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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Pickens County

The Honorable John C. Few, Trial Judge
The Honorable R. Scott Sprouse, Post-Conviction Relief Judge
Lower Case No. 2013-CP-39-0836

JASON ERVIN BLACK,

Respondent-Petitioner,

v.

STATE OF SOUTH CAROLINA,

Petitioner-Respondent.

Appellate Case No. 2021-000525

BRIEF OF RESPONDENT ON BEHALF OF PETITIONER-RESPONDENT

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RESPONDENT-PETITIONER'S STATEMENT OF THE ISSUE

The PCR court granted respondent-petitioner a new trial because of the ineffective assistance of appellate counsel. Respondent-petitioner argues that, alternatively, the PCR court erred in finding that trial counsel was not ineffective and preserved for appellate review whether the defense witness could be impeached with a remote conviction for throwing a deadly missile.

PETITIONER-RESPONDENT'S STATEMENT OF THE ISSUE

Should the Court agree with the State and find no relief is due on the basis of ineffective assistance of appellate counsel, could Black's offered issue in the alternative that the PCR court erred in finding trial counsel had sufficiently preserve the missile conviction impeachment issue support an alternate basis for relief when the finding that counsel did, in fact, preserve the issue is fairly supported by the facts of record?

STATEMENT OF THE CASE

In March 2007, the Pickens County Grand Jury indicted Jason Black (Respondent-Petitioner) for first-degree criminal sexual conduct with a minor (2007-GS-39-0675) and committing a lewd act upon a child[1] (2007-GS-39-0673). (App. 556–569). On June 25, 2007, Black proceeded to a trial by jury before the Honorable John C. Few. (App. 1). Assistant Public Defender John DeJong represented Black and Assistant Solicitor Peter Them prosecuted the case. On June 26, 2007, the jury found Black guilty as charged, and Judge Few sentenced Black to twenty years imprisonment for first-degree CSC with a minor and fifteen years for committing a lewd act upon a minor, to be run concurrent. (App. 333, App. 560–561).

Black filed a timely notice of appeal. Chief Appellate Defender Joseph L. Savitz, III, perfected Black's appeal by filing a brief with the Court of Appeals on the following issue:

> Whether the trial judge committed reversible error by allowing the State to impeach Black's corroborating witness with two Florida manslaughter convictions from 1987, as this evidence violated Rules 404 and 609, SCRE.

(App. 341–349).

Following briefing and oral argument, the Court of Appeals affirmed Black's convictions and sentences in an unpublished per curiam opinion. *State v. Black*, Op. No. 2010-UP-370 (S.C. Ct. App. filed July 19, 2010) (App. 366–367). Black then filed a petition for rehearing, which the Court denied by order dated August 27, 2010. (App. 370–371).

On November 3, 2011, our Supreme Court granted Black's petition for writ of certiorari. (App. 393). Meanwhile, Counsel Savitz retired from the Office of Appellate Defense. Appellate Defender Breen Stevens took over Black's case and filed the brief of petitioner. (App. 394–402).

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[1] The lewd act statute was repealed in 2012, and the "crime that was lewd act is now classified as criminal sexual conduct with a minor in the third degree." *State v. McGaha*, 404 S.C. 289, 293, 744 S.E.2d 602, 604 (Ct. App. 2013).

Following oral argument, our Supreme Court affirmed Black's convictions and sentences in a published opinion issued October 3, 2012. *State v. Black*, 400 S.C. 10, 732 S.E.2d 880 (2012) (App. 420–437). The case was remitted back to the circuit court on October 19, 2012. (App. 438).

Black timely commenced the underlying PCR action July 2, 2013. (App. 439–463). However, the State was never served with the application and therefore did not know it had been filed prior to being contacted by the Pickens County Clerk of Court on August 21, 2019. (App. 464). The State submitted its return requesting an evidentiary hearing on December 12, 2019. (App. 464–748). Black, through PCR counsel, filed an amended application on December 27, 2019, and a second amended application September 7, 2020. (App. 479–480, 481–482). An evidentiary hearing convened via WebEx on March 4, 2021, before the Honorable R. Scott Sprouse. (App. 483–529). Black was present and represented by Don A. Thompson, Esq. Assistant Attorney General Lillian L. Meadows represented the State.

On April 5, 2021, Judge Sprouse issued an Order granting relief on the claim of ineffective assistance of appellate counsel and denying the remaining claims. (App. 530–539). In response, on April 15, 2021, the State filed a motion to alter, amend, and reconsider pursuant to Rule 59(e), but Judge Sprouse denied the State's motion by order issued April 16, 2021. (App. 540–555).

On October 29, 2021, the State filed a petition for writ of certiorari, and Black filed a cross-appeal petition for writ of certiorari on November 3, 2021. Black filed a return to the State's petition on February 23, 2022. The State filed a return to Black's petition on March 14, 2022. On March 30, 2022, our Supreme Court transferred the case to the Court of Appeals. On October 19, 2023, the Court of Appeals granted both petitions. This additional briefing follows.

PETITONER-RESPONDENT'S STATEMENT OF FACTS

On November 28, 2005, Lieutenant Tony Robinson of the Pickens County Sheriff's Office met with Jason Black about his new relationship with Victim. (App. 199-203). During this discussion, Lieutenant Robinson and Black discussed the age of Victim, and the lieutenant told Black that Victim was fifteen years old. (App. 200–202).

On May 16, 2006, Victim was living in Pickens County with her mother. Black, by then her boyfriend of approximately six months, was twenty-six years old and a twice-convicted sex offender. (App. 82–84, 157–160, 163). Throughout Black's relationship with Victim, Black had another girlfriend, whom he lived with in Liberty, South Carolina along with their two-year-old son. (App. 93-94, 129). Consequently, Victim never went to Black's home, but she spoke with him on the phone regularly. (App. 85). Victim kept the relationship with Black a secret from her parents because he was eleven years older than her. (App. 83-86).

On Saturday, May 10, 2006, Black and Victim had planned to spend the day together. (App. 85-88). That morning, Black called Victim's cell phone while she was at her father's house and arranged for her to meet him at a nearby landfill. (App. 86). He then took Victim to a beach near Clemson, where they stayed for three to four hours. (App. 88). Around four o'clock, Black took Victim to meet a friend at a convenience store so that she could be at work by five o'clock. (App. 89-90). While Victim was at work, Black called her and told her to meet him at a trailer belonging to his friend, Richard Bush, later that night. (App. 90-91). Bush was a sixty-six-year-old former convict with an admitted drinking problem. (App. 274). Prior to the night in question, Victim had met Bush five or six times, recalling that he always carried a water bottle filled with liquor. (App. 92–93).

After work, the Victim went with her friend Candie to a skating rink. (App. 89–91). While at the skating rink, Black called Victim and again asked her to come to Bush's home. (App. 90–91). Shortly after, Victim, Candie, and Candie's boyfriend left the skating rink to meet Black at Bush's home. (App. 91). While Candie and her boyfriend entered Bush's home with Victim, they left after just ten to twenty minutes to go to McDonald's. (App. 96).

After Victim's friends left, Black walked to the trailer bedroom and asked Victim to join him. (App. 97). After watching television briefly, Victim and Black engaged in sexual intercourse. (App. 97–98). Victim explained that throughout the duration of this incident Bush was in the living room watching the television. (App. 97). After the incident, Victim and Black returned to the living room with Bush. (App. 99). Five minutes later, Candie picked Victim up and they went to Candie's home. (App. 99). Once back at Candie's home, the Victim noticed her underwear was bloody, so she immediately showered and changed into clean clothes. (App. 100–101). Before deciding to wash her underwear, she discussed the sexual encounter with Candie and showed her the bloody underwear. (App. 101). At trial, Candie confirmed the Victim's disclosure and having seen the bloody underwear. (App. 139–142). Several days after the sexual encounter, Victim told her mother what had happened at Bush's trailer the previous Saturday. (App. 101–102).

Black testified on cross-examination that he had a prior conviction for criminal sexual conduct with a minor. (App. 249–250). Black admitted that Lieutenant Robinson had informed him months earlier that Victim was fifteen years old and acknowledged based on his prior criminal history that he knew the legal consequences of engaging in a relationship with a fifteen-year-old. (App. 255–257). Despite this knowledge, however, Black continued the relationship. (App. 260). On re-direct, Black admitted to meeting Victim two to three times after learning that she was

fifteen years old. (App. 261). On the night in question, Black claims to have informed Victim that they could no longer see each other. (App. 261-262).

Richard Bush testified on Black's behalf, stating he was at the trailer with Black and Victim on the night in question. (App. 264-266). Specifically, Bush testified that Black never went in the bedroom with Victim. (App. 270).

Prior to the State's cross-examination, Bush testified in camera that he had two convictions for second-degree murder in Florida from 1987, for which he received fifteen years' imprisonment. (App. 272-274). However, for whatever reason, he was released a short six years later in 1993. (App. 273). Bush was also convicted of one count of shooting or throwing a deadly missile during the same incident, for which he was sentenced to a consecutive sentence of seven years' imprisonment. (App. 276-277). The State indicated their intent to use the prior convictions as impeachment evidence. (App. 273-274). After hearing arguments of counsel, the trial court ruled all three convictions were admissible for impeachment purposes because the probative value substantially outweighed the prejudicial effect. (App. 282-285).

STANDARD OF REVIEW

In PCR matters, the standard of review depends on the specific issue involved.[2] *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). Appellate courts will uphold a PCR court's findings of fact if there is any probative evidence in the record to support them. *Sellner v. State,* 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts give no deference to the PCR court's conclusions of law and reviews those conclusions *de novo*. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

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[2] The State submits this Court need not defer to the PCR court because the PCR court granted relief on the same cold record that is currently before this Court. *See Hardy v. Comm'r, Alabama Dep't of Corr*., 684 F.3d 1066, 1075 (11th Cir. 2012) ("The District Court ruled on a cold record, the record compiled in the Alabama Courts. We rule on the same cold record, meaning that we afford the District Court's judgment no deference.").

Although appellate counsel testified at the hearing, no facts are in dispute in this case. *See Neely v. Thomasson*, 365 S.C. 345, 618 S.E.2d 884 (2005)(questions of law may be decided with no deference to the trial court); *McWilliams v. Dettore*, 901 N.E.2d 1023, 1032 (Ill. App. 2009) (alterations in original) (citation omitted) ("When a trial judge bases [her] decision solely on the same 'cold' record that is before the court of review, it is difficult to see why any deference should be afforded to that decision.").

ARGUMENT

> Because our Supreme Court previously determined the admission of two voluntary manslaughter convictions for impeachment of a defense witness constituted harmless error, Black could not show *Strickland* prejudice even if trial counsel failed to properly preserve the admissibility of the defense witness's prior conviction for shooting or throwing a deadly missile for appellate review, given the allowable impeachment and the totality of the evidence supporting guilt.

Black argues – essentially as an alternate ground for relief should this Court find in favor of the State in its appeal regarding relief on Black's ineffective assistance of appellate counsel claim – that this Court should find that the PCR court erred in finding trial counsel was not ineffective and had preserved for appellate review whether the defense witness could be impeached with a remote conviction for throwing a deadly missile. The State has previously agreed with Black that the PCR court's order found the issue was properly preserved. (*See* Return at 10). However, even if trial counsel ultimately failed to properly object to the admissibility such that appellate counsel could not have raised it on appeal, Black could not have been prejudiced for essentially the same reasons set forth in the State's Brief of Petitioner. Yet, Black cannot show that his trial counsel's performance was deficient. *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). His argument for relief fails on the very first *Strickland* prong.

Counsel's performance under the first prong of the *Strickland* test is judged under the standard of "reasonableness under prevailing professional norms." *Edwards,* at 456, 710 S.E.2d 64 (2011) (citing *Strickland*). Because this Court, and our Supreme Court, concluded that Bush's two manslaughter convictions were properly preserved for appellate review, it is likely that Bush's shooting/throwing a missile conviction would also be found to be preserved had it been raised in

the appeal. Considering all three convictions were discussed conjunctively at trial, Black cannot reasonably prove that the issue was not preserved, *only that the issue was not raised by appellate counsel*. (*See* App. 276-277, 289-290). The PCR court's ruling is not without support. Additionally, testimony from trial counsel at the PCR evidentiary hearing reflects that he believed he properly preserved all three of Bush's convictions for appellate review.

At the PCR hearing, DeJong testified that his goal with Bush's testimony was to convince the jury that Black and Victim never went into the bedroom together while they were in Bush's mobile home. (App. 508). DeJong recalled objecting to the solicitor's attempt to impeach Bush with the three 1987 Florida convictions because they occurred over ten years ago. (App. 508). DeJong testified that the trial court ultimately allowed the State to impeach Bush with these convictions pursuant to Rules 404(b) and 609(a)(1), SCRE, after weighing the *Colf*[3] factors. (App. 509; *see also* 283-285). As DeJong recalled, the objections and hearing on the matter applied to both manslaughter convictions and the conviction for shooting and throwing a deadly missile.[4] (App. 509). Moreover, the record supports DeJong's recollection that all three convictions were addressed during the hearing, although both parties appeared primarily focused on the two manslaughter convictions. (App. 275–285).

The trial record shows that at the beginning of the hearing, Assistant Solicitor Them informed the Court that Bush pled guilty to both manslaughter charges and the shooting or throwing a deadly missile charge at the same time in 1987. (App. 275–76). Assistant Solicitor Them later advised the Court of the sentence Bush received on each of the three convictions. (App. 282). Moreover, when asked if he believed Judge Few was, at the time, only concerned with the

[3] *State v. Colf*, 337 S.C. 622, 525 S.E.2d 246 (2000).

manslaughter convictions, DeJong stated he believed the discussion pertained to all three prior convictions. (App. 509).

Further, when asked if he believed there was any basis to the solicitor calling Bush a liar in his closing argument, DeJong stated that he shared with the jury that the State was going to call Bush a liar and an objection was likely improper because he discussed the credibility of the witnesses, and a credibility determination is a function of the jury. (App. 512). On cross-examination, when asked if he saw any reason to object to the prosecution's closing argument where they suggest Bush's record makes him a liar, DeJong stated he did not see any reason to object. (App. 515).

Appellate counsel, Savitz, testified at the PCR hearing, as well. He testified that it was unclear whether the missile charge issue was preserved, recognizing it had been "mentioned" as the record shows but he "didn't see that it was preserved." (App. 522-523).[4] Further, he testified that, in his opinion, the manslaughter charges, which he considered clearly preserved, were significantly more prejudicial. (App. 519, 523). He asserted either he was ineffective, or trial counsel was. (App. 523).

As a result of reviewing the trial record and the opinion, (*see* App. 534 and 537), the PCR found that trial counsel was not ineffective.

> Lastly, as to the issue of trial counsel failing to object to the admission of the remote conviction to impeach the defense witness, Bush, I find this assertion to be without merit. After reviewing the transcript, it is clear that trial counsel did raise this objection, as it was included in trial counsel's argument regarding the admissibility of the defense witness' prior convictions. Furthermore, the appellate courts found the issue to be preserved. I find that trial counsel adequately preserved this issue for appellate review.

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[4] Though he does not credit appellate counsel's PCR hearing testimony, Black does mirror it in that Black merely argues to this Court that "[t]rial counsel ***arguably*** failed to raise a specific object" to the missile conviction impeachment. (BOP at 6) (emphasis added).

(App. 537). *See also State v. Black,* 400 S.C. 10, 28, 732 S.E.2d 880, 890 (2012) ("Since Petitioner does not challenge the use of this conviction to impeach Bush's credibility, this ruling, right or wrong, becomes the law of the case."). The record and the opinion support that ruling. As such the ruling should be left undisturbed on appeal. *Smalls, supra.* This ends the *Strickland* inquiry. *Strickland,* 466 U.S., at 700 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim."). However, if the ruling was not so supported, and the inquiry not ended, the record shows that Black still cannot carry his burden of showing *Strickland* prejudice to be entitled to relief.

While a finding of harmless error during a direct appeal review does not entirely foreclose an applicant's ability to establish the requisite prejudice for relief on the same or a related issue, it would be an exceedingly rare case in which an applicant could do so. *See generally Arnold v. State*/*Plath v. State*, 309 S.C. 157, 165, 420 S.E.2d 834, 838 (1992) (noting that the requirement that a constitutional error be harmless beyond a reasonable doubt "embodies a standard requiring reversal 'if there is a reasonable possibility that the evidence complained of might have contributed to the conviction'") (citing *Yates v. Evatt*, 500 U.S. 391, 401 (1991)); *cf. McHam v. State*, 404 S.C. 465, 475–76, 746 S.E.2d 41, 47 (2013)("Before a post-conviction relief court can grant relief on a claim of ineffective assistance of trial counsel for failing to preserve a ground for appellate review, the court must determine the underlying claim was meritorious and a reasonable probability that it would have resulted in reversal and a new trial."), *abrogated on other grounds by Smalls*, 422 S.C. 174, 810 S.E.2d 836. The Supreme Court in *Strickland* explained that

> [A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by [counsel's] errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some

> will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.

466 U.S., at 695–96.

In the direct appeal, our Supreme Court critically reviewed the record to conclude any error in regard to manslaughter charges was harmless beyond a reasonable doubt:

> … In addition to the fact that Bush's credibility had already been significantly compromised by the revelation that he was a former convict, we note, in considering the overall strength of the State's case, that Petitioner's *own* credibility was seriously impeached at trial as well by testimony that he had a criminal record that included two prior offenses for CSC with a minor. In addition, an investigator with the Pickens County Sheriff's Department testified that he had contacted Petitioner before the incident alleged here and specifically warned him that the Minor was only 15 years old. Petitioner acknowledged this conversation and conceded that he knew having a relationship with a 15–year–old could get him in " trouble."
>
> It was undisputed that the Minor was at Bush's home to visit Petitioner the night of the incident, and there was evidence at trial that conflicted with that of Bush and Petitioner and that corroborated the Minor's version of events. For example, despite Petitioner's and Bush's testimony that the Minor never left the confines of the living room, the Minor was able to describe some of the contents of Bush's bedroom, where she maintained Petitioner had taken her to have sex. Moreover, there was corroborating evidence from Candie Hudson, who picked up the Minor from Bush's home around 11:00 p.m., that she saw blood on the Minor's underwear after they returned to Candie's home, that she helped the Minor wash the garment, and that the Minor asked to borrow another pair from her. There has been no allegation any limitation was placed on the parties' ability to conduct cross-examination. Considering the foregoing and all of the other evidence adduced at trial, we find the admission of the additional impeachment evidence against Bush could not reasonably have affected the jury's result in this case and we deem the error harmless beyond any reasonable doubt.

State v. Black, 400 S.C. at 29–30, 732 S.E.2d at 891.

This is a powerful hurdle for Black to overcome. Simply, the trial facts are unchanged and remain applicable to the current prejudice analysis.

Moreover, our Supreme Court acknowledged the missile conviction, and that it undoubtedly "established the fact that Bush was a former convict, and it would have similarly diminished the jury's view of his character," but disagreed with the dissent that all three together could not be harmless. *Id.,* at 30, 732 S.E.2d at 891. Consequently, even assuming all three of Bush's prior convictions were erroneously admitted, the totality of the evidence remains the same and fails to support a showing of prejudice.

Notably, in addition, to those facts in the *Black* opinion, the record also shows that Victim testified that she considered herself to be in a relationship with Black when she was 15 years old, and he was 26 years old. (App. 84). She testified they had been dating for about 5 or 6 months and would drive around together and frequently talk on the phone. (App. 84-85). Victim testified that her parents did not approve of her dating Black due to his age and would have to wait until her mother or father was not around to see him. (App. 84-87). Victim also testified that Black lived with his girlfriend and that she had never been to his house or called over there because they didn't have a phone. (App. 93-94). Darlene Taylor, Victim's mother, testified that Black had attended church with her and Victim because Black's cousin also attended the same church. (App. 161-162). Taylor testified that she believed Black was 18 years old until she later discovered that he was 26 years old with a criminal record. (App. 163). She then asked Black to stay away from Victim. (App. 163). Investigator Tony Robinson of the Pickens County Sheriff's Department testified that on November 28th of 2005, he had a meeting with Black and told him that the Victim was 15 years old. (App. 200-202). Even throughout Black's own testimony, he admitted that Victim and himself were "seeing each other," though he contended they were not in a relationship.

(App. 258). Black testified that he was upset after the breakup with his girlfriend and found companionship with Victim. (App. 252-253). Black also admitted that he understood from Investigator Robinson that Victim was 15 years old. (App. 256).

Moreover, specifically as to Bush's credibility, in addition to his being a "convict" as the Supreme Court noted, he had testified that, although sober on the day in question, he was a "heavy drinker" who had problems with alcohol in the past. (App. 268, 274–75) .He also testified he and Black were very close, and that he cared for Black "like a brother." (App. 286). Although Bush claimed the sexual act between Black and Victim could not have happened at his home on the day in question, he admitted he never contacted law enforcement or reported that information to them following Black's arrest. (App. 288–89). However, as noted in the Supreme Court's opinion, Victim was able to describe some of the contents of Bush's bedroom.

There is ample evidence to defeat Black's argument that he can show the required prejudice under *Strickland.*

Ultimately, had the post-conviction relief court properly weighed the strength of the State's evidence against the specific impact of the shooting or throwing a deadly missile conviction, it would have found no reasonable likelihood that Black would have prevailed on appeal. *See Strickland*, 466 U.S., at 687 (regarding the prejudice prong, "the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt"); *State v. Mitchell*, 330 S.C. 189, 199–200, 498 S.E.2d 642, 647–48 (1998) (highlighting that "the Constitution entitles a criminal defendant to a fair trial, not a perfect one") (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681(1986)). *See also United States v. Lipscomb*, 702 F.2d 1049, 1063 (D.C. Cir. 1983) (noting that [t]here is less risk of prejudice when a defense witness other than the defendant is impeached through a prior conviction because the jury cannot

directly infer the defendant's guilt from someone else's criminal record"); *United States v. Logan*,998 F.2d 1025, 1032 (D.C. Cir. 1993) (where the government improperly uses a conviction to impeach a witness, rather than the defendant, the error is "less prejudicial"); *United States v. Tse*, 375 F.3d 148, 164 (1st Cir. 2004)[5] (explaining that the probability that prior convictions of an ordinary government witness will be unduly prejudicial is low in most criminal cases because the behavior of the witness is generally not the issue in dispute);*United States v. Huddleston*, 811 F.2d 974, 978 (6th Cir.1987) ("Any prejudice to the defendant is normally greater where the defendant's own character is being attacked."). Even so, Black urges this Court to depart from this steady precedent and find this is the same as an instruction that a criminal sexual conduct victim's need "not be corroborated," *citing State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016), or an instruction that a defendant's "[g]ood character … alone may create a reasonable doubt," citing *Pantovich v. State*, 427 S.C. 555, 832 S.E.2d 596 (2019). (*See* BOP at 9-10). His reliance on these cases is wholly misplaced. These cases deal with *jury instructions* which is a clear point of distinction. Moreover, as shown above, the record is more than he said/she said, with testimony from others showing knowledge of age, and opportunity and evidence of the sexual activity, *i.e,* the blood-stained underwear. These cases simply do no support Black's argument for relief.

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[5] The *Tse* Court also noted:

> The outstanding difference between harm to a defendant and harm to other witnesses is undeniable: A jury might conclude from the testifying defendant's criminal career (despite vociferous instructions from the court to the contrary) that he committed the crime charged because of a demonstrated propensity to engage in criminal conduct. That kind and degree of damage cannot be suffered by the prosecution or its witnesses.

375 F.3d at 163–64 (quoting H. Richard Uviller, *Credence*, *Character*, *and the Rules of Evidence: Seeing Through the Liar's Tale*, 42 Duke L.J. 776, 798 (1993)).

Consequently, for the reasons related above, even assuming all three of Bush's prior convictions were erroneously admitted, the totality of the evidence remains unaffected such that Black cannot show a reasonable probability that the result of the trial would have been different.

However, because Black fails on the first prong – the deficiency prong – no analysis is necessary for the second prong. *Strickland, supra.* Black is not entitled to any relief.

CONCLUSION

Therefore, this Court should reverse the grant of relief on the appellate counsel claim for all the reasons presented in the State's petition, deny relief on Black's alternative theory for relief, and reinstate Black's convictions and sentences.

Respectfully submitted,

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[6] Counsel acknowledges the work of former Assistant Attorney General Lillian L. Meadows who previously represented the State in the matter and authored the Return to Petition for Writ of Certiorari. Much her work is included in the instant brief.