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**Feb 23 2022**

**S.C. SUPREME COURT**

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Pickens County

Honorable R. Scott Sprouse, Circuit Court Judge

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JASON ERVIN BLACK,

RESPONDENT-PETITIONER,

V.

STATE OF SOUTH CAROLINA,

PETITIONER-RESPONDENT.

APPELLATE CASE NO. 2021-000525

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RETURN TO PETITION FOR WRIT OF CERTIORARI

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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.

**RESPONDENT’S COUNTER-QUESTION PRESENTED**

In respondent’s direct appeal, where this 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, does this Court need to grant certiorari to review the grant of PCR relief where it has already essentially ruled on this issue?

## STATEMENT OF THE CASE

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. The State and Black seek certiorari as described herein.

## ARGUMENT

Because this 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 in Jason Black's direct appeal, no grant of certiorari is necessary to review the grant of PCR relief.

This criminal sexual conduct case boiled down to a basic credibility contest between four witnesses, two for the State and two for the defense. See State v. Stukes, 416 S.C. 493, 500, 787 S.E.2d 480, 483 (2016) (“Furthermore, we do not believe this case is amenable to a harmless error analysis. Our review of the record indicates this case hinged on credibility. Victim said it was rape; he said it was consensual.”) Complainant, who was fifteen at the time of the alleged incident, said she had sex with Respondent Jason Black in the bedroom of Richard Bush's single-wide trailer while Bush was in the next room. App. 94, l. 18 – 99, l. 16. Complainant's friend, CH, testified that Complainant told her about the sex that evening and showed her blood in her underwear. App. 152, l. 5 – 154, l. 8.

Jason Black testified in his own defense and denied having sex with Complainant. App. 228, l. 11 – 15. Black testified that he and Complainant never left Bush's living room. App. 245, l. 4 – 18. Black testified that Bush also was in the living room the entire time. App. 245, l. 14 – 23. Bush testified that Complainant never went into the bedroom. App. 269, l. 24 – 271, l. 2. To render a verdict, the jury had to decide whether to believe Complainant and CH or Black and Bush.

During Bush's testimony, the trial judge excused the jury to hear argument about impeaching Bush with his prior convictions. App. 271, l. 19 – 285, l. 20. The solicitor stated his intention to impeach Bush with two convictions for manslaughter and a conviction for

shooting/throwing a deadly missile. App. 275, l. 17 – 277, l. 15. Defense counsel objected that the convictions were too old. App. 278, l. 18 – 279, l. 3.

The trial judge decided to allow the impeachment. App. 282, l. 24 – 285, l. 13. 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, l. 5 – 9. The court added, “That, of course, makes the issues of credibility, his credibility essential.” App. 284, l. 13 – 14.

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, l. 14 – 20. 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, l. 9 – 12. The trial court overruled the objection. App. 289, l. 13. The solicitor then asked about both manslaughter convictions and the shooting/throwing a deadly missile conviction, and ended his cross-examination. App. 289, l. 15 – 290, l. 5.

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 – 47.

This Court granted certiorari to review the Court of Appeals’ unpublished opinion affirming Black’s convictions. App. 393. After oral argument, this 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). This 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. This 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.

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. It 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, then the primary reason this Court found the error to be harmless would not have existed. This 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 error would have led this Court to reverse the conviction.

In Stukes, this 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. 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.

In its petition for certiorari, the State does not seriously contest the deficient performance prong of Strickland v. Washington, 466 U.S. 668 (1984), but asks this Court to take the case to review the prejudice prong. The State’s argument is based primarily on the Black opinion’s recitation of the other evidence in the case in its harmless error analysis. The problem with the State’s argument is it asks this Court to weigh the credibility of the witnesses.

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, 1. 2 – 5. 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).

This Court’s decision in 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. State’s Pet. Cert. at 17-19. 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 this 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. This Court need not grant certiorari to revisit this issue. The State’s petition should be denied and the PCR Court’s Order should be left in place.

**CONCLUSION**

For the foregoing reasons, the State's petition for certiorari should be denied.

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This 23rd day of February, 2022.