STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Lexington County
Honorable Frank R. Addy, Circuit Court Judge

Opinion No. 6032 (S.C. Ct. App. Filed November 8, 2023)

Lower Court Case No. 2017-GS-32-02097

THE STATE,

RESPONDENT,

V.

RODNEY JEROME FURTICK,

PETITIONER

APPELLATE CASE NO. 2019-001920

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on January 25, 2024.

QUESTION PRESENTED

Whether the Court of Appeals erred where it affirmed the trial court's admission, against Petitioner, of "sanitized" convictions for impeachment (two convictions for second-degree assault and battery referred to as misdemeanors and one conviction for third-degree burglary referred to as a felony), where the convictions should have been excluded under Rule 609(a)(1), SCRE and *Colf*,[1] since the court's approach implicitly determined that it would not exclude evidence of prior convictions under Rule 609(a)(1)?

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

STATEMENT OF THE CASE

On June 5, 2017, a Lexington County Grand Jury indicted Petitioner for criminal sexual conduct in the first degree. Petitioner was also indicted for burglary in the first degree. Petitioner was tried before the Honorable Frank R. Addy, Jr., and a jury, from November 4 – 6, 2019. Petitioner was represented by Elizabeth Fullwood and Robert Madsen. Suzanne Mayes and Rhonda Patterson prosecuted the case. Petitioner was found guilty of the lesser-included offense of criminal sexual conduct in the second degree, and he was found not guilty of burglary in the first degree. The court sentenced Petitioner to twenty years' imprisonment.[2]

On November 13, 2019, Petitioner served his notice of appeal. On December 6, 2022, a three-judge panel of the Court of Appeals heard oral argument. The Court of Appeals affirmed in a published opinion, *State v. Furtick*, Op. No. 6032 (S.C. Ct. App. Filed November 8, 2023) (Howard Adv. Sh. No. 44 at 12). Petitioner moved for rehearing. The Court of Appeals denied rehearing.[3] This petition for writ of certiorari follows.

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[2] R. 515; R. 151, ll. 5-8; R. 1; R. 14; R. 503, ll. 6-14; R. 513, ll. 8-10; R. 517.

[3] App. 65 – 78; App. 79 – 83; App. 84.

REASONS WHY CERTIORARI SHOULD BE GRANTED

This case presents the novel question of whether the trial court may permissibly "sanitize" a witness's prior convictions by limiting reference to them to generic "felony" or "misdemeanor" convictions so they may be used to attack the witness's credibility pursuant to Rule 609(a)(1), SCRE. Rule 609 requires the trial court to draw a line between admissible impeachment material and inadmissible propensity evidence. "Sanitizing" convictions erases that line. This Court has not addressed the propriety of "sanitization," although it has mentioned the matter as dicta in a footnote. *See Green v. State*, 338 S.C. 428, 433 n. 5, 527 S.E.2d 98, 101 n. 5 (2000) ("One tactic the Fourth Circuit Court of Appeals employs is to allow the prosecutor to ask the defendant about the existence of prior convictions, but not their nature."). The Court should grant certiorari because this case presents a novel question of law. *See* Rule 242(b)(1), SCACR.

Additionally, the decision of the Court of Appeals is in conflict with a prior decision of this Court: *State v. Colf*, 337 S.C. 622, 525 S.E.2d 246 (2000). In *Colf*, this Court "adopted the five-factor analysis employed by federal courts when weighing the probative value of prior convictions against the prejudicial effect to the accused." *State v. Robinson*, 426 S.C. 579, 594, 828 S.E.2d 203, 211 (2019) (citing *Colf*, 337 S.C. at 627, 525 S.E.2d at 248). In this case, the Court of Appeals has sanctioned a procedure that essentially did away with the five-factor *Colf* analysis since all sanitized crimes now have the same impeachment value to the jury under the first *Colf* factor (impeachment value), and since the third *Colf* factor (similarity of the crimes) no longer applies because the similarity has been removed. The decision of the Court of Appeals is therefore in conflict with a prior decision of this Court. *See* Rule 242(b)(3), SCACR. This Court should remedy these errors by granting certiorari. Rule 242(b), SCACR.

ARGUMENT

I.

The Court of Appeals erred where it affirmed the trial court's admission, against Petitioner, of "sanitized" convictions for impeachment (two convictions for second-degree assault and battery referred to as misdemeanors and one conviction for third-degree burglary referred to as a felony), where the convictions should have been excluded under Rule 609(a)(1), SCRE and *Colf*,[4] since the court's approach implicitly determined that it would not exclude evidence of prior convictions under Rule 609(a)(1).

A. Introduction

"Sanitizing" Petitioner's prior convictions was an improper substitute for admission or exclusion under Rule 609 and *Colf*. Rule 609(a)(1), SCRE provides that for the purpose of attacking the credibility of a witness, "if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted . . . evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused." In *Colf*, this Court explained the following factors are to be considered when weighing the probative value of prior convictions against the prejudicial effect to the accused: "1) The impeachment value of the prior crime. 2) The point in time of the conviction and the witness's subsequent history. 3) The similarity between the past crime and the charged crime. 4) The importance of the defendant's testimony. 5) The centrality of the credibility issue." *State v. Robinson*, 426 S.C. 579, 594, 828 S.E.2d 203, 211 (2019) (citing *Colf*, 337 S.C. at 627, 525 S.E.2d at 248).

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

In this case, Petitioner's convictions fell under Rule 609(a)(1), but the trial court determined they should be "sanitized" so that their admission was not precluded by the *Colf* factors. By adopting this approach, the trial court implicitly determined that it would not exclude convictions under Rule 609(a)(1). The court should have completed the admissibility analysis pursuant to Rule 609(a)(1) and *Colf*, and excluded the convictions. Instead, the trial court circumvented the evidence rules. Insofar as the prior convictions were arguably probative of credibility, admitting them in "sanitized" form stripped them of probative value. *See United States v. Estrada*, 430 F.3d 606, 616 (2d Cir. 2005) (different felonies bear on credibility to different degrees).

This approach simply informed the jury Petitioner was a criminal. *See, e.g.*, *People v. Garth*, 287 N.W.2d 216, 219 (Mich. Ct. App. 1979) (Without knowing the nature of the felony, a jury has no probative evidence to consider, "merely an amorphous suggestion that defendant's past is blameworthy."). It encouraged the jury to speculate that the convictions must be for crimes so wicked the jury was not permitted to learn their names, even though they heard that Petitioner had been convicted of other specific crimes—larcenies. *See* ROGER PARK & TOM LININGER, THE NEW WIGMORE. A TREATISE ON EVIDENCE: IMPEACHMENT AND REHABILITATION § 3.4 (1st ed. Cum. Supp. 2020) ("'Sanitizing' the conviction can backfire, because the jury's imagination may furnish worse crimes than those that are being concealed."). The Court of Appeals' decision approved this improper tactic.

The Court of Appeals also incorrectly found the error harmless. The jury deliberated for three-and-a-half hours, it acquitted Petitioner of first-degree burglary, and it convicted him of second-degree criminal sexual conduct rather than first-degree. As the trial judge observed, the case boiled down to a "swearing contest." R. 380, ll. 6-7. *See State v. Bryant*, 369 S.C. 511, 518,

633 S.E.2d 152, 156 (2006) (erroneous admission of prior convictions in self-defense case was not harmless; it could reasonably have affected the result of the trial).

B. Relevant facts

J.H. (Complainant), who was from Wisconsin, moved to Cayce with her husband and one-year-old child in August of 2015. Complainant had no car, she had limited access to a telephone, and she had been medicated for depression for many years. Complainant was soon-to-be both evicted and divorced. As defense counsel argued: "She was unhappy in [her] marriage."[5]

Petitioner was friendly with Complainant's husband and came over regularly. It was undisputed Petitioner had spent the night at Complainant's home at least once. Petitioner would testify at his trial that on November 18, 2015, he had consensual sex with Complainant. Petitioner also said he and Complainant had consensual sex on a prior occasion in October. In contrast, Complainant denied she ever had consensual sex with Petitioner and she claimed that he pushed his way into her home and raped her on the evening of November 18, 2015. According to Complainant, she did not try to resist the rape because Petitioner threatened to hurt her child if she did so.[6]

Complainant reported the alleged rape to her neighbor and the neighbor called 911. Complainant was taken to the hospital, and she was given a sexual assault examination. She provided police officers with Petitioner's description and first name. When officers questioned Petitioner, he denied knowing Complainant and her husband, and he said there was no reason his

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[5] R. 167, l. 1 – 168, l. 23; R. 169, ll. 14-17; R. 171, ll. 21-22; R. 195, ll. 18-24; R. 167, ll. 12-19; R. 198, ll. 4-25; R. 473, ll. 20-21.

[6] R. 195, l. 25 – 196, l. 2; R. 326, l. 17 – 327, l. 2; R. 170, ll. 15-17; R. 408, l. 9 – 412, l. 24; R. 391, l. 21 – 398, l. 19; R. 174, l. 4 – 182, l. 18; R. 194, l. 13 – 195, l. 12; R. 179, l. 18 – 182, l. 25.

DNA would be at their home. However, DNA analysis confirmed that Petitioner and Complainant had sex. According to SLED, DNA found in semen collected during Complainant's sexual assault examination matched Petitioner's DNA.[7]

Petitioner's trial took place in 2019. Prior to Petitioner's testimony, the solicitor moved to impeach Petitioner with prior convictions: (1) third-degree burglary from 2010; (2) petit larceny from 2012; (3) second-degree assault and battery from 2012; (4) second-degree assault and battery from 2012; and (5) property offense, third or greater from 2015. The court noted that the petit larceny and the property offense were crimes involving dishonesty and defense counsel agreed. The parties agreed to refer to the property offense, third or greater as a petit larceny.[8]

However, defense counsel objected to the admissibility of Petitioner's third-degree burglary and second-degree assault and battery convictions and asked the court to "keep [those convictions] out under Rule 609(a)(1)." Defense counsel argued the burglary and assault convictions were "very similar in nature" to the crimes for which Petitioner was on trial.[9]

The court noted that burglary was not probative of truthfulness, prior similar convictions were problematic, and that this was a "swearing contest," which increased probative value. As to Petitioner's conviction for burglary in the third degree, the court decided that the solicitor could not "specifically say a burglary," but could refer to the conviction as a "felony that carries more than one year." The court stated its decision was because "the issue of credibility is quite important in this case" but that since Petitioner was standing trial for burglary, the offense was of

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[7] R. 210, l. 12 – 212, l. 2; R. 217, ll. 6-8; R. 261, l. 13 – 280, l. 4; R. 292, l. 2 – 293, l. 1; R. 307, l. 24 – 312, l. 25; R. 313, l. 7 – 314, l. 19; R. 367, l. 1 – 368, l. 13; R. 367 l. 1 – 368, l. 11.

[8] R. 376, ll. 5-14; R. 376, l. 15 – 377, l. 6.

[9] R. 377, ll. 10-20.

too "similar [a] nature." As to Petitioner's convictions for assault and battery in the second degree, the court found they were "fair game." "[T]hey're not so similar as to warrant exclusion" and "since it is a swearing contest . . . that makes the use of those convictions all the more valuable to the State."[10]

Defense counsel initially responded to the ruling by asking the convictions be referred to as misdemeanors but quickly changed course and asked the court to exclude the assault and battery convictions since they were not probative of credibility. Defense counsel argued that assault "doesn't have anything to do with truthfulness." Defense counsel pointed out that prior convictions may not be admitted to show "habit." "It's just for the truthfulness, the ability to impeach his current testimony, and we don't think under 403 that the assault . . . there's just no way that those are more probative than prejudicial."[11]

The solicitor argued the convictions should be admitted because: "They're simply allowed under the rule because they carry more than a year." Although the solicitor offered no facts or circumstances about the assault and battery convictions or about the burglary conviction, she would later say, during sentencing, that Petitioner's convictions for second-degree assault and battery "were pled down from criminal sexual conduct with a minor second degree."[12]

The court broke for the evening, and when the parties reconvened, the court advised that as to the second-degree assault and battery convictions,

> I've looked at the five factors, I've considered it. Doing a 403 balancing analysis, I think that the **impeachment value mostly**

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[10] R. 378, ll. 7-16; R. 382, l. 16 – 383, l. 4; R. 380, ll. 6-7; R. 379, ll. 4-19; R. 378, l. 25 – 379, l. 6; R. 380, ll. 3-10.

[11] R. 380, l. 11 – 381, l. 23; R. 381, ll. 16-17; R. 381, ll. 17-19; R. 381, ll. 19-23.

[12] R. 381, l. 24 – 382, l. 2; R. 378, ll. 7-11; R. 508, ll. 11-15.

> **outweighs but I cannot say substantially outweighs the danger of unfair prejudice**[13] and the key to . . . my reasoning is that by allowing the jury to hear that he was convicted of **assault and battery in the second degree is tantamount to basically suggesting improperly to the jury that the Defendant has a propensity towards violence, a propensity to assault people, and, of course, sexual assault is one of the charges that he's facing.**
>
> So I'll ask the State to simply limit your inquiry of the [d]efendant as it relates to that conviction; that he was convicted in 2012 of two misdemeanor offenses that carry more than a year in prison . . .
>
> . . . .
>
> [T]he way that I would allow the State to go into this, and it's how it's done in other parts . . . of the state **in order to sanitize the conviction**, but **the burglary third from 2010 I will allow the State to characterize that as a felony punishable by greater than a year**, a petit larceny from 2012. **The 2012 assault convictions may be referred to as two counts—two misdemeanors carrying more than a year**, and then the 2015 larceny. So that's how that can be elicited.[14]

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[13] This ruling was a misapplication of Rule 609. When analyzing whether the conviction of a defendant should be admitted under Rule 609(a)(1), the court must consider whether "the *probative* value of admitting this evidence outweighs its prejudicial effect to the accused," not whether the *impeachment* value outweighs prejudicial effect. Rule 609(a)(1), SCRE (emphasis added). Moreover, because the witness is the accused, the test is whether the probative value of the conviction *outweighs* its prejudicial effect, not whether the probative value *substantially outweighs* the danger of unfair prejudice. The Court of Appeals recognized the circuit court "used a different balancing test," but found the "use of a balancing test requiring the impeachment value to *substantially* outweigh the danger of unfair prejudice actually inured to Furtick's benefit." *State v. Furtick*, Op. No. 6032 at 13; App. 77 (emphasis in original). However, nothing inured to Petitioner's benefit since the judge let in the convictions. The Court of Appeals did not address Petitioner's argument that while impeachment value is a component of probative value, impeachment value is merely one factor to be considered pursuant to *Colf*, while the weighing of probative value versus prejudicial effect must account for all five of the *Colf* factors (i.e., the trial court said *impeachment* value outweighs rather than *probative* value outweighs). Perhaps this is just a matter of semantics, but Petitioner thinks not. The trial court also said, "*mostly* outweighs." R. 385, ll. 20-23. *Mostly* is less than completely. It is less than outweighs or substantially outweighs. The bottom line is the trial court applied the wrong test. It also failed to articulate why the prior convictions were probative of credibility. Whether the prior convictions were probative of credibility will be discussed *infra*.

[14] R. 385, l. 19 – 387, l. 14 (emphasis added).

Defense counsel objected to the "sanitization" of the offenses.

> **[O]ur objection at the end for the burglary and the assault and battery . . . the word 'sanitize," our position would be if the rules don't allow it, if you can't fit a square box into a round hole, then why should we sand off the corners of the square box and now push it through the hole**? I didn't see anything where that was addressed in any of our caselaw and so our position would be **if the rules don't allow it, then it just shouldn't come in, it shouldn't be, quote unquote, sanitized**. In other words, hey, let's do the State a solid and even though it doesn't comply to the rules, let's let them do something that the rules don't necessarily allow them to do . . .[15]

Defense counsel reiterated that per the reasoning in *Bryant*, *supra*, the offenses "are just not probative of truthfulness, and so that is ultimately our objection . . ." Defense counsel clarified that although the defense would bring out Petitioner's prior convictions in the manner specified by the court during Petitioner's direct testimony to lessen the impact, "we certainly want to preserve our objections with that . . ."[16]

The court ruled,

> My—my opinion is that the prejudice flows from the similar nature of the crime, so calling something a burglary when you're on trial for burglary or calling something a rape when you're on trial for rape is what creates the prejudice if they have that prior conviction for that similar type of offense and **the prejudice is substantially lessened if you're simply allowed to inquire as to a nameless felony or a nameless misdemeanor**, and so that's the reasoning that this court is employing it and I think other judges has employed routinely.[17]

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[15] R. 387, l. 16 – 388, l. 7 (emphasis added).

[16] R. 388, ll. 12-15; R. 386, l. 19 – 387, l. 4.

[17] R. 388, l. 21 – 389, l. 7 (emphasis added).

When Petitioner testified, defense counsel brought out Petitioner's prior convictions during direct examination in accordance with the court's ruling. The solicitor brought the sanitized convictions out again during her cross examination of Petitioner. After closing arguments, the court gave a limiting instruction to the jury that evidence of Petitioner's prior convictions could be considered for credibility but not as proof of guilt. The jury deliberated for three-and-a-half hours, and it ultimately acquitted Petitioner of burglary in the first degree. It also acquitted Petitioner of criminal sexual conduct in the first degree but found him guilty of criminal sexual conduct in the second degree. The court sentenced Petitioner to twenty years in prison.[18]

C. Discussion

1. It was error to "sanitize" the convictions in order to achieve admissibility.

The Court of Appeals incorrectly concluded that "the circuit court's sanitization approach was appropriate[.]" *State v. Furtick*, Op. No. 6032 at 13; App. 77. Sanitizing the convictions was not a substitute for the requisite balancing process and it rendered the convictions improper propensity evidence. All felonies and misdemeanors are not equally probative of credibility, and this approach left the convictions indistinguishable from all conceivable crimes, and left the jury to speculate about what was being covered up. The trial court created a boogeyman.

"Sometimes courts will 'sanitize' a conviction by requiring that the impeaching party ask about the 'mere fact' of a felony conviction, without naming the crime. However, this practice is not generally followed, and has been specifically disapproved by some courts." ROGER C. PARK AND AVIVA ORENSTEIN, TRIAL OBJECTIONS HANDBOOK 2d § 7:12 (Sept. 2019 update). "[C]oncealment by 'sanitizing' is blatant and visible to the jury . . . It may cause jurors to wonder

[18] R. 391, ll. 1-10; R. 419, l. 24 – 420, l. 18; R. 492, l. 20 – 493, l. 2; R. 501, l. 19 – 503, l. 10; R. 503, ll. 11-14; R. 513, ll. 8-10.

what else is being concealed, and to base decisions on speculation about what is being kept from them." ROGER PARK & TOM LININGER, THE NEW WIGMORE. A TREATISE ON EVIDENCE: IMPEACHMENT AND REHABILITATION § 3.4 (1st ed. Cum. Supp. 2020). "In the case law, one can find statements suggesting that the practice of sanitizing convictions is routine countered by statements from other courts asserting that it is unprecedented and unwise." *Id.* "In sum, the case law indicates that ordinarily the trial judge should admit the name of the crime as well as the fact of conviction. If the nature of the crime makes the conviction prejudicial, ordinarily the trial judge should prevent the prejudice by excluding the conviction instead of admitting it in denatured form." *Id.*

This Court has not directly addressed the issue of whether a conviction that would be otherwise inadmissible under Rule 609 may be "sanitized" and admitted against the defendant over his objection. In this case, the Court of Appeals reasoned that "our appellate courts have seemingly approved the sanitization of prior convictions in cases addressing Rule 609." *State v. Furtick*, Op. No. 6032 at 10; App. 74. The Court of Appeals cited one Fourth Circuit case, *United States v. Boyce*, 611 F.2d 530 (4th Cir. 1979), and three South Carolina cases for that proposition: *Green v. State*, 338 S.C. 428, 527 S.E.2d 98 (2000); *State v. Elmore*, 368 S.C. 230, 628 S.E.2d 271 (Ct. App. 2006); and *State v. Rollins*, 348 S.C 649, 560 S.E.2d 450 (Ct. App. 2002).

In *State v. Elmore*, 368 S.C. at 239, 628 S.E.2d at 276, the Court of Appeals suggested sanitization under some circumstances was "permissible" in dicta. Elmore appealed a ruling that his prior convictions could be used for impeachment, but he never actually testified at his trial—the Court of Appeals found the issue unpreserved. *Id.* at 237-38, 628 S.E.2d at 274-75. The Court then stated in a footnote,

> **One permissible approach**, advocated by the United States Fourth Circuit Court of Appeals, is to **allow the prosecutor to ask the witness about the existence of a prior similar conviction under Rule 609(a)(1) without disclosing to the jury the nature of the prior offense**. *See United States v. Boyce,* 611 F.2d 530, 531 n. 1 (4th Cir. 1979). The *Boyce* approach was approvingly referenced by our supreme court in *Green v. State,* 338 S.C. 428, 433 n. 5, 527 S.E.2d 98, 101 n. 5 (2000). The *Boyce* approach still requires a meaningful balancing of the probative value and prejudicial effect before admission of the prior conviction, although the prejudice occasioned by the similarity of the prior crime to the crime charged is removed.

Id. at 239 n. 5, 628 S.E.2d at 276 n. 5 (emphasis added).

A close reading of *Boyce*, however, supports Petitioner's position. "In proving the felony conviction on cross-examination, the United States Attorney may ask about the *name of the crime*, the time and place of conviction, and the punishment." *United States v. Boyce*, 611 F.2d at 530 (emphasis added) (cleaned up). "It follows that there was no plain error in permitting the United States Attorney to inquire about the number and nature of defendant's felony convictions, particularly since the defendant himself had already testified that he had been convicted of a felony and there was no objection at trial[.]" *Id.* at 530–31. The Fourth Circuit then added as dicta, "In the special case, where the prior conviction is for the same offense as that for which the defendant is being tried, the trial court generally will not permit the Government to prove the nature of the offense on the ground that to do so would amount to unfair prejudice. This, however, is not such a case." *Id.* at 531 n. 1. Similarly, *Green v. State*, 338 S.C. 428, 527 S.E.2d 98, only referenced sanitization in dicta. The defendant in *Green* was impeached with convictions for possession of cocaine and crack cocaine. The issue was whether his counsel was ineffective for failing to argue the crimes were inadmissible under Rule 609. *Id.* at 431, 527 S.E.2d at 100. Before finding deficiency and prejudice, this Court stated in a footnote: "One tactic the Fourth Circuit Court of Appeals employs is to allow the prosecutor to ask the defendant

about the existence of prior convictions, but not their nature." *Green*, 338 S.C. at 433 n. 5, 527 S.E.2d at 101 n. 5. However, the propriety of "sanitization" was not before the Court.[19]

In *State v. Rollins*, 348 S.C. 649, 651, 560 S.E.2d 450, 451 (Ct. App. 2002), the Court of Appeals, again as in *Elmore*, cited to the same dicta in *Green*. In *Rollins*, the Court of Appeals addressed whether the trial court's decision to permit Rollins to be impeached with the fact that he had "prior convictions from 1992, 1993, and 1997," violated Rule 609, SCRE, and allowed the jury to speculate, and whether the vague reference resulted in prejudice outweighing any probative value. "One tactic the Fourth Circuit Court of Appeals employs is to allow the prosecutor to ask the defendant about the existence of prior convictions, but not their nature." *State v. Rollins*, 348 S.C. at 652, 560 S.E.2d at 452 (citing *Green*, 338 S.C. at 433 n. 5, 527 S.E.2d at 101 n. 5; *Boyce*, 611 F.2d 531 n. 1). "This approach ostensibly reduces the risk of enhanced prejudice based on the similarity of prior crimes." *Rollins*, 348 S.C. at 652, 560 S.E.2d at 452. The Court of Appeals affirmed the trial court: "the trial judge reviewed Rollins' history of convictions and adopted the tactic mentioned in the *Green* footnote." *Id.* at 653, 560 S.E.2d at 452. Certiorari to the Court of Appeals was not sought in *Rollins*.

Federal cases may be persuasive in determining issues that arise under Rule 609 since our rule is identical to the federal rule. *Colf*, 337 S.C. at 626, 525 S.E.2d at 248. In *United States v. Estrada*, 430 F.3d 606, 615 (2d Cir. 2005), Justice Sotomayor, who was then writing for the Second Circuit Court of Appeals, analyzed "whether Rule 609(a)(1) requires district courts to admit evidence of the statutory names of a witness's offenses of conviction by looking at the language and structure of the rule." In *Estrada*, the district court refused to allow defense counsel

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[19] *See also State v. Robinson*, 426 S.C. at 597, 828 S.E.2d at 212 (defendant's 2009 second-degree burglary conviction was "sanitized" when the trial court allowed the State to elicit testimony that Robinson had a prior felony conviction carrying more than one year in prison, but this introduction was not an issue in the appeal).

to impeach three government witnesses with their actual convictions, and instead limited cross-examination to "the fact of an unnamed felony conviction." *Id.* at 609. The Second Circuit explained that pursuant to Fed. R. Evid. 609(a)(1), "inquiry into the 'essential facts' of the conviction, including the nature or statutory name of each offense, its date, and the sentence imposed is presumptively required by the Rule, subject to balancing under Rule 403." *Id.* at 616. "This interpretation of Rule 609 is consistent with both the Rule's structure and the insight that different felonies, even those that do not constitute *crimen falsi*, bear on credibility to varying degrees." All Rule 609(a)(1) felonies are not "equally probative" of credibility. *Id.* at 616-17.

"District courts must thus undertake an individualized balancing analysis under Rule 609(a)(1) before excluding evidence of the statutory name of a witness's crime. Applying a generalized heuristic is simply improper." *Id.* at 616.

> By permitting to go before the jury only evidence of an aseptic, unnamed "felony" conviction for Rule 609(a)(1) crimes of which government witnesses had been convicted, the district court acknowledged the generic probative value of felony convictions. By interpreting the Rule to require nothing more, however, the district court failed to undertake the balancing prescribed by the Rule, which requires assessment of the probative value of a particular conviction on a witness's propensity for truthfulness in light of the risk of prejudice, confusion, and delay. Rather, **the district court short-circuited the balancing prescribed by the Rule, determining first whether a crime fell under Rule 609(a)(1) or (a)(2) and, if the former, foreclosing the typical Rule 403 analysis by admitting evidence only of an unnamed felony.**
>
> Equally important, the district court's approach **implicitly determined that it would not exclude evidence of prior felony convictions under Rule 609(a)(1). While the district court indicated that the fact of a witness's felony convictions was admissible under Rule 609(a)(1) "unless there is a 403 balancing problem," it obviated the need for such balancing by scrubbing the convictions of any factors that would be relevant to a Rule 403 analysis.**

United States v. Estrada, 430 F.3d at 620. "What is crucial is that the district court perform the Rule 403 analysis with respect to the essential facts of conviction and admit or exclude the evidence, rather than merely determining whether a crime falls under Rule 609(a)(1) or 609(a)(2) before applying a general rule as a matter of policy." *Id.* at 621.

Many courts have explained that the nature of a felony is a critical component of its probative value. "The implicit assumption of Rule 609 is that prior felony convictions have probative value. Their probative value, however, necessarily varies with their nature and number." *United States v. Burston*, 159 F.3d 1328, 1335 (11th Cir. 1998). "Evidence of a murder conviction says something far different about a witness' credibility than evidence of a conviction for a minor drug offense, although both may constitute a prior felony conviction." *Id.* Ordinarily, impeachment of the defendant with prior convictions "should be confined to a showing of the essential facts of convictions, the nature of the crimes, and the punishment." *United States v. Wolf*, 561 F.2d 1376, 1381 (10th Cir. 1977). *See United States v. Gordon*, 780 F.2d 1165, 1176 (5th Cir. 1986) (impeachment pursuant to Rule 609 "is limited to the number of convictions, the nature of the crimes and the dates and times of the convictions"); *People v. Garth*, 287 N.W.2d at 219 ("Without knowledge of the nature of the felony, the trier of fact has no probative evidence to consider, merely an amorphous suggestion that defendant's past is blameworthy."); *Bells v. State*, 759 A.2d 1149, 1154 (Md. Ct. Spec. App. 2000) ("A sanitized prior conviction is not merely 'ill-defined,' but totally undefined. A jury would be completely unable to assess what, if any, impact a 'prior felony conviction' has upon a witness's veracity."); *State v. Taylor*, 993 S.W.2d 33, 35 (Tenn. 1999) ("Identifying the nature of the prior conviction avoids confusion and speculation on the part of the jury and permits the jury to properly evaluate the conviction's probative value on the issue of credibility."); *State v. Hardy*, 946 P.2d 1175, 1181 (Wash. 1997)

(internal citations and quotations omitted) ("unnaming a felony is not a substitute for the balancing process required under ER 609(a)(1) . . . it is generally the nature of the prior felony which renders it probative of veracity"); *State v. Crawford*, 206 P. 717, 719 (Utah 1922) ("[J]urors are entitled to know of what particular felony a witness has been convicted . . . Some convictions on felony charges affect the credibility of witnesses much more than others.").

South Carolina caselaw is in agreement that the nature of the crime is critical to whether and how a conviction is probative of credibility. "Under the Rule, the pivotal issue of the probative value of a conviction turns largely on a consideration of the nature of the conviction itself." *State v. Black*, 400 S.C. 10, 22, 732 S.E.2d 880, 887 (2012) (citing *United States v. Cavender*, 578 F.2d 528, 534 (4th Cir. 1978)). "This follows because the purpose of impeachment is not to show that the witness who takes the stand is a 'bad' person but rather to show background facts which bear directly on whether jurors ought to believe him. Accordingly, in general it is a conviction which bears on whether jurors ought to believe the witness or party that qualifies for impeachment purposes." *Black*, 400 S.C. at 22, 732 S.E.2d at 887 (cleaned up).

All felonies and misdemeanors are not equally probative of credibility. The trial court's approach left the jury without critical information to use to assess credibility; they simply knew Petitioner was a convict. The jury was left to speculate about what type of convict. The "sanitization" was improper, since it stood in for a full application of Rule 609 and *Colf*. Like *Estrada*, the trial court's "approach implicitly determined that it would not exclude evidence of prior felony convictions under Rule 609(a)(1)," since it ruled that although the potential for prejudice was great, the problem under Rule 609 and *Colf* could be warded off with a generic substitution. This was error. *See Black*, 400 S.C. at 22, 732 S.E.2d at 887; *Estrada*, 430 F.3d at 620; *Colf*, 337 S.C. at 627, 525 S.E.2d at 248; Rule 609(a)(1), SCRE.

2. Rule 609 and *Colf* provided the framework to determine admissibility and required exclusion.

Petitioner's prior convictions for third-degree burglary and second-degree assault and battery would have been excluded if the trial court completed the correct analysis. The trial court instead improperly "sanitized" the convictions. It also applied the wrong test, as seen on page 9, above. "[U]nder Rule 609(a)(1), when the accused chooses to testify during his trial, if the State seeks to introduce impeachment evidence that the accused has been convicted of a crime punishable by imprisonment for more than one year, the evidence is admissible if the State establishes the probative value of admitting the evidence outweighs its prejudicial effect upon the accused." *State v. Robinson*, 426 S.C. at 593, 828 S.E.2d at 210.

The current state of the law does not mandate the trial court make on-the-record specific findings as long as record reveals trial judge did engage in a meaningful balancing of probative value and prejudicial effect before admitting a prior conviction under 609(a)(1). *State v. Elmore*, 368 S.C. at 238–39, 628 S.E.2d at 275. "[W]hen balancing the probative value of a prior conviction under Rule 609(a)(1) against the prejudicial effect, meaningful appellate review is best achieved when the trial court articulates its ruling and the basis for it." *Id.* at 239, 628 S.E.2d at 275 (cleaned up). "An on-the-record balancing test is particularly important for prior similar convictions under Rule 609(a)(1) because the similarity of a prior crime to the crime charged heightens the prejudicial value of the crime." *State v. Howard*, 384 S.C. 212, 221, 682 S.E.2d 42, 47 (Ct. App. 2009) (internal alterations and quotations omitted) (citing *Elmore*, *supra*).

When weighing the probative value of prior convictions against the prejudicial effect to the accused under Rule 609, SCRE, the court should consider: "1) The impeachment value of the prior crime. 2) The point in time of the conviction and the witness's subsequent history. 3) The similarity between the past crime and the charged crime. 4) The importance of the defendant's

testimony. 5) The centrality of the credibility issue." These factors are not exclusive. *Robinson*, 426 S.C. at 594, 828 S.E.2d at 211 (citing *Colf*, 337 S.C. at 627, 525 S.E.2d at 248). The burden of establishing admissibility is upon the State, the proponent of the evidence." *State v. Howard*, 396 S.C. 173, 180, 720 S.E.2d 511, 515 (Ct. App. 2011).

"In any given case involving the same indicted charges, two different trial courts could examine the same prior conviction(s), evaluate the same five *Colf* factors, and perhaps reach opposite conclusions as to the admissibility of the prior convictions." *State v. Robinson*, 426 S.C. at 607, 828 S.E.2d at 217. "In such an instance, it is conceivable that under our standard of review, both trial courts would be affirmed. This is the nature of our standard of review in Rule 609(a)(1) cases when a trial court weighs the probative value of a prior conviction against its prejudicial effect." *Id.*

The first factor the trial court must consider when weighing prejudice and probative value is the extent to which the prior crimes have impeachment value. "Impeachment value refers to how strongly the nature of the conviction bears on the veracity, or credibility of the witness." *State v. Black*, 400 S.C. at 21-22, 732 S.E.2d at 887. "[A] conviction for robbery, burglary, theft, and drug possession, beyond the basic crime itself, is not probative of truthfulness." *State v. Bryant*, 369 S.C. at 517, 633 S.E.2d at 155. However, offenses that are not crimes of dishonesty or false statement may still have impeachment value under Rule 609(a)(1). *State v. Robinson*, 426 S.C. at 599, 828 S.E.2d at 213. "A rule of thumb is that convictions that rest on dishonest conduct relate to credibility, whereas crimes of violence, which may result from a myriad of causes, generally do not." *State v. Black*, 400 S.C. at 22, 732 S.E.2d at 887. All Rule 609(a)(1) felonies are not equally probative of credibility. "The distinction between crimes falling outside Rule 609(a)(2) but nonetheless ranking high on the scale of probative worth on credibility,

including, for example, theft and escape crimes, and those ranking low on that scale, including crimes of violence, appears in cases from many jurisdictions." *United States v. Estrada*, 430 F.3d at 618. In this case, there was no showing that Petitioner's prior convictions for burglary and second-degree assault and battery reflected dishonesty. Burglary is not probative of truthfulness, beyond the basic crime itself. Assaults are crimes of violence, which ordinarily do not rest on dishonest conduct. These convictions did not weigh highly on the scale of probative worth of credibility. The trial court did not identify *how* these convictions were probative of credibility, although it made a blanket statement they had "impeachment value." The first factor weighed in favor of exclusion.

The second *Colf* factor addresses the point in time of the convictions and the witness's subsequent history. This factor considers the "temporal proximity" of prior convictions to current charges and whether that proximity reveals a "pattern of behavior" that evokes questions of credibility. *State v. Robinson*, 476 S.C. at 600, 828 S.E.2d at 214. The State sought to impeach Petitioner in 2019 with convictions from 2010 (third-degree burglary) and 2012 (two counts of second-degree assault and battery). The State also impeached Petitioner with two other offenses the parties agreed to refer to as petty larcenies, from 2012 and 2015. Petitioner's criminal history subsequent to 2010 consisted of convictions in 2012 and 2015, and additional arrests in 2015. Petitioner's burglary and assault and battery convictions were remote in time—nine years and seven years prior to trial. Although Petitioner did have a subsequent criminal history, the remoteness of the offered convictions meant that the second factor also weighed in favor of exclusion.

The third *Colf* factor compares the nature and details of the past crimes with the crimes for which an accused stands trial. Where the past convictions are similar to the case at trial, this

factor weighs in favor of exclusion rather than admission. *Colf*, 337 S.C. at 628, 525 S.E.2d at 249. "[W]hen the prior offense is similar to the offense for which the defendant is on trial, the danger of unfair prejudice to the defendant from impeachment by that prior offense weighs against its admission." *State v. Bryant*, 369 S.C. at 517–18, 633 S.E.2d at 156. *See State v. Broadnax*, 414 S.C. 468, 478, 779 S.E.2d 789, 794 (2015) (prejudicial effect of prior convictions for exact same offense "is often very high"); *United States v. Beahm*, 664 F.2d 414, 418 (4th Cir. 1981) ("Admission of evidence of a similar offense often does little to impeach the credibility of a testifying defendant while undoubtedly prejudicing him."); *State v. Elmore*, 368 S.C. at 238, 628 S.E.2d at 275 ("inherent prejudice" flows from use of similar prior convictions for impeachment under Rule 609(a)(1)); *Colf*, 337 S.C. at 628, 525 S.E.2d at 249 (trial court "erred in treating the prior crimes as if their similarity heightened their probative value when it actually increased their prejudicial effect").

The prior convictions appeared extremely similar to the crimes for which Petitioner was on trial—in a trial for burglary in the first degree, a prior conviction for burglary in the third degree. In a trial for criminal sexual conduct in the first degree, two prior convictions for assault and battery in the second degree. Based on similarity, the trial court decided to "sanitize" them. "If the nature of the crime makes the conviction prejudicial, ordinarily the trial judge should prevent the prejudice by excluding the conviction instead of admitting it in denatured form." ROGER PARK & TOM LININGER, THE NEW WIGMORE. A TREATISE ON EVIDENCE: IMPEACHMENT AND REHABILITATION § 3.4 (1st ed. Cum. Supp. 2020). The third factor weighed heavily in favor of exclusion. *Colf*, 337 S.C. at 627, 525 S.E.2d at 248; Rule 609, SCRE.

The fourth *Colf* factor looks at the importance of the defendant's testimony. That is because "evidence that a witness is a convicted criminal can [] seriously prejudice the defense, especially when the witness is the defendant himself." *United States v. Lipscomb*, 702 F.2d 1049, 1062 (D.C. Cir. 1983). In *Lipscomb*, the D.C. Circuit Court of Appeals discussed the legislative history of Fed. R. Evid. 609, and observed per *Luck v. United States*, 348 F.2d 763, 769 (D.C. Cir. 1965), that the trial court should consider "the extent to which it is more important to the search for truth in a particular case for the jury to hear the defendant's story than to know of a prior conviction." *Lipscomb*, 702 F.2d at 1065. "There may well be cases where the trial judge might think that the cause of truth would be helped more by letting the jury hear the defendant's story than by the defendant's foregoing that opportunity because of the fear of prejudice founded upon a prior conviction." *Luck v. United States*, 348 F.2d at 768. In some cases, the defendant's testimony may be cumulative rather than important. In this criminal sexual conduct case, however, the defense was consent and there were no other witnesses who corroborated Petitioner's version of events, so it was more important for the jury to hear Petitioner's side of the story than to hear of his convictions. The fourth factor weighed in favor of exclusion.

The fifth *Colf* factor considers the centrality of the credibility issue. "[W]hen credibility is central to a case, the introduction of prior convictions for impeachment purposes becomes even more legitimate." *State v. Robinson*, 426 S.C. at 606, 828 S.E.2d at 217. "If the jury must choose between the defendant's credibility and that of another witness, there would be a high probative value in admitting evidence of prior convictions to impeach the defendant's credibility." *Id.* This factor weighed in favor of admission since credibility was the central issue of the case.

Under Rule 609 and *Colf*, the prior convictions should have been excluded. The court found that Appellant's convictions for second degree assault and battery would improperly suggest to the jury that Appellant had "a propensity for violence, a propensity to assault people, and of course, sexual assault is one of the charges that he's facing." R. 385, l. 24 – 386, l. 5. The court also noted that Appellant's burglary conviction was not probative of truthfulness. R. 378, ll. 7-9. The court did not explain its ruling as to each factor. It applied the wrong test. However, even if the court applied the proper test, and found *Colf* favored admission of the named convictions, it erred by admitting them as "sanitized."

3. The error was not harmless.

The Court of Appeals incorrectly concluded that "even if the circuit court erred in sanitizing or discussing its balancing of Furtick's prior convictions, such error would be harmless," and that "this was far from a 'he said, she said' case." *State v. Furtick*, Op. No. 6032 at 14; App. 78. The error was not harmless since the critical issues for the jury to decide were whether Petitioner's entry into the home and sex with Complainant were consensual. "Whether the improper introduction of this evidence is harmless requires us to look at the other evidence admitted at trial to determine whether the defendant's guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached." *State v. Broadnax*, 414 S.C. at 479, 779 S.E.2d at 794 (cleaned up). "Error is harmless where it could not reasonably have affected the result of the trial." *State v. Bryant*, 369 S.C. at 518, 633 S.E.2d at 156. In *Bryant*, the erroneous admission of prior convictions to impeach the accused was not harmless where the defense was self-defense and "hinged entirely" on the accused's own testimony, where "the only witnesses to the shooting were Petitioner and the victim." *Id.* This Court concluded, "the State should not be allowed to attack the defendant's credibility with inadmissible prior convictions;

especially where the Petitioner's credibility was essential to his defense. Accordingly, we hold the improper admission of Petitioner's prior firearms convictions was not harmless." *Id.* at 518–19, 633 S.E.2d at 156.

This case is similar to *Bryant.* The defense was consent and hinged entirely on Petitioner's testimony, and the only witnesses were Petitioner and Complainant. It was the jury's role to determine credibility, and the jury found that it was a "he said, she said" case—for example, it acquitted Petitioner of burglary despite the complainant's testimony to the contrary. Similarly, Petitioner's remarks to law enforcement were a matter for the jury—which could find Petitioner's statements were suspicious because he was guilty, or because he was uncomfortable with law enforcement for reasons which did not bear on his guilt. The trial judge observed that the case boiled down to "a swearing contest." R. 380, ll. 6-7. The jury deliberated for three-and-a-half hours and acquitted Petitioner of all the crimes for which he was indicted. The admission of two larceny convictions without objection did not render the prejudice of the unnamed convictions "low." *State v. Furtick*, Op. No. 6032 at 14; App. 78. Juxtaposing named larcenies (petty crimes) with unnamed felonies and misdemeanors only enhanced the danger of unfair prejudice. Finally, the court's limiting instruction was insufficient to overcome the harm here. "Limiting instructions alone do not make an erroneous admission of prior conviction evidence harmless." *Green v. State*, 338 S.C. at 434, 527 S.E.2d at 101. "The jury, despite limiting instructions, can hardly avoid drawing the inference that the past conviction suggests some probability that defendant committed the similar offense for which he is currently charged." *United States v. Beahm*, 664 F.2d at 418–19.

Sanitization was an improper and prejudicial substitute for exclusion pursuant to *Colf* and Rule 609, SCRE.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented.

Respectfully Submitted,

Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of February, 2024.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Lexington County
Honorable Frank R. Addy, Circuit Court Judge

Opinion No. 6032 (S.C. Ct. App. Filed November 8, 2023)

Lower Court Case No. 2017-GS-32-02097

THE STATE,

RESPONDENT,

V.

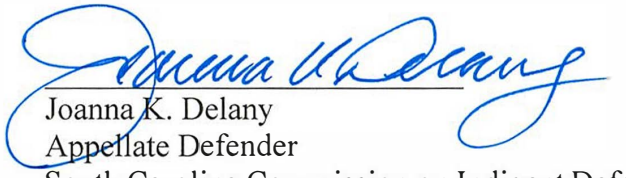
RODNEY JEROME FURTICK,

PETITIONER

APPELLATE CASE NO. 2019-001920

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 writ of certiorari to the Court of Appeals and appendix in the above-referenced case has been served upon Joshua A. Edwards, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and the South Carolina Court of Appeals; and on Rodney Jerome Furtick, #282923, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 23rd day of February, 2024.



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ATTORNEY FOR PETITIONER

From: Warren, Kaylynn
To: Josh Edwards
Cc: Delany, Joanna; Anne Mueller
Subject: 2019-001920 The State v. Rodney Jerome Furtick
Date: Friday, February 23, 2024 3:24:00 PM
Attachments: 2019-001920 The State v. Rodney Jerome Furtick Petition for Writ of Certiorari to the Court of Appeals and COS.pdf
2019-001920 The State v. Rodney Jerome Furtick Appendix.pdf

Good Afternoon,

Attached for service in the above-referenced case is the Petition for Writ of Certiorari to the Court of Appeals and the Appendix which will be filed along with the previously-filed two-volume Record on Appeal
today, February 23, 2024, with the Supreme Court via email filing.

Respectfully,
Kaylynn

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