RECEIVED
Apr 16 2025
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO SALUDA COUNTY
Court of Common Pleas
The Honorable Kristi F. Curtis, Circuit Court Judge

Appellate Case No. 2024-000547

Kyle Wayne Way,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

DON J. ZELENKA
Deputy Attorney General

D. RUSSELL BARLOW, II
Senior Assistant Deputy Attorney General

ZACHARY W. JONES
S.C. Bar No. 104174
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

PETITIONER'S STATEMENT OF THE ISSUES PRESENTED

I. Whether the PCR court erred where it denied Petitioner belated appellate review, where counsel did not file a notice of appeal after Petitioner's trial, and where there was no evidence Petitioner knowingly and intelligently waived his right to appeal, since absent an intelligent waiver by Petitioner, counsel was obliged to initiate an appeal or comply with the procedure in *Anders v. California*, 386 U.S. 738 (1967)?

II. Whether the PCR court erred in denying post-conviction relief where counsel failed to specify to the trial court why it should direct a verdict of acquittal, since issue preservation principles require an issue to be raised to the trial court with sufficient specificity, and where Petitioner was prejudiced by counsel's deficient performance?

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUES PRESENTED

I. Petitioner's current argument that Counsel was ineffective for failing to seek a directed verdict on the ground that "kissing is not a lewd or lascivious act" was never raised to the PCR court, is not preserved for appellate review, and is meritless because a jury could have found Petitioner's kissing of Victim was a lewd or lascivious act and there was substantial evidence of additional lewd or lascivious acts committed by Petitioner.

II. This Court should deny the petition for a writ of certiorari as to Petitioner's argument that he is entitled to belated review of direct appeal issues, since Petitioner has conceded that the only direct appeal issue articulated in his "Statement of Issue on Appeal" was not preserved.

STATEMENT OF THE CASE

Petitioner was arrested on March 16, 2017, following an investigation into allegations Petitioner sexually abused his thirteen-year-old half-sister over a period of several months. During its May 2017 term, the Saluda County Grand Jury indicted Petitioner for second-degree criminal sexual conduct with a minor ("CSCM 2nd"). (2017-GS-41-1175). During its November 2019 term, the Saluda County Grand Jury indicted Petitioner for third-degree criminal sexual conduct with a minor ("CSCM 3rd"). (2019-GS-41-344). On November 18, 2019, Petitioner proceeded to a jury trial before the Honorable Walton J. McLeod, IV. John Andrew Bishop, Esquire ("Counsel"), represented Petitioner. Assistant Solicitors Robbie McNair and Melanie Darko prosecuted the case. On November 21, 2019, the jury convicted Petitioner of CSCM 3rd and acquitted him of CSCM 2nd. Judge McLeod sentenced Petitioner to fifteen years' imprisonment. Petitioner did not appeal.

On May 8, 2020, Petitioner filed his initial post-conviction relief ("PCR") application, raising the following allegations:

> 10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
>
> (a) "Invalid arrest warrants / 4th Amendment"
> (b) "Constitutional violation"
>
> 11. State concisely and in the same order the facts which support each of the grounds set out in (10):
>
> (a) "Warrants was [*sic*] not issued under section 17-13-140"
> (b) "No commitment order to be detain [*sic*] to detentional [*sic*] center under section 24-5-10."

Petitioner amended his application on October 7, 2022, raising the following allegations:

> 1. Ineffective assistance of Counsel – John A. Bishop
> a. Failure to file a direct appeal.

Petitioner amended his application a second time on March 22, 2023, raising the following allegations:

2. Ineffective Assistance of Counsel
    a. Erroneously advised Petitioner as to parole eligibility. *See Smith v. State*, 329 S.C. 280, 494 S.E.2d 626 (1997).

Petitioner also asked to be permitted to amend his PCR application to conform to the evidence presented at the PCR hearing should any new or unaddressed issues arise during the course of the hearing.

An evidentiary hearing into the matter was held before the Honorable Kristi F. Curtis on April 4, 2023, at the Lexington County Courthouse. Petitioner was present at the hearing and represented by Ashley A. McMahan, Esquire. Assistant Attorney General Zachary W. Jones represented Respondent.

The PCR court found Petitioner had abandoned the allegations in his initial application. The PCR court further found the following additional issues had been presented based on the evidence at the hearing:

1. Ineffective Assistance of Counsel
    a. Failure to adequately explain Petitioner's plea options after Petitioner was indicted for CSCM 3rd;
    b. Failure to adequately cross-examine Victim as to the reason for the incriminating text messages between her and Petitioner;
    c. Failure to challenge Captain Price's testimony that Petitioner had admitted to kissing Victim and had said his feelings for Victim were more than those of a brother;
    d. Failure to expose witnesses' changing stories:
        i. Victim gave inconsistent statements during her forensic interviews and at trial;
        ii. Older Sister's trial testimony differed from her earlier statement;
        iii. Younger Sister's trial testimony differed from her earlier statement;
    e. Failure to adequately argue the directed verdict motion.

By order filed February 26, 2024, the PCR court denied and dismissed Petitioner's application with prejudice. Petitioner did not file a motion to alter or amend the PCR court's order.

Petitioner thereafter filed a timely notice of appeal. By and through counsel Joanna K. Delany, Esquire, Petitioner filed a petition for writ of certiorari on October 30, 2024. This Return follows.

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

I. Petitioner's current argument that Counsel was ineffective for failing to seek a directed verdict on the ground that "kissing is not a lewd or lascivious act" was never raised to the PCR court, is not preserved for appellate review, and is meritless because a jury could have found Petitioner's kissing of Victim was a lewd or lascivious act and there was substantial evidence of additional lewd or lascivious acts committed by Petitioner.

Petitioner contends Counsel was ineffective for failing to argue to the trial court that "kissing is not a lewd or lascivious act" in support of his motion for a directed verdict on the CSCM 3rd charge. Petitioner argues kissing can never constitute a "lewd or lascivious act" because the act of kissing is not, in and of itself, obscene or indecent. Petitioner claims that the State's only justification for CSCM 3rd, as opposed to CSCM 2nd, was Victim's testimony that Petitioner kissed her. Petitioner appears to acknowledge that there was also evidence of sexual intercourse and fellatio between him and Victim; however, he claims that because each of those acts constitutes a "sexual battery" within the definition of CSCM 2nd—for which he was acquitted—they cannot also be deemed "lewd or lascivious acts" within the definition of CSCM 3rd.

There are numerous flaws with the merits of this argument, which this Return will expose in detail. However, this Court need not even reach the merits, because Petitioner's current argument was never presented to the PCR court and is not preserved for appellate review.

In South Carolina, issue preservation requirements are a fundamental component of appellate procedure. *Gaddy v. Douglass*, 359 S.C. 329, 350, 597 S.E.2d 12, 23 (Ct. App. 2004). The key purpose of those requirements is "to give the [circuit] court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review." *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). Through their enforcement and application, the circuit court is

guaranteed a chance "to rule properly after it considered all relevant facts, law, and arguments" and the appellate court is provided with everything needed to properly review the ruling within the limits of the applicable standard of review. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

For an issue to be preserved for appellate review pursuant to our issue preservation requirements, the issue must have been: (1) raised to and ruled upon by the circuit court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the circuit court with sufficient specificity. *State v. Rogers*, 361 S.C. 178, 183, 603 S.E.2d 910, 912–13 (Ct. App. 2004). Based on those requirements, an issue cannot ordinarily be raised or considered on appeal unless it was first presented to and ruled upon by the circuit court judge. *State v. Freiburger*, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005); *see State v. Patterson*, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial.").

Likewise, an appellant is precluded from arguing one ground or theory in support of an issue during the circuit court proceedings and then a different ground or theory in support of the issue on appeal. *See State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (holding a defendant cannot raise one argument in support of an issue at trial and then raise a different argument in support of that issue to the appellate court); *State v. Thomason*, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal.").

Petitioner did not raise any allegations concerning the adequacy of Counsel's directed verdict motion in his initial application or in either of his two amended applications. However, at the evidentiary hearing before the PCR court, Petitioner testified that he believed Counsel failed to adequately argue for a directed verdict:

> He argued for it but he really didn't explain why he was asking for it. . . . All the witnesses that took the stand were all asked if they

> ever seen anything sexual going on or anything and all of them said no. So I felt like with the CSC third with it being a separate offense than the second which I was found not guilty on. *You know, it's things like things that that happened prior to the sexual battery such as touching, fondling, kissing in a sexual manner.* With all of them saying they never seen anything sexual going on, and in text messages nothing sexual was ever said, that's what Mr. Price said when he looked through them because he was asked that. I felt like they didn't really have enough that showed that I committed CSC with a minor third.

(App.pp.607–08) (emphasis added). It is clear that Petitioner's position on the directed verdict issue was simply that "all the witnesses" testified that they had never "seen anything sexual going on." Petitioner himself admitted that CSCM 3rd would include conduct "such as touching, fondling, kissing in a sexual manner." At no point did Petitioner argue to the PCR court that kissing, as a matter of law, cannot constitute a "lewd or lascivious act." Petitioner did not even mention the directed verdict issue during his closing statements to the PCR court, nor did he file any post-hearing briefs or memoranda to elaborate on the directed verdict issue.

The PCR court issued its order, which found Petitioner had not met his burden of proving Counsel was ineffective for failing to more adequately argue the directed verdict issue. The PCR court noted Counsel's testimony at the evidentiary hearing that he never expected the directed verdict motion to succeed because there was an abundance of evidence in the record to support the charges; the court "agree[d] with Counsel's assessment of the evidence" and found Petitioner had failed to prove deficiency or prejudice. The PCR court did not address the argument that kissing cannot constitute CSCM 3rd as a matter of law, no doubt because that argument had never been presented to it (and because Petitioner expressly testified to his belief that "kissing in a sexual manner" *can* constitute CSCM 3rd). Petitioner never filed a motion to alter or amend the PCR court's order.

Because Petitioner did not present the argument he has now raised on appeal at any point

during the proceedings before the PCR court, the PCR judge was denied a fair opportunity to rule on the merits of this argument. *See State v. Stone*, 376 S.C. 32, 36, 655 S.E.2d 487, 488–89 (2007) ("If a pitch was never thrown at trial, we cannot review whether the trial court made the proper call."); *I'On*, 338 S.C. at 422, 526 S.E.2d at 724 ("The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred."); *see also Queen's Grant*, 368 S.C. at 372–73, 628 S.E.2d at 919 ("Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." (citations omitted)); *cf. Powers v. City of Aiken*, 255 S.C. 115, 117, 177 S.E.2d 370, 371 (1970) ("We have searched the record and agree that the trial judge was not given an opportunity to rule upon this issue, and accordingly, the question is not properly before us. This is a court of review."). Therefore, the argument Petitioner now advances on appeal is not properly preserved for appellate review pursuant to well-established South Carolina law. Petitioner's argument cannot appropriately be considered for the first time on appeal. *See Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("[E]rror preservation has been a critical part of appellate practice in this State for a long time, serving to ensure . . . that we do not reach issues which were not ruled upon by the trial court. . . . If our review of the record establishes that an issue is not preserved, then we should not reach it."); *State v. Head*, 330 S.C. 79, 87, 498 S.E.2d 389, 393 (Ct. App. 1997) (holding an appellate court "cannot address unpreserved errors"); *Plyler v. State*, 309 S.C. 408, 413, 424 S.E.2d 477, 480 (1992) (holding an issue that was neither raised at the PCR hearing nor ruled on by the PCR court is procedurally barred on appeal), *overruled on other grounds by State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019); *Hyman v. State*, 278 S.C. 501, 502, 299 S.E.2d 330, 331 (1983) (holding an issue that was not raised in the PCR application or at the PCR hearing

is not properly before the appellate court).

In addition to being unpreserved, Petitioner's current argument—that kissing can never constitute a "lewd or lascivious act" as a matter of law—fails on the merits. First of all, Petitioner's argument depends on an illusory distinction between the nature of the act itself and the intention of the actor. Petitioner appears to argue that, for an act to fall within the CSCM 3rd statute, it must not only be committed "with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of the actor or the child," but the act must also be "lewd or lascivious" in and of itself. In Petitioner's view, the statutory element of a "lewd or lascivious act" is totally separate from the element of the actor's intent, and evidence of the actor's lewd or lascivious intent cannot suffice to render the act itself lewd or lascivious. This view is untenable.

The very same argument was addressed and rejected by the California Supreme Court in *People v. Martinez*, 11 Cal.4th 434, 903 P.2d 1037 (1995), construing a virtually identical provision of the California penal code.[1] That case concerned incidents involving two separate victims, both 13-year-old girls; the defendant Martinez was a stranger to both victims. In the first incident, the victim noticed Martinez following her as she was walking from her junior high school to a friend's house. Martinez suddenly lunged at her, "hugged" her tightly, and attempted to kiss her before neighbors intervened and ordered Martinez to release her. When one of the neighbors indicated police were on their way, Martinez fled on foot. A short time later, the second victim

---

[1] *Compare* Cal. Penal Code § 288 (West) ("[A] person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony . . . .") *with* S.C. Code Ann. § 16-3-655(C) ("A person is guilty of criminal sexual conduct with a minor in the third degree if the actor . . . wilfully and lewdly commits or attempts to commit a lewd or lascivious act upon or with the body, or its parts, of a child under sixteen years of age, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of the actor or the child.").

was playing at a nearby park when Martinez appeared, seized her, and began "hugging" her. Martinez released the victim and attempted to flee after her family confronted him. He was ultimately arrested at the scene of the second incident after being tackled by the victim's father and uncle.

Martinez was convicted on two counts of violating Cal. Penal Code § 288. He challenged his convictions on the ground that his hugging of both victims and attempted kissing of the first victim were not inherently "lewd or lascivious" acts. Mirroring Petitioner's current argument, Martinez argued "that section 288 separately requires sexual 'intent' *and* a 'lewd or lascivious *act*.' . . . Each of these elements, 'lewd' act and sexual 'intent,' is necessary to a completed violation under this approach." *Martinez*, 11 Cal.4th at 442, 903 P.2d at 1041 (emphasis in original).

> [Martinez] observes that the phrase "lewd or lascivious act" appears in section 288 in addition to language describing the "sexual" nature of the criminal "intent." . . . [Martinez] argues that each such phrase—lewd act and sexual intent—must be given separate effect, and that a contrary approach violates the general rule requiring courts to construe a statute so as to avoid surplusage.

Id. at 447–48, 903 P.2d at 1045. Martinez claimed that, "even assuming he intended sexual arousal, there was no evidence he touched either victim in an inherently sexual manner." *Id.* at 441, 903 P.2d at 1040.

The California Court of Appeal accepted Martinez's argument and reversed one of his convictions as a result.[2] The Supreme Court of California, however, held that section 288 criminalized *any* touching of an underage child with sexual intent. The following reasons

---

[2] Although it agreed with Martinez's argument, the California Court of Appeal found any error was "harmless" as to the first victim, because Martinez's attempts to kiss that victim were "clearly sexual." *Id.*

articulated by the *Martinez* court apply with equal force to the South Carolina statute at issue in the present case:

First, the expansive language of section 288 expressly applies to contact "upon or with the [victim's] body, or any part or member thereof," unlike the language of other sex offense statutes, which "prohibit the commission of certain clearly specified acts" described "in precise and clinical terms." *Id.* at 442–43, 903 P.2d at 1041. The *Martinez* court held the comparatively "broad and amorphous language" of section 288 indicated "that the statute was intended to include sexually motivated conduct not made criminal elsewhere in the scheme," which was consistent with the legislature's well-established policy of providing special protection to children against sexual exploitation. *Id.* at 442–44, 903 P.2d at 1041–42. Likewise, S.C. Code Ann. section 16-3-655(C) broadly criminalizes acts "upon or with the [victim's] body, or its parts," unlike other sex offense statutes, which are restricted to clearly specified acts upon specified parts of the victim's body. *See, e.g.*, S.C. Code Ann. §§ 16-3-652, -653, -654, -655(A), and -655(B) (specifying "sexual battery" as an element of all criminal sexual conduct offenses other than CSCM 3rd); *id.* § 16-3-755(B), -755(C); and -755(D) (specifying "sexual battery" as an element of offenses of sexual battery with a student); *id.* § 16-3-651(h) and -755(A)(5) (defining "sexual battery" as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes."); *see also id.* § 16-3-600(C)(1)(i) and -600(D)(1)(b) (criminalizing acts involving "nonconsensual touching of the private parts of a person"); *id.* § 16-3-600(A)(3) (defining "private parts" as "the genital area or buttocks of a male or female or the breasts of a female"). The broad, general language of the CSCM 3rd statute, as contrasted with other South Carolina sex offense statutes,

indicates that statute was intended to apply expansively to sexually motivated touching not otherwise provided for in the statutory scheme.

Second, the *Martinez* court rejected the reasoning of Martinez and the California Court of Appeal that their interpretation of the statute—requiring proof of *both* sexual intent *and* an inherently lewd act—was necessary to avoid "surplusage." *Martinez*, 11 Cal.4th at 447–48, 903 P.2d at 1045. The court noted that the presumption against surplusage "is not absolute." *Id.* at 448, 903 P.2d at 1045. "We are not required to assume that the Legislature has chosen 'the most economical means of expression,' particularly where a statute of venerable origin is involved." *Id.* at 449, 903 P.2d at 1045. The court acknowledged that the successive phrases of section 288—*willfully and lewdly*, *lewd and lascivious act*, and *with the intent of arousing the lust, passions, or sexual desires*—are "archaic and logically redundant to some degree." *Id.* at 449, 903 P.2d at 1045–46. The court specifically noted prior cases had determined that no separate meaning could be ascribed to the phrases "willfully and lewdly" and "with [sexual] intent"; although those phrases were distinct, they overlapped and referred to a single phenomenon: sexual motivation. *Id.* at 449, 903 P.2d at 1046. For the same reason, the court held that whether an act is "lewd or lascivious" depends entirely upon the sexual motivation with which it is committed:

> [T]he lewd character of an activity cannot logically be determined separate and apart from the perpetrator's intent. It is common knowledge that children are routinely cuddled, disrobed, stroked, examined, and groomed as part of a normal and healthy upbringing. On the other hand, any of these intimate acts may also be undertaken for the purpose of sexual arousal. Thus, depending upon the actor's motivation, innocent or sexual, such behavior may fall within or without the protective purposes of section 288.

Id. at 449–50, 903 P.2d at 1046. The same rationale applies to South Carolina's CSCM 3rd statute, which likewise includes the phrases "willfully and lewdly," "lewd or lascivious act," and "with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of the actor

or the child." It is not possible to give separate and distinct meaning to each of these three phrases; clearly, some logical redundancy is present in the statutory text. Therefore, the sensible reading of all three phrases is that they "overlap and refer to a single phenomenon": the actor's sexual intent.

For the reasons articulated in *Martinez*, this Court should reject Petitioner's reading of the CSCM 3rd statute. However, even if the Court were to accept Petitioner's argument that an act must be *inherently* lewd or lascivious to satisfy the statute, the manner of kissing that Victim described in her testimony obviously qualifies as "lewd or lascivious" under any reasonable definition of those terms, including the definitions Petitioner quotes in his petition. (Pet.pp.16–17) (quoting Black's Law Dictionary (5th ed. 1979)). Describing the kissing incident at trial, Victim testified that, although Petitioner had once given her a "peck" while they were home alone together, on another occasion he kissed her "with his tongue" against her will. (App.pp.82–83). Such a "French kiss" is commonly understood to constitute an expression of lustful sensuality, rather than chaste, fraternal affection. Therefore, any common understanding of the terms "lewd," "lascivious," "lustful," "indecent," or "obscene" would encompass Petitioner's non-consensual kissing of Victim with his tongue.

Finally, Petitioner acknowledges that there was evidence—in the form of Victim's testimony—that, in addition to kissing Victim, he had sexual intercourse with Victim and that he made Victim perform fellatio on him. Indisputably, those acts would be "lewd or lascivious" under the definitions Petitioner urges. Nevertheless, Petitioner seems to argue that, because he was acquitted of CSCM 2nd, which requires proof of a "sexual battery" such as fellatio or sexual intercourse, the jury could not have used the evidence of fellatio and sexual intercourse as evidence of "lewd or lascivious acts" to support its guilty verdict on the CSCM 3rd charge.

In effect, Petitioner is making an argument that the jury's verdict of not guilty on the CSCM 2nd charge is inconsistent with a finding that he performed the "lewd and lascivious" acts of sexual intercourse and fellatio to which Victim testified. South Carolina, however, has abolished the rule against "inconsistent verdicts." *State v. Alexander*, 303 S.C. 377, 401 S.E.2d 146 (1991). If there is any evidence in the record to support a charge, a guilty verdict on that charge will not be disturbed merely because it is purportedly "inconsistent" with the jury's verdict of acquittal on a separate charge.

There was substantial evidence to support the charge of CSCM 3rd in this case. Therefore, the PCR court did not err in concluding Petitioner failed to prove Counsel was ineffective for failing to more adequately argue his directed verdict motion as to that charge. This Court, accordingly, should deny the petition for a writ of certiorari as to this unpreserved and meritless issue.

II. This Court should deny the petition for a writ of certiorari as to Petitioner's argument that he is entitled to belated review of direct appeal issues, since Petitioner has conceded that the only direct appeal issue articulated in his "Statement of Issue on Appeal" was not preserved.

Petitioner contends he is entitled to belated review of his direct appeal issues pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). As required by Rule 243(i)(2), SCACR, Petitioner has included a "Statement of Issue on Appeal" identifying the following direct appeal issue to be addressed if *White* review is granted:

> Whether the trial court erred in failing to direct a verdict of acquittal pursuant to Rule 19, SCRCrimP, where the State alleged Petitioner was guilty of third-degree criminal sexual conduct with a minor based on testimony that Petitioner kissed Minor 1, and where § 16-3-655 requires the State prove the commission or attempted commission of "a lewd and lascivious act," since kissing is not a lewd and lascivious act?

The Court may have noticed something familiar about this issue. It is, in fact, the very same issue discussed over several immediately preceding pages of the Petition for Writ of Certiorari, wherein Petitioner claims Counsel deficiently *failed* to raise this issue at the directed verdict stage and, therefore, *failed* to preserve it for direct appeal. The petition for a writ of certiorari itself states that "[C]ounsel's bald statement that 'the defense would just move for a directed verdict' was insufficient to raise this argument with specificity to the trial judge and thus to preserve this issue for direct appeal." (Pet.p.17).

In other words, the only direct appeal issue raised by Petitioner for this Court's consideration is concededly unpreserved for appellate review. Therefore, any error committed by the PCR court in determining that Petitioner is not entitled to *White* review is harmless. *See Fleming v. State*, 399 S.C. 380, 731 S.E.2d 889 (2012) (holding PCR court erred in dismissing applicant's claim that he was denied right to appeal, but error was harmless because no issues were preserved and appeal would be to no avail).

There are no "special and important reasons" why this Court should issue a writ of certiorari to consider an admittedly unpreserved issue. Rule 242(b), SCACR. In addition, the issue itself is meritless, as discussed in section I of this Return. Therefore, this Court should deny the petition for a writ of certiorari.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

DON J. ZELENKA
Deputy Attorney General

D. RUSSELL BARLOW
Senior Assistant Deputy Attorney General

ZACHARY W. JONES
S.C. Bar No. 104174
Assistant Attorney General

By: _____
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

April 16, 2025