

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

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S.C. SUPREME COURT

Opinion No. 2011-200566 (S.C. Ct. App. filed Dec. 14, 2016)

TOMMY S. ADAMS, #311901..... Petitioner,

v.

STATE OF SOUTH CAROLINA Respondent.

PETITION FOR WRIT OF CERTIORARI

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Certificate of Counsel

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on February 23, 2017.

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?

Statement of the Case

Petitioner, Tommy S. Adams, was convicted in Edgefield County, South Carolina, of lewd acts on a child and criminal sexual conduct with a minor (1st degree). On October 14, 2005, he was sentenced consecutively to the maximum terms of 15 years for lewd acts and 30 years for criminal sexual conduct. The South Carolina Court of Appeals affirmed. Appendix (App.) 199.

Adams filed an Application for Post-Conviction Relief (PCR) on February 9, 2009, App. 200-06, which was amended several times with a Final Amended Application filed on December 2, 2010, App. 247-59. An evidentiary hearing was held on December 2, 2010, before The Honorable William P. Keesley, who denied relief in a Form 4 Order requiring a proposed order by Respondent the same date. App. 404. Following Respondent's submission of a Proposed Order of Dismissal, Adams submitted Objections

to the Proposed Order, App. 430-39. The PCR court adopted Respondent's Proposed Order *in toto* on September 12, 2011. App. 441-54. A Notice of Appeal was timely filed. App. 465.

Petitioner sought review of the following issues:

- I. Petitioner 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 numerous instances of deficient and prejudicial conduct.
 - A. Failure to object to admission of Adams' statements that were neither relevant nor material to the crimes charged.
 - B. Failure to rebut the state's misrepresentation of the nature of Adams' statement.
 - C. Eliciting testimony from the police investigator that she believed the alleged victim and failing to move for a mistrial.
 - D. Advising petitioner not to testify after informing the jury that he would testify, or, alternatively, failing to properly advise petitioner at all with respect to whether he should testify.
- II. Petitioner was 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.

App. 466-96.

The Court of Appeals granted the Petition for Writ of Certiorari on 518. Following briefing and oral argument, the Court of Appeals granted relief on Issue I.A. App. 595-97. Respondent's petition for rehearing was denied on May 21, 2015. App. 616. Respondent then petitioned this Court for a Writ of Certiorari. App. 617-34. This Court granted the petition, dispensed with further briefing, reversed the decision of the Court of Appeals, and

remanded the matter to the Court of Appeals to address the remaining allegations of error asserted by Petitioner. App. 674. The Court of Appeals affirmed on the remaining issues, App. 677-79, and denied rehearing.

Adams, through the undersigned counsel, now requests that this Court grant certiorari to review the decision of the Court of Appeals.

Statement of Facts

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, App. 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 2002, when she was ten years old, because she repeatedly physically resisted Adams' efforts to pull her pants down. App. 43.¹

¹Amanda Salas, M.D., an expert in forensic and child and adolescent psychiatry, testified in PCR 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.

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 "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. During cross-examination, Bledsoe testified that she believed AW. App. 70.²

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

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.

²At defense counsel's request, the court instructed the jury to ignore Bledsoe's opinion of AW's truthfulness. App. 78.

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."

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 section.

Argument

- I. Petitioner 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 numerous instances of deficient and prejudicial conduct.**

In reviewing the Circuit Court's findings, this Court must reverse the PCR judge's decision when there is no evidence of probative value supporting it. *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 reverse the PCR judge's decision when it is 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 must 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). *See also* *Council v. State*, 380 S.C. 159, 179 n.7, 670 S.E.2d 356, 366 n.7 (2008) (“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”).

Here, counsel was ineffective in numerous respects, as addressed below.

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

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. As asserted previously, Petitioner submits that 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 without the proper context, which 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. The State then 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”).

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. The Court of Appeals apparently also found that counsel had a strategy for not calling the two sons to testify that Adams' comment was made only in the parental context of educating his children about sexual matters.

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 clear given the state's focus on this evidence in its closing argument.

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.

In finding that counsel was not ineffective for eliciting testimony from the police investigator that she believed the alleged victim was telling the truth, the Court of Appeals apparently found that counsel's conduct was deficient but that Adams failed to prove prejudice due to the trial court's curative instruction. In doing so, however, the Court overlooked the fact that testimony of this nature is especially prejudicial 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). Here, the only state witness, aside from the officer who vouched for her testimony, was the alleged victim. Thus, the entire case hinged on her testimony. In other words, improper corroboration, in the context of a charge of criminal sexual conduct with a minor stepdaughter and where 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). Moreover, when defense counsel, rather than the prosecution, 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).

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.

In finding that counsel was not ineffective in essentially promising the jury in opening statements that Adams would testify and then failing to produce that testimony, the Court of Appeals deferred to the PCR court’s credibility findings. Even 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*).³

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 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

³ 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).

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.

The Court of Appeals apparently found no prejudice because the trial court instructed the jury that it could not consider a defendant’s failure to testify against him. This finding, however, ignores counsel’s role in promising the jury that Adams would testify and then not delivering on that promise. “[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).

II. 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*⁴ 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

⁴ *Allen v. United States*, 164 U.S. 492 (1896).

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 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.

The Court of Appeals, on the other hand, cited *State v. Cameron*, 311 S.C. 204, 207-08, 428 S.E.2d 10, 12 (Ct. App. 1993) for the proposition that "[t]he mere fact, however, that some conversation occurred between a juror and a court official would not necessarily prejudice a defendant." The Court overlooked, however, the fact that what occurred in this case was not simply "some conversation" but conversation about the fundamental requirement that the jury's decision must be unanimous. As in *Cameron*, this was "an occurrence which cannot be tolerated if the sanctity of the jury system is to be maintained. 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." 311 S.C. at 208, 428 S.E.2d at 12 (quoting *Holmes v. United States*, 284 F.2d 716, 718 (4th Cir. 1960)).

Nonetheless, the Court of Appeals appeared to excuse counsel's conduct by finding a valid strategy. There can be no valid strategy where counsel did not correctly understand

the law, *Matthews v. State*, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002) (counsel cannot assert trial strategy as a defense for failure to object to . . . an error of law”), which would have required an *Allen* charge for a hung jury. In other words, instead of simply being told that the jury must be “one hundred percent,” the jurors would have been instructed to “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). Trial counsel’s failure to understand this distinction was deficient conduct rather than valid strategy and was prejudicial.

Conclusion

Wherefore, for the foregoing reasons, this Court should grant the petition for writ of certiorari and grant post-conviction relief.

Respectfully Submitted,

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March 27, 2017.

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CERTIFICATE OF SERVICE

S.C. SUPREME COURT

The undersigned attorney hereby certifies that a petition has been served upon Respondent's counsel by first class mail, postage prepaid, this 27th day of March, 2016, addressed to counsel of record, Patrick L. Schmeckpeper, Post Office Box 11549, Columbia, South Carolina 29211.

Teresa L. Norris

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