficulty recalling the deliberations of Petitioner's trial. (App. p. 305). Ms. Oliphant testified, though, that her "one hundred percent" inquiry regarded the judge's charge on rendering a unanimous verdict. (App. p. 306). She clarified the question arose from her personal lack of experience as juror. (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...." (App. p. 306). She stated she shared the brief communication with rest of the panel. (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. (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 App. p. 155).

In regard to the communication, trial counsel testified "there's momentum in trials just like there is on a football field." (App.p.351). He testified the jury had deliberated for an hour and a half when the bailiff testified as to the communication. (App. p. 361). The disclosure left counsel with the impression the "jury was having trouble making a unanimous decision." (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." (App. p. 342). Counsel reasoned an *Allen* charge was not appropriate at that juncture of the trial. 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." (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." (App. p. 460).

"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). "'[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. *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 employing 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 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.

The PCR judge's concluded the vague PCR testimony from the jurors concerning the comment was unpersuasive to show that either individual jurors' verdicts or the collective verdicts was negatively affected. After the foreperson's communication was disclosed, the trial judge instructed the jury to pose any question to him in writing. The procedure was properly followed and the jury was released for the afternoon. The panel returned the following day, resumed deliberations (which continued over an hour), found Petitioner guilty, and were individually polled on the verdicts. 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.).

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. 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. (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. Certiorari review is not warranted.

CONCLUSION

For the reasons stated above, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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RECEIVED

MAY 19 2017

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The 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

Tommy S. Adams,

Petitioner,

v.

State of South Carolina,

Respondent.

Appellate Case No. 2017-000739

PROOF OF SERVICE

I, Melody J. Brown, counsel for the Respondent, certify that I have served the within Return to Petition for Writ of Certiorari on the Petitioner by depositing two (2) copies of the same via U.S. mail, first class, postage prepaid to his attorneys of record, 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.

I further certify that all parties required by Rule to be served have been served.

This 16th day of May, 2017.

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