

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

S.C. SUPREME COURT

William P. Keesley, Circuit Court Judge

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

TOMMY S. ADAMS..... *Petitioner,*

V.

STATE OF SOUTH CAROLINA..... *Respondent.*

APPENDIX

VOLUME 2 OF 2

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on his own behalf. (Id.). Additionally, Applicant offered the testimony of Dr. Amanda Salas (Dr. Salas), Sharon Adams (Ms. Adams), Tommy Adams, Jr. (Mr. Adams, Jr.), Cody Adams (Cody Adams), Leslie Boyce (Ms. Boyce), Henry Rainey (Mr. Rainey), Phoebe Oliphant (Ms. Oliphant), and Warrena Mathis (Ms. Mathis). (Id.). The State offered the testimony of James Huff, Esquire (Mr. Huff) Applicant's trial counsel. (Id.). The Honorable William P. Keesley denied and dismissed Applicant's Application for PCR by Order dated September 12, 2011. (App. p.441-464).

The Petitioner filed a timely Notice of Appeal and Petition for Writ of Certiorari. This Return to Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

The proper standard of review of a post conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland v. Washington. The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland v. Washington. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

ARGUMENT

I. The PCR Court correctly found that trial counsel was not ineffective during trial.

Trial counsel was not ineffective during Petitioner's trial, in which the Petitioner asserts that the state's case relied on uncorroborated testimony of the alleged victim and irrelevant, inadmissible, and prejudicial testimony by a law enforcement officer.

A. The PCR Court correctly ruled that trial counsel was not ineffective for failing to object to the admission of Petitioner's statements that were neither relevant nor material to the crimes charged.

Trial counsel was not ineffective for failing to object to the admission of Petitioner's statements that were allegedly neither relevant nor material to the crimes charged. Petitioner directs this Court's attention to the following statement: "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, lines13-17). At the PCR hearing trial counsel testified that he did not object because he did not find the comment objectionable as it was a statement of the accused, that both sides get to interpret its meaning as they choose, and that the jury ultimately has to make that decision. (App. p.336, lines4-8). Trial counsel also testified that in regards to trial strategy that the intent was when the case began that Petitioner was going to testify, that Petitioner was going to clear up that comment when he took the stand, and that trial counsel felt like the comment would be clarified, if it needed to be clarified, when Petitioner testified. (App. p.336, lines9-13). Additionally, trial counsel testified that anytime "you object during a trial, regardless of the ruling you get, it waves somewhat of a red flag to the jury that it must be something important and hurtful to your case or you wouldn't be objecting." (App. p.337,

lines 18-22).

Strickland requires that trial counsel be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). *See also* Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) and McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). The PCR court found that trial counsel provided a rational explanation as to why he did not object. (App. p.455). Trial counsel also testified that even if he had objected to the statement, it would not have made any difference at trial. (App. p.337, line 15 – p.338, line 5).

In Watson v. State, 370 S.C. 68, 634 S.E.2d 642 (2006), this Court found that trial counsel had articulated a valid strategy for not objecting to the corroborative and impermissible hearsay where counsel reasonably believed that objecting to the corroborative testimony could lead to the introduction of more damaging evidence. Trial counsel's representation and trial strategy was within the standards of competence demanded in criminal matters and within the wide range of reasonable professional assistance. Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977). The PCR court accepted trial counsel's reasoning as to why he did not object and correctly found that Petitioner failed to show that the outcome of his trial would have been different if such an objection would have been made. (App. p.455-56). Because the PCR Court's findings are supported by evidence of probative value in the record, Respondent submits the PCR Court should be affirmed. Cherry v. State, 300 S.C.

115, 386 S.E.2d 624 (1989).

B. The PCR Court correctly ruled that trial counsel was not ineffective for failing to rebut the state's misrepresentation of the nature of Petitioner's statement.

Trial counsel was not ineffective for failing to rebut the state's alleged misrepresentation of the nature of Petitioner's statement. Petitioner asserts that trial counsel was ineffective for failing to interview and call Mr. Adams, Jr. and Cody Adams as witnesses to rebut Investigator Bledsoe's testimony that Petitioner made the statement, "your cooter belongs to daddy." At the PCR hearing trial counsel testified that he and Petitioner discussed what Mr. Adams, Jr. and Cody Adams' testimony would be. (App. p.361, lines9-17). Trial counsel testified that he had prepared a list of witnesses with specific topics that would be covered by trial counsel on or during their testimony, and that the list included Mr. Adams, Jr. and Cody Adams. (App. p.331, lines20-25). When asked why trial counsel did not question Mr. Adams, Jr. and Cody Adams about the 'cooter' comment trial counsel testified that "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." (App. p.339, lines5-8). The PCR court found that trial counsel did not call Petitioner's two boys as rebuttal witnesses based on trial counsel's discussion with Petitioner as to what the 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. p.452-53).

Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). *See also* Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) and McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). The PCR court found that trial

counsel provided a rational explanation as to why he did not question Petitioner's two boys about the 'cooter' comment at trial. (App.p.455). It is generally accepted that trial counsel cannot be held ineffective for failing to anticipate every possible event or outcome. Reasonable efforts and performance are all that is required of trial counsel. See Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993). At the PCR hearing trial counsel further testified that the context of the comment would be made clear primarily when the Petitioner testified and that standing alone, it's not subject to only one interpretation. (App. p.337, lines12-14). Trial counsel further testified that the corrected testimony, as it were, would come out in the Petitioner's testimony, but ultimately he chose not to testify, which understandably surprised trial counsel. (App. p.338, lines2-7). Respondent submits the 'cooter' comment was presented in its entirety by Investigator Bledsoe at trial, and not out of context. The PCR court found that trial counsel had no way of knowing that Petitioner would ultimately choose not to testify and thereby eliminate Petitioner's opportunity to clear up the context of the comment through Petitioner's testimony. (App. p.456-57). Because the PCR Court's findings are supported by evidence of probative value in the record, Respondent submits the PCR Court should be affirmed. Cherry v. State , 300 S.C. 115, 386 S.E.2d 624 (1989).

C. The PCR Court correctly ruled that trial counsel was not ineffective for eliciting testimony from the police investigator that she believed the alleged victim. The issue of whether trial counsel was ineffective for failing to move for a mistrial is not preserved for review. Even if the issue was properly before this Court, it would be without merit.

Trial counsel was not ineffective for eliciting testimony from the police investigator that she believed the alleged victim. Petitioner directs this Court's attention to the following question asked by trial counsel of Investigator Bledsoe: "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?” (App. p.70, lines11-14). At the PCR hearing trial counsel testified that his intent in asking the question was that he knew there was a domestic case going on in this matter between Petitioner and Petitioner’s wife and that the Investigator was going to respond that in some of these cases people may tell the truth, in some of them they may tell a lie. (App. p.356, lines17-22). Trial counsel testified explaining that he was not going to specifically ask, “did you believe or disbelieve her?” (App. p.356, lines23-24). Trial counsel testified that he wanted to present to the jury that this investigator had found that people who make these accusations sometimes tell the truth and they sometimes lie. (App. p.356, line24 – p.357, line2).

Respondent submits that trial counsel could not know how the Investigating Officer was going to respond to his question or that she was going to respond with the statement that she believed the victim. When the Investigating Officer did respond trial counsel immediately made a motion to strike her response as non-responsive. (App. p.70, lines11-22). The trial judge then immediately removed the jury from the courtroom and trial counsel explained his strategy and intent in asking the question. (App. p.70-78). The trial judge gave the jury a curative instruction stating, “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.” (App. p.78, lines2-7). The PCR court found that the curative instruction was adequate to cure the matter. (App. p.458).

The nature and scope of cross-examination is inherently a matter of trial tactics. United States v. Nersesian, 824 F.2d 1294, 1321 (2nd Cir. 1987). As previously stated, trial

counsel cannot be held ineffective for failing to anticipate every possible event or outcome. Reasonable efforts and performance are all that is required of trial counsel. See Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993). The PCR court found that Petitioner failed to show that a different approach to cross-examination would have been beneficial and that Petitioner was not prejudiced by this elicited testimony that was subsequently stricken from the record and cured by the trial judge. Because the PCR Court's findings are supported by evidence of probative value in the record, Respondent submits the PCR Court should be affirmed. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The issue of whether trial counsel was ineffective for failing to move for a mistrial is not preserved for review. Any issue not raised before the post conviction court and not ruled on by the post conviction court is not preserved for appellate certiorari review. Padgett v. State, 324 S.C. 22, 484 S.E.2d 101 (1997). Petitioner's original Application for PCR contained three allegations of ineffective assistance of trial counsel, however there was no allegation concerning trial counsel's failure to move for a mistrial. (App. p.200-218). Petitioner filed three (3) Amended Applications for PCR, however there was no allegation raised concerning trial counsel's failure to move for a mistrial. (App. p.227-256). Additionally, the transcript of the PCR hearing is void of any reference to trial counsel's failure to move for a mistrial by Petitioner. (App. p.263-390). Accordingly, in his Order of Dismissal, the Honorable William P. Keesley did not make any ruling as to any issue regarding the failure to move for a mistrial. (App. p.441-64). The issue of trial counsel's failure to move for a mistrial fits squarely into the rule stated in Padgett precluding issues not raised at the hearing level of PCR from being raised on appeal. Petitioner's "Objections to Proposed Order of Dismissal" also failed to address this issue. (App. p.430-436). Therefore,

this Court should dismiss this claim and deny the Petition for Writ of Certiorari because this claim was not preserved.

Even if this issue was properly preserved, trial counsel was not ineffective for failing to move for a mistrial. The power of a court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes" stated into the record by the trial judge. State v. Kirby, 269 S.C. 25, 28, 236 S.E.2d 33, 34 (1977). Granting of motion for mistrial is an extreme measure that should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way. State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999). Mistrial should not be granted unless absolutely necessary; to receive mistrial, defendant must show error and resulting prejudice. State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999). Respondent submits that Petitioner fails to set forth any basis on which trial counsel should have made a motion for mistrial. Respondent further submits that Petitioner cannot show that had trial counsel made a motion for mistrial that such motion would have been successful. In fact, the opposite is true, as the record reflects the trial judge made the decision to give a curative instruction. (App. p.70-78). Therefore, trial counsel was not ineffective for failing to move for a mistrial. Accordingly, this Court should deny the Petition for Writ of Certiorari.

D. The PCR Court correctly ruled that trial counsel was not ineffective for advising Petitioner not to testify after informing the jury that Petitioner would testify, or, alternatively, for failing to properly advise Petitioner at all with respect to whether Petitioner should testify.

Trial counsel was not ineffective for advising Petitioner not to testify after informing the jury that Petitioner would testify, or, alternatively, for failing to properly advise Petitioner at all with respect to whether Petitioner should testify. Petitioner direct this Court's attention

to the following statement made by trial counsel in his opening statement to the jury: "I am confident 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. p.35, lines3-9). The PCR court did not agree with Petitioner's assertion that this statement was an example of where trial counsel told the jury there was going to be two different people saying two different things, which could leave the jury wondering why Petitioner did not testify. (App. p.459). At the PCR hearing trial counsel testified that he has never promised a jury that his client was going to testify and he was not trying to imply that he was promising that Petitioner was going to take the stand. (App. p.370, line10 – p.371, line11). Trial counsel testified that Petitioner's story or version could be derived on cross-examination and from the evidence presented. (App. p.370).

The PCR court found that trial counsel provided a rational explanation as to the language he used in his opening statement. (App. p.459). The Order of dismissal provided that "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. p.459-60). The PCR court correctly ruled that Petitioner failed to show that the outcome of his trial would have been different if trial counsel had not used the challenged language. Respondent submits that trial counsel was not ineffective in his opening statement to the jury.

Next, trial counsel was not ineffective in advising Applicant whether to testify or not. 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, lines 12-14). Trial 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. p.333, line23 – p.334, line2). Trial counsel further testified that when they came back from court or prior to the break, it certainly was trial counsel's intention and understanding that the Petitioner was always going to testify in this case. (App. p.334, lines4-7). Trial counsel made clear at the PCR hearing that it was Petitioner's decision alone, whether to testify or not, and that Petitioner made the decision not to testify. (App. p.334, line 19). Furthermore, Petitioner testified that trial counsel told Petitioner, it was Petitioner's decision to testify or not testify. (App. p.323, line25 – p.324, line2). The PCR court found Petitioner's testimony on this subject not credible and found trial counsel to be credible. Credibility determinations are factual determinations. As such, they "are presumed to be correct absent clear and convincing evidence to the contrary, and a decision adjudicated on the merits and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state court proceeding." Miller-El v. Cockrell, 537 U.S. 322 (2003).

The trial judge explained to Petitioner, Petitioner's Fifth Amendment right to remain silent and Petitioner's right to testify or not to testify. (App. p.112, lines2-20). The trial judge asked Petitioner if he understood his rights and Petitioner indicated that he understood. (App. p.112, lines19-21). The record reflects the following colloquy between the trial judge and Petitioner concerning Petitioner's right to testify:

THE COURT: Now, have you had all the time you need to make up your mind as to whether or not you wish to testify?

PETITIONER: Yes, sir.

THE COURT: Are you satisfied that you understand both your right to remain silent and your right to testify?

PETITIONER: Yes, sir.

THE COURT: Is there anything you want to ask me about that decision now?

PETITIONER: No, sir.

THE COURT: You're ready to make your decision?

PETITIONER: Yes, sir.

THE COURT: And you understand that this is your decision?

PETITIONER: Yes, sir.

THE COURT: And even though you should rely on the advice given to you by your lawyer, when it comes down to it, you must make this decision.

PETITIONER: Yes, sir.

THE COURT: Are you ready to make your decision?

PETITIONER: Yes, sir.

THE COURT: And what is that decision?

PETITIONER: Not to be a witness.

THE COURT: You will not testify?

PETITIONER: No, sir. (App. p.112, line22 – p. 114, line1).

Respondent submits and the record clearly reflects that the trial judge adequately ensured that Petitioner alone was making the decision not to testify and that it was Petitioner's decision, not trial counsels'. The PCR court found that trial counsel and Petitioner discussed Petitioner's choice to testify or not testify, and that the Petitioner testified to the trial judge it

was his decision and not trial counsel's decision that Petitioner chose not to testify. (App. p.459). The PCR court further found that trial counsel properly advised Petitioner of his rights in deciding whether to testify or not testify and that it was Petitioner's decision not to testify. Because the PCR Court's findings are supported by evidence of probative value in the record, Respondent submits the PCR Court should be affirmed. Cherry v. State , 300 S.C. 115, 386 S.E.2d 624 (1989).

II. The PCR Court correctly found that trial counsel was not ineffective during jury deliberations for failing to object and request that the jurors and bailiffs be questioned, and for failing to request that the jurors be returned to court for proper instructions following improper communications between jurors and the bailiffs.

Trial counsel was not ineffective for failing to object or request further questioning of jurors and bailiffs after a bailiff disclosed that the jury foreperson had come out of deliberations and asked if they had to be, "one-hundred percent." At the PCR hearing trial counsel testified that the jury's question went no further than asking "if it had to be a hundred percent," and that the bailiffs answered "yes." (App. p.341, lines 17-21). Trial counsel testified that the remark impressed him that the jury was having trouble making a unanimous decision, that trial counsel felt at the very least they would get a hung jury. (App. p.341, lines21-25). 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. p.341, line25 – p.342, line5). Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). *See also* Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812

(2005) and McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003).

Trial counsel additionally explained at the PCR hearing that based on his experience and opinion there was no typical action that should have or should not have been taken, such as requesting an Allen charge. (App. p.358, lines8-23). Respondent submits that the testimony of the two jurors at the PCR hearing failed to show that the jury deliberations were somehow affected or that jurors changed their minds in response to this question and answer at issue. (App. p.304-309). The PCR court found that there had 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. The PCR court further found that Petitioner failed to show that he was prejudiced by counsel's alleged ineffectiveness. Accordingly, the PCR Court correctly ruled that trial counsel was not ineffective for failing to object or request further questioning of jurors and bailiffs. Because the PCR Court's findings are supported by evidence of probative value in the record, Respondent submits the PCR Court should be affirmed. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

CONCLUSION

For the reasons stated above, this Court should affirm the PCR court's Order and deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, the Respondent asks permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

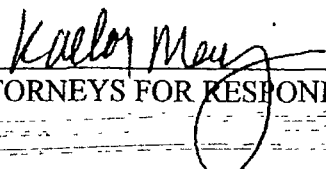
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By: 
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Columbia, South Carolina
April 4, 2012

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Edgefield County

The Honorable William P. Keesley, Circuit Court Judge

Case No. 2009-CP-19-00064

TOMMY S. ADAMS,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

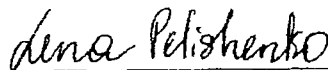
RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Teresa L. Norris, Esquire
900 Elmwood Ave, Suite 101
Columbia, SC 29201

This 4th Day of April, 2012.



Lena Pelishenko
LEGAL ASSISTANT
Office of the Attorney General

The South Carolina Court of Appeals

Tommy S. Adams, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2011-200566

ORDER

This matter is before the Court on a petition for a writ of certiorari. The petition for a writ of certiorari is granted. The parties shall proceed to serve and file the appendix and briefs as provided by Rule 243(j), SCACR.

Paul E. Short, Jr.

J.

Paul W. Thomas

J.

Daniel G. Pieper

J.

Columbia, South Carolina

cc: Teresa L. Norris
Kaelon Elizabeth May

FILED

July 1, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

Case No. 09-CP-19-00064
Appellate Case No. 2011-200566

TOMMY S. ADAMS, #311901..... Appellant,

v.

STATE OF SOUTH CAROLINA..... Respondent.

BRIEF OF PETITIONER

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Statement of Issues on Appeal

- I. Was Adams 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 Adams 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

Appellant, 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. This Court 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 and this Court granted the petition for writ of certiorari on July 1, 2013.

Adams, through the undersigned counsel, now requests that this Court grant post-conviction relief and vacate his convictions and sentences.

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.

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.

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 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.

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

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. 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 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); *Milke v. Ryan*, 711 F.3d 998, 1019 (9th Cir. 2013). *See also Council v. State*, 380 S.C. 159, 179 n.7, 670 S.E.2d 356, 366 n.7 (2008) (holding in ineffective assistance of counsel case: “We cannot say beyond a reasonable doubt that the undiscovered mitigating evidence, taken as a whole, would not have influenced at least one juror to recommend a life sentence”); *Vail v. State*, 402 S.C. 77, 91, 738 S.E.2d 503, 511 (Ct. App. 2013) (holding in ineffective assistance of counsel case: “[W]e cannot find the admission of the inadmissible hearsay was harmless beyond a reasonable doubt”).

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

A. Failure to object to admission of Adams' statements that were neither relevant nor material to the crimes charged.

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

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

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

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

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

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

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

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

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

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

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

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

App. 67.

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

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

App. 336. While he gave further testimony that he thought this evidence could be explained in anticipated testimony from Adams and that objecting before the jury could raise a "red flag to the jury," App. 336-37, the bottom line is that he simply did not view the evidence as objectionable.³ He conceded, however, that he would have preferred to keep the evidence out if possible, App. 345, and that the statement was a "[c]onfession of nothing," App. 344. He also conceded in his testimony that if the evidence was objectionable, "[a]s to whether or not it could be a strategic choice to allow it in, I would generally say no." App. 378.

³Even assuming counsel did not object to avoid raising a "red flag" before the jury, counsel's conduct would still be deficient because this issue could have been litigated outside the presence of the jury. See, e.g., *Dawkins v. State*, 346 S.C. 151, 551 S.E.2d 260 (2001); *Vail*, 402 S.C. at 88-89, 738 S.E.2d at 509-10.

Specifically, he conceded that if Adams' statements were not admissible and were "detrimental," his failure to object "well may warrant . . . a new trial." App. 378.

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

Here, Adams' statement that he told AW "your cooter belongs to daddy," was not even arguably a confession to the crimes charged or relevant to them. Admission of this testimony was unquestionably detrimental though, as the state turned this statement into essentially a character assassination in closing statements. 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 Bledsod? 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”).

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

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

Alternatively, 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. App. 336. Counsel also testified that "we certainly had the ability to argue to the jury or have them understand that it wasn't a statement that [AW's] body was his play thing." App. 336.

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

Counsel's explanations for not presenting this testimony are not valid strategic reasons and, indeed, are explanations that ring hollow. First, the boys did testify for the

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

C. Eliciting testimony from the police investigator 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 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, the Supreme 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 after he stumbled into the improper bolstering. Counsel apparently recognized the deficiency in his failure to move for mistrial because he asserted this ground as a basis for granting a new trial in his post-trial motions. App. 179.

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

An instruction to disregard incompetent evidence usually is deemed to have cured any error in its admission *unless on the facts of the particular case it is probable that, notwithstanding such instruction, the accused was prejudiced.*

State v. Dempsey, 340 S.C. 565, 532 S.E.2d 306 (Ct. App. 2000) (citing *State v. Johnson*, 334 S.C. 78, 512 S.E.2d 795 (1999)) (emphasis added). “[O]n the facts of [this] particular case,” Adams was prejudiced by Bledsoe’s improper testimony and the curative instruction was inadequate to cure the error. The only proper evidence for the state was the testimony of AW. As addressed above, there was no valid purpose for the state to even present Bledsoe’s testimony, as Adams’ statements to her were not relevant and were improperly used as a character assassination by the state. Adding to that testimony that Bledsoe believed AW, it is unlikely that the jury could unring that bell and properly disregard this testimony. Improper corroboration, in the context of a charge of criminal sexual conduct with a minor stepdaughter and the state’s case is built almost solely on the testimony of the minor alleged victim, has a “devastating impact.” *State v. Barrett*, 299 S.C. 485, 487, 386 S.E.2d 242, 243 (1989).

D. 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. He asserted 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 mentally retarded or has a low IQ. App. 354.

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

Assuming that counsel’s testimony on this point was credible and believable, counsel’s conduct was still deficient by his own admission in that counsel did not advise Adams whether he should or should not testify. Likewise, counsel did not assert any trial strategy for failing to advise Adams. He simply does not advise his clients at all on this front.

If there’s any part, I think, of a criminal trial where a lawyer brings a person to the edge of the diving board and then turns around and steps back, it’s at that moment. We don’t push them in the water and we don’t hold them back. We’ve trained them, hopefully, in trial preparation of how to testify. We’ve covered what they intend to testify about. We’ve prepared them. But we’ve

got to let them fly or not fly on their own. To do one or the other, to push them or hold them back, I think a lawyer oversteps his bounds.

App. 354.

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

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

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

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

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

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 “Your cooter belongs to daddy” comment. App. 317. Consistent with the testimony of his sons,

⁴This situation is analogous to situations where the defendant receives a plea offer from the state. It is not enough for counsel simply to inform the client of the offer. Counsel must advise the defendant with counsel’s opinion on whether the offer should be accepted or rejected. *See, e.g., Boria v. Keane*, 99 F.3d 492, 495 (2nd Cir. 1996) (Counsel ineffective in drug case for failing to advise client concerning the advisability of accepting the state’s plea bargain offer even though counsel believed that “his client’s decision to reject the plea bargain was suicidal”). Counsel’s failure to offer his opinions to his client is “extremely troubling,” *Young v. Zon*, 827 F. Supp. 2d 144, 158 (W.D.N.Y. 2011), because “the failure to give *any* advice [is] entirely contrary to the minimum professional norms of practice,” *id.* at 162 (emphasis in original). *See also Hicks v. Howton*, 675 F. Supp. 2d 1050 (D. Ore. 2009).

Adams testified that the comment was made in the context of sex education or “the birds-and-bees talk” with his sons and AW’s mother present. App. 317. “I didn’t mean any other thing than they had my protection to keep their virginity.” App. 318. He informed Bledsoe of this because she “asked me if my kids knew about sex.” App. 316.

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

“[L]ittle is more damaging than to fail to produce important evidence that had been promised in an opening.” *Anderson v. Butler*, 858 F.2d 16, 17 (1st Cir.1988). *See, e.g., Ouber v. Guarino*, 293 F.3d 19 (1st Cir. 2002) (counsel ineffective in drug trafficking case for promising the jury four times in the opening to call the defendant as a witness, but then failing to keep those promises); *English v. Romanowski*, 602 F.3d 714 (6th Cir. 2010) (counsel ineffective in assault with intent to commit murder case for failing to adequately investigate prior to informing the jury in opening statements that the defendant’s girlfriend would be called as a witness to corroborate the claim of self-defense); *U.S. ex rel. Hampton*

v. Leibach, 347 F.3d 219 (7th Cir. 2003) (counsel ineffective in sexual assault and robbery case for failing to investigate and interview exculpatory eyewitnesses and for making promises in his opening statement to the jury that he did not keep).

II. Adams 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.

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* charge instruction informing jurors that they should "approach the evidence with an open mind and

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

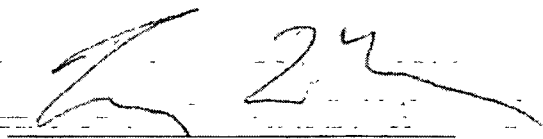
Adams was prejudiced by counsel’s deficient conduct. The jury was hung in this case that hinged solely on the credibility of the minor alleged victim, who testified in an “utterly emotionless, blank” fashion, App. 340, and whose testimony was completely uncorroborated by any other proper evidence. While the bailiff was correct that it had to be “a hundred percent” or unanimous,” “the bailiff’s remarks were not offset by a statement that each juror should not surrender his conscientious convictions merely to reach an agreement.” *Blake*, 307 S.C. at 17, 413 S.E.2d at 818. In these circumstances, there is no assurance that “the communication was harmless and could not have affected the verdict.” *Cameron*, 311 S.C. at 208, 428 S.E.2d at 12. In other words, there is “reason to suppose outside influences” entered into deliberations and impacted the verdict. *Blake*, 307 S.C. at 17, 413 S.E.2d at 818. See also *Weaver v. Thompson*, 197 F.3d 359, 365-66 (9th Cir. 1999). Counsel’s conduct was deficient and prejudicial. *Dawson v. State*, 352 S.C. 15, 572 S.E.2d 445 (2002) (counsel ineffective for failing to object to a coercive *Allen* charge).

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

Conclusion

Wherefore, for the foregoing reasons, Petitioner prays this Court will grant his application for post-conviction relief and vacate his convictions and sentences.

Respectfully Submitted,



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July 31, 2013.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

Case No. 09-CP-19-00064
Appellate Case No: 2011-200566

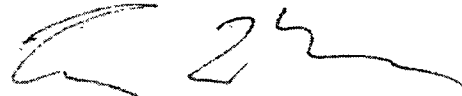
TOMMY S. ADAMS, #311901, ... Appellant,

v.

STATE OF SOUTH CAROLINA, ... Respondent.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Brief of Appellant has been served upon Respondent's counsel by first class mail, postage prepaid, addressed to counsel of record, Kaclon E. May, Post Office Box 11549, Columbia, South Carolina 29211.



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STATE OF SOUTH CAROLINA
In The Court of Appeals

CERTIORARI FROM EDGEFIELD COUNTY
Court of Common Pleas

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

Appellate Case No. 2011-200566

Tommy S. Adams, ... Petitioner,

v.

State of South Carolina, ... Respondent.

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STATEMENT OF ISSUES ON APPEAL

- I. Was a counsel, a veteran criminal defense lawyer ineffective in his presentation of Petitioner's case during the course of the trial?
 - A. Did the PCR judge err in finding Petitioner failed to prove counsel's failure to object to Petitioner's unsolicited voluntary statement regarding the victim genitalia result in ineffective assistance of counsel?
 - B. Did the PCR Judge err in finding Petitioner failed meet his burden to prove the execution of counsel's intended strategy to apprise the jury of the defense's interpretation of Petitioner's statement from Petitioner and not his other minor children resulted in ineffective assistance of counsel?
 - C. Did the PCR Judge err in finding Petitioner failed meet his burden to prove the execution of counsel's trial strategy in cross-examining from a police investigator resulted in ineffective assistance of counsel?
 - D. Did the PCR judge err in finding Petitioner failed to prove counsel was ineffective in the presentation of the opening statement and for advising Petitioner on his right to testify?
- II. Did the PCR judge err in finding Petitioner failed to prove counsel was ineffective for failing to object to disclosed private communications between a juror and a bailiff?

STATEMENT OF THE CASE

Petitioner 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). (App.p.19). James B. Huff, Esquire, represented him. (App.pp.1-175).

On October 12-14, 2005, Petitioner underwent trial, pursuant to which he was found guilty as indicted. (App.pp.1-174). The Honorable John C. Few sentenced him to confinement for fifteen years for the Lewd Act on a Child Under Sixteen and thirty years for Criminal Sexual Conduct with a Minor—1st Degree. The sentences were ordered to run consecutively. (App.p.173). Petitioner filed a Motion for a New Trial on or about June 23, 2006. (App. pp.176-82). The Honorable John C. Few issued an Order denying Petitioner's Motion for a New Trial on July 10, 2006. (App.p.183).

A timely Notice of Appeal was filed and an appeal was perfected. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. Adams, Op. No. 2006-UP-560 (S.C. Ct. App. filed October 10, 2008). (App.p.199). The Remittitur was sent on October 18, 2008.

On February 23, 2009, Petitioner filed an Application for Post-Conviction Relief. (App.pp.200-19). Respondent filed its Return on July 7, 2009. (App.pp.222-26). An evidentiary hearing into the matter was convened on December 2, 2010 at the Lexington County Courthouse. (App.pp.260-390). The Applicant was present at the hearing and was represented by Teresa Norris, Esquire. The Respondent was represented by A. West Lee, Esquire of the South Carolina Attorney General's Office. The Honorable William P.

Keesley denied and dismissed Applicant's Application for PCR by Order dated September 12, 2011. (App.pp.441-464).

STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

I. The PCR judge correctly found that trial counsel was not ineffective during trial.

Counsel was not ineffective during Petitioner's trial, in which Petitioner asserts that the State's case relied on uncorroborated testimony of the alleged victim and irrelevant, inadmissible, and prejudicial testimony by a law enforcement officer.

A. The PCR Judge correctly ruled that trial counsel was not ineffective for failing to object to the admission of Petitioner's statement that was relevant underlying offense and material to the State's theory of the case.

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

Solicitor: What did [Petitioner] say?

Bledsoe: [Petitioner] denied the allegations, but he made some odd statements to me that day.

Solicitor: What were those statements?

Bledsoe: [Petitioner] mentioned something about he talked frankly with his children -- his older children about sex... 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.”

Solicitor: Had you disclosed to him prior to that time what the allegations were against him?

Bledsoe: Yes, sir, I did.

(App.p.67, lines 1-20). At the PCR hearing, counsel testified Petitioner’s statement was admissible because it was a statement given by the accused that could be and was reasonably interpreted as an admission of guilt to the underlying offense. (App.pp.77-8; p.85). Counsel noted the statement was harmful but was open to a neutral and positive meaning. (App.p.86). Counsel testified, “[the statement] would indicate to me it was more of a father saying, “Don’t let anyone touch you inappropriate.” (App.p.336, lines 23-5). Counsel reasoned Petitioner was the witness to address the defense’s interpretation (App.p.336).

The PCR judge found the allegation was without merit where Petitioner failed to show that he was prejudiced by counsel’s alleged ineffectiveness, because there was not a reasonable probability, that but for counsel’s alleged deficiency, the result of the proceeding would have been different. (App.pp.456-7).

First, Respondent submits the PCR judge correctly found Petitioner failed to meet his burden to prove counsel was ineffective for failing to object to the admission of Petitioner’s statement. “Generally, only those parts of a confession or statement made to police which are relevant and material to the crime charged should be received into evidence.” State v. Nelson, 331 S.C. 1, 16, 501 S.E.2d 716, 723 (1998). “Under Rule 401, SCRE, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy.” State v. Cheeseboro, 346 S.C.

526, 548, 552 S.E.2d 300, 311 (2001). "Unlike a prior bad act, which always raises the risk of an improper inference based on character, a statement is an actual communication of thought which may or may not give rise to an impermissible inference, depending upon what is said and circumstances under which it is said." State v. Gilchrist, 329 S.C. 621, 629, 496 S.E.2d 424, 428 (1998).

In State v. Cheeseboro, the court held a letter drafted by the defendant was relevant because it established the defendant's need for money as a motive for murder. Cheeseboro, 346 S.C. at 548, 552 S.E.2d at 311. In State v. Cutro, the court held the memorabilia from the deceased victim's seized from the defendant was relevant to the State's theory to show defendant's motive to gain attention. State v. Cutro, 365 S.C. 366, 618 S.E.2d 890 (2005).

Petitioner's contention that Petitioner's statement was not relevant to underlying charges is patently absurd. A reasonable facial interpretation shows Petitioner's comment were material to motive. Certainly, a proclamation of dominion and control to an eleven-year old child regarding her sexual autonomy implied an ability to stifle disclosure. AW testified the abuse occurred when she was isolated from her mother and siblings. (App.p.40). Furthermore, AW testified she feared retribution for non-compliance, let alone reporting the abuse to her mother, an older sibling, or an adult at school. (App.p.41). The solicitor argued in closing that the Petitioner's statements evidenced a zealous motive to safeguard dominion and control over AW's sexual autonomy necessary to foster the exploitation. The solicitor summarized the State's case against Petitioner as a "betrayal of [AW]'s trust." (App.pp.138-42; p.142, lines 9-10).

State v. Gilchrist, 329 S.C. 621, 628, 496 S.E.2d 424, 428 (Ct. App. 1998) is instructive to the present case. This Court in Gilchrist noted that “In considering a Rule 403, SCRE, challenge, the trial court must consider the nature of the statement, as well as the context in which it was made.” Id. This Court noted the comment at issue “[that store] looks like a good place to rob would not normally be prejudicial, for example, if made in a security evaluation.” Id. at 630, 496 S.E.2d at 429 (internal citations omitted). This Court determined a statement only becomes unduly prejudicial when its only purpose is would be to convey the impression of a general criminal intent. Id. (citing United States v. Bonds, 12 F.3d 540, 567 (6th Cir.1993) (“Unfair prejudice does not mean the damage to a defendant’s case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis.”)).

Here, the PCR judge correctly found “the cooler comment” was presented in its entirety by Investigator Bledsoe’s testimony at trial, and was not presented out of context. Respondent submits context shows the statement was not prejudicial. A general desire for a parent to safeguard a child’s virtue does not indicate bad character. See Cutro, 365 S.C. at 366, 618 S.E.2d at 890 (“collecting memorabilia of a deceased child, while perhaps uncommon, is not behavior that itself indicates a bad character.”). Counsel presented several witnesses that testified Petitioner was an exemplary parent.

Furthermore, evidence of probative value supports the PCR judge’s finding that counsel articulated a valid trial strategy on the matter. Strickland requires that trial counsel be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of

circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992).

Petitioner testified that in regards to trial strategy, the intent when the case began was that Petitioner was going to testify and clear up his statement in order to maximize an effective counter-punch. (App.p.336). It is generally accepted that trial counsel cannot be held ineffective for failing to anticipate every possible event or outcome. Reasonable efforts and performance are all that is required of trial counsel. See Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993). At the PCR hearing, counsel further testified that the context of the comment would be made clear primarily when Petitioner testified and that standing alone, it's not subject to only one interpretation. (App.p.337). Counsel further testified that the corrected testimony, as it were, would come out in Petitioner's testimony, but ultimately he chose not to testify, which understandably surprised trial counsel. (App. p.338).

Certainly Petitioner was the only logical witness to explain the context of his statement to the jury. The PCR judge found that trial counsel had no way of knowing that Petitioner would ultimately choose not to testify until he presented all prior witnesses and thereby eliminate Petitioner's opportunity to clear up the context of the comment through his testimony. (App.pp.456-57). Therefore, this Court should affirm the PCR judge.

B. The PCR Judge correctly found counsel was not ineffective for failing to rebut the state's interpretation of Petitioner's

statement by eliciting cumulative testimony from his other minor children.

The PCR judge found that trial counsel did not call Petitioner's two sons as rebuttal witnesses based on counsel's preparation on what Petitioner's sons would testify to (App.pp.452-53).

At the PCR hearing, counsel testified that he and Petitioner discussed what Tommy Adams, Jr. and Cody Adams' testimony would be. (App.p.361). Counsel testified that he had prepared a list of witnesses with specific topics that would be covered. (App.p.331). Furthermore, counsel did not want to accentuate the comment. Counsel noted that all of his trial witnesses testified in a manner he planned for and predicted. Counsel testified all of his trial witnesses testified in a manner he planned for and predicted. (App.p.339).

Petitioner failed to show the beneficial impact of having either one of his son's testify to 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 seal of approval. (App.pp.289-90) (emphasis added). Cody Adams testified Petitioner did not want men to harm AW. (App.p.292). The new testimony was cumulative and not distinguishable from a plain reading of Petitioner's comment. 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 now teenage sons regarding a possible traditional gender approach to mitigate an unflattering interpretation of Petitioner's statement. Therefore, this Court should affirm the PCR judge.

C. The PCR Judge correctly ruled counsel was not ineffective for eliciting testimony from the police investigator that she believed the alleged victim because counsel effectuated a thorough cross-examination of the witness that resulted in no detriment to Petitioner.

At trial, counsel cross-examined Bledsoe as follows:

Counsel: When you assume that what people tell you when they -- in one of these type of child sex abuse cases, you're assuming what they're telling you is true?

Bledsoe: Yes, and I believe what AW has told me on this case.

(App.p.70, lines 11-6). Counsel immediately objected and moved to strike the testimony as non-responsive; a brief hearing on the matter was held outside the presence of the jury. (App.pp.70-7). 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, lines 12-7). The trial judge, on a ruling yet sua sponte decided to strike the testimony. (App.p.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.p.357, lines 1-3). 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.457-8).

Evidence of probative value supports the PCR judge's ruling. Counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995). Where counsel articulates a strategy, it is measured under an objective standard of reasonableness. Id. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Strickland, 466 U.S. at 688, 104 S. Ct. 2052. "The nature and scope of cross-examination is inherently a matter of trial tactics." United States v. Neresian, 824, F.2d 1294, 1321 (2nd Cir. 1987).

Ellenburg v. State, 367 S.C. 66, 625 S.E.2d 224 (2006) is instructive to the present case. The court in Ellenburg held the defense attorney's strategic decision to attack the co-defendant's credibility in his closing was valid despite opening the door the State's invited response.

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.p.77, line 15—p.78, line 10). 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). Counsel referenced his cross-exemption of 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).

Second, Respondent submits the PCR judge correctly found the trial judge's curative instruction cured any possibility of prejudice. The power of a court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes" stated into the record by the trial judge. State v. Kirby, 269 S.C. 25, 28, 236 S.E.2d 33, 34 (1977). Granting of motion for mistrial is an extreme measure that should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way. State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999).

Respondent submits that Petitioner fails to set forth any basis on which trial counsel should have made a motion for mistrial. Respondent further submits a motion for mistrial was without merit because counsel unintentionally elicited the improper testimony. See State v. White, 361 S.C. 407, 605 S.E.2d 540 (2004). Regardless, the present issue is frivolous because reflects the trial judge made the decision to give a curative instruction. (App. p.70-78). Therefore, this Court should affirm the PCR judge.

D. The PCR Judge correctly found counsel was not ineffective for his selection of syntax employed in his opening statement and for advising Petitioner on his right to testify

At the PCR hearing, counsel testified that he has never promised a jury that his client was going to testify and he was not trying to imply that he was promising that Petitioner was going to take the stand. (App.pp.370-1). Trial counsel testified that Petitioner's story or version could be derived on cross-examination and from the evidence presented. (App. p.370).

The PCR court found that trial counsel provided a rational explanation as to the language he used in his opening statement. (App. p.459). The PCR judge 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. p.459-60).

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...."). Furthermore, the State did exploit the trivial semantics at issue in its closing argument. See State v. Brown, 277 S.C. 203, 204, 284 S.E.2d 777, 778 (1981) ("An opening statement serves to inform the jury of the **general nature of the action** and defenses involved in a case so they will be better prepared to understand the evidence presented.") (emphasis added).

Second, evidence of probative value supports the PCR judge's finding that 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, lines 12-14). 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.p.333, line 23 – p.334, line2). 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, lines 4-7). Trial counsel made clear at the PCR hearing that it was Petitioner's decision alone, whether to testify or not, and that Petitioner made the decision not to testify. (App. p.334, line 19).

The PCR court found Petitioner's testimony on this subject not credible and found trial counsel to be credible. Credibility determinations are factual determinations. As such, they "are presumed to be correct absent clear and convincing evidence to the contrary, and a decision adjudicated on the merits and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state court proceeding." Miller-El v. Cockrell, 537 U.S. 322 (2003). The PCR court found that trial counsel and Petitioner discussed Petitioner's choice to testify or not testify, and that the Petitioner testified to the trial judge it was his decision and not trial counsel's decision that Petitioner chose not to testify. (App. p.459). The PCR court further found that trial counsel properly advised Petitioner of his rights in deciding whether to testify or not testify and that it was Petitioner's decision not to testify.

Respondent submits and the record clearly reflects that the trial judge adequately ensured that Petitioner alone was making the decision not to testify and that it was Petitioner's decision, not trial counsel's. The trial judge entered a thorough colloquy with Petitioner on the matter (App. pp.112-4). Furthermore, even Petitioner acknowledged counsel advised him that the ultimate decision to testify rested with him. (App. pp.323-4). Therefore, this Court should affirm the PCR judge.

II. The PCR Judge correctly found that counsel was not ineffective during jury deliberations for failing to object to and request the trial judge conduct additional questioning regarding a jurors innocuous inquiry to a bailiff regarding the definition of "unanimous."

The trial judge charged the jury on the procedure for reaching a verdict after it reached a unanimous verdict. (App.p.151). The jury was informed the bailiffs would serve as their conduits during the course of deliberations. (App.p.151-2). Deliberations began at 2:58 p.m. (App.p.152). At an undisclosed time, Bailiff Watson approached the bench with a concern. Watson testified under oath that she was approached by the foreperson. (App.p.153-2). 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?
Bailiff 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?

Bailiff Watson: We told them yes, uh-huh

The Court: Okay, all right. So who came out, the forelady?

Bailiff Watson: Yes.

The Court: All right. **And that was all that was said?**

Bailiff Watson: Yes.

(App.p.153, line 19—p.154 line 10) (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, lines 16-20) (emphasis added). The trial judge instructed Bailiff Scurry on the proper procedure to follow. (App.p.155). Following the proper

procedure after two hours and sixteen minutes 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. (App.155). The jury was instructed to return to the Courthouse by 9:00 a.m. (App.p.157). Guilty verdicts were returns at 10:31 a.m. the following day. (App.p.162).

At the PCR hearing, the jury foreperson, Phoebe Oliphant, testified she had difficulty recalling the deliberations of Petitioner's trial. (App.p. 305, lines 9-14; p.305, lines 16-24). Oliphant denied she was the foreperson. (App.p.305). Oliphant testified her one hundred percent inquiry regarded the judge's charge on rendering a unanimous verdict. (App.p.306). Oliphant clarified the question was borne from her personal lack of her personal lack of experience as juror. (App.p.306, lines 11-15). Oliphant 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." (App.p.306, lines 16-20) (emphasis added). Oliphant stated she shared the brief communication with rest of the panel.

At the PCR hearing, juror Warrena Mathis also testified to inchoate memories of the deliberations. Mathis testified she did not recall Oliphant's disclosure of her communication with Bailiff Scurry.

Counsel testified "there's momentum in trials just like there is on a football field." (App.p.351, line 16-7). Counsel testified the jury had deliberated for an hour and a half when Bailiff Watson testified to the communication with the Oliphant. (App.p.361).

Bailiff Watson's testimony left counsel with the impression the "jury was having trouble making a unanimous decision." (App.p.341, lines 21-2). 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, lines 2-5). Counsel testified "there's momentum in trials just like there is on a football field." (App.p.351, line 16-7).

Counsel reasoned an Allen charge was not appropriate at that juncture of the trial. Counsel noted "I'm not going to know how [the jury] see the entire case because we are never going to know what a jury thinks." (App.p.373, lines 4-6).

The PCR judge found the allegation was without merit where "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. State v. Cameron, 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.

Respondent submits first that the subject matter of the brief communication between Bailiff Scurry and Oliphant was utterly harmless. Unlike the Cameron jury that considered a matter outside of its province, scope of the communication here concerned one juror's request to be reassured on the definition of "unanimous." Despite Oliphant's fading memory on the deliberations, she was just wanted to make certain everyone had to be in agreement. Unlike in 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. Instead, counsel reasonably interpreted the occurrence as a positive omen.

Second, evidence of probative value supports the PCR judge's finding the testimonies of foreperson Oliphant and juror Mathis were utterly unpersuasive to show that either individual jurors' verdicts or the collective verdicts "were somehow affected" by Petitioner's allegation. See Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517, *cert. denied*, 510 U.S. 1014, 114 S. Ct. 607 (1993). ("[The court] has consistently given great deference to PCR judges' findings and conclusions when matters of credibility are involved."). After foreperson Oliphant's private 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, deliberated for no more than an hour and a half, found Petitioner guilty, and were all individually polled on the verdicts. See 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 the trial judge examine each juror or request a premature and needless Allen charge was a matter of sound trial strategy. The record shows the jury was never reached a deadlock. See Dawson v. State, 352, S.C. 15, 572 S.E.2d 445 (2002). 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. p.341, line25 – p.342, line 5).

CONCLUSION

For the reasons stated above, this Court should affirm the lower court's ruling and deny the requested relief.

Respectfully submitted,

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By: 
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December 2, 2013

STATE OF SOUTH CAROLINA
In The Court of Appeals

CERTIORARI FROM EDGEFIELD COUNTY
Court of Common Pleas

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

Appellate Case No. 2011-200566

Tommy S. Adams, ...Petitioner,

v.

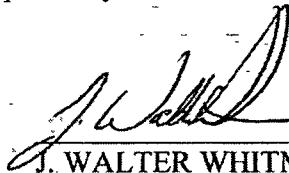
State of South Carolina, ...Respondent.

CERTIFICATE OF SERVICE

I, J. Walter Whitmire, certify that I have today served the within Brief of Respondent upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Teresa L. Norris, Esquire
Post Office Box 11744
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.
This 2nd day of December, 2013.



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

Case No. 09-CP-19-00064
Appellate Case No. 2011-200566

TOMMY S. ADAMS, #311901..... Appellant,

v.

STATE OF SOUTH CAROLINA..... Respondent.

REPLY BRIEF OF APPELLANT

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Appellant, Tommy Swinson Adam, through the undersigned counsel, herein replies to Respondent's arguments which contain numerous factual and legal errors, as follows:

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 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.

In responding to this claim, Respondent falsely states the facts. Counsel failed to object to Detective Bledsoe's testimony that Adams admitted 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. According to Respondent:

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

Response at 7 (citations omitted).¹ The representation that counsel believed the statement to be an admission of guilt is false. Counsel did not say the statement "could be and was reasonably interpreted as an admission of guilt to the underlying offense."

On direct examination, counsel stated:

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

¹Respondent cites to Appendix 77-78, 85-86. There is nothing even remotely relevant to these statements on those pages of the Appendix, which are actually part of the trial transcript. Respondent is apparently attempting to cite pages 77-78 and 85-86 of the PCR transcript, which can be found in the Appendix at 336-37 and 344-45.

App. 336. He gave further testimony that he thought this evidence could be explained in anticipated testimony from Adams. App. 336-37.

On cross-examination, counsel testified as follows:

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

A No.

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

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

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

A Relevant, yes. Because the State would have the ability to put the spin on it that they would desire. There's a difference between -- when it comes to admissibility, I think in trial work the actions, conduct, statements of people, specifically the defendant, is nothing more than paint. And I think both the defense and the prosecution paint the picture they want with the same paint samples they've got.

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

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

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

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

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

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

Respondent also asserts:

Petitioner’s contention that Petitioner’s statement was not relevant to underlying charges is patently absurd. A reasonable facial interpretation shows Petitioner’s comment was material to motive.

Response at 8. The statement – “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 – says absolutely nothing about motive. Moreover, the solicitor, during the trial, said absolutely nothing about motive. Instead, the solicitor relied heavily on the “cooter” statement to convince the jury that this “vile” statement was indicative of Adams’ character and, therefore, his guilt:

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 (emphasis added). *See also* App. 139 (“[T]his child is his plaything, because it belongs to him”).

Respondent follows the assertion that the statement was admissible as evidence of motive with a discussion of *State v. Gilchrist*, 329 S.C. 621, 628, 496 S.E.2d 424, 428 (Ct. App. 1998). Specifically, Respondent states: “This Court determined a statement only becomes unduly prejudicial when its only purpose is would be [sic] to convey the impression of a general criminal intent.” Response at 9. The statement at issue in the portion of *Gilchrist* cited by Respondent was a statement by the defendant shortly before an attempted robbery that a liquor store passed on the way to the crime scene “looked like a good place to rob.” *Gilchrist*, 329 S.C. at 628, 496 S.E.2d at 427. This statement was admitted, not as Respondent seems to assert as “motive,” but as relevant to show Gilchrist’s state of mind relating to the attempted robbery of the victim.” *Id.* This Court found the statement relevant because it “tends to make the existence of Gilchrist’s intent to rob more probable than it would be without this evidence.” *Id.*, 329 S.C. at 628, 496 S.E.2d at 428. The Court further held that this statement was admissible under Rule 403, SCRE, because

The comment “[that store] look[s] like a good place to rob” would not normally be prejudicial, for example, if made in a security evaluation. On the other hand, it may be unduly prejudicial if introduced against someone who is accused of an unrelated or dissimilar crime, such as tax evasion, since its

only purpose in such a context would be to convey the impression of a general criminal mind.

The “prejudice” created by Gilchrist’s comment in the context of this case is an inference that he intended to rob someone that day. This inference is material to the State’s charge against him. The State attempted to prove Gilchrist intended to rob the victim and followed through with that intent by actually attempting to rob her with Ethridge. The prejudice Gilchrist seeks to escape is the prejudicial impact any criminal defendant faces when the State produces relevant evidence that implicates guilt of a crime charged.

Id., 329 S.C. at 630, 496 S.E.2d at 428-29. Here, unlike in *Gilchrist*, which actually supports Adams’ argument, the sole purpose behind the State’s presentation of evidence of Adams’ statement – “Your cooter belongs to Daddy” – was “to convey the impression of a general criminal mind.” *Id.*, 329 S.C. at 630, 496 S.E.2d at 428. The State explicitly argued to the jury, “That’s his attitude. That’s his true colors.” App. 138. Clearly, this was an assertion of “a general criminal mind,” *Gilchrist*, 329 S.C. at 630, 496 S.E.2d at 428, and not motive or intent.

Respondent also asserts that “Petitioner testified that in regards to trial strategy, the intent when the case began was that Petitioner was going to testify and clear up his statement. . . .” Response at 10 (citing App. 336). This was counsel’s testimony not Adams’ as misrepresented by Respondent.

Respondent also misstates the facts in asserting that “Petitioner was the only logical witness to explain the context of his statement to the jury” in essentially blaming Adams for counsel’s failure to object to admission of this evidence. Response at 10. First, even if Adams intended to testify, this was no excuse for failing to object to admission of this evidence. Second, as addressed below, Adams was not “the only logical witness to explain

the context.” Both of Adams’s sons, who testified in the trial and the PCR were present when the statement was made and could and did (in the PCR) explain the context.

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

Respondent begins with the statement: “The PCR judge found that trial counsel did not call Petitioner’s two sons as rebuttal witnesses based on counsel’s preparation on what Petitioner’s sons would testify to.” Response at 11 (citing App. 452-53). The PCR order, which was written entirely by Respondent’s counsel, actually states:

This Court finds the Applicant’s allegation that counsel was ineffective for failing to call or interview Mr. Adams, Jr. and Cody Adams as witnesses to rebut Investigator Bledsoe’s testimony that Applicant made inflammatory statement is without merit. At the PCR hearing Applicant’s trial counsel testified that he and the Applicant discussed what Mr. Adams, Jr. and Cody Adams’ testimony would be. This Court finds that Mr. Huff 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. Mr. Huff did not want to draw further attention to this comment by calling the two boys as rebuttal witnesses and the boys then speculate as to what they thought the Applicant meant.

App. 452-53. Contrary to the “finding” below and Respondent’s statement here that counsel chose not to call Adams’ sons to testify during trial, 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.

Respondent asserts that this testimony would have been "cumulative and not distinguishable from a plain reading of Petitioner's comment." Response at 11. While Adams agrees that "a plain reading of Petitioner's comment" – "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 – is a non-criminal parenting discussion that clearly is not the reason the state offered this statement into evidence and clearly is not what the state argued when asserting that this was evidence of "malice," App. 135, and Adams' "attitude" and "true colors," App. 138.

As addressed in detail, in the opening brief, Adams' general comment was inadmissible because it was 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, once this statement was admitted into

evidence, counsel was ineffective in failing to present this rebuttal evidence to establish that the statements had nothing to do with malice or criminal intent.

C. Eliciting testimony from the police investigator that she believed the alleged victim and failing to move for a mistrial.

In asserting that counsel was not ineffective in opening the door to Detective Bledsoe's testimony that she believed AW, Respondent asserts: "counsel successfully executed his crafted cross-examination of Bledsoe who notably acknowledged she entered an investigation with a presumption of an accused's guilt." Response at 13 (citing App. 70). What counsel sought to elicit, as he stated to Judge Few, the trial judge, was "that some accusations are true, some accusations are false." App. 73. As Judge Few clearly pointed out to counsel, this was an "obvious point." App. 71. Counsel was ineffective in engaging in this cross-examination rather than simply arguing this "obvious point" to the jury without opening the door to the improper testimony that Detective Bledsoe believed AW.

Nonetheless, Respondent argues that this claim is "frivolous" because of the trial court's "curative instruction." Response at 15. The instruction did not "cure" the error in this instance.

An instruction to disregard incompetent evidence usually is deemed to have cured any error in its admission *unless on the facts of the particular case it is probable that, notwithstanding such instruction, the accused was prejudiced.*

State v. Dempsey, 340 S.C. 565, 532 S.E.2d 306 (Ct. App. 2000) (citing *State v. Johnson*, 334 S.C. 78, 512 S.E.2d 795 (1999)) (emphasis added): The only proper evidence for the state was the testimony of AW. As addressed above, there was no valid purpose for the state to even present Bledsoe's testimony, as Adams' statements to her were not relevant and were

improperly used as a character assassination by the state. Adding to that testimony that Bledsoe believed AW, it is unlikely that the jury could unring that bell and properly disregard this testimony. Improper corroboration, in the context of a charge of criminal sexual conduct with a minor stepdaughter and the state's case is built almost solely on the testimony of the minor alleged victim, has a "devastating impact." *State v. Barrett*, 299 S.C. 485, 487, 386 S.E.2d 242, 243 (1989). It is even more devastating when defense counsel elicited the improper testimony. *See, e.g., Ingle v. State*, 348 S.C. 467, 560 S.E.2d 401 (2002).

Ingle is especially instructive on this point. In *Ingle*, the defendant, like Adams, was charged with criminal sexual conduct and lewd acts upon the daughter of his live-in girlfriend. The defendant testified that the semen on the alleged victim's shorts was a result of her sitting on the bed shortly after he and his girlfriend had sex. Defense counsel, without interviewing the girlfriend called her as a defense witness. She denied having sex with the defendant that morning. The Supreme Court held that counsel's conduct in relying on the defendant's belief that she would admit the intercourse and the state's failure to call her in the case in chief was unreasonable. The defendant was prejudiced despite the state's recall of the girlfriend in rebuttal because the prejudice of this testimony was heightened because "it came as part of what was supposed to be petitioner's defense." Counsel also elicited hearsay evidence of the alleged victim's identification of the defendant from the state's expert on child abuse and failed to object to hearsay of the child's identification of the defendant to a police office. This testimony was prejudicial because it was inadmissible corroboration and there was other evidence that called the victim's credibility in question.

Despite the cumulativeness of the identification testimony, it was prejudicial because it corroborated the victim's testimony.

Here, as in *Ingle*, the prejudice is heightened because defense counsel elicited the improper testimony. And, as in *Vail v. State*, 402 S.C. 77, 738 S.E.2d 503 (Ct. App. 2013), prejudice was established from the admission of improper corroborating evidence as there were no eyewitnesses and no physical evidence despite six to nine alleged instances of sexual intercourse with the minor.

D. 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.

Respondent asserts:

Trial counsel made clear at the PCR hearing that it was Petitioner's decision *alone*, whether to testify or not, and that Petitioner made the decision not to testify.

Response at 17 (citing App. 334). While Adams asserts that counsel advised him not to testify and presented a number of witnesses contradicting counsel's testimony on this point,² counsel was ineffective even if Respondent's statement is true because "alone" is the operative word.

² 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. Respondent simply ignores the testimony of Adams' other witnesses and asserts that "[t]he PCR court found Petitioner's testimony on this subject not credible and found trial counsel to be credible." Response at 17 (citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003)). The standard of review cited from *Miller-El* is a statutory standard applicable in federal courts in habeas corpus proceedings. It is not the standard of review for this Court.

Counsel testified 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 mentally retarded or has a low IQ. App. 354. 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.

As set forth in the opening brief in detail, 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." *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). Rule 2.1, RPC, Rule 407, SCACR.

II. Adams 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.

In recounting the testimony of Juror Warrena Mathis, respondent asserts that "Mathis testified she did not recall [Foreperson] Oliphant's disclosure of her communication with Bailiff Scurry," Response at 19. The communication, of course, was that the Bailiff responded affirmatively to Oliphant's question whether "it had to be a hundred percent." App. 153. Respondent again misrepresents the testimony. Mathis testified, in full, as follows:

Q Ms. Mathis, did you serve as a juror during Tommy Adams' trial?

A I did.

Q And during deliberations, do you remember a juror leaving the room to -- for any purpose when you all were deliberating?

A Yes.

Q And do you recall who that person was?

A I think it was Ms. Oliphant.

Q Was she the foreperson, the woman sort of in charge in there?

A Yes.

Q And when she came back in, do you recall what she said to you?

A I don't remember. *I remember something to the effect that we was going -- we wasn't going to leave until we found him guilty. We were going to stay there.*

Q Do you remember hearing the phrase [sic], "We have to be a hundred percent" or something along that line?

A Yes, yes.

Q And so basically your understanding is that until everybody agreed you weren't leaving?

A We weren't leaving.

Q And did you change your vote because of that understanding?

A I did.

App. 308-09 (emphasis added).³

Respondent then asserts:

The PCR judge found the allegation was without merit where “there has been no showing by [Petitioner] that the outcome of the trial would have been different if any objections or requests of questioning the jurors and bailiffs had been made.”

Response at 20 (citing App. 460). While the PCR court made this statement, it is wrong in asserting that Adams’ burden is to show that “the outcome of the trial would have been different.” The relevant prejudice question under *Strickland v. Washington*, 466 U.S. 668, 686 (1984), is whether “there is a reasonable probability that at least one juror would have struck a difference balance.” *Wiggins v. Smith*, 539 U.S. 510, 537 (2003); *Milke v. Ryan*, 711 F.3d 998, 1019 (9th Cir. 2013). See also *Council v. State*, 380 S.C. 159, 179 n.7, 670 S.E.2d 356, 366 n.7 (2008) (holding in ineffective assistance of counsel case: “We cannot say beyond a reasonable doubt that the undiscovered mitigating evidence, taken as a whole, would not have influenced at least one juror to recommend a life sentence”); *Vail*, 402 S.C. at 91, 738 at 511 (holding in ineffective assistance of counsel case: “[W]e cannot find the admission of the inadmissible hearsay was harmless beyond a reasonable doubt”). The focus

³ After misrepresenting the evidence from Ms. Mathis, Respondent then asserts – apparently as an explanation for counsel’s failure to request that the jurors and bailiffs be questioned and failure to request that the jurors be returned to court for proper instructions – that “Counsel noted, ‘I’m not going to know how [the jury] see the entire case because we are never going to know what a jury thinks.’” Response at 20 (citing App. 373). Counsel did not make this statement in the context of the jury issue. This part of his testimony was addressing the failure to object to the “cooter” comment.

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." *Strickland*, 466 U.S. at 694.

The PCR order does not address at all counsel's failure to request a proper charge, even though it was asserted in the PCR application, App. 232-33, addressed in counsel's PCR testimony, App. 357-59, and asserted in the objections to the Proposed Order, App. 434-36, which was ultimately signed by the PCR court. Respondent asserts only that counsel's decision "not to request the trial judge examine each juror or request a premature and needless *Allen* charge was a matter of sound trial strategy. The record shows the jury never reached a deadlock." Response at 22.

First, just logically, the only reason for the foreperson to ask the question of whether "it had to be a hundred percent" was if the jury was not unanimous. Ms. Oliphant made that clear in her testimony.

Q And according to our court transcript, the question was whether you had to be one hundred percent. What were you actually asking with that, one hundred percent what, put it that way?

A Should all of us agree on doing the same thing. I mean, like, since we had 12 in the back, you know, trying to, you know, determine everything that went on and how it went on, we wanted to make sure that everybody agreed on the same thing. We couldn't have like 11 I mean nine doing something and two saying, you know, we disagree. All of us be on one accord.

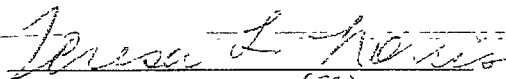
App. 305-06. Second, it was was even reported in the media that "[t]he jury was deadlocked, we are told, with a nine guilty to three innocent voting" apparently when the question was asked of the bailiffs. App. 258.

Finally, contrary to Respondent's assertion and the PCR court's finding, Adams did establish a reasonable probability that the outcome would have been different if the jury had been given a proper instruction. Specifically, 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, Ms. Mathis understood it to mean "we wasn't going to leave until we found him guilty. We were going to stay there." App. 309. After an overnight recess and continued deliberations, she changed her vote from not guilty to guilty because of that understanding. App. 309.

Conclusion

Wherefore, for the reasons set forth above and in the Opening Brief, Adams prays this Court will vacate his convictions and sentences.

Respectfully Submitted,


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January 21, 2014.

Counsel for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

Case No. 09-CP-19-00064
Appellate Case No. 2011-200566

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

v.

STATE OF SOUTH CAROLINA, ...Respondent.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Reply Brief has been served upon Respondent's counsel by first class mail, postage prepaid, addressed to counsel of record, J. Walt Whitmire, Post Office Box 11549, Columbia, South Carolina 29211.


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January 21, 2014

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Tommy S. Adams, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2011-200566

Appeal From Edgefield County
William P. Keesley, Circuit Court Judge

Unpublished Opinion No. 2015-UP-174
Heard December 8, 2014 – Filed April 1, 2015

REVERSED

Teresa L. Norris, of Blume Norris & Franklin-Best, LLC,
of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Assistant
Attorney General John Walter Whitmire, and Assistant
Attorney General Mary Williams Leddon, all of
Columbia, for Respondent.

PER CURIAM: Tommy S. Adams was convicted of lewd act on a child under sixteen and first-degree criminal sexual conduct with a minor. He appeals from the

denial and dismissal of his application for post-conviction relief (PCR), arguing his trial counsel was ineffective.¹ We agree.

We find Adams' trial counsel was ineffective in failing to object to the admission of Adams' statement to police because it was improper character evidence and should not have been admitted. *See State v. Haselden*, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) ("Character evidence is not admissible to prove the accused possesses a criminal character or has a propensity to commit the crime with which he is charged."). The State used Adams' statement in its closing argument as evidence of Adams' bad character to prove he was guilty as charged. *See State v. Nelson*, 331 S.C. 1, 15-16, 501 S.E.2d 716, 723-24 (1998) (finding defendant's statements to police that he "was uncomfortable around adult women" and "he had fantasies about children" were improper character evidence and were not relevant to the crime charged). Further, we find trial counsel's explanation he did not object to the statement because he did not want to "wave a red flag" before the jury was not a reasonable strategy because the issue could have been litigated outside the presence of the jury. *See Dawkins v. State*, 346 S.C. 151, 157, 551 S.E.2d 260, 263 (2001) (finding trial counsel's failure to object to testimony because he did not want to confuse or upset the jury was not a valid strategy because he could have sought a determination as to the inadmissibility of the testimony out of the hearing of the jury); *see also Matthews v. State*, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002) ("[C]ounsel cannot assert trial strategy as a defense for failure to object to comments which constitute an error of law and are inherently prejudicial."). Finally, we find there was not overwhelming evidence of Adams' guilt; therefore, the PCR court erred in finding Adams failed to prove prejudice. *See generally Smith v. State*, 386 S.C. 562, 566, 689 S.E.2d 629, 631 (2010) (stating "no prejudice occurs, despite trial counsel's deficient performance, where there is otherwise overwhelming evidence of the defendant's guilt").

We decline to address Adams' remaining issues because our determination that Adams' counsel was deficient for failing to object to the admission of his statement to police is dispositive. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of another issue is dispositive of the appeal).

¹ Adams filed an application for PCR, and after an evidentiary hearing, the PCR court filed its order denying Adams relief. Adams thereafter filed a petition for a writ of certiorari, which this court granted.

REVERSED.

SHORT, KONDUROS, and GEATHERS, JJ., concur.

STATE OF SOUTH CAROLINA
In The Court of Appeals

CERTIORARI TO EDGEFIELD COUNTY
Court of Common Pleas

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

Appellate Case No. 2011-200566

Tommy S. Adams, ...Petitioner,

v.

State of South Carolina, ...Respondent.

PETITION FOR REHEARING

I.

On April 1, 2015, this Court reversed the post-conviction relief (PCR) judge's denial of Petitioner's application for post-conviction relief. Tommy S. Adams v. State of South Carolina, Op. No. 2015-UP-174 (S.C. Ct. Ap. Filed April 1, 2015). This Court misapprehended or overlooked relevant facts of this case and the applicable law. Accordingly, pursuant to Rule 221(a), SCACR, the Court should grant the petition for rehearing and affirm the PCR judge's denial of relief.

II.

At trial, the State's investigator testified to statements made by Petitioner in an non-custodial interview:

Solicitor: What did [Petitioner] say?

Bledsoe: [Petitioner] denied the allegations, but he made some odd statements to me that day.

Solicitor: What were those statements?

Bledsoe: [Petitioner] mentioned something about he talked frankly with his children -- his older children about sex... 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."

Solicitor: Had you disclosed to him prior to that time what the allegations were against him?

Bledsoe: Yes, sir, I did.

(App.p.67, lines 1-20).

In Petitioner's Application for Post-Conviction Relief (PCR), he pled "counsel provided ineffective assistance in failing to object to Detective Bledsoe's testimony that, while Applicant denied the allegations, he made odd statements when he mentioned something about he talked frankly with his children—his older children—about sex." (App.p.228). Petitioner posited "[t]hese general comments were inadmissible because they were neither relevant nor material to the crimes charged, nor statements that could be construed as conveying an admission of guilt." (App.p.228).

At the PCR hearing, counsel testified Petitioner's statement was admissible because it was a statement given by the accused that could be and was reasonably interpreted as an admission of guilt to the underlying offense. (App.pp.77-8; p.85). Counsel noted the statement was harmful but was open to a neutral and positive meaning. (App.p.86). Counsel testified, "[the statement] would indicate to me it was more of a father saying, 'Don't let anyone touch you inappropriate'" (App.p.336, lines 23-5).

Counsel testified to making the tactical decision to "counterpunch" the State's testimony on Petitioner's statement concerning admissions of inculpatory conduct towards the victim by

calling Petitioner to testify to the defense's alternative interpretation. (App.p.336). Counsel testified that as a result of his pre-trial consultations with Petitioner, they had discussed and had agreed upon the tactical decision to call Petitioner to testify in the defense's case-in-chief. (App.pp.334-35). Petitioner changed his mind and communicated his desire to not take the stand during the defense's case-in-chief. Counsel noted "matter of fact, I was somewhat surprised that he made the decision not to testify." (App.p.334, ln. 19-21).

III.

In denying and dismissing Applicant's noxious PCR Action, the PCR Court found Applicant failed to meet his burden to prove Strickland's deficiency prong on two grounds. First, the PCR Court rejected Applicant's notion that Applicant's statement that "your cooter belongs to your daddy" was inadmissible and did not warrant an objection. Second, and in the alternative, the PCR Court found counsel's testimony concerning the tactical decision to not object here constituted valid trial strategy even if the statement had been inadmissible. (App.p.456).

The PCR Court also found Applicant failed to meet his burden to prove Strickland's prejudice prong. The PCR Court announced, "there has been no showing by the Applicant that the outcome of his trial would have been different if this objection had been made." (App.p.457).

A.

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). The Strickland standard makes it clear

that one can only prevail on a claim of ineffective assistance of counsel if one can meet his burden of proving both deficiency of counsel and resulting prejudice.

B.

Counsel made a sound tactical decision to not object to Petitioner's statement by eliciting testimony from Petitioner concerning his statement. Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel. Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). As counsel astutely articulated at the evidentiary hearing before the PCR Court, the statement at issue held two objectively reasonable interpretations. Certainly, Petitioner was certainly the appropriate witness to testify to his intent making the statement to support his version that it showed he was apparently a good parent that cared deeply about the chastity of his children. Arguendo, had the statement been inadmissible, counsel's strategy to not object in favor of "counterpunching" by calling Petitioner as a defense witness to explain his version of the context of the statement constituted valid trial strategy that bars an assignment of deficient performance. See Bullock v. Carver, 297 F.3d 1036 (10th Cir. 2002) (emphasis added) (counsel's failure to object to molest victim's statements and hearsay was not ineffectiveness where he believed the objection would be futile and where the statements served the interest of showing allegedly suggestive interview techniques).

In reversing the PCR Court, this Court held "[f]urther, we find trial counsel's explanation he did not object to the statement because he did not want to waive a red flag before the jury was not a reasonable trial strategy because the issue could have been litigated outside of the presence of the jury." This Court cited to Dawkins v. State¹ that reiterates the Supreme Court's long held pronouncement that a defense attorney's decision to not object to inadmissible evidence out of fear of drawing further attention to inadmissible evidence, standing alone, will not provide safe

¹ Dawkins v. State, 346 S.C. 151, 157, 551 S.E.2d 260, 263 (2001).

harbor from an assignment of deficient performance under Strickland. The State posits that this Court's reversal of the PCR Court's denial is contrary to the South Carolina Supreme Court's holding in Rhodes v. State, 349 S.C. 25, 33, 561 S.E.2d 606, 610 (2002), that determined the attorney's decision to not object to inadmissible evidence in favor of attacking and utilizing its admission in the defense's presentation of its case constituted a valid trial strategy and effective assistance of counsel. "[Rhodes' attorney] stated at the PCR hearing he purposely sought to convert this evidence to petitioner's advantage by portraying it as rumor. He brought this out in his cross-examination of Thompson and based much of his closing argument on the idea that the victims' identifications stemmed purely from rumor and innuendo." Id. (emphasis added). In the present case, counsel made a similar decision to forgo an objection to admissibility in order to attack and convert the State's evidence to a strength of the defense's case.

The valid trial strategy was unrealized because of Petitioner's unforeseen decision to not testify. The long standing principle has governed PCR jurisprudence that a defense attorney does not hold a duty of clairvoyance to anticipate either changes of law or facts during challenged representation. Thomes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993). Strickland explicitly states "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690 (emphasis added); Phoenix v. Matesanz, 233 F.3d 77, 84 (1st Cir. 2000) (strategic choices are given greater latitude during trial when time is short.).

After numerous pre-trial consultations, strategy session, and countless hours of preparation, Petitioner made an impromptu decision to not testify. Petitioner has only himself to blame on this matter. Therefore, the State requests this Court reconsider its opinion and affirm

the PCR Court's finding that counsel's decision to not object here constituted valid trial strategy here.

C.

Petitioner's statement was admissible. "Generally, only those parts of a confession or statement made to police which are relevant and material to the crime charged should be received into evidence." State v. Nelson, 331 S.C. 1, 16, 501 S.E.2d 716, 723 (1998). The statement concerned Petitioner's conduct towards the child victim on a matter incredibly relevant to the State's case against him: the child victim's sexuality. Petitioner's contention that the statement was not relevant to underlying charges is patently absurd. A reasonable facial interpretation shows Petitioner's comment was material to the evidence and testimony presented at trial. Certainly, a proclamation of dominion and control to an eleven-year old child victim regarding her sexual autonomy implied an ability to stifle disclosure. Furthermore, the child victim testified she feared retribution for non-compliance, let alone reporting the abuse to her mother, an older sibling, or an adult at school. (App.p.41). The solicitor argued in closing that the Petitioner's statements evidenced a zealous motive to safeguard dominion and control over the child victim's sexual autonomy necessary for exploitation. The solicitor summarized the State's case against Petitioner as a "betrayal of [child victim]'s trust." (App.pp.138-42; p.142, ln 9-10). Alternatively, the defense's case made Petitioner's character an issue in the case from opening statement on and opened the door to the admissibility of the statement on other grounds. Thus, the PCR Court made the correct finding that an objection here lacked merit for numerous reasons.

Second, the probative value of the statement was not substantially outweighed by the prospect of unfair prejudice. Here, the PCR Court correctly found "the cooter comment" was

presented in its entirety and was not presented out of context. Respondent submits context shows the statement was not prejudicial. A general desire for a parent to safeguard a child's virtue certainly does not insinuate criminal behavior.² See State v. Cutro, 365 S.C. 366, 618 S.E.2d 890 (2005) ("collecting memorabilia of a deceased child, while perhaps uncommon, is not behavior that itself indicates a bad character."). Counsel presented several witnesses that testified Petitioner was an exemplary parent. Therefore, the State requests this Court reconsider its opinion.

C.

The State urges this Court to reconsider its holding that "[f]inally, we find there was not overwhelming evidence of [Petitioner]'s guilt; therefore the PCR Court erred in finding [Petitioner] failed to prove prejudice." The PCR Court did not address whether Petitioner's conviction was supported by overwhelming evidence of guilt. On the relevant issue, the PCR Court ruled that "Applicant has failed to show that he was prejudiced by counsel's alleged ineffectiveness." (App.p.456). Thus, the State requests this Court to reconsider this matter and conform its holding to the standard of review on whether there is probative evidence to support the PCR Court's finding of fact. See Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996) (the Court will not uphold the findings of the PCR court if no probative evidence supports those findings).

Second, this Court's holding constituted an improper burden shift to the State. In the PCR forum, the applicant holds the burden to prove by a preponderance of evidence that his attorney's

² The word "cooter" is a red herring. Any interchangeable synonym of a child's genitals would not change the analysis here. The State posits that the "turtle word" probably holds substantially less shock value in rural Edgefield County than it holds to this Court. Simply, Petitioner cannot cry outrage about the "turtle word" when he chose the verbiage when being questioned about the offenses by law enforcement. See U.S. v. Pellerito, 878 F.2d 1535, 1543 (1st Cir. 1989) ("If counsel was ineffective in any sense, it was only because the client rendered him so, first by keeping Noriega in the dark, and then, by refusing to heed his advice. That is not the sort of 'ineffectiveness' for which relief can be granted")

alleged error undermined the PCR circuit court's confidence in the outcome of the trial. Jackson v. State, 355 S.C. 568, 570, 586 S.E.2d 562, 563 (2003). Probative evidence supports the PCR Court finding that Petitioner failed to meet this burden. The State's case hinged on the credibility of the minor the victim's testimony. Furthermore, counsel presented other evidence to show that Petitioner was a commendable and caring parent; creating a counter-inference that Petitioner's statement evidenced his concern over the chastity of his children. Albeit indirectly, the defense presented testimony that would have neutralized the "cooter comment's" taint on an Edgefield County jury. In imposing Petitioner's sentences, the Trial Judge importantly commented, "As I sit here today, however, I completely agree with the verdict of the jury. I am convinced that these acts took place." See State v. Cutro, 332 S.C. 100, 117, 504 S.E.2d 324, 332 (1998) ("The trial judge, not this Court, is in the best position to be the arbiter of [the witness'] credibility").

IV.

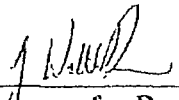
For all of the foregoing reasons, the State submits both prongs of the Strickland analysis were not satisfied and the opinion in this case was error. The State requests the panel grant the petition for rehearing, find the PCR judge properly denied Petitioner's PCR application, and affirm the order of dismissal.

Respectfully submitted,

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By: 
Attorneys for Respondent

April 16, 2015

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Edgefield County

The Honorable William P. Keesley, Circuit Court Judge
Appellate Case No: 2011-200566

TOMMY S. ADAMS,

PETITIONER.

v.

STATE OF SOUTH CAROLINA,

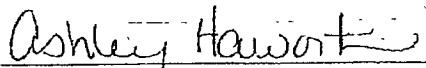
RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Petition for Rehearing** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Ms. Teresa L. Norris
Blume Norris & Franklin-Best, LLC
900 Elmwood Ave., Ste. 101
Columbia, SC 29201

This 16th day of April, 2015.


Ashley Haworth
Legal Assistant
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

Case No. 09-CP-19-00064
Appellate Case No. 2011-200566

TOMMY S. ADAMS, #311901 Appellant,

v.

STATE OF SOUTH CAROLINA Respondent.

RESPONSE TO STATE'S PETITION FOR REHEARING

Tommy Swinson Adam, through the undersigned counsel, herein responds to the State's Petition for Rehearing, which essentially just reargues the case, without pointing out any facts that this Court misapprehended or overlooked and without pointing out any legal error by the Court, which would warrant rehearing.¹

¹The State also makes no mention of the numerous other instances of counsel's ineffectiveness. Specifically, this Court granted review to address the following issues.

- I. Was Adams 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

(continued...)

First, the State falsely states the facts. Counsel failed to object to Detective Bledsoe's testimony that Adams admitted telling the alleged victim ("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." Appendix ("App.") at 67. According to the State:

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

Petition for Rehearing at 2 (citations omitted). The representation that counsel believed the statement to be an admission of guilt is false. Counsel did not say the statement "could be and was reasonably interpreted as an admission of guilt to the underlying offense."

¹(...continued)

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 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.

- II. Was Adams 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?

This Court, in its unpublished opinion, granted relief on Ground I.A. In light of that relief, the Court declined to address the remaining issues.

On direct examination, counsel stated:

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

App. 336. He gave further testimony that he thought this evidence could be explained in anticipated testimony from Adams. App. 336-37.

On cross-examination, counsel testified as follows:

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

A No.

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

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

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

A Relevant, yes. Because the State would have the ability to put the spin on it that they would desire. There's a difference between -- when it comes to admissibility, I think in trial work the actions, conduct, statements of people, specifically the defendant, is nothing more than paint. And I think both the defense and the prosecution paint the picture they want with the same paint samples they've got.

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

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

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

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

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

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

Given this testimony, the State’s argument now – that counsel made a tactical decision to “counterpunch” by deliberately allowing admission of inadmissible evidence, Petition for Rehearing at 4 – is fanciful. Counsel never said that and, in fact, said the opposite. Thus, the State’s subsequent arguments that this Court erred under *Rhodes v. State*, 349 S.C. 25, 33, 561 S.E.2d 606, 610 (2002), are simply irrelevant because counsel did not make a tactical decision to allow admission of this evidence in an attempt to utilize it for purposes of the defense. Moreover, unlike in *Rhodes*, it is not even arguable that the “cooter” comment was a “strength in petitioner’s defense and/[or] counsel effectively capitalized on the evidence,” 349 S.C. at 33, 561 S.E.2d at 610, or even desired or attempted to do so.

After arguing – incorrectly – that counsel sought to utilize the “cooter” comment as somehow favorable to the defense, the State then simply reiterates its prior arguments – which this Court already rejected – that the statement was a confession and, therefore, relevant and material evidence.

Specifically, the State asserts:

Petitioner's contention that Petitioner's statement was not relevant to underlying charges is patently absurd. A reasonable facial interpretation shows Petitioner's comment was material to motive.

Petition for Rehearing at 6. The statement — "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 — says absolutely nothing about motive. Moreover, the solicitor, during the trial, said absolutely nothing about motive. Instead, the solicitor relied heavily on the "cooter" statement to convince the jury that this "vile" statement was indicative of Adams' character and, therefore, his guilt:

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 (emphasis added). *See also* App. 139 (“[T]his child is his plaything, because it belongs to him”).

Immediately following the State’s argument that the “cooter” statement was indicative of motive and, therefore, a confession, the State makes the incredible argument that the statement was not prejudicial. Specifically, the State declares: “A general desire for a parent to safeguard a child’s virtue certainly does not insinuate criminal behavior.” Petition for Rehearing at 7. That is precisely the point. By admission of Adams’ statement, and the focus on that by the Solicitor in arguments, “[t]he State used Adams’ statement in its closing argument as evidence of Adams’ bad character to prove he was guilty as charged.” Opinion at 2.

The State then asks this Court to reconsider on the question of prejudice asserting that this Court improperly shifted the burden of proof to the State. This is patently false because this Court explicitly cited Adams’ burden in its finding of prejudice: “the PCR court erred in finding Adams failed to prove prejudice.” Opinion at 2.

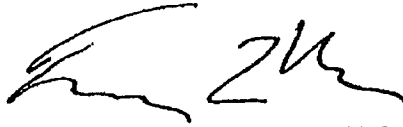
Finally, the State acknowledges that the State’s entire case at trial “hinged on the credibility of the minor” alleged victim. Petition for Rehearing at 8. The State then asserts as “important” that, in sentencing, the trial court commented: “As I sit here today, however, I completely agree with the verdict of the jury.” App. 173. The State then cites *State v. Cutro*, 332 S.C. 100, 117, 504 S.E.2d 324, 332 (1998) with the parenthetical: “The trial judge, not this Court, is in the best position to be the arbiter of [the witness’] credibility.” Petition for Rehearing at 8. Once again, the State misses the point. The question before this Court in determining whether there was prejudice due to counsel’s deficient conduct has

noting to do with the question of whether the trial court or the jury found the alleged victim to be "credible." The proper test, under *Strickland v. Washington*, 466 U.S. 668 (1984), is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. "[A] defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 693. "The 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. In short, the prejudice test of *Strickland* "is not a sufficiency of evidence test." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).² Thus, the trial court's opinion of credibility is irrelevant to the question before this Court – one this Court already answered in finding prejudice: "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687.

²In *Kyles*, the Court reviewed a petitioner's claim that the state did not disclose evidence favorable to the defense in violation of the rule established in *Brady v. Maryland*, 373 U.S. 83 (1963), and refined in *United States v. Bagley*, 473 U.S. 667 (1985). In *Brady*, the Court held that the government must disclose evidence that is both favorable to the defense and "material." 373 U.S. at 87. In *Bagley*, the Court held that the "materiality" test under *Brady* was the same as the prejudice test espoused in *Strickland* for determining ineffective assistance of counsel claims. *Bagley*, 473 U.S. at 682, (Blackmun, J., with O'Connor, J., concurring) and 473 U.S. at 685 (White, J., with Burger, C.J., and Rehnquist, J., concurring in part and concurring in the judgment). Thus, the Court's discussion of the "materiality" test in *Kyles* is equally applicable to the analysis of prejudice in resolving claims of ineffectiveness of counsel under *Strickland*.

This Court should, therefore, reject the State's Petition for Rehearing, which is nothing more than a repetition of arguments already rejected by this Court.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'T. Norris', is written over a horizontal line.

TERESA L. NORRIS

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Counsel for Appellant

May 4, 2015.

The South Carolina Court of Appeals

Tommy S. Adams, Petitioner,

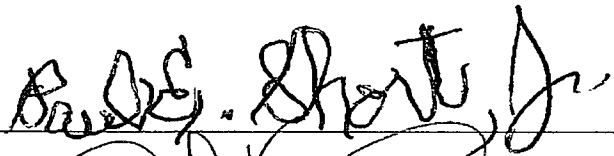
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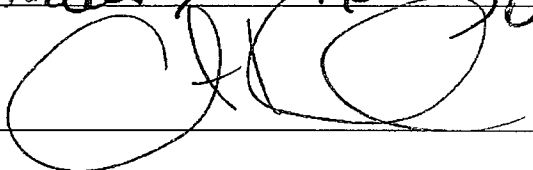
State of South Carolina, Respondent.

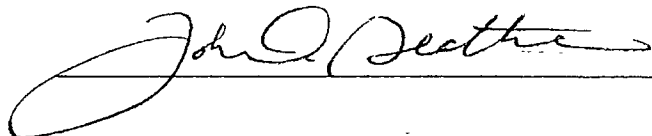
Appellate Case No. 2011-200566

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.


_____ J.


_____ J.


_____ J.

Columbia, South Carolina

cc:

Teresa L. Norris, Esquire
John Walter Whitmire, Esquire
Alan McCrory Wilson, Esquire
Mary Williams Leddon, Esquire

FILED

May 21, 2015

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO THE COURT OF APPEALS
Appeal From Edgefield County
The Honorable William P. Keesley, Circuit Court Judge

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

Appellate Case No. 2015-001342

Tommy S. Adams, ... Respondent,

v.

STATE OF SOUTH CAROLINA, ... Petitioner.

PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR PETITIONER

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The intermediate appellate court erred in reversing the PCR Judge and holding counsel was ineffective in failing to object to the admission of Adams' statement to police because it was improper character evidence.	6
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CERTIFICATION OF COUNSEL

Counsel for Petitioner hereby certifies a Petition for Rehearing was filed in the South Carolina Court of Appeals on April 16, 2015 and denied by Order filed May 21, 2015.

QUESTIONS PRESENTED

1. Did the intermediate appellate court err in reversing the PCR Judge in holding counsel was ineffective in failing to object to the admission of Adams' statement to police because it was improper character evidence?

STATEMENT OF THE CASE

Adams 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, First-Degree (2003-GS-19-0418). (App. p.19). James B. Huff, Esq., represented him. (App. p.1-175). On October 12-14, 2005, Adams proceeded to trial and was found guilty as indicted. (App. p.1-174). The Honorable John C. Few sentenced him to confinement for fifteen (15) years for the Lewd Act on a Child Under Sixteen and thirty (30) years for Criminal Sexual Conduct with a Minor—1st Degree. The sentences were ordered to be served consecutively. (App. p.173, lines15-25). Adams filed a Motion for a New Trial on or about June 23, 2006. (App. p.176-182). Judge Few issued an Order denying Adams's Motion for a New Trial on July 10, 2006. (App. p.183).

A timely Notice of Appeal was filed and perfected of Adams' behalf. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. Adams, Op. No. 2006-UP-560 (S.C. Ct. App. filed October 10, 2008). (App. p.199). The Remittitur was sent on October 18, 2008.

On February 23, 2009, Adams filed an Application for Post-Conviction Relief. (App. p.200-219). The State filed its Return on July 7, 2009. (App. p.222-226). An evidentiary hearing into the matter was convened on December 2, 2010 at the Lexington County Courthouse. (App. p.260-390). Adams was present at the hearing and was represented by Teresa Norris, Esq. The Respondent was represented by A. West Lee, Esq., of the South Carolina Attorney General's Office. The Honorable William P. Keesley denied and dismissed Adams' Application for PCR by Order dated September

12, 2011. (App. p.441-464).

After a petition for writ of certiorari and return to petition for certiorari were filed, the case was transferred to the South Carolina Court of Appeals. The court of appeals granted the petition for writ of certiorari by order filed July 1, 2013. After oral argument, the court of appeals reversed the PCR judge's denial of relief on April 1, 2015. Adams v. State, Op. No. 2015-UP-174 (S.C. Ct. App. filed April 1, 2015). Petitioner filed a timely Petition for Rehearing, which the court of appeals denied by order filed May 21, 2015.

ARGUMENT

The intermediate appellate court erred in reversing the PCR Judge in holding counsel was ineffective in failing to object to the admission of Adams' statement to police because it was improper character evidence.

Certiorari is warranted because the intermediate appellate court committed certain error in reversing the PCR Judge and holding that Adams met his burden to prove counsel's performance was deficient and ineffective in failing to object to Adams' admissible "turtle comment" statement. Even if the statement was inadmissible to support the intermediate appellate court's conclusion that counsel's performance was deficient, ample probative evidence supports the PCR Judge's finding that Adams' failed to meet his burden to prove Strickland's prejudice prong. The intermediate appellate court's error is further magnified where counsel made the contemporaneous strategic decision to not object under the presumption that Adams' would testify on the defense's behalf and neutralize any inferential taint from the "turtle comment."

STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

EFFECTIVE ASSISTANCE OF COUNSEL

For an applicant to be granted post-conviction relief as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably

effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006).

The Strickland court noted:

A fair 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. Because of the difficulties inherent in making the evaluation, 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, 104 S. Ct. at 2065.

STATEMENT OF FACTS

At trial, Investigator Bledsoe testified to statements made by Adams in the non-custodial interview:

Solicitor: What did [Adams] say?

Bledsoe: [Adams] denied the allegations, but he made some odd statements to me that day.

Solicitor: What were those statements?

Bledsoe: [Adams] mentioned something about he talked frankly with his children -- his older children about sex... 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."

Solicitor: Had you disclosed to him prior to that time what the allegations were against him?

Bledsoe: Yes, sir, I did.

(App.p.67, lines 1-20). At the PCR hearing, counsel testified Adams' statement was admissible because it was a statement given by the accused that could be and was reasonably interpreted as an admission of guilt to the underlying offense. (App.pp.77-8;

p.85). Counsel noted the statement was harmful but was open to a neutral and positive meaning. (App.p.86). Counsel testified, “[the statement] would indicate to me it was more of a father saying, “Don’t let anyone touch you inappropriately” (App.p.336, lines 23-5).

Furthermore, counsel testified to making the tactical decision to “counterpunch” the State’s testimony on Adams’ statement concerning admissions of inculpatory conduct towards the victim by calling Adams’ to testify to the defense’s alternative interpretation. (App.p.336). Counsel reasoned Adams was the witness to address the defense’s interpretation (App.p.336). Counsel testified that as a result of his pre-trial consultations with Adams, they had discussed and had agreed upon the tactical decision to call Adams to testify in the defense’s case-in-chief. (App.pp.334-35). Adams changed his mind and communicated his desire to not take the stand during the defense’s case-in-chief. Counsel noted “matter of fact, I was somewhat surprised that he made the decision not to testify.” (App.p.334, ln. 19-21).

In denying and dismissing Adams’ PCR Action, the PCR Judge found Adams failed to meet his burden to prove Strickland’s deficiency prong on two grounds. First, the PCR Judge rejected Adams’ notion that his statement that “your cooter belongs to your daddy” was inadmissible and did not warrant an objection. Second, and in the alternative, the PCR Judge found counsel’s testimony concerning the tactical decision to not object here constituted valid trial strategy even if the statement had been inadmissible. (App.p.456).

The PCR Judge also found Adams failed to meet his burden to prove Strickland’s

prejudice prong. The PCR Judge announced, "there has been no showing by [Adams] that the outcome of his trial would have been different if this objection had been made." (App.p.457).

A.

The intermediate appellate court erred in reversing the PCR Judge in finding Adams met his burden of proving counsel's performance was deficient. Adams' statement was admissible.

"Generally, only those parts of a confession or statement made to police which are relevant and material to the crime charged should be received into evidence." State v. Nelson, 331 S.C. 1, 16, 501 S.E.2d 716, 723 (1998). "Under Rule 401, SCRE, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy" State v. Cheeseboro, 346 S.C. 526, 548, 552 S.E.2d 300, 311 (2001). "Unlike a prior bad act, which always raises the risk of an improper inference based on character, a statement is an actual communication of thought which may or may not give rise to an impermissible inference, depending upon what is said and circumstances under which it is said." State v. Gilchrist, 329 S.C. 621, 629, 496 S.E.2d 424, 428 (1998).

In State v. Cheeseboro, the court held a letter drafted by the defendant was relevant because it established the defendant's need for money as a motive for murder. Cheeseboro, 346 S.C. at 548, 552 S.E.2d at 311. In State v. Cutro, the court held the memorabilia from the deceased victim's seized from the defendant was relevant to the State's theory to show defendant's motive to gain attention. State v. Cutro, 365 S.C. 366,

618 S.E.2d 890 (2005).

The statement in the present case concerned Adams' conduct towards the child victim on a matter incredibly relevant to the State's case against him: the child victim's sexuality. Adams' contention that the statement was not relevant to the underlying charges is patently absurd. A reasonable facial interpretation shows Adams' comment was material to the evidence and testimony presented at trial. Certainly, a proclamation of dominion and control to an eleven-year old child victim regarding her sexual autonomy implied an ability to stifle disclosure. Furthermore, the child victim testified she feared retribution for non-compliance, let alone reporting the abuse to her mother, an older sibling, or an adult at school. (App.p.41).

The solicitor argued in closing that the Adams' statements evidenced a zealous motive to safeguard dominion and control over the child victim's sexual autonomy necessary for exploitation. The solicitor summarized the State's case against Adams as a "betrayal of [child victim]'s trust." (App.pp.138-42; p.142, ln 9-10). Alternatively, the defense's case made Adams' character an issue in the case from opening statement on and opened the door to the admissibility of the statement on other grounds. Thus, the PCR Judge made the correct finding that an objection here lacked merit for numerous reasons.

Second, the probative value of the statement was not substantially outweighed by the prospect of unfair prejudice. Here, the PCR Judge correctly found "the cooter comment" was presented in its entirety and was not presented out of context. The State submits context shows the statement was not prejudicial. A general desire for a parent to

safeguard a child's virtue certainly does not insinuate criminal behavior.¹ See State v. Cutro, 365 S.C. 366, 618 S.E.2d 890 (2005) ("collecting memorabilia of a deceased child, while perhaps uncommon, is not behavior that itself indicates a bad character."). Therefore, the State requests this Court grant certiorari to reverse the intermediate appellate court and affirm the PCR Judge's finding that Adams' failed to meet his burden to prove counsel rendered deficient performance that resulted in prejudice.

B.

The intermediate appellate court erred in reversing the PCR Judge's factual finding that Adams' failed to meet his burden on Strickland's prejudice prong where there is ample probative evidence to support the PCR Judge's factual finding.

The intermediate appellate court held "[f]inally, we find there was not overwhelming evidence of Adams' guilt; therefore the PCR Court erred in finding Adams failed to prove prejudice." On the relevant issue, the PCR Judge found that "Applicant has failed to show that he was prejudiced by counsel's alleged ineffectiveness." (App.p.456). The intermediate appellate court abused its discretion here when it departed from the standard of review on whether there is probative evidence to support the PCR Court's finding of fact. See Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996) (the Court will not uphold the findings of the PCR court if no probative evidence supports those findings). Thus, the intermediate appellate court's holding constituted an improper

¹ The word "cooter" is a red herring. Any interchangeable synonym of a child's genitals would not change the analysis here. The State posits that the "turtle word" probably holds substantially less shock value in rural Edgefield County than it held to the intermediate appellate court. Simply, Petitioner cannot cry outrage about the "turtle word" when he chose the verbiage when being questioned about the offenses by law enforcement. See U.S. v. Pellerito, 878 F.2d 1535, 1543 (1st Cir. 1989) ("If counsel was ineffective in any sense, it was only because the client rendered him so, first by keeping Noriega in the dark, and then, by refusing to heed his advice. That is not the sort of "ineffectiveness" for which relief can be granted")

burden shift to the State. In the PCR forum, the applicant holds the burden to prove by a preponderance of evidence that his attorney's alleged error undermined the PCR court's confidence in the outcome of the trial. Jackson v. State, 355 S.C. 568, 570, 586 S.E.2d 562, 563 (2003).

Ample Probative evidence supports the PCR Judge's finding that Adams failed to meet this burden to prove Strickland's prejudice prong. The State's case hinged on the credibility of the minor victim's testimony. The Trial Judge made the following comment during sentencing: "As I sit here today, however, I completely agree with the verdict of the jury. I am convinced that these acts took place." See Cutro, 332 S.C. at 117, 504 S.E.2d at 332 ("The trial judge, not [the intermediate appellate court], is in the best position to be the arbiter of [the witness'] credibility"). Furthermore, counsel presented other evidence to show that Adams was a commendable and caring parent; creating a counter-inference that Adams' statement evidenced his concern over the chastity of his children. Albeit indirectly, counsel also elicited testimony that would have neutralized the "turtle comment's" potential taint on an Edgefield County jury. Therefore, the State requests this Court grant certiorari to reverse the intermediate appellate court and affirm the PCR Judge's finding that Adams' failed to meet his burden to prove counsel rendered deficient performance that resulted in prejudice.

C.

Last, the intermediate appellate court erred in holding that counsel's decision to not object to the admission of the "turtle comment" was outside the ambit of valid trial strategy.

Counsel made a sound tactical decision to not object to Adams' statement by eliciting testimony from Adams on the matter. Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel. Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). As counsel astutely articulated at the evidentiary hearing before the PCR Judge, the statement at issue held two objectively reasonable interpretations. Certainly, Adams was the appropriate witness to testify to his intent in making the statement to support his version that it showed he was apparently a good parent that cared deeply about the chastity of his children.

Arguendo, had the statement been inadmissible, counsel's strategy to not object in favor of "counterpunching" by calling Adams as a defense witness to explain his version of the context of the statement constituted valid trial strategy that bars an assignment of deficient performance. See Bullock v. Carver, 297 F.3d 1036 (10th Cir. 2002) (emphasis added) (counsel's failure to object to molest victim's statements and hearsay was not ineffectiveness where he believed the objection would be futile and where the statements served the interest of showing allegedly suggestive interview techniques).

The intermediate appellate court cites to Dawkins v. State² to support its holding on the propriety of counsel's strategy in not objecting: "[f]urther, we find trial counsel's explanation he did not object to the statement because he did not want to waive a red flag before the jury was not a reasonable trial strategy because the issue could have been litigated outside of the presence of the jury." Id. Yet, Dawkins reiterates this Court's long held pronouncement that a defense attorney's decision to not object to inadmissible evidence out of fear of drawing further attention to inadmissible evidence, standing alone,

² Dawkins v. State, 346 S.C. 151, 157, 551 S.E.2d 260, 263 (2001).

will not provide safe harbor from an assignment of deficient performance under Strickland. Id. The State posits that the intermediate appellate court's holding here is contrary to the controlling case, Rhodes v. State, 349 S.C. 25, 33, 561 S.E.2d 606, 610 (2002), where this Court held that the attorney's decision to not object to inadmissible evidence in favor of attacking and utilizing its admission in the defense's presentation of its case constituted a valid trial strategy and effective assistance of counsel.

[Rhodes' attorney] stated at the PCR hearing he purposely sought to convert this evidence to petitioner's advantage by portraying it as rumor. He brought this out in his cross-examination of Thompson and based much of his closing argument on the idea that the victims' identifications stemmed purely from rumor and innuendo.

Id. (emphasis added). In the present case, counsel made a similar decision to forgo an objection to admissibility in order to attack and convert the State's evidence as a sword for the defense's case.

What is lost in translation to the intermediate appellate court was that counsel's valid trial strategy was ultimately unrealized because of Adams' unforeseen decision to not testify. The long standing principle has governed PCR jurisprudence that a defense attorney does not hold a duty of clairvoyance to anticipate either changes of law or facts during challenged representation. Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993).

Strickland explicitly states "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690 (emphasis added); Phoenix v. Matesanz, 233 F.3d 77, 84 (1st Cir. 2000) (strategic choices are given greater latitude during trial when time is short.).

After numerous pre-trial consultations, strategy sessions, and countless hours of preparation, Adams made an impromptu decision to not testify. Adams has only himself to blame on this matter. Therefore, the State requests this Court grant certiorari to reverse the intermediate appellate court and affirm the PCR Judge's finding that counsel's decision to not object here constituted valid trial strategy here.

Accordingly, the intermediate appellate court erred in concluding Adams met his burden of proving counsel was either deficient or ineffective in failing to object to Adams' admissible statement. Even if the "turtle comment" was inadmissible, the test on the bloody pieces of glass from the crime scene. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

CONCLUSION

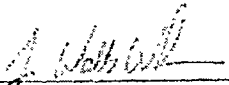
For the reasons stated above, this Court should grant the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

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By: 
ATTORNEYS FOR PETITIONER

July 6, 2015

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO THE COURT OF APPEALS
Appeal From Edgefield County
The Honorable William P. Keesley, Circuit Court Judge

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

Appellate Case No. 2015-001342

Tommy S. Adams, ... Respondent.

v.

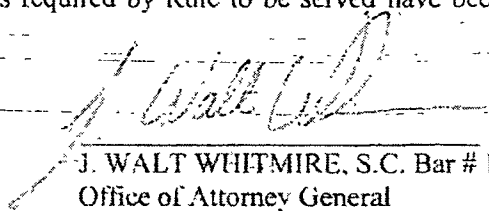
State of South Carolina, ... Petitioner.

CERTIFICATE OF SERVICE

I, J. Walt Whitmire, certify that I have today served the within Petition for Writ of Certiorari and Appendix upon Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Ms. Teresa L. Norris, Esquire
Blume Norris & Franklin-Best, LLC
900 Elmwood Ave., Ste. 101
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I further certify that all parties required by Rule to be served have been served.
This 6th day of July, 2015.


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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

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

Appellate Case No. 2015-001342

TOMMY S. ADAMS, #311901 Respondent,

v.

STATE OF SOUTH CAROLINA Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESTATEMENT OF QUESTION PRESENTED

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

ADDITIONAL SUSTAINING GROUNDS

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

STATEMENT OF THE CASE

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

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

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

2002, when she was ten years old, because she repeatedly physically resisted Adams' efforts to pull her pants down. App. 43.³

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

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

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

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

App. 277. In particular:

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

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

“odd statements” when he “mentioned something about he talked frankly with his children—his older children—about sex.” Specifically, Bledsoe testified Adams told AW: “Your cooter belongs to your daddy, and if anybody wants to touch that or bother that, you need to tell them to ask me.” App. 67.⁴ During cross-examination, Bledsoe testified that she believed AW. App. 70.⁵

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

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

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

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

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

Additional relevant evidence will be discussed in the argument below.

Argument

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

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

(b) Considerations Governing Review. A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court’s discretion or power to grant review in general, indicate the character of reasons which will be considered:

- (1) Where there are novel questions of law.
- (2) Where there is a dissent in the decision of the Court of Appeals.
- (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.

(4) Where substantial constitutional issues are directly involved.

(5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

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

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

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

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

Likewise, the State includes in its “Statement of Facts” that “counsel testified to making the tactical decision to ‘counterpunch,’” citing App. 336; the State’s arguments and

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

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

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

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

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

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

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

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

A No.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

App. 67.

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

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

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

App. 344.

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

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

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

What did he tell Virginia Bledsoe? What a vile thing to say. He's just been talked to by this investigator about allegations of sexual misconduct that he's alleged on this child. And what does he tell the investigator from the Sheriff's Office? "Your cooter belongs to your daddy," because he's using this child as his sexual plaything.

You can bet it belonged to him. He considered it his personal property, because he was using it for his own sexual benefit and lust. Yes, it belonged to him, and he showed that. It didn't belong to anybody else in the world. "If anybody else wants to come and touch you or do anything else, they've got to talk to me, because the cooter belongs to me."

He's even telling this investigator that. What an inappropriate thing, and it shows what's in his heart, malice.

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

She could sure tell you exactly when it started, when he started dragging her back there in that bedroom, and molesting her, and using her for his own lust and satisfaction, because it belongs to him.

He couldn't even resist throwing that in in front of this investigator after she's telling him what he's been accused of. That's his attitude. That's his true colors, and it came out right then. He couldn't even cover it up when he was talking to the police, because that's what he believes.

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

In asserting that the Court of Appeals “erred” in finding that counsel’s conduct was deficient, the State asserts:

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

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

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

McManus v. Bank of Greenwood, 171 S.C. 84, 89, 171 S.E.2d 473, 475 (1933) (“statements of fact appearing only in argument of counsel will not be considered”). The State does not bother to even attempt to explain what these alleged “other grounds” are or include any actual argument or citation to the record or any law. Presumably, the State is referring to counsel’s statements that the defendant would testify. First, as set forth below, counsel provided ineffective assistance in making these statements. Second, even if Adams had testified, his character would not have been in evidence until after his testimony or presentation of other character evidence. See *State v. Council*, 335 S.C. 1, 12 n.6, 515 S.E.2d 508, 514 n.6 (1999) (“An accused must introduce evidence of his character at trial before the prosecution can attack it. See Rule 404(a), SCRE. Here, because appellant never testified or offered other evidence of his good character, his character was never an issue”). Third, again, Adams’ “cooter” statement was simply not indicative of character. Even according to the police report of this statement, the context was simply Adams “tell[ing] the kids don’t have sex until you are married and your cooter belongs to your daddy.” App. 402.⁸

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

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

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

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

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

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

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

Additional Sustaining Grounds

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

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

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

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

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

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

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

Daddy was having a talk to us about sex because Daddy had taken me and Tommy to work with him one day and I had found a condom and I didn't know what it was, and he told us that he would sit us down and talk to us about it, and we all sat down in the living room and talked about it.

And when he said that, he was saying it because he doesn't want people to harm [AW]. He didn't want other men to just take control of her. He was protecting her as he was protecting all of us.

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

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

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

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

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

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

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

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

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

A Yes, sir, I have.

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

A Yes, sir.

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

A Yes, sir.

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

A Yes, sir.

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

A Yes, sir.

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

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

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

All right, ladies and gentlemen, let me clear a couple a things up before we move forward. I supposed that it is somewhat obvious that there may be people who on different sets of facts and other situations have made accusations against people that are not people [sic] and that some people have made accusations against other people that are true.

It will be your job in this case to determine what it is that the State has proven beyond a reasonable doubt. That's your job to determine that on the facts of this case.

Now, with regard to the last statement by the witness, I am going to instruct you to disregard anything that you may have heard this witness say regarding whether or not she believes or does not believe any other witness. That is a matter for you. It is not for a witness to tell you who they believe. It is for you to decide who you believe.

App. 77-78.

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

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

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

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

An instruction to disregard incompetent evidence usually is deemed to have cured any error in its admission *unless on the facts of the particular case it is probable that, notwithstanding such instruction, the accused was prejudiced.*

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

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

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

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

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

There's going to be two people saying two different things.

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

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

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

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

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

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

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

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

App. 354.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. WATSON: Yes, sir.

THE COURT: All right, raise your right hand.

(The witness was sworn.)

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

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

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

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

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

MS. WATSON: That's all.

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

App. 153-54. Defense counsel responded only:

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

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

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

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

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

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

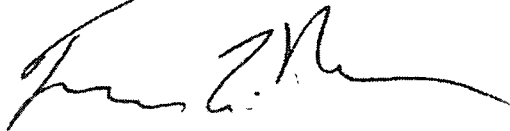
818. See also *Weaver v. Thompson*, 197 F.3d 359, 365-66 (9th Cir. 1999). Counsel's conduct was deficient and prejudicial. *Workman v. State*, 412 S.C. 428, 771 S.E.2d 636 (2015) (counsel ineffective for failing to object to a coercive *Allen* charge); *Dawson v. State*, 352 S.C. 15, 572 S.E.2d 445 (2002)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

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

Conclusion

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

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Teresa L. Norris", written over a horizontal line.

TERESA L. NORRIS

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Counsel for Respondent

August 17, 2015.

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

Tommy S. Adams, Respondent,

v.

State of South Carolina, Petitioner.

Appellate Case No. 2015-001342

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Edgefield County
The Honorable William P. Keesley, Circuit Court Judge

Memorandum Opinion No. 2016-MO-015
Submitted March 29, 2016 – Filed April 20, 2016

REVERSED AND REMANDED

Attorney General Alan McCrory Wilson, Assistant
Attorney General John Walter Whitmire, Assistant
Attorney General Patrick Schneckpeper, all of
Columbia, for Petitioner.

Teresa L. Norris, of Blume Norris & Franklin-Best, LLC,
of Columbia, for Respondent.

PER CURIAM: Petitioner seeks a writ of certiorari to review the decision of the court of appeals in *Adams v. State*, Op. No. 2015-UP-174 (S.C. Ct. App. filed April 1, 2015). We grant the petition for a writ of certiorari, dispense with further briefing, reverse the decision of the court of appeals, and remand the matter to the court of appeals.

Following a hearing, the PCR judge denied the application for post-conviction relief (PCR) filed by respondent (Adams). The court of appeals granted Adams' petition for a writ of certiorari and reversed the decision of the PCR judge. The court held a statement made by Adams to police was inadmissible character evidence and trial counsel was ineffective in failing to object to its admission. The court rejected trial counsel's reasoning for failing to object.

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.¹

Because Adams raised other allegations of error by the PCR judge that the court of appeals did not address, we remand this matter to the court of appeals to rule on those issues.

REVERSED AND REMANDED.

PLEICONES, C.J., BEATTY, KITTREDGE and HEARN, JJ., concur. FEW, J., not participating.

¹ We express no opinion on the allegations that trial counsel was ineffective in failing to elicit testimony from Adams and/or his sons to explain the context of the statement.

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Tommy S. Adams, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2011-200566

Appeal From Edgefield County
William P. Keesley, Circuit Court Judge

Unpublished Opinion No. 2016-UP-515
Submitted September 1, 2016 – Filed December 14, 2016

AFFIRMED

Teresa L. Norris, of Blume Norris & Franklin-Best, LLC,
of Charleston, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant
Attorney General Patrick Lowell Schneckpeper, of
Columbia, for Respondent.

PER CURIAM: Tommy S. Adams was convicted of lewd act on a child under sixteen and first-degree criminal sexual conduct with a minor. He appealed from the denial and dismissal of his application for post-conviction relief (PCR), arguing

his trial counsel was ineffective in (1) not objecting to the admission of his statement to police because it was irrelevant to the crimes charged; (2) not calling Adams' two sons to testify as to the circumstances surrounding his statement; (3) 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; (4) advising Adams not to testify after informing the jury he would testify and not properly advising Adams as to whether he should testify; and (5) not objecting following improper communication between jurors and the bailiffs. We reversed the denial of PCR and remanded the case for a new trial, finding Adams' statement to the police was inadmissible character evidence and trial counsel was ineffective for failing to object to it.¹ Our supreme court reversed and remanded the case to this court, finding Adams' statement to the police was relevant as circumstantial evidence of Adams' control over and sexual use of the victim.² The supreme court ordered this court to address the remaining issues. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. 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))).

2. 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).

¹ See *Adams v. State*, Op. No. 2015-UP-174 (S.C. Ct. App. filed Apr. 1, 2015).

² See *Adams v. State*, Op. No. 2016-MO-015 (S.C. Sup. Ct. filed Apr. 20, 2016).

3. 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).

4. 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)).

AFFIRMED.³

SHORT, KONDUROS, and GEATHERS, JJ., concur.

³ We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

Case No. 09-CP-19-00064
Appellate Case No. 2011-200566

RECEIVED

DEC 29 2016

SC Court of Appeals

TOMMY S. ADAMS, #311901.....Appellant,

v.

STATE OF SOUTH CAROLINA.....Respondent.

PETITION FOR REHEARING

Appellant, Tommy S. Adams, through the undersigned counsel hereby petitions the Court for rehearing due to this Court's factual and legal errors in its per curiam opinion, as follows:

- 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 numerous instances of deficient and prejudicial conduct.**
- A. **Failure to rebut the state's misrepresentation of the nature of Adams' statement.**

In determining that counsel was not ineffective for failing to call Adams' sons to testify concerning the circumstances of Adams' statement to the alleged victim that "your

cooter belongs to daddy,” this Court appears to find 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. First, there was no strategy not to call the sons to testify as both sons DID testify during the trial. They were simply not asked about this topic. Second, counsel’s explanations that he intended to have Adams testify about the context rather than his sons are clearly “hindsight” rather than “strategy” because counsel advised Adams not to testify and never mentioned Adams’ statement in closing.

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

In finding that counsel was not ineffective for eliciting testimony from the police investigator that she believed the alleged victim was telling the truth, this Court appears to find that counsel’s conduct was deficient but that Adams has not proven prejudice due to the trial court’s curative instruction. In doing so, however, this Court overlooks 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.

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, this Court defers 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. As discussed in detail in Appellant's Opening Brief at 19-20, counsel's conduct was deficient by his own admission because he failed to properly advise Adams.

This Court also appears to find no prejudice because the trial court instructed the jury that it could not consider a defendant's failure to testify against him. This finding

ignores, however, 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 also *Ouber v. Guarino*, 293 F.3d 19 (1st Cir. 2002); *English v. Romanowski*, 602 F.3d 714 (6th Cir. 2010); *U.S. ex rel Hampton v. Leibach*, 347 F.3d 219 (7th Cir. 2003).

II. Adams 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.

In finding that counsel was not ineffective in failing to object or take further action in response to improper communication between the jurors and bailiffs, this Court cites *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." This Court overlooks, 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

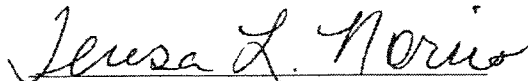
S.C. at 208, 428 S.E.2d at 12 (quoting *Holmes v. United States*, 284 F.2d 716, 718 (4th Cir. 1960)).

Nonetheless, this Court appears 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.

Conclusion

Wherefore, for the foregoing reasons, Petitioner requests this Court to grant rehearing and vacate his convictions and sentences.

Respectfully Submitted,


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December 29, 2016

RECEIVED

DEC 29 2016

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

Case No. 09-CP-19-00064
Appellate Case No. 2011-200566

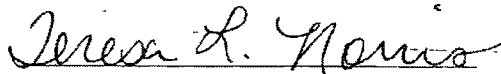
TOMMY S. ADAMS, #311901.....Appellant,

v.

STATE OF SOUTH CAROLINA.....Respondent.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing has been served upon Respondent's counsel by first class mail, postage prepaid, addressed to counsel of record, Patrick Schmeckpeper, Post Office Box 11549, Columbia, South Carolina 29211.


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December 29, 2016

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

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

Appellate Case No. 2011-200566

Tommy S. Adams, ...Petitioner,

v.

State of South Carolina, ...Respondent.

RETURN TO PETITION FOR REHEARING

On December 14, 2016, this Court issued an opinion in this case in which it affirmed the post-conviction relief (PCR) judge's order dismissing the underlying PCR matter. Adams v. State, Op. No. 2016-UP-515 (S.C. Ct. App. filed December 14, 2016).

Adams submitted a petition for rehearing dated December 29, 2016. This Court did not misapprehend or overlook relevant facts of this case and the applicable law.

Accordingly, pursuant to Rule 221(a), SCACR, the Court should deny the petition for rehearing.

I.

Adams was convicted of the commission of a lewd act on a child under the age of sixteen and criminal sexual conduct with a minor, 1st degree. On October 14, 2005, the

Honorable John C. Few sentenced him to forty five years imprisonment. This Court affirmed his convictions and sentences. State v. Adams, Op. No. 2006-UP-560 (S.C. Ct. App. filed October 10, 2008).

Adams filed a PCR application on February 23, 2009, and a hearing was held on December 2, 2010. The Honorable William P. Keesley denied the application in an order dated September 3, 2010.

Adams appealed, and in an unpublished opinion, the South Carolina Court of Appeals reversed the PCR Court's order and granted relief on a single issue. State v. Adams, Op. No. 2015-UP-174 (S.C. Ct. App. filed April 1, 2015).

The State appealed. In an opinion filed April 20, 2016, the Supreme Court of South Carolina reversed, reinstated Adams' convictions and sentences, and remanded the matter to this Court for consideration of the remaining issues. State v. Adams, 2016-MO-2015. This Court ultimately affirmed the PCR Court's denial of Adams' application, and Adams filed a Petition for Rehearing.

II.

In its opinion, this Court affirmed the lower court's ruling as to whether counsel was ineffective for not calling Adams' two sons to testify to the circumstances surrounding his statement, where counsel articulated a valid reason for employing that strategy.

Adams argues "there was no strategy not to call the sons to testify as both sons DID testify during trial," and that "[t]hey were simply not asked about this topic." Adams further argues counsel's explanations that he intended to have Adams testify about the context rather than his sons are based in hindsight rather than strategy, where

counsel advised Adams not to testify and never mentioned Adams' statement in closing.

Counsel's strategy was reasonable. First, counsel testified that he did not believe Investigator Bledsoe's testimony – from which the offending statement was elicited – was actually as damaging as the State made it out to be. App. p. 339. Clearly counsel was entitled to take that into account in choosing how to try Adams' case. The PCR Court agreed, finding Counsel did not want to "draw further attention" to the comment. App. p. 417; 421. In any event, counsel's plan was to use Adams' testimony to clear the matter up and was ultimately surprised that Adams chose not to testify. App. p. 338; 347. Given the probative evidence in support of the PCR Court's decision, this Court correctly affirmed its ruling. The Petition for Rehearing should therefore be denied.

III.

This Court also affirmed the lower court's ruling as to whether 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.

Adams' argument appears to be that both this Court and the PCR Court failed to properly weigh the prejudicial impact of counsel's alleged error. Specifically, he argues that the testimony is "especially prejudicial" based on what he says is a lack of overwhelming evidence of guilt.

There are two problems with this argument. First, it ignores that on appeal from post-conviction relief, the proper inquiry is whether there is any evidence to support the lower court's finding. After hearing all of the evidence, the PCR Court concluded Adams

was not prejudiced by counsel's alleged error.¹ App. p. 422-23. The fact that the trial judge issued a curative instruction constitutes probative evidence in support of the PCR Court's ruling. See 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"). Indeed, the PCR Court specifically found that the instruction was adequate. App. p. 422-23.

The second problem is, of course, that the issue was unpreserved – as presented – for appellate review. At the lower level, Adams argued counsel was ineffective for *eliciting* the testimony in question. App. p. 238. The PCR Court found counsel properly objected to the comment, after which the trial judge issued a curative instruction. App. p. 422-23. Adams then argued on appeal, for the first time, that counsel was ineffective for failing to object to the adequacy of the curative instruction and request a mistrial. This Court therefore appropriately found that, in addition to being non-meritorious, the issue was not preserved for review. Adams' Petition for Rehearing should be denied.

IV.

This Court also affirmed the lower court's ruling 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.

In his Petition for Rehearing, Adams appears to have abandoned his argument that counsel was ineffective in advising him not to testify.² Instead, he argues counsel was ineffective for simply failing to advise him *whether* to testify. As discussed in the Brief

¹ The PCR Court specifically found counsel did not make any error, and properly objected to the witness's impermissible testimony. App. p. 422.

² This decision makes sense, given the PCR Court's straightforward credibility findings on the matter. App. p. 423.

of Respondent, Counsel's credible testimony indicated that he thoroughly discussed the potential ramifications of testifying, but appropriately left the overall determination up to him. See, Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312 (1983) ("the accused has the ultimately authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal").

Indeed, counsel's method in advising Adams represented a deep respect for Adams' right to testify, while still adhering to the prevailing professional norms. Rather than a hollow "I think you should do X," he thoroughly explained X's consequences based on the context and circumstances of the case. App. p. 347-55. The fact that some attorneys may advise their clients differently does not mean counsel's advice was constitutionally deficient. "There are countless ways to provide effective assistance in any given case." Strickland, at 689, 104 S.Ct. at 2065. "Even the best criminal defense attorneys would not defend a particular client in the same way." Id.

In addressing prejudice from counsel's opening statement to the jury, Adams again argues that this court has improperly weighed the effect of the purported error. Given counsel's credible testimony – as well as the trial judge's correct instructions that the jury could not, in any way, consider Adams' failure to testify in determining guilty – Respondent submits there is probative evidence to support the PCR Court's finding on the matter. For the foregoing reasons, this Court correctly affirmed the denial of Adams' application and this Petition for Rehearing should be denied.

V.

This Court also affirmed the lower court's ruling as to whether counsel was ineffective for not objecting to improper communications between jurors and bailiffs, where the communications did not prejudice Adams and counsel articulated a valid trial strategy. Adams argued in his Petition for Rehearing that the conversation between the bailiff and juror was more serious than recognized by the PCR Court.

Counsel's reasoning was supported by a valid trial strategy. Counsel testified to his reasoning for not objecting or requesting an Allen charge. Specifically, as discussed in the Brief of Respondent, counsel spoke with Adams as to whether or not they should do anything about the jury comment or leave it alone, and that the decision was just to leave it alone because counsel felt like they were gaining momentum with the jury and the jury was really having to struggle on this case. BOR, p. 22. Counsel's articulated reasoning on the matter is dispositive.³ See 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"). In any event, there is also probative evidence supporting the PCR Court's finding on prejudice given the innocent nature of the communications, the trial judge's instruction that the jury pose any future questions to him in writing, and the lack of any evidence that an Allen charge was actually warranted or necessary. This Court therefore correctly affirmed the lower court. The Petition for Rehearing should be denied.

³ Respondent would also note that despite Adams' assertion that the bailiff's instruction was an "error of law," the trial judge clearly explained that to the jurors that he was the "exclusive judge of the law," and that they were to apply the law "precisely" as he explained it. App. p. 144-45.

VI.

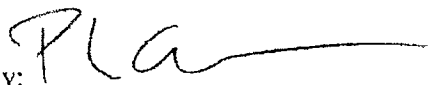
WHEREFORE, as this Court properly affirmed the PCR judge's decision to deny relief in this case, it is respectfully requested that the petition for rehearing in this case be denied.

Respectfully submitted,

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By: 

ATTORNEYS FOR RESPONDENT

January 9, 2016

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

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

Appellate Case No. 2011-200566

Tommy S. Adams, ... Petitioner,

v.

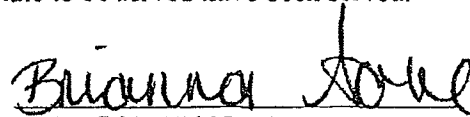
State of South Carolina, ... Respondent.

PROOF OF SERVICE

I, Brianna Arnone, certify that I have served the within Return to Petition for Rehearing on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Teresa L. Norris, Esquire
Blume Norris & Franklin-Best LLC
101 Meeting Street, 5th Floor
Charleston, SC 29401

I further certify that all parties required by Rule to be served have been served.
This 9th day of January, 2017.


BRIANNA ARNONE
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(803) 734-3737

The South Carolina Court of Appeals

Tommy S. Adams, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2011-200566

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paul E. Short, Jr.

J.

U. Ke

J.

John D. Porter

J.

Columbia, South Carolina

cc:

Teresa L. Norris, Esquire

Alan McCrory Wilson, Esquire

Patrick Lowell Schmeckpeper, Esquire

FILED

February 23, 2017