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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ON WRIT OF CERTIORARI TO PICKENS COUNTY
Court of Common Pleas
The Honorable John C. Few, Trial Judge
The Honorable R. Scott Sprouse, Post-Conviction Relief Judge

Appellate Case No. 2021-000525

JASON BLACK

RESPONDENT-PETITIONER,

v.

STATE OF SOUTH CAROLINA,

PETITIONER-RESPONDENT.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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RESPONDENT-PETITIONER'S STATEMENT OF ISSUE ON CERTIORARI

In the event this Court grants the State's petition for certiorari, it should also grant certiorari to consider the question of whether 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 COUNTERSTATEMENT OF ISSUE ON CERTIORARI

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, Black was not prejudiced 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 because Black's credibility was significantly compromised by the fact that he had previously been convicted of criminal sexual conduct with a minor and the totality of the evidence remains unaffected even assuming all three of Bush's prior convictions were erroneously admitted.

STATEMENT OF THE CASE

In March 2007, the Pickens County Grand Jury indicted Black (Petitioner-Respondent) for first-degree criminal sexual conduct (CSC) with a minor (2007-GS-39-0675) and committing a lewd act upon a child¹ (2007-GS-39-0673). (J.A. 556–69). On June 25, 2007, Black proceeded to a jury trial before the Honorable John C. Few, then-circuit court judge. Assistant Public Defender John DeJong represented Black and Assistant Solicitor Peter Them prosecuted the case.

A. Summary of Evidence Adduced at Trial

On May 16, 2006, Victim was a fifteen-year-old girl living in Pickens County with her mother. Black, her boyfriend of approximately six months, was twenty-six years old and a twice-convicted sex offender. (J.A. 82–83, 157–59, 163). Throughout Black’s relationship with Victim, Black had another girlfriend. (J.A. 92). He lived in Liberty, South Carolina with his other girlfriend and their two year-old-son. (J.A. 92, 129). Consequently, Victim never went to Black’s home, but she spoke with him on the phone regularly. (J.A. 84, 93). Victim kept the relationship with Black a secret from her parents because he was eleven years older than her. (J.A. 83, 85–86).

On Saturday, May 10, 2006, Black and Victim had planned to spend the day together. (J.A. 83). 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. (J.A. 85). He then took Victim to a beach near Clemson, where they stayed for three to four

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)

hours. (J.A. 84, 87). 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. (J.A. 87–88). 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. (J.A. 89, 112). After work, the Victim went with her friend Candie to a skating rink. (J.A. 88–89). While at the skating rink, Black called Victim asking her to come to Bush's home. (J.A. 89–90). Shortly after, Victim along with Candie and Candie's boyfriend left the skating rink to meet Black at Bush's home. (J.A. 91).

Bush was a sixty-six year old former convict with an admitted drinking problem. (J.A. 273). Prior to the night in question, Victim had met Bush five or six times. (J.A. 91). She recalled that he always carried a water bottle filled with liquor. (J.A. 91–92). While Candie and her boyfriend entered Bush's home with Victim, they left around ten to fifteen minutes after arriving to go to McDonald's. (J.A. 95). Victim recalls that Candie and her boyfriend were gone for about thirty minutes. (J.A. 95).

After Victim's friends left, Black walked to the trailer bedroom and asked Victim to join him. (J.A. 95–96). After watching television briefly, Victim and Black engaged in sexual intercourse. (J.A. 96–98). Victim explained that throughout the duration of this incident Bush was in the living room watching the television. (J.A. 96). After the incident, Victim and Black returned to the living room with Bush. (J.A. 98). Five minutes later, Candie picked Victim up and they went to Candie's home. (J.A. 98).

Once back at Candie's home, the Victim noticed her underwear was bloody. (J.A. 99). She immediately showered and changed into clean clothes. (J.A. 100). Before deciding to wash her underwear, she discussed the sexual encounter with Candie and showed her the bloody underwear. (J.A. 100). At trial, Candie confirmed the Victim's disclosure and seeing the bloody underwear. (J.A. 139–42). Several days after the sexual encounter, Victim disclosed to her mother what had happened at Bush's the previous Saturday. (J.A. 102–03).

On November 28, 2005, Lieutenant Tony Robinson of the Pickens County Sheriff's Office meet with Black. (J.A. 199-200). In the midst of this discussion, Lieutenant Robinson and Black discussed the age of Victim. (J.A. 200). Specifically, Lieutenant Robinson informed Black that Victim was fifteen years old. (J.A. 201).

Black testified his relationship with Victim was solely platonic and never developed into a sexual relationship. (J.A. 260). Their friendship began between October and November 2005 after they met outside of Victim's neighbor's home. (J.A. 228–29). In the weeks to come, Black and Victim met up several times. (J.A. 229). Despite Lieutenant Robinson's testimony to the contrary, Black stated on direct examination that he believed Victim was seventeen years old. (J.A. 200–01, 229).

In regard to the night in question, Black testified that he went to the mobile home of Mr. Robert Bush to watch the Saturday night NASCAR race at 7:30 p.m. (J.A. 234–36). Approximately two hours later, Bush received a phone call from Victim asking if she could come to his house to speak with Black. (J.A. 241, 261). While Candie and her boyfriend entered Bush's home with Victim, they left around ten to

fifteen minutes after arriving to take her boyfriend home. (J.A. 242–43). According to Black, Candie returned to the home between 11:00 and 11:30 p.m. to pick up Victim (J.A. 243–44). Throughout Victim’s entire visit, Black insisted that he was never alone with the Victim. (J.A. 244). Specifically, Black testified that neither he nor Victim ever left the living room. (J.A. 244).

Black testified on direct examination that he met with Lieutenant Robinson via phone sometime between February and March 2006. (J.A. 246–47). Black recalled a second meeting with Lieutenant Robinson at the jail sometime after he was arrested for the incident in question. (J.A. 244). During these meetings, Black stated that he and Lieutenant Robinson never discussed Black’s sexual relationship with Victim. (J.A. 248). Black confirmed that he was convicted of assault with intent to commit criminal sexual conduct in 1997. (J.A. 248).

Subsequently, on cross-examination, Black revealed that his 1997 conviction involved criminal sexual conduct with a minor. (J.A. 248–49). Despite Lieutenant Robinson’s testimony, Black insist he never met Lieutenant Robinson in person until after he was arrested in 2006. (J.A. 253–54). However, Black admitted that Lieutenant Robinson had informed him, via telephone conversation, months earlier that Victim was fifteen years old. (J.A. 255–56). Black acknowledged based on his prior criminal history, that he knew the legal consequences of engaging in a relationship with a fifteen year old. (J.A. 256–57). Despite this knowledge, Black continued the relationship. (J.A. 256).

On re-direct, Black admitted to meeting Victim two to three times after learning that she was fifteen years old. (J.A. 260). On the night in question, Black claims to have informed Victim that they could no longer see each other. (J.A. 260).

Bush testified on Black's behalf, stating he was at the trailer with Black and Victim on the night in question. (J.A. 265–66). Specifically, Bush testified that Black never went in the bedroom with Victim. (J.A. 269).

Prior to the State's cross-examination, Bush testified *in camera* that he was convicted on two counts of second degree murder in Florida in 1987. (J.A. 271–72). As a result of that conviction, Bush was sentenced to twenty-two years' imprisonment, but was released in 1993. (J.A. 272). The State subsequently clarified that Bush was convicted of two counts of manslaughter, to which he was sentenced to two concurrent sentences of fifteen years' imprisonment. (J.A. 275–76). Bush was also convicted of one count of shooting or throwing a deadly missile, to which he was sentenced to a consecutive sentence of seven years' imprisonment. (J.A. 275–76). The State indicated their intent to use the prior convictions as impeachment evidence. (J.A. 272–73). After hearing argument of counsel, the circuit court ruled the manslaughter convictions were admissible for impeachment purposes because the probative value substantially outweighed the prejudicial effect. (J.A. 280–82).

B. Verdict & Subsequent Proceedings

On June 26, 2007, the jury convicted Black as indicted. (J.A. 333). Then-Judge Few sentenced Black to concurrent terms of twenty years' imprisonment for first-degree CSC with a minor and fifteen years for committing a lewd act upon a minor.

(J.A. 560–61).

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.

(J.A. 341–49)

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) (J.A. 366–67). Black then filed a petition for rehearing, which the Court denied by order dated August 27, 2010. (J.A. 370–71).

On November 3, 2011, this Court granted Black's petition for writ of certiorari. (J.A. 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. (J.A. 394–402). Following oral argument, this 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) (J.A. 420–37). The case was remitted back to the circuit court on October 19, 2012. (J.A. 438).

Black timely commenced the underlying PCR action July 2, 2013. (App. J.A. 439–63). 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. (J.A. 464). The State submitted its return requesting an evidentiary hearing on December 12, 2019. (J.A. 464–78). Black, through PCR counsel, filed an amended application on December 27, 2019, and a second amended application September 7, 2020. (J.A. 479–80, 481–82).

An evidentiary hearing convened on March 4, 2021, before the Honorable R. Scott Sprouse. (J.A. 483–529). Black was present and represented by Don A. Thompson, Esquire. 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. (J.A. 530–39). In response, on April 15, 2021, the State filed a motion to alter, amend, and reconsider pursuant to Rule 59(e). (J.A. 540–54). Judge Sprouse denied the State’s motion by order issued April 16, 2021. (J.A. 555). The State and Black now seek certiorari as described herein.

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 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*, 387 Ill. App. 3d 833, 844, 901 N.E.2d 1023, 1032 (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

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, Black was not prejudiced 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 because Black’s own credibility was significantly compromised by the fact that he had previously been convicted of criminal sexual conduct with a minor and the totality of the evidence remains unaffected even assuming all three of Bush’s prior convictions were erroneously admitted.

On cross-appeal, Black asks this Court to grant certiorari to consider the question of whether 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. The State agrees with Black that the PCR court’s order implicitly found the issue was properly preserved. However, even if trial counsel ultimately failed to properly object to the admissibility of this conviction such that appellate counsel could not have raised it on appeal, Black could not have been prejudiced for the same reasons set forth in the State’s petition for a writ of certiorari.

Had the PCR court properly weighed the strength of the State’s evidence against the specific impact of the admission of the defense witness’s conviction for shooting or throwing a deadly missile was improperly admitted for impeachment purposes, it would have concluded that there is no reasonable likelihood Black would have prevailed on appeal. Specifically, the PCR court failed to consider the “specific impact counsel’s error had on the outcome of the trial” and “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; *Strickland v. Washington*, 466 U.S. 668, 695–96 (1984). Likewise, assuming all three of Bush’s prior convictions were erroneously admitted, the totality of the evidence remains unaffected such that the result of the trial would not have been different. Accordingly, this Court should deny Black’s petition for a writ of certiorari; grant the State’s petition for a writ of certiorari; reverse the post-conviction order granting relief; and reinstate Black’s convictions and sentences.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee all criminal defendants the right to “assistance by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.” *Strickland v. Washington*, 466 U.S. 668, 685 (1984). In post-conviction relief actions, the reviewing court applies the two-part test outlined in *Strickland* to determine whether counsel’s conduct “was so ineffective as to require reversal” of the applicant’s conviction. *Id.* at 687. To obtain relief, a PCR applicant must prove (1) counsel’s performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel’s deficient performance. *Id.* at 687–88; *accord. Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Strickland*, 466 U.S. at 700; *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that “[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the

result of the proceeding unreliable” (citation and internal quotation marks omitted)). Significantly, “the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.” *Strickland*, 466 U.S. at 696.

The applicant has the burden of establishing both deficiency and prejudice in order to be entitled to relief. *Hughes v. State*, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); Rule 71.1(e), SCRPC. To prove deficient performance, the applicant must establish that, in light of all the circumstances, the acts or omissions complained of “fell below an objective standard of reasonableness.” *Strickland*, 466 U.S. at 688. “A court considering a claim of ineffective assistance must apply a ‘strong presumption’ that counsel’s representation was within the ‘wide range’ of reasonable professional assistance.” *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland*, 466 U.S. at 689). With respect to prejudice, the applicant must demonstrate that, “but for counsel’s unprofessional errors,” there is a “reasonable probability” that the “result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. A reasonable probability is a probability “sufficient to undermine confidence in the outcome.” *Id.* The likelihood of that result must be “substantial, not just conceivable.” *Richter*, 562 U.S. at 112.

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. (J.A. 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. (J.A. 508). DeJong testified that the 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. (J.A. 509). 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 (J.A. 509).

Savitz, however, testified at the PCR hearing that it was unclear from this Court's opinion whether it implied that the missile charge was preserved or not preserved. (J.A. 522–23). He nonetheless believed that the manslaughter charges were more clearly preserved than the missile charge, and were significantly more prejudicial. (J.A. 519). He noted that the court heard extensive argument from both sides regarding the admissibility of the manslaughter convictions, and it seemed like a close call. (J.A. 519–20). Savitz further confirmed that this Court's harmless error analysis was based in part on the prejudicial effect of Black's own previous CSC convictions. (J.A. 520–21).

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 issues, it would be an exceedingly rare case in which an

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

⁴ The record supports DeJong's recollection that all three convictions were addressed during the hearing, although both parties were focused mainly on the two manslaughter convictions. (J.A. 275–84). 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. (J.A. 275–76). Assistant Solicitor Them later advised the Court of the sentence Bush received on each of the three convictions. (J.A. 282).

applicant could do so. *See also 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. *Compare State v. Tapp*, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012) (“Error is harmless when it could not reasonably have affected the result of the trial.”), *with Smalls*, 422 S.C. at 188, 810 S.E.2d at 843 (“To satisfy the prejudice prong [under *Strickland*], an applicant must demonstrate “there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different.”).

Indeed, “the prejudice prong of the PCR analysis runs parallel to the harmless error analysis applied in a direct appeal.” *McFadden v. State*, 342 S.C. 637, 641, 539 S.E.2d 391, 393 (2000); *see Vaughn v. State*, 362 S.C. 163, 171 n.3, 607 S.E.2d 72, 76 n.3 (2004) (In deciding the prejudice prong of a PCR action, the PCR court “is to examine the same factors as those analyzed in deciding on direct appeal whether a similar error is harmless beyond a reasonable doubt.”).

“Harmless error review looks to the basis on which the jury actually rested its verdict.” *Lowry v. State*, 376 S.C. 499, 508, 657 S.E.2d 760, 765 (2008) (citing *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)); see *State v. Page*, 378 S.C. 476, 483–84, 663 S.E.2d 357, 360 (Ct. App. 2008) (holding error is harmless where it could not reasonably have affected the trial’s outcome; no definite rule of law governs the finding that an error was harmless; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case; in considering whether error is harmless, a case’s particular facts must be considered along with various factors including: the importance of the witness’ testimony in the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution’s case). Likewise, 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 concluding the admission of Bush's manslaughter convictions were harmless beyond a reasonable doubt under the *Van Arsdall*⁵ factors, this Court stated:

In the current appeal, we believe a review of the entire record indicates the error was harmless under the circumstances. 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

⁵ In *Delaware v. Van Arsdall*, the United States Supreme Court (USSC) instructed appellate courts to consider the following factors in determining whether the erroneous exclusion of evidence of a witness' bias constitutes harmless error: (1) the importance of the witness' testimony in the prosecution's case; (2) whether the testimony was cumulative; (3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points; and (4) the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. 475 U.S. 673, 684 (1986); see *State v. Holmes*, 320 S.C. 259, 265, 464 S.E.2d 334, 337 (1995) (holding the *Van Arsdall* factors apply with equal force in determining a harmless error violation relating to any issue of witness credibility").

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.

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

Essentially, the prejudice prong in this case mirrors this Court's harmless error analysis in that the same factors apply with the exception of the shooting/throwing a deadly missile conviction. Here, assuming all three of Bush's prior convictions were erroneously admitted, the totality of the evidence remains unaffected.

Specifically, Bush's credibility was undermined by several factors unrelated to his prior convictions. Although Bush testified he was sober on the day in question, he admitted he was a "heavy drinker" who had problems with alcohol in the past. (J.A. 268, 274–75). He also testified he and Black were very close, and that he cared for Black "like a brother." (J.A. 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. (J.A. 288–89). Moreover, as this Court noted, Victim was able to describe some of the contents of Bush's bedroom. (J.A. 97, 123, 435).

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 *Van Arsdall*, 475 U.S. at 681). Black simply could not have been prejudiced by Bush’s shooting/throwing a deadly missile conviction in light of Black’s own credibility being “seriously impeached . . . by testimony that he had a criminal record that included two prior offenses for CSC with a minor.” *Black*, 400 S.C. at 29, 732 S.E.2d at 891. Likewise, assuming all three of Bush’s prior convictions were erroneously admitted, the totality of the evidence remains unaffected such that the result of the trial would not have been different.

As Washington’s Court of Appeals aptly noted

The considerations involved in impeaching a witness are different because the ruling is unlikely to influence the defendant’s decision to testify or not testify. Furthermore, there is less risk of prejudice to the defendant when a defense witness is impeached because it is unlikely a jury would infer the defendant’s guilt because a witness has a criminal record.

State v. Harris, 44 Wash. App. 401, 406–07, 722 P.2d 867, 870–71 (1986) (citations omitted); *see 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)⁶ (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.").

⁶ 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)).

CONCLUSION

Based on the foregoing argument, this Court should deny Applicant's petition for a writ of certiorari; grant the State's petition for a writ of certiorari; reverse the post-conviction order granting relief; and reinstate Black's convictions and sentences. Should this Court grant either or both petitions, the State seeks permission to more fully brief the issues discussed above.

Respectfully submitted,

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March 14, 2022

ATTORNEYS FOR
PETITIONER- RESPONDENT