

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Pickens County
R. Scott Sprouse, Circuit Court Judge

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S.C. SUPREME COURT

Opinion No. 2025-UP-270 (S.C. Ct. App. Filed July 30, 2025)

Lower Court Case No. 2013-CP-39-00836

JASON ERVIN BLACK,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPENDIX

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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 child¹ (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).

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.

PETITIONER-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).

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.

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.

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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April 22, 2024

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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.

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

PROOF OF SERVICE

The undersigned certifies that as per the March 20, 2020 Order of the Chief Justice, the Brief of Respondent on Behalf of Petitioner-Respondent and Proof of Service has been forwarded to Appellant's counsel, David Alexander, Esq., via email today, April 1, 2024 to DAlexander@sccid.sc.gov, and Mr. Alexander's legal assistant, Shelby Pollard, SPollard@sccid.sc.gov

I further certify that all parties required by Rule to be served have been served.

This 22nd day of April 2024.

s/Melody J. Brown
**ATTORNEY FOR PETITIONER-
RESPONDENT**

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Pickens County

Honorable R. Scott Sprouse, Circuit Court Judge

JASON ERVIN BLACK,

RESPONDENT-PETITIONER,

V.

STATE OF SOUTH CAROLINA,

PETITIONER-RESPONDENT.

APPELLATE CASE NO. 2021-000525

BRIEF OF RESPONDENT
ON BEHALF OF RESPONDENT-PETITIONER

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ATTORNEY FOR
RESPONDENT-PETITIONER

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QUESTION PRESENTED BY THE STATE

Where this Court previously determined the trial court's admission of two voluntary manslaughter convictions—which were used to impeach the defense witness—constituted harmless error, the post-conviction relief court erred in finding Black was prejudiced by appellate counsel's failure to additionally argue the trial court erred by allowing the State to impeach the same witness with a remote conviction for shooting or throwing a deadly missile because the defense witness's credibility was already compromised and because Black's credibility was significantly compromised by the fact that he had previously been convicted of criminal sexual conduct with a minor.

JASON BLACK'S COUNTER-QUESTION PRESENTED

In respondent's direct appeal, where the Supreme Court specifically faulted appellate counsel for failing to raise the admissibility of a remote conviction and based its harmless error analysis on that specific failing, the PCR Court correctly granted relief.

STATEMENT

Respondent-petitioner Jason Black was tried in Pickens County before the Honorable John C. Few and a jury on June 25, 2007. App. 1. Peter Them represented the State and John DeJong represented Black. App. 1. The jury convicted Black of first-degree criminal sexual conduct with a minor and lewd act. App. 333, l. 10 – 18. Judge Few sentenced Black to concurrent terms of imprisonment of twenty years for the CSC charge and fifteen years for lewd act. App. 339, l. 8 – 13. On direct appeal, Black was represented by Joseph L. Savitz, III. App. 341. The Court of Appeals and this Court affirmed. App. 367. App. 420.

On July 2, 2013, Black filed a PCR application. App. 439. On March 4, 2021, a hearing was held before the Honorable R. Scott Sprouse. App. 483. Don A. Thompson represented Black and Lillian L. Meadows represented the State. App. 483. Judge Sprouse granted PCR relief. App. 530. Both the State and Black's petitions for certiorari were granted by this Court.

STANDARD OF REVIEW

The appellate court defers to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)).

ARGUMENT

In respondent's direct appeal, where the Supreme Court specifically faulted appellate counsel for failing to raise the admissibility of a remote conviction and based its harmless error analysis on that specific failing, the PCR Court correctly granted relief.

Introduction

Resolution of this case depends upon the prejudice prong of Strickland¹ and harmless error analysis. This Court must look in two places. First, this Court must closely read the Supreme Court's 3-2 decision finding harmless error in Jason Black's direct appeal. Second, it must look at the record and find whether—in the PCR context—harmless error equates to overwhelming evidence of guilt. In this child sex case that was a credibility contest, no evidence of guilt exists that would overwhelm the specific prejudice of improperly impeaching Black's witness who testified that he was innocent.

The Testimony at Trial

Complainant testified she was fifteen years old when she began dating Black, who was 26. App. 83-85. She met Black at Warpath Landing where they laid on the beach and talked. App. 85-88. They left to meet Complainant's friend, Candie, who took Complainant to work at a Japanese restaurant. App. 88-89. Complainant was hiding her relationship with Black from her parents. App. 84.

Complainant got off work at 9:00 and went to a skating rink. App. 89-90. She and Black spoke on the phone while Complainant was at the skating rink. App. 90-91. Black asked her to come to his friend, Richard Bush's trailer. App. 90-91. Candie and her friend Travis took

¹ Strickland v. Washington 466 U.S. 688 (1984)

Complainant to Bush's trailer. App. 92. Candie, Travis, and Complainant all went inside. App. 92-93. Candie and Travis left after about 10-15 minutes. App. 96.

While Bush was still in the living room watching TV, Complainant said Black asked her to come into the bedroom. App. 96-97. After kissing, Complainant and Black had what would have been consensual sex (as described by Complainant) if Complainant had been of legal age. App. 97-99. Complainant originally told police that she wiped ejaculate off herself, but in her trial testimony she claimed Black wiped it off with a rag. App. 122-23.

When they went back into the living room, Candie had returned, and Complainant left with Candie. App. 99. Complainant spent the night at Candie's house. App. 99. Complainant said she noticed blood in her underwear when she got back to Candie's house. App. 100-01. She washed the underwear at Candie's house. App. 101. Candie testified that she saw "a little bit of blood in them." App. 140.

The following Wednesday, Complainant's mother confronted her about Black. App. 101-04. From the questions her mother asked, Complainant believed her mother "knew something might have happened." App. 101-04. A couple of days later, she told her mother what happened with Black because she believed her mother "already knew." App. 101-04. Complainant described her mother as "angry" and admitted that when her mother gets angry, she wanted to please her mother. App. 114-15.

On cross-examination, Candie admitted that she was fifteen when she was driving Complainant that night and disregarded the restrictions on her license. App. 143-44. Candie agreed that Bush was at the house when she arrived and when she returned to pick up Complainant. App. 148-153.

Black testified in his own defense and denied having sex with Complainant. App. 228. Bush was friends with Black. App. 233. Bush had no driver's license and was on disability, so Black would take him on errands. App. 233. Black agreed that he met Complainant at Warpath Landing and dropped her off with Candie. App. 234-35.

Black testified that he was a die-hard race fan and the Chevy Rock and Roll 400 race at Richmond came on at 7:30PM. App. 234-35. Black did not have cable, so he went to Bush's single-wide trailer to watch the race. App. 234-36. The race was still on when Complainant, Candie, and Candie's boyfriend arrived. App. 242-43. Dale Jr. eventually won the race. App. 246.

Complainant went outside on the porch for a few minutes and when she returned, she told Black that Candie was taking her boyfriend home. App. 244-45. Black said Complainant was at the trailer with him and Bush for about forty-five minutes. App. 245. During that time, Complainant never left the living room. App. 245. Black never left the living room. App. 245. Bush never left the living room. App. 245. Black never went to Bush's bedroom with Complainant. App. 246.

Bush was the trial's last witness. He was sixty-six years old, but nothing was wrong with his hearing. App. 263, 267. He could see fine with his glasses. App. 267. He remembered watching the race with Black and the cable channel that broadcast the race (TNT). App. 264. Bush said Complainant and her two friends came to his trailer. App. 265. Complainant stayed on the couch watching the race with him and Black. App. 270. Black and Complainant never went in any bedroom. App. 270.

The Improper Impeachment

Before the solicitor began his cross-examination of Bush, the trial judge excused the jury to hear argument about impeaching Bush with his prior convictions. App. 271-285. The solicitor stated his intention to impeach Bush with two convictions for manslaughter and a conviction for shooting/throwing a deadly missile. App. 275-77. Defense counsel objected that the convictions were too old. App. 278-79.

The trial judge decided to allow the impeachment. App. 282-85. As part of the basis for his ruling, the court stated that Bush's "testimony here is critical. It's a very important piece of testimony. If his testimony is true, then it means that this crime could not have even happened at all." App. 284. The court added, "That, of course, makes the issues of credibility, his credibility essential." App. 284.

Defense counsel stated he would "have to object to it when the Solicitor gets into it. Obviously, I have no further argument but I will have to object to it." App. 285. When the solicitor asked Bush, "And on or about that date, were you in criminal court in Florida—" and defense counsel objected "as previously stated." App. 289. The trial court overruled the objection. App. 289. The solicitor then asked about both manslaughter convictions and the shooting/throwing a deadly missile conviction, and ended his cross-examination. App. 289-90.

The Appeal

Black was represented by Joseph L. Savitz, III, on appeal. App. 348. The issue Savitz raised was, "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. 344. The brief mentioned the deadly missile conviction, but only argued that admission of the manslaughter convictions were error. App. 346

The Supreme Court granted certiorari to review this Court's unpublished opinion affirming Black's convictions. App. 393. After oral argument, the Supreme Court issued a published Opinion finding that the trial judge erred in allowing impeachment of Bush with the two manslaughter convictions. State v. Black, 400 S.C. 10, 26-27, 732 S.E.2d 880, 889 (2012). The Court found the error harmless because of the unappealed admission of the deadly missile conviction. Id. at 27-31, 732 S.E.2d at 890-91. The Opinion stated, "We find the jury's knowledge of this conviction unquestionably established the fact that Bush was a former convict, and it would have similarly diminished the jury's view of his character." Id.

The Court discussed the other evidence in the State's case and Black's own prior CSC convictions, but in the Conclusion section of the Opinion, made clear that the specific prejudice complained of by the error—the diminishment of Bush's credibility—was harmless because of the admission of the deadly missile conviction which was "now law of the case." Id.

Discussion

The Supreme Court's Opinion does not support the State's contention that had the deadly missile conviction also been appealed, the result would have been the same. The Black opinion noted that the deadly missile conviction "occurred at the same time as the manslaughter convictions and ostensibly arose from the same set of facts." Id. The deadly missile conviction would have been analyzed in an identical fashion to the two manslaughter convictions. Under the same analysis, admission of the deadly missile conviction would also have been error.

If the appeal had been properly raised,² then the primary reason the Court found the error to be harmless would not have existed. The Court would have been able to analyze whether an error affecting Bush's credibility was harmless without the distorting effect of the unappealed deadly missile conviction. Without that distortion, the Supreme Court would have reversed Black's conviction.

In State v. Stukes, 416 S.C. 493, 500, 787 S.E.2d 480, 483 (2016), the Court recognized that errors in criminal sexual conduct cases that are primarily credibility contests are rarely harmless. Stukes at 500, 787 S.E.2d at 483. The defendant in Stukes testified that his sex with the adult complainant was consensual. Id. at 496-97, 787 S.E.2d at 481. The Stukes Court concluded that the error, which bolstered the complainant's credibility, was not "amenable to a harmless error analysis." Id. at 500, 787 S.E.2d at 483. Like in Stukes, Black's testimony here was pitted against the complainant and as then-Judge Few recognized, Bush's testimony was "critical" and his credibility "essential." If the jury believed Bush, then the alleged crime did not happen. Instead, the jury heard that Bush was a violent criminal with two manslaughter convictions and a conviction for throwing a deadly missile.

² The State contends that Savitz did not perform deficiently and had a strategic reason for not raising the deadly missile error. State's Brief at 10. But a closer reading of the State's contention shows that crediting Savitz with a strategic decision only means that the error would still have been objectively harmless. State's Brief at 11. Crediting Savitz with a strategic decision does not make sense for three reasons. First, as the State makes clear on page 9, it is not supported by the record because Savitz testified that he thought that the deadly missile issue was not preserved. Second, because the missile conviction arose from the same set of facts, it would not be reasonable to omit it from the appellate brief because the legal analysis was the same. Finally, as the State's argument reveals, any analysis of ineffective assistance of appellate counsel will always boil down to prejudice—whether appellate counsel failed to raise a winning issue. Current appellate counsel for Black cannot imagine any legitimate scenario in which an appellate lawyer would intentionally omit a winning issue for strategic reasons. Whether appellate counsel is ineffective will almost always be solely a question of law and will not depend on any testimony from appellate counsel.

The State asks this Court to find that the Supreme Court's Opinion decided the harmless error question even if Savitz had presented a proper appeal. State's Brief at 12-14. The State hangs its hat on two observations in the Opinion. First, that Complainant could "describe some of the contents of Bush's bedroom." Black at 30, 732 S.E.2d at 891. This observation is hardly devastating. Complainant and Bush agreed that she had been in Bush's trailer multiple times. App. 111. And the "contents" Complainant described were hardly anything extraordinary: a television, a bed, a table lamp, and a comforter. App. 97. App. 124.

The second is Candie's corroboration of blood in Complainant's underwear. Again, this testimony is not conclusive. The fifteen-year-old Candie said she saw a "little bit of blood" and admitted she had been driving that night on a restricted license with her boyfriend in the car. Candie and Complainant were both two teenagers likely in trouble with their parents. Furthermore, Candie's testimony makes Bush's testimony even more important. Bush's testimony discredits both of them.

This Court must also contend examine whether, in the PCR context, overwhelming evidence of guilt exists that undoes the specific prejudice from appellate counsel's error. See Smalls v. State, 422 S.C. 174, 190-91, 810 S.E.2d 836, 844-45 (2018). Because this case was only about the credibility of Complainant, Candie, Black, and Bush, it is not an overwhelming evidence of guilt case. No confession, DNA evidence, or combination of physical and corroborating evidence exists. Id. The specific error—an error pertaining to credibility—has the specific prejudice needed for reversal in a sexual assault swearing match.

The State challenges Black's credibility because of his prior CSC convictions. It challenges Bush's credibility because of his admission that he had been a heavy drinker, even though Bush testified that he was not drinking on the day of the alleged sexual encounter. App.

268. While these are certainly fair criticisms of the witnesses' credibility, these points must be made to a jury, not an appellate court. Black is entitled to have a jury weigh his and Bush's credibility. See State v. Witherspoon, 418 S.C. 641, 643, 795 S.E.2d 685, 686 (2016) (reversing CSC conviction because of "the centrality of the issue of credibility in this case, and the absence of other overwhelming evidence of petitioner's guilt"); Chappell v. State, 429 S.C. 68, 81, 837 S.E.2d 496, 502 (Ct. App. 2019) (reversing because CSC case "hinged" on credibility).

Pantovich v. State, 427 S.C. 555, 832 S.E.2d 596 (2019) also neutralizes one of the State's arguments—that because the error only pertained to a witness's credibility and not Black's, the error is diminished to the point it is harmless. In Pantovich, the defendant called several character witnesses. Id. The defendant asked for an instruction on "good character," which the trial court refused to give. Id. Appellate counsel (the same attorney as in Black's case) failed to appeal this issue and the Supreme Court reversed in PCR. Id. In Pantovich, the error only affected how the jury assessed the defendant's character witnesses, but this Court found that the error satisfied Strickland prejudice. Id. The Pantovich Court noted that a jury should be entitled to consider such information. Id. at 564, 832 S.E.2d at 601.

Black should also be allowed to have an untainted jury assess Bush's credibility. A close reading of Black's harmless error analysis supports that but for appellate counsel's failure, this case would have been reversed on direct appeal.

CONCLUSION

For the foregoing reasons, the judgment of the PCR Court should be affirmed.



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ATTORNEY FOR
RESPONDENT-PETITIONER

This 31st day of July, 2024.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Pickens County

Honorable R. Scott Sprouse, Circuit Court Judge

JASON ERVIN BLACK,

RESPONDENT-PETITIONER,

V.

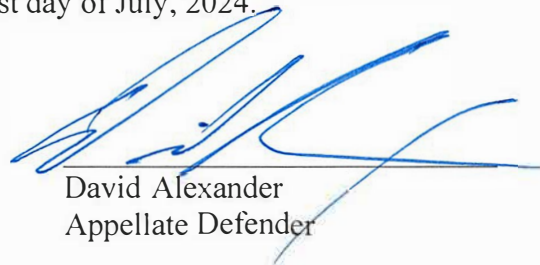
STATE OF SOUTH CAROLINA,

PETITIONER-RESPONDENT.

APPELLATE CASE NO. 2021-000525

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Brief of Respondent on Behalf of Respondent-Petitioner in the above-referenced case has been served upon Melody J. Brown, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Jason Ervin Black, #322628, at 195 Country Club Dr., Pickens, SC 29671, this 31st day of July, 2024.



David Alexander
Appellate Defender

ATTORNEY FOR
RESPONDENT-PETITIONER

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

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

Jason Black, Respondent-Petitioner,

v.

State of South Carolina, Petitioner-Respondent.

Appellate Case No. 2021-000525

Appeal From Pickens County
R. Scott Sprouse, Circuit Court Judge

Unpublished Opinion No. 2025-UP-273
Heard May 27, 2025 – Filed July 30, 2025

REVERSED

Appellate Defender David Alexander, of Columbia, for
Respondent-Petitioner.

Attorney General Alan McCrory Wilson, Deputy
Attorney General Donald J. Zelenka, Senior Assistant
Deputy Attorney General Melody Jane Brown, and
Assistant Attorney General Kaylee Christine Kemp, all
of Columbia, for Petitioner-Respondent.

PER CURIAM: The State appeals the post-conviction relief (PCR) court's order granting relief to Jason Black on the ground of ineffective assistance of appellate

counsel for failing to raise an issue regarding the admission of a defense witness's prior conviction. On cross-appeal, Black argues that, in the alternative, the PCR court erred in finding trial counsel was not ineffective for failing to adequately preserve the issue. We reverse.

Black was charged with criminal sexual conduct (CSC) with a minor and committing a lewd act upon a minor as a result of an incident that occurred between him and a then-fifteen-year-old girl (Victim) at the home of Richard Bush on May 6, 2006.

At trial, Victim testified she began a relationship with Black in the fall of 2005 which continued until the incident; she asserted that Black was twenty-six and she was fifteen—and that Black was aware of her age. Victim testified that on the day of the incident, she left work with her friend Candie around 9:30 p.m., and they eventually made their way to Bush's house, where Black was hanging out, so she could spend time with Black. She stated Candie and Candie's boyfriend, who had ridden to Bush's house with them, only stayed approximately ten minutes before leaving to go to McDonald's. Victim and Black then went into Bush's bedroom where they had sex. Candie returned to pick up Victim approximately thirty minutes later, and Victim went to Candie's house to stay the night. Victim testified that when she got to Candie's house, she noticed blood in her underwear; she told Candie what happened and showed Candie her underwear. Candie also testified and corroborated Victim's version of events. She stated that when she and Victim got back to her house that night, Victim showed her the undergarments with blood in them, and she helped Victim launder them. Candie stated Victim explained what had caused the blood, and she confirmed Victim relayed that the incident took place in Bush's bedroom.

Black and Bush both testified and agreed that Victim and Candie had come to Bush's home that night, but they denied that Black and Victim ever went into the bedroom.¹ Black acknowledged that he had spoken to Tony Robinson, an officer with the Pickens County Sheriff's Office, in early 2006, and Robinson informed him that Victim was fifteen and warned him that his relationship with Victim could "get [him] in trouble." Black, however, repeatedly refused to characterize his involvement with Victim as a "relationship," instead referring to it as

¹ Interestingly, on cross-examination, Bush acknowledged he knew Black had been arrested and the nature of the charges, but asserted "[t]here was nothing [he] could do" to help Black. He never contacted law enforcement to give a statement on Black's behalf prior to trial.

"companionship" and calling Victim a "great friend." Black confirmed he had previously been convicted of CSC with a minor.

During Bush's testimony, the trial court held a bench conference regarding the admissibility of three of Bush's prior convictions; he had been sentenced in Florida in 1987 to twenty-two years in prison for two counts of manslaughter and one count of shooting or throwing a deadly missile. Bush served approximately six years of his sentence and was released on March 1, 1993. The trial court admitted Bush's convictions for impeachment purposes. Bush was Black's only other defense witness.

The jury convicted Black of CSC with a minor and committing a lewd act upon a minor, and the trial court sentenced him to an aggregate sentence of twenty years. This court and the South Carolina supreme court affirmed the convictions. See *State v. Black*, Op. No. 2010-UP-370 (S.C. Ct. App. filed July 19, 2010); *State v. Black*, 400 S.C. 10, 30-31, 732 S.E.2d 880, 891 (2012).

In its opinion, the supreme court found error in the trial court's decision to admit Bush's two manslaughter convictions, but it determined the error was harmless, in part due to Black's failure to raise the admission of the third conviction for throwing a deadly missile. *Black*, 400 S.C. at 30-31, 732 S.E.2d at 891. In conducting its harmless error analysis, the supreme court stated it reviewed the entire record and "consider[ed] the overall strength of the State's case," including that Black'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." *Id.* at 29, 732 S.E.2d at 891 (emphasis omitted). The opinion further detailed the additional evidence against Black, including the fact that he met with law enforcement prior to May 2006 and was warned that Victim was only fifteen years old; Victim was able to describe some of the contents of Bush's bedroom despite Black's and Bush's testimony that she never left the living room; and Candie corroborated Victim's version of events. *Id.* at 29-30; 732 S.E.2d at 891. The supreme court ultimately concluded that "the admission of the additional impeachment evidence"—i.e. Bush's manslaughter convictions—"could not reasonably have affected the jury's result." *Id.* at 30, 732 S.E.2d at 891.

Black then filed an application for post-conviction relief, alleging, among other things, that his appellate counsel was ineffective for failing to raise the admission of the conviction for throwing a deadly missile on appeal. The PCR court granted relief on this ground and denied the State's motion to alter or amend. The State

filed a petition for writ of certiorari, and Black filed a cross-petition, both of which were granted by this court on October 13, 2023.

ISSUES ON APPEAL

State's Appeal

Did the PCR court err in granting post-conviction relief on the basis of ineffective assistance of appellate counsel for appellate counsel's failure to raise the admission of a defense witness's conviction for shooting or throwing a deadly missile when that conviction arose at the same time as two voluntary manslaughter convictions whose admission our supreme court found to be harmless error?

Black's Cross-Appeal

Did the PCR court err 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?

STANDARD OF REVIEW

In PCR matters, the standard of review "depends on the specific issue before us." *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). "We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." *Id.* However, "[w]e review questions of law de novo, with no deference to [PCR] courts." *Id.* at 180-81, 810 S.E.2d at 839.

LAW/ANALYSIS

The State argues the PCR court erroneously found Black was prejudiced by appellate counsel's failure to argue Bush's conviction for throwing a deadly missile was improper impeachment evidence because the supreme court determined on direct appeal that the admission of Bush's other convictions, for manslaughter, was harmless beyond a reasonable doubt. We agree.

"In [PCR] proceedings, the burden of proof is on the applicant to prove the allegations in his application." *Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008). To establish a claim of ineffective assistance of counsel, a PCR applicant must show that counsel was deficient and that counsel's deficiency prejudiced the defendant's case. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To demonstrate deficiency, "the [applicant] must show that counsel's

representation fell below an objective standard of reasonableness." *Id.* at 688. Additionally, an applicant "must prove that he or she was prejudiced by such deficiency to the extent of there being a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Southerland v. State*, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999) (emphasis omitted). However, "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the [applicant] as a result of the alleged deficiencies." *Strickland*, 466 U.S. at 697. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." *Id.*

"Generally, in analyzing a claim of ineffective assistance of appellate counsel, this [c]ourt applies the *Strickland* test just as it would when analyzing a claim of ineffective assistance of trial counsel." *Bennett v. State*, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). "Thus, in this case, we ask 1) whether appellate counsel's performance was deficient, and 2) whether [the applicant] was prejudiced by appellate counsel's deficient performance." *Id.* "To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal." *Anderson v. State*, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

This case turns on the prejudice analysis required by *Strickland's* second prong because that analysis is the same regardless of whether it was trial counsel or appellate counsel who was deficient. See *Hillerby v. State*, 431 S.C. 323, 333, 847 S.E.2d 500, 505 (Ct. App. 2020) ("We do not have to examine both deficiency and prejudice in every case."); *Strickland*, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed."). Initially, we note our concern with the prejudice analysis—or rather, the lack thereof—in the PCR court's order. *Smalls* directs PCR courts, in analyzing prejudice, to "consider the specific impact counsel's error had on the outcome" of the proceeding as well as "the strength of the State's case in light of all the evidence presented to the jury." *Smalls*, 422 S.C. at 188, 810 S.E.2d at 843; see also *id.* ("In general, the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice."). Here, the order states only that the PCR court considered "the record in this matter, particularly the opinion of the [South Carolina] Supreme Court," and found appellate counsel's performance was deficient and Black was prejudiced by the deficiency, without elaboration. This finding conflicts with the supreme court's opinion in the direct appeal; the supreme court ultimately found that although Bush's credibility was "diminished by the admission of the unchallenged

conviction for shooting/throwing a deadly missile, . . . the error could not have reasonably impacted the result in this case[,] because Black'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[,]" "an investigator with the Pickens County Sheriff's Department testified that he had contacted [Black] before the incident alleged here and specifically warned him that [Victim] was only 15 years old[,]" and "[Black] acknowledged this conversation and conceded that he knew having a relationship with a 15-year-old could get him in 'trouble.'" *Black*, 400 S.C. at 29-31, 732 S.E.2d at 891.

Accordingly, we find Black failed to establish prejudice that would entitle him to a new trial because it is unlikely he would have prevailed on appeal even if the issue had been raised. *See Carrier v. State*, 441 S.C. 547, 558, 895 S.E.2d 679, 685 (Ct. App. 2023) ("Prejudice in ineffective-assistance-of-counsel claims is typically analyzed using a harmless error framework."), *cert. denied* (Nov. 14, 2024); *Anderson*, 354 S.C. at 434, 581 S.E.2d at 835 ("To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal."). Any error in the admission of evidence impeaching Bush's credibility does not change the fact that Black's *own* credibility was seriously damaged by his own criminal record, which included at least one prior conviction for CSC with a minor.² Further, we find Black's testimony at trial was evasive and not credible in other ways; specifically, although Black agreed he and Victim were "seeing each other" and he was "going out with [Victim]," he repeatedly refused to characterize his involvement with Victim as a "relationship." Instead, he referred to her—a fifteen-year-old child—as a "great friend" and "companion." Finally, we note that Victim's version of events was corroborated by other witnesses and evidence, particularly Victim's friend, Candie, in whom Victim confided immediately after the incident and who saw Victim's bloodied underwear. *See Thompson v. State*, 423 S.C. 235, 247, 814 S.E.2d 487, 493 (2018) (noting "[t]he PCR court reviewing the trial transcript is in no better position than we are to determine the credibility of trial witnesses or otherwise assess the strength of the State's case"). Therefore, we find the admission of the missile-throwing conviction "could not reasonably have affected the jury's result in this case[,]" and we hold the PCR court erroneously found Black established prejudice from counsel's alleged

² We note the supreme court's opinion refers to two previous CSC convictions. Although there are some references to "charges," in the plural, at trial, the State only questioned Black about one incident, which Black acknowledged. It is unclear to us whether there was one conviction or two which arose out of that incident.

deficiencies such that he was entitled to a new trial. *Black*, 400 at 29-31, 732 S.E.2d at 891; *see also Anderson*, 354 S.C. at 434, 581 S.E.2d at 835 ("To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal.").

As stated above, the prejudice analysis would be the same regardless of which attorney committed the deficiency, if any, in the preservation or presentation of this issue for appeal; therefore, we do not need to reach Black's cross-appeal as our finding that Black was not prejudiced is dispositive. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not address remaining issues when its resolution of a prior issue is dispositive).

CONCLUSION

Accordingly, the decision of the PCR court granting relief is **REVERSED**.

WILLIAMS, C.J., and GEATHERS and TURNER, JJ., concur.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
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SC Court of Appeals

Appeal from Pickens County

Honorable R. Scott Sprouse, Circuit Court Judge

Opinion No. 2025-UP-273
Filed July 30, 2025

JASON ERVIN BLACK,

RESPONDENT-PETITIONER

V.

STATE OF SOUTH CAROLINA,

PETITIONER-RESPONDENT

APPELLATE CASE NO. 2021-000525

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Jason Ervin Black requests that this Court grant rehearing because this Court erred in weighing the credibility of the witnesses. “In a law case tried before a jury, it is the jury that must decide what part of the witness’s testimony it wants to believe and what part it wants to disbelieve. Under such circumstances, it is not the function of this Court to weigh the evidence and determine the credibility of the witnesses.” Small v. Pioneer Mach., Inc., 329 S.C. 448, 465, 494 S.E.2d 835, 843-44 (Ct. App. 1997). This Court mistakenly weighed witness credibility when it determined Black could not prove prejudice.

The Supreme Court's Opinion in the direct appeal found harmless error only after Bush's credibility had been impeached by a prior conviction that was not challenged on appeal. Had the jury not heard any impeachment of Bush, it would have then needed to weigh the credibility of an unimpeached alibi witness and Black against the credibility of complainant and her friend. Errors in criminal sexual conduct cases that are credibility contests rarely can be harmless. State v. Stukes, 416 S.C. 493, 500, 787 S.E.2d 480, 483 (2016).

This Court's decision improperly usurps the jury's vital jury function of assessing credibility. This Court wrote, "Further, we find Black's testimony at trial was evasive and not credible in other ways. . ." and then criticized Black's description of his interactions with complainant. Opinion at 7. The Opinion's finding that Black's credibility was impaired by his prior CSC conviction shows this error. If Black's credibility was impaired by a prior conviction, then so was Bush's. The removal of that improperly admitted impairment of Bush's testimony means that a jury should weigh the competing testimony. Furthermore, in a retrial, the jury would not learn of Black's prior CSC conviction until after it decided whether he committed the crime charged. State v. Cross, 427 S.C. 465, 832 S.E.2d 281 (2019).

The trial judge succinctly stated why counsel's error was prejudicial. When ruling on the impeachment's admissibility, then-Judge Few stated that Bush's "testimony here is critical. It's a very important piece of testimony. If his testimony is true, then it means that this crime could not have even happened at all." App. 284. The trial judge added, "That, of course, makes the issues of credibility, his credibility essential." App. 284.

Because weighing credibility is a function for a jury and not the appellate court, this Court should grant rehearing, affirm the judgment of the PCR court, and allow Black to be retried.

A handwritten signature in black ink, appearing to read 'D. Alexander', written over a horizontal line.

David Alexander
Deputy Chief Attorney for Capital Appeals

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR JASON ERVIN BLACK

This 11th day of August, 2025.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Pickens County

Honorable R. Scott Sprouse, Circuit Court Judge

JASON ERVIN BLACK,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-000525

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-referenced case has been served upon Kaylee C. Kemp, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Jason Ervin Black, #322628, at 118 Left Fork Road, , Pickens, SC 29671, this 11th day of August, 2025.



David Alexander
Deputy Chief Attorney for Capital Appeals

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR JASON ERVIN BLACK

The South Carolina Court of Appeals

Jason Black, Respondent-Petitioner,

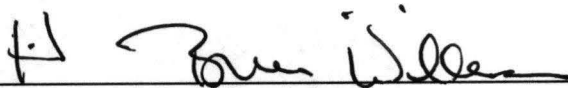
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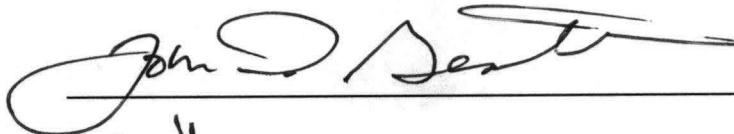
State of South Carolina, Petitioner-Respondent.


Appellate Case No. 2021-000525

ORDER

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


_____ C. J.


_____ J.


_____ J.

Columbia, South Carolina

cc:

David Alexander, Esquire

Melody Jane Brown, Esquire

Alan McCrory Wilson, Esquire

Donald J. Zelenka, Esquire

FILED
Sep 18 2025

Kaylee Christene Kemp, Esquire
The Honorable R. Scott Sprouse