

**ORIGINAL**

STATE OF SOUTH CAROLINA  
In the Court of Appeals

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CERTIORARI TO DARLINGTON COUNTY  
Court of Common Pleas  
G. Thomas Cooper, Jr., Circuit Court Judge

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Appellate Case No. 2016-002364

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Larry James Tyler,

State of South Carolina,

v.

Petitioner,

Respondent.

**RECEIVED**  
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SC Court of Appeals

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**BRIEF OF RESPONDENT**

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### **PETITIONER'S ISSUE PRESENTED**

Was trial counsel ineffective in failing to move to sever the trial of Petitioner's charge for second-degree sexual exploitation of a minor from the trial of his remaining charges?

### **RESPONDENT'S ISSUE PRESENTED**

Did the lower court deny post-conviction relief for trial counsel's alleged failure to sever the charges where the evidence to establish the *res gestae* of each crime was largely the same, where the evidence of each crime was probative to establishing motive and intent of each other crime, and where Tyler was deprived of no rights by virtue of the consolidated trial?

## STATEMENT OF THE CASE

Larry James Tyler (“Tyler”) is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Darlington County Clerk of Court. Tyler was indicted at the February 2013 term of the Darlington County Grand Jury for criminal solicitation of a minor (2013-GS-16-00603), sexual exploitation of a minor, second degree (2013-GS-16-00604), contributing to the delinquency of a minor (2013-GS-16-00605), and disseminating harmful material to minors (2013-GS-16-00606). J. Richard Jones, Esq. represented Tyler. John W. Holt, IV, Esq., and Patti McKenzie Parker, Esq., of the Fourth Circuit Solicitor’s Office, prosecuted the case. On February 25, 2013, Tyler proceeded to trial before the Honorable Paul M. Burch and a jury. The jury found Tyler guilty as indicted on February 27, 2013. Judge Burch sentenced Tyler to imprisonment for concurrent terms of eight years for solicitation, eight years for exploitation, three years for contributing to delinquency, and eight years for disseminating.

Tyler filed a timely notice of appeal and a direct appeal was perfected by Robert M. Pachak, Esq., who raised the following issue:

Whether the trial court erred in refusing to grant a directed verdict to the charge of contributing to the delinquency of a minor when the State failed to present any substantial evidence beyond a reasonable doubt that appellant did anything to make the minor delinquent as alleged by the indictment?

The parties proceeded to oral arguments before the South Carolina Court of Appeals on October 8, 2014. Counsel Pachak represented Applicant, and Jennifer Ellis Roberts, Esq., of the South Carolina Attorney General’s Office, represented the State. By unpublished opinion decided January 14, 2015, the Court of Appeals affirmed Tyler’s convictions. State v. Tyler, Op. No. 2015-UP-025 (S.C. Ct. App. filed Jan. 14, 2015). The Remittitur was issued on January 30, 2015.

Tyler filed his application for post-conviction relief on January 2, 2015 (2015-CP-16-00016). He alleged the following grounds for relief in his application (excerpted verbatim):

1. "Defendant's trial counsel rendered ineffective assistance by failing to object to the consolidation of trials defendant was entitled to have severed. It is very clear that Defendant was entitled to have two (2) [separate] trials, but was only permitted one unfair, prejudicial trial."
2. "Defendant's trial counsel rendered ineffective assistance by failing to challenge the validity of the search of Appellant's home, computer and e-mail as well as the admissibility of any evidence seized as a result of said search."
3. "Defendant's trial counsel rendered ineffective assistance by failing to object, specifically to the admission of any photos obtained from Defendant's e-mail account which is not on his computer, all of which were irrelevant and inflammatory."
4. "Defendant's trial counsel rendered ineffective assistance by failing to remedy the double jeopardy violations with respect to Defendant's criminal solicitation of a minor and contributing to the delinquency of a minor conviction."
5. "Defendant's appellate counsel rendered ineffective assistance on appeal by abandoning on appeal Defendant's properly preserved motion for directed verdict on all counts due to insufficient evidence, and by refusing to submit Defendant's argument on appeal as to the sufficiency of the evidence."

Respondent made its return on May 15, 2015, and amended it by filing on September 14, 2015.

An evidentiary hearing into the matter was convened on July 18, 2016, before the Honorable G. Thomas Cooper, Jr. Tyler was present at the hearing and represented by Lance S. Boozer, Esq. J. Rutledge Johnson, Esq., of the South Carolina Attorney General's Office, represented Respondent. By written order dated November 2, 2016, and filed November 4, 2016, Judge Cooper denied and dismissed the application.

The present appeal follows.

## STATEMENT OF FACTS

Victim and her sister accompanied their grandmother, Dorris Brown, to her friend Ernestine Witherspoon's house on numerous occasions. (Appx. 44-45). On one visit, Tyler, who was Ms. Witherspoon's son, gave Victim and her sister a cell phone. (Appx. 45, ll. 15-19; Appx. 54, ll. 5-17; Appx. 65, ll. 5-14). The girls began looking at the pictures on the phone and saw girls in bathing suits and one picture of Tyler in blue underwear. (Appx. 55, ll. 8-17; Appx. 65, ll. 18-23). Ms. Brown returned the phone to Tyler after Victim told her that her sister said there were pictures of naked men on the phone. (Appx. 45-46).

Tyquan Brown, the girls' twenty-one-year-old cousin, visited Ms. Witherspoon's house and Tyler asked him and his mother if they wanted a cell phone. (Appx. 68-69). Tyquan's mother gave him the cell phone and when he got home he began to delete items from the phone. (Appx. 69, ll. 22-25). He noticed some draft versions of text messages that contained Victim's name in the titles. (Appx. 71, ll. 4-23). After reading the drafts, he realized they referred to Tyler wanting Victim in his bed and he notified Victim's mother, Georgita Brown. (Appx. 72-73). Georgita called the police, and the police arrested Tyler initially for driving under suspension and then charged him with the charges for which he was ultimately convicted. (Appx. 81, ll. 13-17; Appx. 89, ll. 4-9).

At trial, twelve-year-old Victim testified that when she was around Tyler, he would take pictures of her and her sister, sometimes without adults in the room. (Appx. 52-53). She also explained that Tyler played a racing game with her and her sister where, "[h]e said that if he win[s] he get[s] a hug, and if we win we get a dollar." (Appx. 53, ll. 5-12). She acknowledged that she never won a dollar but that she received a lot of hugs from Tyler. (Appx. 53, ll. 13-18). She identified the cell phone Tyler gave her and her sister. (Appx. 53-54). She stated that she

saw pictures on the phone of a girl in bikinis and of Petitioner in blue underwear. (Appx. 55, ll. 5-17). Victim testified that Petitioner liked her more than her sister because he took more pictures of her. (Appx. 55-56).

Victim's ten-year-old sister ("Sister") also testified Petitioner took more pictures of Victim than of her and he played a racing game where he would win hugs. (Appx. 64, ll. 3-16). Sister admitted she was more outgoing and more of a talker than Victim. (Appx. 64, ll. 17-21). Sister testified she looked at the pictures on the cell phone and saw some of girls in bathing suits and one of Petitioner in blue underwear. (Appx. 65, ll. 18-23). Sister stated the pictures made her feel uncomfortable, and she told her grandmother, "Grandma, there are some naked pictures of him." (Appx. 66, ll. 8-12). Sister agreed Petitioner paid more attention to Victim than to her and testified Victim received a lot of hugs from Petitioner. (Appx. 66-67). She explained that she told her father, "[h]e keep[s] hugging on us." (Appx. 64, ll. 7-11).

Tyquan Brown testified regarding the cell phone Tyler gave him and the pictures that were on it. (Appx. 70, ll. 1-17). He described one picture as the Tyler in a blue Speedo. (Appx. 70, line 18). He also saw pictures of women and children. (Appx. 70, ll. 19-20). Tyquan deleted most of the pictures so he could start using the phone. (Appx. 70-71). He then noticed some unsent draft text messages that were labeled using Victim's name. (Appx. 71, ll. 4-18). He read them and saw that they appeared to be for Victim because they acknowledged she was a little girl and mentioned Sister by name. (Appx. 71-72). Tyquan notified Victim's mother. (Appx. 72, ll. 16-21).

Georgita Brown, Victim's mother, testified next. (Appx. 79, ll. 3-24). She explained that Tyquan called her and she went to pick up the cell phone from him. (Appx. 80, ll. 7-19). She testified she saw a picture on the phone of Tyler in a blue Speedo with no other clothing on.

(Appx. 80, ll. 20-21). She then read the draft text messages and became disturbed enough to call the police. (Appx. 80, ll. 23-25). She met Deputy Eric Hodges in the parking lot of a Roses grocery store, and he sent her to retrieve the box for the phone. (Appx. 81-82). At that point her aunt, who was riding in the car with her, noticed Tyler nearby. (Appx. 82, ll. 14-25). Georgita told Officer Hodges that Tyler was at a nearby garage. (Appx. 83, ll. 11-13).

Deputy Eric Hodges of the Darlington County Sheriff's Office testified that after learning where Tyler was, he approached him and arrested him for driving under suspension, advised him of his Miranda rights, and told him he was working on another investigation for which Tyler agreed to answer questions. (Appx. 88-89).

Deputy Russell Harrell testified next regarding his assistance in obtaining items from Tyler's residence pursuant to a search warrant. (Appx. 99, ll. 14-25). Harrell explained that he collected from Tyler's residence a computer, hard drive, multiple cell phones, "various other digital items and some paperwork." (Appx. 99-100). He read out the draft text messages he was able to retrieve from the cell phone in question:

Number One: It was in the status folder is sent. Folder is sent. Type is outgoing. Text reads as follows: "[Victim] Two, to fall in love with a little girl as young as you are, but I can't stop my heart from loving you, girl. I wish I had another hour alone with you and nobody knew."

Number Two: Says it's unsent in the drafts folder. Type is outgoing. Reads J5, "Me in trouble. Please, [Victim] especially don't tell [redacted]. She will surely tell someone. This is just between you and me, my love."

Number Three: Unsent status. Drafts folder. Type is outgoing. J4: "Never want to be apart from each other ever again. I love you, little [angel]. Wish I could make you my wife. If I could you – if I could you would be in my bed tonight. Don't get me."

Number Four says it's unsent. Folder is draft. Type is outgoing. J3: "Where we were. I would how you know how much I love you, [Victim] by holding you close to me and plant a kiss on your lovely lips so powerful that we both would never."

Number Five – excuse me. It’s unsent, drafts and also outgoing:  
“[Victim], you were so beautiful. Please don’t tell anyone what I am telling you.  
First time I ever saw you, [Victim] I fell for you. I know a man should not  
suppose.”

(Appx. 102-03). A printout of those messages was admitted as State’s Exhibit 11 without objection. (Appx. 101-02).

At the evidentiary hearing, Counsel recalled that the State obtained search warrants for Tyler’s phone, house, computers, and then his Yahoo account. (Appx. 251, ll. 11-22). Notably, Counsel testified that a computer expert hired for Applicant’s defense “found a whole lot more damaging information on [Tyler’s] computer than the State had found[,]” which prompted Counsel to “shut him down[.]” (Appx. 252, ll. 11-20). Counsel further managed to reduce the most damning picture, of anal sex with a young child, by shrinking it and blending it among other pictures. (Appx. 252-53). Asked why he did not attempt to sever the charges, Counsel responded: “Again, based on the theory that we had developed, first of all, the information we felt had not been sufficiently communicated to the young lady on the four charges dealing with her. And the exploitation, the pictures, except for one, we felt we could minimize.” (Appx. 254, ll. 9-13). On cross-examination, Counsel testified that he and Tyler did not discuss the possibility of severance in detail. (Appx. 259, ll. 14-21). Counsel acknowledged Tyler’s argument that without severing the charges, “perhaps one would lead the jury to believe the other[,]” but denied that the argument was applicable to Tyler’s case. (Appx. 259-60).

## STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Id.; Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

## ARGUMENT

**THE PCR COURT PROPERLY DENIED RELIEF BECAUSE COUNSEL HAD NO BASIS TO MOVE TO SEVER THE CHARGES WHERE THE FACTS PROVIDING FOR EACH CHARGE WERE PART OF THE SAME *RES GESTAE*, WERE PROBATIVE OF EACH CRIME CHARGED, WHERE TYLER WAS DEPRIVED OF NO RIGHTS AS A CONSEQUENCE OF THE CONSOLIDATED TRIAL, AND WHERE TYLER HAS NOT SHOWN THAT HAD THE SEVERENCE BEEN GRANTED, HE WOULD HAVE BEEN ACQUITTED ON ONE OF THE CHARGES.**

The PCR court properly denied post-conviction relief because when a single investigation from a single incident results in the discovery of multiple crimes of the same general nature, they are properly tried together.

- a. **Counsel had no valid basis on which to seek severance of the charges because law enforcement discovered the child pornography in the course of the same investigation into solicitation of a minor, and because the child pornography serves as evidence to show motive, intent, and rebut Tyler's arguments that the solicitation of Victim was a mistake or accident.**

“Charges can be joined in the same indictment and tried together where they (1) arise out of a single chain of circumstances, (2) are proved by the same evidence, (3) are of the same general nature, and (4) no real right of the defendant has been prejudiced.” State v. Beekman, 415 S.C. 632, 636, 785 S.E.2d 202, 204 (2016). Even where charges may not rise out of a single, isolated incident, the Supreme Court has “allowed joinder when the crimes involved connected transactions closely related in kind, place, and character.” Id., 415 S.C. at 637, 785 S.E.2d at 205 (quoting State v. Cutro, 365 S.C. 366, 374, 618 S.E.2d 890, 894 (2005)); see also State v. Rice, 368 S.C. 610, 614, 629 S.E.2d 393, 395 (Ct. App. 2006) (“Offenses are considered to be of the same general nature where they are interconnected.”). Courts should avoid the “inflexible application” of the rule that charges must arise out of the same set of circumstances to warrant joinder; if “it does not appear that any real right of the defendant has been jeopardized, [then] it

would be a refinement not demanded by the law or by justice to require in all instances a separate trial[.]” City of Greenville v. Chapman, 210 S.C. 157, 161-62, 41 S.E.2d 865, 867 (1947).

That joinder of related offenses may result in the introduction of evidence that is relevant to one or more, but not all, of the charges, is not in and of itself an adequate basis for severance of charges into multiple trials. Beekman, 415 S.C. at 638-39, 785 S.E.2d at 205-06 (citing State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996)).

This Court’s treatment of the facts in State v. Rice is instructive. In Rice, the defendant was separately indicted for trafficking in cocaine and murder—wholly unrelated crimes, though the former all too often leads to the latter. 368 S.C. at 615, 629 S.E.2d at 396. “The cocaine trafficking charge arose out of a traffic stop the police set up because they suspected Rice of Johnson’s murder. The police found the gun believed to be the murder weapon in the same search that produced the cocaine that forms the basis of the cocaine trafficking charge.” Id. The Court of Appeals further observed the motive for the murder related to the victim’s theft of drugs and money from Rice, and that their relationship was mostly based on selling drugs. Id. Consequently, the Court of Appeals held that “[t]he information regarding the cocaine trafficking was relevant to show the complete, whole, unfragmented story[.]” and found Rice was not prejudiced by the joinder of the charges. Id., 368 S.C. at 616, 629 S.E.2d at 396 (quoting State v. Adams, 322 S.C. 114, 122, 470 S.E.2d 366, 370-71 (1996)).

The charges at issue here are much more closely related and of the same general character than was approved in Rice. Each charge revolves around Tyler’s singular motive: his own sexual gratification at the expense of young girls. The charges against Tyler arose out of the same circumstances—the discovery of solicitous texts on Tyler’s cell phone, which beget search warrants for Tyler’s phone, house, computers, and Yahoo account, the last of which produced the

most explicit photograph known to law enforcement at the time. The same evidence proved each case—the same testimony provides for how law enforcement was led to investigate Tyler and reveal his various illegal actions taken for the purpose of his own sexual gratification. That a grotesque image was discovered on Tyler’s computer as part of the investigation into his solicitation of Victim forms a part of the *res gestae*, of the immediate context through which each of these crimes was inextricably entwined.

Tyler’s own arguments discounting his shutterbug tendencies towards Victim and solicitous texts to the same demonstrate why the explicit photograph on his Yahoo account was relevant to all of the charges brought. The Yahoo photograph provides the context necessary to firmly establish that Tyler’s intent in all of his actions was exploitative and pedophilic, and no mere accidental action upon otherwise suppressed urges. By way of hypothetical, it would not be illegal<sup>1</sup> or untoward for a person to take photographs of an old, ornate, and architecturally distinguished bank on the morning of a beautiful sunrise. However, if that same person shortly thereafter endeavors to rob that bank, the previous act of taking pictures outside is less innocent, and becomes evidence that he or she was, in fact, casing the bank. Similarly, if one keeps a variety of pictures of their (or their friends’ or relatives’) children, they are most likely just keeping pictures of loved ones. However, if one keeps the same pictures alongside photographs of children in implicitly and explicitly sexual circumstances, or in a folder labeled so as to reflect a wretched use, the purpose of keeping the “innocent” pictures is contextually changed, and one may rightly infer that the “innocent” pictures are not so innocently kept, but rather are organized for the purpose of the keeper’s pedophilic sexual gratification. Consequently, the “innocent” pictures taken and stored become probative and relevant to show a common scheme or plan

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<sup>1</sup> As far as the undersigned is aware.

(sexual interest in girls of a young age), as well as to disprove arguments that explicitly pedophilic materials were acquired by accident, or that solicitous messages were erroneously made available to the minor addressee. See Rule 404(b), SCRE (evidence of other bad acts admissible “to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.”); cf. State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 278 (2009) (where the similarities between bad acts outweighs the dissimilarities, the bad act evidence is admissible).

Tyler’s effort to distinguish the present matter from State v. McGaha, 404 S.C. 289, 744 S.E.2d 602 (Ct. App. 2013) (see Brief of Petitioner at 12-15), misapprehends joinder analysis and, if accepted as a basis upon which trial counsel could have successfully moved for severance, would provide for an extreme prohibition against joinder against the interests of justice. Tyler argues the crimes charged against him were different, and that the illicit picture from the internet involved a different victim with no relationship to Tyler, such that the charges should have been severed. First, Tyler’s attempt to distinguish his various crimes (disseminating harmful materials to a minor; solicitation of a minor; contributing to the delinquency of a minor; and sexual exploitation of a minor) as inherently different is untethered from the “general nature” analysis provided by the precedents set forth above and the real nature of child sexual abuse and the diverse ways in which it may be effectuated. One may disseminate harmful materials to a minor as part of an effort to successfully solicit sexual acts from them. If one disseminates harmful materials to a minor, they may place that minor themselves into possession of materials which are illegal to possess, thereby contributing to their delinquency.<sup>2</sup> One may disseminate

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<sup>2</sup> Petitioner’s assertion that S.C. Code Ann. §16-17-490 (contributing to delinquency of a minor) has no regard for sexual activity is particularly absurd. The absence of the word “sex” from the

harmful materials to a minor in order to facilitate the sexual exploitation of that minor; e.g. sending them child pornography in order to obtain comparable materials in return. Soliciting a minor is extremely likely to contribute to their delinquency,<sup>3</sup> and one may solicit a minor using materials which sexually exploit another minor or minors. The determination of whether crimes are proved by the same evidence or whether they are of the same general nature is not a mechanical and elementary comparison of the most basic elements of the crimes in a vacuum, in the vein of a test pursuant to Blockberger v. United States, 284 U.S. 299 (1932) or Murdock v. State, 308 S.C. 143, 417 S.E.2d 543 (1992). The question, as noted in Rice, *supra*, is whether they are interconnected. Tyler's charges collectively form a part of the dread, interconnected web of crimes which define, prohibit, and are intended to *prevent* the grooming, pursuit, and sexual abuse of children.

Second, in Tyler's framing, prosecutions for possession of child pornography sourced from the internet could *never* be joined with any other crime save other charges for possession of child pornography also sourced from the internet. At its core, Tyler's demand for relief would require this Court impose the very sort of inflexible, nonsensical rule rejected in Chapman, which has not heretofore existed, and upon which Counsel could not have known to rely upon in making any arguments at trial.

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ten scenarios set forth in the statute does not mean that none of them can regard sexual activity. To the contrary, sexually-related illegal activity with respect to a minor may cause or influence the minor to violate the law, turn to the abuser's command and presence as opposed to the parent or guardian, inflict physical or mental harm which produces truancy, engage in prostitution or the production of child pornography, associate with child molesters, habitually use obscene sexual language, and substantially diminish the morals and health of the child. Sexual activity and sexually-related activity directed at minors can, depending on the facts, trigger any or all of the circumstances considered to contribute to the delinquency of a minor.

<sup>3</sup> The prior footnote is, again, here applicable.

Tyler also attempts to shoehorn the present matter into the recent holding of State v. Cross, 427 S.C. 465, 832 S.E.2d 281 (2019) (see Brief of Petitioner at 16-17). The object of concern in Cross was the introduction of a prior conviction where it was an element of the crime, which is not here at issue, and which could in no way, shape, or form illuminate the *res gestae* of the acts charged. To the extent Cross represents anything of concern to the present case, it only reflects the last decade's swing of scales of justice to the favor of extraordinary caution in child sex abuse cases, at the cost prosecutorial confidence in how to prosecute such cases.

What Tyler condemns as a prosecution “for who he is” is more accurately a prosecution of the undivided whole of his criminal conduct, each part properly illuminated by each other part, all of which revolves around his efforts to obtain the pictures, attention, and affections necessary to satisfy his sexual predilection for young girls. Counsel correctly concluded he had no basis to demand severance, such that the PCR court correctly concluded Tyler was not entitled to relief.

1. *Other jurisdictions have permitted joinder of prosecutions for child molestation and child pornography, recognizing the inherently close relationship between the crimes, the motive common between them, and the simplicity of the crimes such that jurors can readily distinguish the evidence to prove each crime.*

In considering whether charges for child pornography and child molestation (and efforts thereto) should be tried together, multiple federal jurisdictions—with a mind to the close relationship between the crimes—have concluded they should. In United States v. Reynolds, a thirteen-year-old girl reported that she had been sexually abused by the thirty-four-year-old Reynolds, the father of one of her classmates. 720 F.3d 665, 668 (8th Cir. 2013). Reynolds was arrested, and during interrogation made multiple admissions. Id. At trial, Reynolds was prosecuted not only for his actions with respect to the eleven-year-old girl, but an additional eleven-year-old girl and a seventeen-year-old girl: the former, Reynolds' niece, testified he

inappropriately touched her, and the latter testified to swapping pornographic pictures with Reynolds over the internet. Id. at 668-69. Reynolds' motion to sever the charge relating to the seventeen-year-old was denied, and on appeal he argued the denial was error because the count was not of a similar character and not part of a common scheme or plan. Id. at 669. The Eighth Circuit disagreed:

The court properly determined counts two, three, and four "are of the same or similar character." The charges of enticement of a minor to engage in illicit sexual activities, receiving child pornography, and production of child pornography 'are of the same or similar character' because they show Reynolds' predisposition to abnormal sexual attraction and tend to rebut the claim that Reynolds was trapped into receiving child pornography. This abnormal sexual attraction is not limited to Reynolds' production and possession of child pornography, but also includes his desire to engage in sexual activities with female minors.

Id. at 669-70. The Eighth Circuit affirmed the conviction.

In United States v. Hersh, the defendant Hersh was convicted in a single trial for various counts of sex trafficking minors, conspiracy to sex trafficking minors, receiving child pornography, and other violations of federal law. 297 F.3d 1233, 1236-39 (11th Cir. 2002). Before and during trial, Hersh moved to sever his child pornography charges from the others, but was denied. Id. at 1239. On appeal, Hersh argued that joinder of the pornography charges to the others was error because they were distinct in subject and in time, and because there was no evidentiary overlap between them. Id. at 1241. After explaining the preference in the federal rules for joinder, the Eleventh Circuit explained the inherently close character of child pornography and the sexual exploitation of minors: "Collectively, the counts charge Hersh with child molestation and child pornography—which plainly represent acts of 'similar character' involving the extraordinary mistreatment of children. In fact, both Congress and the courts have

acknowledged a link between these two offenses.” Id. at 1242.<sup>4</sup> The Eleventh Circuit then held the charged offenses were properly joined, and further rejected Hersh’s contention that “the stigma of the child pornography charges must have impacted the jury’s verdict[.]” Id. at 1242-43.

Our neighbors in the Georgia Court of Appeals, in Dickerson v. State, also recently considered whether denial of severance was appropriate where the defendant was charged with both child molestation and child pornography charges. 697 S.E.2d 874 (Ga. Ct. App. 2010). Dickerson was charged with three counts of aggravated child molestation, three counts of aggravated sexual battery, and two counts of sexual exploitation of children. Id. at 876. Upon Dickerson’s motion to sever, the State noted that the pornography included images which reflected the acts Dickerson was alleged to have committed against his daughter, and “further denominated similarities between the crimes to show a common motive, plan, scheme, or bent of mind pattern.” Id. The Georgia Court found severance was not mandatory, and further held Dickerson “failed to show either that severance was absolutely necessary to promote a just determination of guilt or innocence as to each offense or that the jury was unable to intelligently judge each offense due to the failure to sever.” Id. The Georgia Court noted that “the evidence

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<sup>4</sup> The authorities thereafter cited by the Eleventh Circuit are also compelling here. See Osborne v. Ohio, 495 U.S. 103, 110-11 n.7 (1990) (“A child who is reluctant to engage in sexual activity with an adult or to pose for sexually explicit photos can sometimes be convinced by viewing other children having ‘fun’ participating in the activity.”); United States v. Neal, 249 F.3d 1251, 1260-61 (10th Cir. 2001) (upholding the district court’s sentence following a child pornography plea where the district court upwardly departed based on the defendant’s molestation of three minors, since his “molestation is not ‘totally irrelevant’ to his child pornography possession”); United States v. Toler, 901 F.2d 399, 403 n.5 (4th Cir. 1990) (“A Senate Report discussing the child pornography law expresses the fear that unless the dissemination of child pornography is checked, it could contribute to a continuing cycle of child abuse.”).

was not complex and there is no indication that the jury was unable to distinguish the evidence and apply the law intelligently as to each offense.” Id. at 877.

Tyler identifies rulings from other jurisdictions to support his arguments, but the authorities are flawed. For example, Tyler notes the 3-2 decision by the Supreme Court of Nebraska in State v. Rocha, 836 N.W. 2d 774 (Neb. 2013), in which Rocha’s trial counsel was found ineffective for failing to move to sever his charges for sexual assault of a child from other child abuse charges which had no sexual character whatsoever. First, Rocha is distinguishable in that the object of potential severance was not a charge for child pornography, but rather four non-sexual child abuse charges from a child sex abuse charges. Second, the Nebraska majority, as scathingly observed by the strong dissent, jumped to its conclusion that trial counsel was ineffective without any developed record to establish trial counsel’s reasoning or lack thereof for failing to seek a severance, dismissively casting aside the ability of defendants and trial counsels to independently determine how many trials to face. Id. at 781; 788-90. The Rocha holding is subject to numerous peculiar procedural irregularities, and this Court should be extremely hesitant to give it any persuasive weight.

The Nebraska Court acknowledged Rocha’s flaws the following year in State v. Knutson, 852 N.W.2d 307 (Neb. 2014), which more closely resembles the present case. For his acts against four minor victims, Knutson was charged for soliciting a minor through an electronic device, two counts of child abuse, and two counts of third-degree sexual assault of a child. Id. at 316. The Nebraska Supreme Court found the charges were of the same or similar character, were rightly joined, and specifically distinguished and downplayed Rocha:

In Rocha, we addressed whether joinder of a sexual assault charge was proper with child abuse charges and, as relevant here, whether the charges were of the same or similar character. In concluding that they were not, we emphasized that “sexual assault, on its face, is sexual in nature, whereas child abuse is not.”

That statement may have been imprecise; of course, the crime of child abuse may encompass factual situations which are sexual in nature. For example, “a person commits child abuse if he or she knowingly, intentionally, or negligently causes or permits a minor child to be placed in a situation to be sexually abused.” Our point in Rocha, however, was that the child abuse charges there (outside the charge involving the alleged victim of the sexual assault charge) all involved purely physical conduct, with no sexual purpose. But here, each charge, whether sexual assault or child abuse, was sexual in nature. And that is a critical distinction.

Knutson at 317 (cleaned up). Like in Knutson, and unlike Rocha, the present case involves charges all of a sexual character, and the evidence to prove each charge casts probative light on each other charge. Thus, Counsel had no basis on which to seek severance.

Tyler next offers Wilkerson v. State, 728 N.E.2d 239 (Ind. Ct. App. 2000), which concluded that Wilkerson’s trial counsel was ineffective in failing to move for severance of his charges. Wilkerson was convicted in 1987 for two rapes of two women<sup>5</sup> occurring three weeks apart in Anderson, Indiana. Id. at 242, 244-45, 247. The perpetrator entered each victim’s home through a window late at night, raping one at 1 a.m. and the other at 10:30 p.m. Id. at 247. The perpetrator forced each woman to submit to oral sex and intercourse. Id. Nonetheless, the Indiana Court of Appeals concluded Wilkerson would have enjoyed severance as a matter of right due to differences between the rapes: different weapons were used (scissors to one throat, a knife to the other victim’s throat), the crimes were “at different times of day,” and only one victim was robbed. Id. However, in considering prejudice, the Indiana court determined that the only prejudice to Wilkerson occurred in sentencing, and that had he been tried separately and convicted the trial courts could not have ordered the sentences to run consecutively. Id. at 247-

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<sup>5</sup> Petitioner asserts Wilkerson involved attacks on minors, (Brief of Petitioner at 19) but the opinion states that one of the victims, “A.W. was 66 years old at the time of trial and 72 years old at the time of her death.” Id. at 244. The other victim, “T.S.,” was old enough to be robbed of a purse, cigarette, lighter, cash, and food stamps in her own apartment. Id. at 247. It is unlikely T.S. was a minor.

49. Accordingly, the Indiana court did not vacate the convictions, but only the sentences, and remanded the matter to order the sentences be run concurrent. Id. at 249.

The difficult to follow prejudice reasoning in Wilkerson was subsequently dismissed as “dicta” the following year by the same court, and though never explicitly overturned has been minimized where it has been closely examined. Totten v. State, 760 N.E.2d 1074, 1078 (Ind. Ct. App. 2001); see also Heinzman v. State, 895 N.E.2d 716, 720-21 (Ind. Ct. App. 2008) (finding the defendant’s charges were rightly joined because of a common *modus operandi*, whereas Wilkerson was only joined because the offenses were of “the same or similar character”); Blake v. State, 912 N.E.2d 919, 2009 WL 2913916, 5 (Ind. Ct. App. 2009) (an unpublished opinion, but which points out the sentencing issue which provided for prejudice in Wilkerson had since been amended to eliminate the restrictions that provided Wilkerson relief). The most thorough recent precedent in Indiana on the point of severance in sex crimes, Pierce v. State, 29 N.E.3d 1258 (Ind. 2015), makes no mention of it. The only other jurisdiction to consider Wilkerson acknowledged it, and then affirmed a denial of post-conviction relief. See, generally England v. State, 543 S.W.3d 553 (Ark. Ct. App. 2018) (finding no basis for severance in case involving one count of rape and two counts of incest against defendant’s two stepdaughters). Altogether, Wilkerson appears to be a disregarded opinion involving facts distinct from the present matter: two adult women raped by a burglar weeks apart *versus* a child being groomed and child pornography on the perpetrator’s e-mail to show his motive and intent. This Court should give it no persuasive weight.

Finally, Tyler offers the Washington Supreme Court’s 6-3 decision in State v. Sutherby, 204 P.3d 916 (Wash. 2009). Sutherby was convicted of first degree child rape, first degree child molestation, and ten counts of possessing child pornography. Id. at 918. The minor victim

reported her paternal grandfather, Sutherby, had crawled into bed with her and poked his finger into her vagina. Police arrested Sutherby, who denied wrongdoing and consented to law enforcement seizure of his personal computers. Police found child pornography on the computers, and Sutherby admitted that while he looked at the pornography and had sexual fantasies about children, he had never acted on the fantasies. Id. at 918. All of the charges were tried together, and Sutherby contended that trial counsel was ineffective in failing to move for severance. Id. at 922.

Opining that “joinder of charges can be particularly prejudicial when the alleged crimes are sexual in nature[,]” and rejecting the State’s argument the pornography would have been admissible to show the absence of mistake or accident, the Washington “majority” found trial counsel was ineffective and vacated the convictions. Id. at 922-24. In effect, the Washington Supreme Court held that possession of child pornography could only be admissible if transmitted to the rape victim, and that otherwise the risk of undue prejudice was too great to permit admission.

The three justices in dissent were not restrained in criticism of the majority, and declared the minor “was victimized at age five by her own grandfather, and now by a justice system that is supposed to protect her.” Id. at 925. Justice James M. Johnson opined the decision to not pursue severance was likely a strategic choice to endure one trial instead of two, and to save money, and that the “bald assertion that there was ‘no downside’ to severance” was not persuasive. Id. The dissent similarly condemned the broad, presumptive prejudice adopted by the majority, and noted the evidence to show the victim was “clear, consistent, and timely in her accounts,” the testimony of other witnesses that the victim became reluctant to be around Sutherby, the medical evidence consistent with digital penetration, and Sutherby’s admission that

his finger “might have been in the area of L.K.’s vagina while she was naked.” Id. at 926. The dissent concluded in mourning the injustice to the minor victim.

As was the case with Wilkerson, Arkansas considered Sutherby on the issue now before the court<sup>6</sup> acknowledged it, and then affirmed a denial of post-conviction relief. See, generally England v. State, 543 S.W.3d 553 (Ark. Ct. App. 2018) (finding no basis for severance in case involving one count of rape and two counts of incest against defendant’s two stepdaughters).

Washington’s extraordinary and hotly contested holding in Sutherby should pale in comparison before this court to the weight and reason of the other authorities provided and the particular facts and circumstances of the present case. Tyler claims he *accidentally* received the child pornography to his Yahoo account, but was slipping solicitous messages to the minor victim by providing her his cell phone. Tyler claims he did not know the messages were on the phone, and that communicating them to the victim was not his *intent* but was a *mistake*, but he possessed materials which reflect the desires he professes in the messages. Tyler claims his numerous pictures of the victim were innocent, but his possession of more explicit child pornography justifiably reflects a different *intent*. Each charge was inexorably linked to the other, and the same evidence was necessary to rebut his arguments at trial and in mitigation. See Appx. 159-60; Appx. 163,64; Appx. 168-170; Appx. 171; Appx. 193). Severance would not have been justified, Counsel had no basis to seek it, and the denial of relief should be affirmed.

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<sup>6</sup> Numerous jurisdictions have considered Sutherby on the question of how to numerate child pornography charges.

- b. Tyler has not presented any evidence to establish that, had his charges been severed, he would have been acquitted in a separate trial; to the contrary, Counsel indicated he discovered evidence which would make the State's case against Tyler much stronger, and severance would have provided the State additional time to find it.**

As to the prejudice prong of Strickland, Tyler has additionally failed to show that he would have been acquitted in a separate trial. “An appellate court should not reverse a conviction achieved at a joint trial in the absence of a reasonable probability that the defendant would have obtained a more favorable result at a separate trial.” Hughes v. State, 346 S.C. 554, 559, 552 S.E.2d 315, 317 (2001) (citing People v. Greenberger, 58 Cal.App.4th 298, 68 Cal.Rptr.2d 61, 86 (1997)); see also People v. Gonzalez, 791 N.E.2d 578, 587 (Ill. App. Ct. 2003) (adopting holdings from California, Georgia, and Washington that “a defendant’s claim that he was prejudiced by his trial counsel’s failure to seek severance of charges depends on how the defendant would have fared in separate trials.”).

The overwhelming thrust of the prior section is that the evidence as to each charge was essential to provide proof of each other charge, such that for the purpose of a prejudice analysis the evidence still would have been essential even if the trials were separated. See Rule 404(b), SCRE (evidence of other bad acts admissible “to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.”); State v. Clasby, 385 S.C. 148, 155, 682 S.E.2d 892, 896 (2009) (quoting State v. Gaines, 380 S.C. 23, 29, 667 S.E.2d 728, 731 (2008)) (“To be admissible, the bad act must logically relate to the crime with which the defendant has been charged.”). The arguments in the prior section establish that even if Tyler received a separate trial for the child pornography charge, the evidence relating to the other charges would have been admissible in the separate trials to establish his motive, scheme, intent, and the absence of mistake or accident, and the probative value would not have been substantially outweighed by the danger of unfair prejudice.

Furthermore, even if the evidence from one trial would have been inadmissible in the other, the record still does not provide that Tyler would have enjoyed a more favorable result had his charges been severed. Severance of the charges would have prolonged the administration of justice and permitted the State additional time to recognize and locate the materials identified by Counsel during the evidentiary hearing—much more and much worse as described by Counsel. Counsel’s testimony does not explicitly state, but appears to strongly imply, a need to resolve the charges with haste after the discovery of the harmful evidence. In that context, not only can Tyler not show Strickland prejudice, evidence exists to show Counsel had a valid strategic reason to proceed on all of the charges at once, which would foreclose a finding of ineffectiveness. As such, the denial of post-conviction relief should be affirmed.

#### CONCLUSION

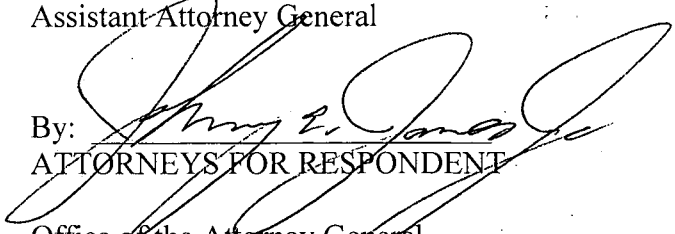
For the foregoing reasons, this Court should affirm the denial of post-conviction relief.

Respectfully submitted,

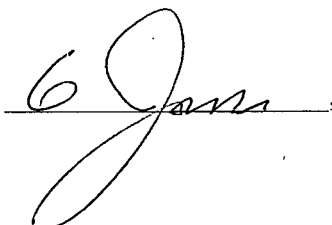
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