STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Spartanburg County

Roger L. Couch, Circuit Court Judge

CARNIE NORRIS,

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2019-000334

BRIEF OF RESPONDENT

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

PETITIONER'S QUESTION PRESENTED

Did the PCR court err in granting post-conviction relief due to the unobjected introduction of Norris' prior convictions for burglary and robbery in a trial for armed robbery where the law at the time of trial established the prior convictions were crimes of dishonesty, where Norris was caught in possession of the victims' property and the knife they described mere yards away from the scene of the crime, and where the Norris' testimony was an inconsistent, self-serving fabrication?

RESPONDENT'S COUNTER-QUESTION PRESENTED

Did the PCR judge correctly determine trial counsel provided ineffective assistance where trial counsel failed to object to the admission of Respondent's prior convictions of burglary and robbery during his trial for armed robbery based upon the PCR judge's proper analysis of the five-factor test for determining the admissibility of prior convictions pursuant to Rule 609(a), SCRE?

STATEMENT

On September 19, 2008, a Spartanburg County grand jury indicted Respondent for armed robbery (2008-GS-42-5631). App. 528-529. The state, represented by Barry J. Barnette, called the case to trial before the Honorable J. Derham Cole and a jury on July 6-7, 2009. App. 1. Beverly Dorine Jones represented Respondent. App. 1. Respondent was tried along with his co-defendant Kenneth Wayne Chiles, who was represented by J. Roger Poole. App. 1. The jury found Respondent guilty as charged. App. 335, ll. 17-21. Likewise, the jury found Chiles guilty of armed robbery. App. 335, ll. 22-25. Judge Cole sentenced Respondent to twenty-eight years imprisonment. App. 344, ll. 10-14; App. 527; App. 537. Judge Cole sentenced Chiles to eighteen years imprisonment. App. 344, ll. 4-9.

Respondent filed a notice of appeal. Kathrine H. Hudgins represented Respondent. App. 349-358. Ms. Hudgins filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). App. 349-358. On appeal, Ms. Hudgins raised the trial judge's failure to instruct the jury on the law of citizen's arrest where the evidence showed Respondent had engaged in a citizen's arrest. App. 349-358. Notably, trial counsel did *not* even request such a charge despite the clear evidence in the record to support citizen's arrest as a defense to the charge; thus, appellate counsel had no choice but to raise the issue in a no merits brief due to South Carolina's strict error preservation rules. Respondent submitted a pro se response. App. 359-376. On April 18, 2012, the Court of Appeals dismissed Respondent's appeal. State v. Norris, Op. No. 2012-UP-226 (S.C. Ct. App. filed April 18, 2012). App. 377-378. Remittitur issued on June 19, 2012. App. 379.

Thereafter, Respondent filed an application for post-conviction relief (PCR) on November 7, 2012. App. 380-394. Almost two years later, the state filed its return on September 15, 2014. App. 395-403. The Honorable Roger L. Couch convened a hearing on the matter on September

15, 2014. App. 404. Brandt Rucker represented Respondent, and Suzanne White represented the state. App. 404.

By an order filed September 6, 2017, Judge Couch granted Respondent relief from his conviction and sentence. App. 498-512. Judge Couch found that trial counsel "failed to render reasonably effective assistance regarding the improper introduction of portions of [Respondent]'s prior record." App. 503. Judge Couch found that trial counsel's consent to the introduction of the prior convictions, and her introduction of the prior convictions during her direct examination of [Respondent] was error." App. 505. He further found that the error undermined confidence in the outcome of the trial. App. 505.

Subsequently, the state moved to alter or amend the judgment pursuant to Rule 59(e), SCRCP. App. 513-522. By an order filed February 15, 2019, Judge Couch denied the state's motion to alter or amend the judgment. App. 526. The state received a copy of the order denying its motion to alter or amend the judgment on February 19, 2019.

Thereafter, on March 1, 2018, the state served its notice of appeal. On September 20, 2019, the state filed its petition for writ of certiorari. Respondent filed his return on February 3, 2020. The Supreme Court transferred the case to the Court of Appeals on February 18, 2020. On August 19, 2022, this Court granted the state's petition for writ of certiorari and ordered full briefing on the issue presented. The state filed its brief on February 15, 2022. Respondent now files his brief.

STATEMENT OF FACTS

At 8 p.m. on July 16, 2008, A.C. Worthy arrived at the home of Kenneth Chiles. App. 230, ll. 2-14. For the next two hours, the men watched wrestling and drank beer. App. 230, ll. 15-20; App. 240, ll. 5-11.

Around 9 p.m., when it was just starting to get dark on July 16, 2008, seventeen-year old Andrew Bond, Zack Blankenship, Herbert "Hub" Blankenship, Kellen Mayfield, Joseph Holder, Kyle Quinn, "and two other females" gathered in the parking lot of First Baptist Church, where they claimed they were playing Frisbee golf, across the street from Chiles' home. App. 113, ll. 7-22; App. 130, l. 24 – App. 131, l. 21; see also App. 144, ll. 5-11; App. 168, l. 23 – App. 169, l. 6. Also, across the street from Chiles' home was a free medical clinic. App. 250, ll. 9-15; App. 265, l. 23 – App. 266, l. 9.

Two hours later at 11 p.m., one of the frisbees allegedly landed on top of one of the buildings. App. 114, ll. 6-14; App. 130, l. 24 – App. 131, l. 3; App. 145, ll. 1-6; App. 169, ll. 7-9. Zack got on top of the roof where he retrieved the Frisbee. App. 114, ll. 18-20; App. 145, ll. 7-9; App. 169, ll. 19-20. He threw the Frisbee down from the rooftop. App. 114, l. 20. Bond, who was standing with two of the other players, "walked over to pick it up." App. 114, ll. 21-24.

Around this time, Respondent went to Chiles' house. App. 231, ll. 4-5; App. 266, ll. 18-24. Respondent "saw a couple of individuals on the top of the building." App. 266, ll. 10-17; see also App. 241, ll. 9-10. Respondent told Chiles that "it looked like somebody was trying to break into a building." App. 240, l. 24 – App. 241, l. 1; see also App. 252, ll. 16-18; App. 270, ll. 3-9. When Chiles walked outside, he saw "two, or three guys on top of the building." App. 241, ll. 19-21; App. 255, ll. 5-11; App. 268, ll. 13-15. Chiles got his cell phone from his inside his home. App. 234, l. 18 – App. 235, l. 6; App. 268, ll. 16-20. In the meantime, Respondent walked across

the street to investigate further into the unusual spectacle of young men on the rooftop of a building in the dead of night. App. 268, ll. 21-24.

When he arrived, Respondent yelled out to ask what the young men were doing. App. 268, l. 25. When the men saw Respondent, they acted scared and ran beside the building. App. 268, l. 25 – App. 269, l. 1; App. 269, ll. 4-6. However, Bond turned around to face Respondent. App. 269, ll. 1-3. Bond tried to run away as well, but Respondent extended his arms to stop him. App. 269, ll. 7-11. Respondent asked Bond who he was, and in response, Bond pulled out his wallet and cell phone. App. 271, ll. 2-4. To prove his identity, he removed some cards from his wallet, which he showed to Respondent. App. 271, ll. 4-5. Bond then sat down on the ground. App. 271, ll. 5-10.

When Chiles walked across the street, Respondent "had one of the guys" "sitting on the ground." App. 242, l. 22 – App. 243, l. 1; App. 256, ll. 7-11. Respondent handed Chiles the guy's identification – a stack of cards – in case he tried to run. App. 242, ll. 2-4; App. 257, ll. 14-17. Chiles put the cards into his pocket. App. 242, ll. 5-6. As Chiles was trying to call 9-1-1, he saw two officers approaching. App. 242, ll. 7-11.

However, Bond claimed the midnight hour passed very differently. Bond alleged he was "pushed down from behind by a man." App. 114, l. 25 – App. 115, l. 1. The man, whom Bond alleged was Respondent, asked for his identification and told him that he was under arrest. App. 115, ll. 1-3; App. 115, ll. 10-23. According to Bond, the man "reached in [his] pocket and pulled out [his] wallet and began looking through it and pulling stuff out of it." App. 115, ll. 4-6. Bond claimed that when he asked Respondent for "a badge or some sort of identification" to show he was "actually an officer," Respondent pulled his knife out and put the knife to his throat. App. 116, ll. 1-7.

According to Bond, his friends then "walked up to see what was going on" at the same time that "another individual" began to approach from across the street. App. 117, ll. 2-4. Next, Bond alleged, Respondent "pulled the knife out and pointed at [Bond's friends] and told them to get on the ground also." App. 117, ll. 5-8. Instead of getting on the ground, however, his friends "kind of stepped back" and two of them even ran off. App. 117, ll. 9-12. Bond claimed that Chiles was the other individual who approached from across the street, and that when Chiles reached them, Respondent gave Bond's wallet to Chiles. App. 117, l. 18 – App. 118, l. 9. Chiles went through Bond's wallet, according to Bond. App. 118, ll. 11-12.

Four to five minutes later, the police arrived. App. 119, ll. 22-24. Bond's friends returned as well. App. 120, ll. 7-13. At this point, according to Bond, Respondent returned his cell phone and empty wallet to him. App. 120, ll. 18-22. "Six dollars and a debit card" were missing from his wallet. App. 121, ll. 4-7. Bond claimed that Respondent then "walked across the street back to the house that he came out of." App. 120, ll. 23-25.

Bond's friend, Herbert, testified differently from his friend. According to Herbert, after the Frisbee allegedly landed on the roof, he, Bond, Mayfield, and Holder "were all standing in a group watching to make sure that the Frisbee would come off." App. 145, ll. 10-14. He described seeing a man walk across the street toward the group. App. 145, ll. 17-19. "Bond was closest" to the man "[s]o he grabbed Drew Bond and put him on the ground" and told "everybody [to] get on the ground." App. 145, ll. 20-22. It was then that the man pulled out a knife. App. 145, ll. 22-23. According to Herbert, "simultaneously the other man [arrived from] across the street." App. 146, ll. 8-9. Herbert and the others "decided to run off so [they] wouldn't get hurt as well." App. 146, ll. 10-11. Herbert, Holder, and Mayfield went to talk to the security officer at First Baptist. App. 147, ll. 15-18. The security officer called the police. App. 148, ll. 1-2. Herbert alleged this "was

the second time the police had been called that night." App. 148, ll. 2-3. In fact, he claimed Zack "who was on top of the roof had called." App. 148, ll. 13-15.

According to Herbert, the threesome then "returned and got back in [Herbert's] car." App. 148, ll. 4-5. They "stopped about 20 to 30 yards away" from Bond. App. 148, ll. 5-7. The police arrived shortly thereafter. App. 148, l. 12. According to Herbert, while the police were talking to the young men in the car, the two men had walked back across the street to a house. App. 149, ll. 9-11. The officers then went to the house to question the men. App. 149, ll. 12-14.

Likewise, Mayfield's story also differed from Bond's and Herbert's. According to Mayfield, Bond moved a little bit away from the group in order to catch the Frisbee when it was thrown from the roof. App. 169, ll. 14-16. "[A]t that time," Mayfield noticed a man walking toward them. App. 169, ll. 21-22. The man told them "that he was a security guard" and they did not need to be where they were. App. 169, ll. 22-24. Mayfield turned his attention back to Zack who was climbing down the tree. App. 170, ll. 1-2. Mayfield "made sure that he got out of the tree safely." App. 170, ll. 2-3. When Mayfield looked back at the man, he saw "the man already had [Bond] on the ground, and he had taken his wallet ... out of his pocket." App. 170, ll. 4-6. According to Mayfield, the man pointed the knife at him and his other friends. App. 170, ll. 11-12. At this time, Mayfield "noticed that another man had begun to walk across the street toward [them]." App. 171, ll. 10-13.

Mayfield explained that when the first man pulled the knife on them, he, Holder, Herbert, and the girls ran around the other side of the building to the parking lot. App. 172, ll. 3-7. Initially, Mayfield thought Bond was with them because "the man with the knife had moved away from [Bond]" in order to threaten Mayfield and the others. App. 172, ll. 8-13. Upon realizing that Bond was not with the group, Quinn returned to where Bond was. App. 172, ll. 14-18. The group "stood

there for a couple of minutes trying to decide what [they] were going to do." App. 172, ll. 21-22. Ultimately, they "realized [they] needed to call the cops." App. 172, ll. 18-19. Herbert approached the group in his car. App. 172, ll. 24-25. Herbert got everyone into his car, and then he went to alert the security guard. App. 172, l. 24 – App. 173, l. 4. The police arrived shortly thereafter. App. 173, ll. 13-22.

In response to the calls for help, Officer Bradford James, arrived at approximately 11:15 p.m. App. 187, ll. 9-11. He "observed two black males, and a white male laying back on the ground." App. 187, ll. 14-15. As James approached the group, the two black males walked across the street to a house. App. 187, l. 23 – App. 188, l. 1. When a second officer arrived, the two officers walked across the street to a house where the two black males were sitting on the porch. App. 189, ll. 10-17; App. 211, ll. 8-12. The two men were Respondent and Chiles. App. 189, ll. 16-17. Respondent explained to the police that he and Chiles approached the young men to make sure they did not leave before the police arrived. App. 216, ll. 1-7.

Chiles gave the officers a few cards belonging to Bond that were in his pocket. App. 189, l. 24 – App. 190, l. 2; App. 212, ll. 2-6. The police found a kitchen knife in Respondent's pocket. App. 190, ll. 10-11; App. 212, ll. 22-24. Based on the statements from the young men who were allegedly playing Frisbee golf during the middle of the night, the police arrested Respondent and Chiles. App. 190, ll. 12-14; App. 213, ll. 8-10.

Respondent and Chiles were consistent that they remained with the young men when the officers arrived. App. 244, ll. 9-15; App. 23-25. After Chiles and Respondent told the police what happened – stopping the young men from breaking into the buildings – the police allowed them to walk across the street to Chiles' home. App. 244, ll. 9-15; App. 271, l. 25 – App. 272, l. 4; App. 272, ll. 5-10. Chiles and Respondent remained on the porch. App. 244, ll. 16-18. Later, an officer

approached Chiles on the porch and asked him about the cards. App. 244, ll. 19-21. Chiles gave the officer the cards. App. 244, ll. 21-25. Respondent explained that he had a kitchen knife in his pocket, which the police found, because he had been cleaning fish earlier in the evening. App. 279, ll. 11-21.

STANDARD OF REVIEW

The proper standard for appellate review of in PCR cases "depends on the specific issue raised on appeal. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d at 839. The reviewing court will "defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." Id. This Court must sustain a PCR court's grant of relief if there is "any evidence of probative value" exists to sustain the PCR court's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989); see also Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006); Jackson v. State, 329 S.C. 345, 348, 495 S.E.2d 768, 769 (1998); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997). The reviewing court must give great deference to the PCR court's findings of fact and conclusions of law. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). The appellate court "will review questions of law de novo, with no deference to trial courts." Smalls, 422 S.C. at 180-181, 810 S.E.2d at 839. "Questions of law are reviewed de novo," and the reviewing court must "reverse the PCR court's decision when it is controlled by an error of law." Sellner, 416 S.C. at 610, 787 S.E.2d at 527; see also Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013).

Criminal defendants are entitled to the effective assistance of counsel pursuant to the Sixth and Fourteenth Amendments to the United States Constitution. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984). To prove ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Id. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell

below an objective standard of reasonableness." Id. at 687-688. "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Id. at 688. Concerning prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

ARGUMENT

The PCR judge correctly determined trial counsel provided ineffective assistance where trial counsel failed to object to the admission of Respondent's prior convictions of burglary and robbery during his trial for armed robbery based upon the PCR judge's proper analysis of the five-factor test for determining the admissibility of prior convictions pursuant to Rule 609(a), SCRE.

Relevant facts

Trial

After the resting its case, the solicitor informed the trial judge that Respondent "ha[d] been in the last ten years found guilty of common-law robbery, as well as burglary second." App. 226, ll. 1-3. He indicated he would ask Respondent "about those crimes as possible impeachment." App. 226, ll. 3-4. When the judge asked trial counsel for her position on the admissibility of Respondent's prior convictions, trial counsel indicated she had no argument against their admission. App. 227, ll. 21-24. She clarified, however, that the state was referring to "a 1996 common-law robbery and a 1995 burglary second nonviolent." App. 228, ll. 7-8.

Thereafter, during the middle of Respondent's testimony, trial counsel actually stopped him from continuing to describe what happened on the night he was arrested. App. 267, ll. 6-8. Instead, she turned their conversation to his prior record. It was then that trial counsel questioned Respondent about his prior record. App. 267, ll. 9-20.

Q Okay. Let me stop you and back up a minute and ask a couple of questions before we get into what you're going to explain happened.

Mr. Norris, back in 1995, the winter of '95, were you convicted in this court of a burglary?

A Yes, ma'am, I was.

Q Okay. And just a few months later, Mr. Norris, were you also convicted in this very courtroom of a robbery?

A Yes, ma'am.

Q Okay. During that period of your life did you have a drug problem?

A Yes, ma'am. That was over 15 years ago, yes ma'am.

Q Okay. And you admitted your involvement and were punished, correct?

A Yes, ma'am.

Q Okay. Now, I'm sorry. I didn't mean to interrupt you. You were explaining.

App. 267, ll. 6-22.

During the cross-examination, the skilled and experienced solicitor attempted to turn Respondent's testimony about trying to effectuate a citizen's arrest on its head by re-directing the jury to Respondent's prior record. Using the persuasion tool of recency, the solicitor ensured his final questions to Respondent exposed – yet again – his prior record.

Q And you've done robbery before, haven't you, Mr. Norris?

A Yes, sir.

Q And you've broke into buildings before, haven't you, sir?

A Yes, sir. That's my past record. I hope that my past record will not do anything to harm me.

App. 283, ll. 16-22.

It was no surprise then that during his closing argument, the solicitor implored the jurors to use Respondent's prior record against him.

> And that's one thing the judge will tell you. You weigh the credibility of the witnesses. You believe whatever you want. You're the judges of the facts. You decide what facts are true and what's not true. You've got two sides that are so diametrically opposed on what happened that night. You've got the state's version and you've got the defendant's version.

> They want you to believe - - these are two gentlemen that's been familiar with the criminal justice system. Both of them has been convicted of different offenses. And you heard what those offenses was. And that's part of what you can weigh with the credibility of their testimony. And the judge will tell you about that. It's called impeachment - - impeachment. The defendants can be asked about it.

App. 304, l. 12 – App. 305, l. 1.

Judge Cole instructed the jurors to consider Respondent's prior record when evaluating his credibility. First, he explained the jurors "heard certain evidence relating to a defendant having prior convictions for certain types of criminal offenses." App. 318, ll. 10-12. Judge Cole informed the jurors that "[o]rdinarily, evidence of any prior convictions of a defendant is not admissible during the trial of a criminal case because it's not ordinarily relevant to any issue that the jury must decide." App. 318, ll. 13-16. "However," according to Judge Cole, "where a defendant has a prior record of convictions for certain types of criminal offenses and where that defendant takes the witness stand and testifies during the trial of the case, then evidence of those convictions may be admitted during that testimony." App. 318, ll. 17-21. He then told the jurors that the "evidence may be used for a very and strictly limited purpose" "as it relates to the impeachment of a witness' or a defendant's testimony during the trial." App. 318, ll. 22-25. The jurors were allowed to "consider such evidence on the issue of credibility and/or the believability of a defendant and that defendant's testimony, but ... not ... for any other purpose." App. 318, l. 25 – App. 319, l. 4. Judge Cole continued:

> It is not being introduced as evidence of a defendant's guilt for the crime for which he now stands charged, and you are not permitted to consider it on that issue.
>
> The sole purpose for which it is introduced, the sole reason that it is allowed and the sole purpose for which you may consider it is solely as to the issue of credibility and the believability of a defendant's testimony in the event you find such evidence to be probative on that particular point or issue.

App. 319, ll. 9-14.

PCR proceedings

During the PCR hearing, Respondent explained that he "was convicted in 1995 of burglary second, and four or five months later, ... common law robbery ... in January of '96." App. 428, ll. 6-8. He noted the convictions occurred more than ten years before his trial. App. 428, ll. 8-9. Further, Respondent explained that his own trial counsel was the one to introduce those convictions during the trial. App. 428, ll. 10-11; App. 429, ll. 3-12. Respondent's prior convictions, particularly, the conviction for robbery, "was similar in nature" to the charges levied against him. App. 428, l. 19 – App. 429, l. 2. He explained he "never had a, a false statement or anything like that to, to make it a crime of dishonesty." App. 429, ll. 1-2. As Respondent described, his "credibility was shot" when he testified, and trial counsel elicited his prior convictions that "paint[ed] that terrifying image" of him. App. 445, ll. 21-23. Respondent made clear that the judge should have held a hearing on the admissibility of his prior convictions, but that trial counsel failed to request the hearing. App. 452, ll. 4-12.

Trial counsel indicated that Respondent's prior convictions were fair game for use by the solicitor to impeach Respondent because the length of his sentence on those offenses extended into the ten-year time frame prior to his trial. App. 465, ll. 4-13. According to trial counsel, the introduction of Respondent's prior convictions would not have impacted the jury's decision. App. 473, ll. 20-23. In her view, the trial was "a situation where it was [Respondent]'s statements and [his co-defendant's] statements and testimony versus the witnesses that were out there." App. 473, l. 24 – App. 474, l. 5. Even if the trial judge excluded the prior common law robbery conviction based upon its similarity to the armed robbery, trial counsel claimed "there was still gonna be some impeachment anyway" due to Respondent's burglary conviction. App. 474, ll. 6-10.

Judge Couch found trial "counsel failed to render reasonably effective assistance regarding the improper introduction of portions of [Respondent]'s prior record." App. 503.

At the conclusion of the hearing, Respondent argued trial counsel provided ineffective assistance by failing to move to exclude his prior convictions. App. 477, ll. 17-25. Had the prior convictions been excluded, then the jury would have been "looking at people on nearly equal footing and making a determination." App. 477, ll. 22-25. The state argued simply that the "evidence [was] overwhelming" against Respondent. App. 479, ll. 8-15. Further, although no trial strategy was ever mentioned by trial counsel, the state argued "all of it was reasonable trial strategy and objectionably reasonable." App. 479, ll. 13-14.

PCR order granting relief

After reciting testimony and evidence produced during the trial, Judge Couch found that it was "clear" "that the jury was given two competing stories of what happened" on the night in question. App. 504. He also found it was "clear that the credibility of the witnesses, and particularly the credibility of [Respondent], was crucial for the jury to make a determination of guilt in this case." App. 504. "Both the prosecution and the respective defense counsel sought to attack the credibility of the respective opposing witnesses." App. 504-505. Further, he found "[t]he introduction of [Respondent]'s prior record was a large part of the prosecution's attack on the credibility of [Respondent]." App. 505.

As Judge Couch recounted, the trial judge inquired of trial counsel if she objected to the state's use of Respondent's two prior convictions for impeaching his credibility. App. 505. Instead of objecting, trial counsel agreed the state could use the convictions – a 1996 common law robbery and a 1995 burglary second, non-violent, to challenge Respondent's credibility. App. 505. Further, as Judge Couch noted, trial counsel elicited Respondent's prior convictions during her

direct examination. App. 505. As Judge Couch found, "[t]rial counsel's consent to the introduction of the prior convictions, and her introduction of the prior convictions during her direct examination of [Respondent] was error." App. 505. Further, he found the error "undermine[d] the confidence" "in the outcome of the trial." App. 505.

Judge Couch determined that "[u]nder the South Carolina Rules of Evidence, Rule 609(a)(1) and Rule 609(a)(2), and State v. Bryant, 369 S.C. 511 (2006), these prior convictions were more likely than not inadmissible." App. 505. "As indicated in Bryant, [this Court] has held that a trial judge must conduct a balancing test to determine whether remote convictions are admissible and under Rule 609(b) creates a presumption that remote convictions are inadmissible and places the burden on the state to overcome this presumption." App. 505. After recounting the factors, Judge Couch explained that the trial judge "must make a determination and articulate, on the record, the specific reasons for his ruling." App. 506. Citing State v. Bryant, 369 S.C. 511, 633 S.E.2d 152, 156 (2006), Judge Couch recognized that "if a crime is viewed as one involving dishonesty, the court must admit the prior conviction because prior convictions involving dishonesty or false statement must be admitted regardless of their probative value or prejudicial effect." App. 506.

Judge Couch found that "trial counsel failed to submit the prosecution's use of the prior convictions to any adversarial testing and failed to move the court to disallow the use of the prior convictions under the Bryant test." App. 507. Thereafter, Judge Couch evaluated Respondent's prior convictions utilizing the Bryant test.

> The first factor is the impeachment value of the prior crime. Under State v. Bryant, "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. 511, 633 S.E.2d 152, 156 (2006). [Respondent]'s two prior convictions, on their face, did not involve crimes of dishonesty. No additional evidence was given by the

> prosecution when those convictions were proffered that there was anything about the facts surrounding the convictions that showed any dishonesty.

App. 507.

Turning to the second factor, consideration of the point in time of the conviction and the witness's subsequent history, Judge Couch found the two prior convictions were from 1995 and 1996 and the state failed to show any subsequent criminal history. App. 507-508. He explained the "conviction dates were well in excess of ten years before [Respondent's] case." App. 508. Further, Judge Couch found the "two prior convictions were also unduly prejudicial under South Carolina Rule 609(B)(2)(b) in that they were not supported by specific facts and circumstances as required by the Rule." App. 508. Thus, Judge Couch concluded, "[t]he use of those convictions ... could not substantially outweigh[] its prejudicial effect." App. 508.

As Judge Couch found, the third factor weighed heavily in favor of exclusion of the prior convictions due to the similarity of the offenses. "The prior conviction for common law robbery is similar to the charged crime of armed robbery." App. 508. This point was made clear in case law. "Armed robbery is commission of common law robbery while armed with a deadly weapon. State v. Muldrow, 348 S.C. 264, 559 S.E.2d 847 (2002)." App. 508. Finally, Judge Couch found the fourth and fifth factors required exclusion of the prior convictions because of the importance of Respondent's testimony and the centrality of credibility in the case. App. 508. "In this case the defendant's testimony was crucial to his defense against the charge of armed robbery, and therefore, his credibility was central to this case." App. 508. "[T]his case had two competing and diametrically opposed narratives, one for the prosecution and one for the defense. The use of the prior convictions harmed undoubtedly [Respondent]'s ability to have the jury fairly consider his version of events." App. 508.

Judge Couch found Respondent met his burden of proving trial counsel provided ineffective assistance by a preponderance of the evidence. App. 508.

> Based upon the analysis of the Bryant factors with the facts of this case, there is a reasonable probability that but for counsel's unprofessional errors, the result of the trial would have been different. Trial counsel's errors in failing to oppose the introduction of the prior convictions, and worse, trial counsel's introduction of the prior convictions during the direct examination of [Respondent], create a probability sufficient to undermine confidence in the outcome of the trial.

App. 509.

Judge Couch continued, explaining that "[i]f trial counsel had opposed the introduction of the two prior convictions it is more likely than not that the trial judge would have excluded the use of those convictions." App. 509. "Absent the knowledge of these prior convictions, the jury would have been confronted with two competing versions of the event in question." App. 509. In turn, "[t]he jury would not be focused on speculation about [Respondent]'s character, but would have instead have been required to determine whether the prosecution's version of events was sufficient to prove to them that [Respondent] committed an armed robbery in this case beyond a reasonable doubt." App. 509.

Motion to alter or amend

In its motion to alter or amend, the state challenged Judge Couch's finding that Respondent's prior convictions were well in excess of ten years before his trial. App. 514. In the state's view, Judge Couch applied Rule 609(b), SCRE, instead of Rule 609(a), SCRE, because he simply remarked that the prior convictions occurred over ten years prior to Respondent's trial. App. 513-514. The state pointed out that "[a]lthough the conviction dates [were] past the ten-year mark, [Respondent] was released from confinement imposed for both convictions inside the ten year mark." App. 514. To support this proposition, the state supplied Respondent's SCDC records. App. 514.

Additionally, the state challenged Judge Couch's finding that the trial court did not examine the facts and circumstances of the prior convictions in order to compare the probative value and prejudicial effect of the convictions. App. 515. Again, the state accused Judge Couch of employing Rule 609(b), SCRE, instead of Rule 609(a), SCRE. App. 515. Nevertheless, the state admitted the Bryant factors controlled the analysis.[1] App. 515.

After putting forth its assessment of the factors as related to Respondent's prior convictions, the state concluded "[b]ecause it is arguable that the prior common law robbery would have been admitted and because the burglary would have almost certainly been admitted, it was reasonable for trial counsel not to have objected to their use for impeachment purposes." App. 516. Additionally, the state argued trial counsel employed reasonable trial strategy for failing to object to the admission of the prior convictions, despite the fact that none had been articulated by trial counsel. App. 516-517. Finally, the state continued to press its position that any deficiency was not prejudicial due to "the overwhelming evidence against him." App. 518; App. 520.

Discussion

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. To prove ineffective assistance of counsel, Respondent must establish that counsel's performance was unreasonable under prevailing professional norms, and that counsel's deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668 (1984); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). Prejudice occurs where there is a reasonable probability that, but for counsel's errors, the result at trial would have been

[1] In its memorandum of law submitted after the PCR hearing, the state cited the five factors from State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005), as the ones to be considered by a trial judge when making a decision to admit prior convictions for impeachment purposes. App. 486.

different. A reasonable probability is a probability sufficient to under confidence in the outcome of trial. Strickland, supra; Johnson, supra.

Appellate courts give great deference to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, the appellate court reviews questions of law de novo, with no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)). See also, Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839–40 (2018).

The Rules of Evidence permit the introduction of prior convictions for purposes of impeachment in limited circumstances. Pursuant to Rule 609(a)(1), SCRE, "evidence that an accused has been convicted" of a crime punishable by death or imprisonment in excess of one year shall be admitted if the court determines that the probative value of admitting the evidence outweighs its prejudicial effect to the accused. However, "evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment." Rule 609(a)(2), SCRE.

Error Preservation

As an initial matter, the state's argument that Respondent's convictions were admissible pursuant to Rule 609(a)(2), SCRE, because they were considered crimes of dishonesty at the time of his trial is not preserved for review. In its memorandum of law presented at the PCR hearing, the state argued Respondent's prior convictions were admissible under Rule 609(a), SCRE. App. 486. While the state did not designate which subsection of the rule to which it was referring, it was clear the state was referring to Rule 609(a)(1), SCRE, because the state described how the rule "require[d] a finding by the court that the probative value of admitting the evidence of the prior

convictions outweighs the prejudicial effect to the defendant." App. 486. Further, the state cited to the five-factor test for determining admissibility. App. 486. "Under Rule 609(a)(2), SCRE, if a crime is viewed as one involving dishonesty, the court must admit the prior conviction because, prior convictions involving dishonesty or false statement must be admitted regardless of their probative value or prejudicial effect." State v. Bryant, 369 S.C. 511, 517, 633 S.E.2d 152, 155 (2006).

Similarly, the state's motion to alter or amend never argued the PCR judge by failing to analyze the admissibility of the prior convictions using Rule 609(a)(2), SCRE. Rather, the motion regurgitated what was contained in the memorandum of law with the additional twist of actually analyzing the prior convictions using the five-factor test applicable to convictions falling within the ambit of Rule 609(a)(1), SCRE, and specifically, not applicable to convictions falling within the ambit of Rule 609(a)(2), SCRE. App. 515-516.

In order for an issue to be preserved for appellate review, it must be raised to the lower court with sufficient specificity and ruled upon by the lower court. S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 641 S.E.2d 903 (2007). Counsel must state clearly the reasons for the objection. State v. Byers, 392 S.C. 438, 710 S.E.2d 55 (2011). In other words, the objection must be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably understood by the trial judge. State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005). In light of the state's failure to raise this issue to the PCR judge, it is not preserved for appellate review. See State v. Acker, 435 S.C. 716, 739-740, 869 S.E.2d 873, 885-886 (Ct. App. 2022) (holding that Acker's Rule 404, SCRE argument was not preserved for review because he objected pursuant to Rule 404(a), SCRE at trial, but argued on appeal that the evidence was inadmissible pursuant to Rule 404(b)); Creech v. South Carolina Wildlife and Marine Resources

Dept., 328 S.C. 24, 33-34, 491 S.E.2d 571, 576 (1997) (explaining that because the Wildlife Department did not argue that it owed no duty of care to Creech as part of its directed verdict motion at trial, then that argument was not preserved for appellate review); State v. Sams, 410 S.C. 303, 310, 764 S.E.2d 511, 514-515 (2014) (holding that because the defendant never expressly asserted to the circuit court that his actions were not of a type naturally tending to cause great bodily harm or death, whether he was entitled to a jury instruction on the first definition of voluntary manslaughter was not properly preserved).

Application of Rule 609(a)(2), SCRE

If this Court determines the issue is preserved, this Court must reject the state's argument that "[b]oth the prior common-law robbery and the burglary would have been considered under Rule 609(a)(2), SCRE, at the time of trial as crimes of dishonesty" because of State v. Al-Amin, 353 S.C. 405, 425, 578 S.E.2d 32, 43 (Ct. App. 2003). Pet. at 16. Just as the state argued in State v. Broadnax, 414 S.C. 468, 475, 779 S.E.2d 789, 792-793 (2015), the state posits that the Supreme Court's statement in Bryant that "a conviction for robbery, burglary, theft, and drug possession, beyond the basic crime itself, is not probative of truthfulness" was mere dicta. Pet. 16-17. Boldly, the state claims "Al-Amin remained good law in 2009." Pet. at 17. The Supreme Court quickly rebuffed the state's dicta argument in Broadnax. This Court must do the same here.

The Rules of Evidence permit the introduction of prior convictions for purposes of impeachment in limited circumstances. Specifically, the South Carolina Rules of Evidence provide:

> For the purpose of attacking the credibility of a witness, (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and 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; and (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

Rule 609(a), SCRE.

"[U]nder Rule 609(a)(2), if a witness, even an accused, has been convicted of a crime involving dishonesty or false statement, evidence of such a conviction shall be admitted regardless of the maximum punishment and regardless of the probative value or prejudicial effect of the evidence." State v. Robinson, 426 S.C. 579, 593, 828 S.E.2d 203, 210 (2019). This Court held that armed robbery was a crime of dishonesty under Rule 609(a)(2), SCRE. State v. Al-Amin, 353 S.C. 405, 425, 578 S.E.2d 32, 43 (Ct. App. 2003). This Court refused "[t]o restrict the application of Rule 609(a)(2) only to those offenses which evidence an element of affirmative misstatement or misrepresentation of fact." Id.

Then, in 2006, three years prior to Respondent's trial, the South Carolina Supreme Court examined Rule 609(a)(2), SCRE, where the trial judge allowed a defendant's prior convictions for possession of a unlawful weapon by a convicted felony and pointing and presenting a firearm. State v. Bryant, 369 S.C. 511, 515, 633 S.E.2d 152, 154 (2006). The Court explained that "[v]iolations of narcotics laws are generally not probative of truthfulness" and that "a conviction for robbery, burglary, theft, and drug possession, beyond the basic crime itself, is not probative for truthfulness." Id. at 517, 633 S.E.2d at 155. Using the reasoning in support of these criminal offenses not falling within the ambit of Rule 609(a)(2), SCRE, the Court held that the defendant's prior firearms convictions did not involve dishonesty, and thus, they were not admissible pursuant to Rule 609(a)(2), SCRE. Id. at 517, 633 S.E.2d at 156. While the Court did not formally overrule Al-Amin, the Court certainly put the bench and bar on notice that convictions for robbery and burglary were not probative of truthfulness under Rule 609(a)(2), SCRE.

When confronted with the same argument as presented here – that Al-Amin remained good law after Bryant – the Supreme Court took the "opportunity to overrule Al-Amin, and reaffirm the rule as formulated in Bryant that armed robbery is not a crime of dishonesty or false statement for purposes of impeachment under Rule 609(a)(2)." State v. Broadnax, 414 S.C. 468, 475-476, 779 S.E.2d 789, 792-793 (2015). See also State v. Robinson, 426 S.C. 579, 596, 828 S.E.2d 203, 212 (2019) (explaining that in Broadnax, the Court overruled Al-Amin and reaffirmed the rule articulated in Bryant). The very language used by the Court, that it was "reaffirm[ing] the rule as formulated in Bryant" demonstrates that what the Court said in Bryant was *not* dicta. It was a *rule* that was merely *reaffirmed* by Broadnax, *not* announced anew.

A trio of cases from the Supreme Court are helpful for determining whether trial counsel should have been aware of the change in the law. The Court explained that "[a]fter Dawkins in 1989, certainly after Douglas in 2009 and Smith in 2010, reasonably competent trial counsel should know to object – absent a valid trial strategy – when a forensic interviewer gives testimony that indicates the witness believes the victim, but does not serve some other valid purpose." Briggs v. State, 421 S.C. 316, 325, 806 S.E.2d 713, 718 (2017). "When the testimony directly conveys the witness's opinion that the victim is telling the truth, it is obviously improper bolstering." Id. The Court held Briggs' trial lawyer provided deficient performance by failing to object when the forensic interviewer told the jurors that her role was to determine whether the child knew the difference between the truth and a lie and that her purpose was to find out if something happened because these points "clearly conveyed to the jury that she believed the victim." Id. at 327-329, 806 S.E.2d at 719-720. Further, the Court affirmed the PCR court's finding that Briggs' trial lawyer's failure to object resulted in prejudice because the case turned on the alleged victim's credibility. Id. at 334, 806 S.E.2d at 723.

The Supreme Court rejected the state's argument that in 2008, a lawyer's failure to object to improper vouching testimony by forensic interviewer was not deficient because the lawyer "was without the 'pointed guidance' provided by appellate decisions" that similar testimony was improper bolstering. Thompson v. State, 423 S.C. 235, 243-245, 814 S.E.2d 487, 491-492 (2018). The Court held that "[w]ell before [Thompson]'s criminal trial, trial counsel was on notice that it was improper for a witness to vouch for the credibility of another witness." Id. at 244-245, 814 S.E.2d at 492.

One witness testified that the alleged victim's disclosures were "consistent with her own training and experience." Id. at 241, 814 S.E.2d at 490. This testimony improperly bolstered the alleged victim's testimony. Id. at 242, 814 S.E.2d at 490. Another witness diagnosed the alleged victim with post-traumatic stress disorder based upon the emotional distress and genuine grief shown. Id. The witness opined the interview was among the most compelling she had conducted due to the amount of detail provided and the emotional intensity the alleged victim was clearly experiencing. Id. at 242, 814 S.E.2d at 490-491. The Court held the "testimony most certainly served to directly enhance the credibility of Victim" and was used by the state during its closing to urge the jury to conclude the alleged victim was credible. Id. at 243, 814 S.E.2d at 491. Further, the Court held Petitioner established prejudice because the "overall strength of the properly admitted evidence of [Thompson]'s guilt [did] not overcome the individual impact of each instance of trial counsel's deficient performance." Id. at 245, 814 S.E.2d at 492. In making its prejudice conclusion, the Court noted the outcome of the trial hinged on credibility, the state relied heavily upon the improper bolstering testimony in closing, and the compounded harm was created because the improper evidence was elicited from an expert witness. Id. at 249-250, 814 S.E.2d at 494. See also Chappell v. State, 429 S.C. 68, 79-80, 837 S.E.2d 496, 501-502 (Ct. App. 2019) (examining

on collateral review the status of the law at the time of Chappell's trial, noting the state's concession at oral argument that there had been no change in the law, but simply an application of existing law to a new set of facts, and holding counsel "should have known to object when [a witness] testified, 'Children don't often lie about sexual abuse incidents' because the testimony conveyed to the jury that the alleged victim's allegations must be true).

With this trio of cases in mind, Broadnax was *not* a pronouncement of new law; rather it was an application of existing law to the facts presented. After the Court's statement in Bryant that armed robbery and burglary are not probative of truthfulness, trial counsel was on notice of her need to object to the introduction of Respondent's prior convictions for robbery and burglary. Certainly, trial counsel should *not* have *consented* to their introduction. Doing so was below the prevailing professional norms just as the trial lawyers' failure to object in Briggs, Thompson, and Chappell was below prevailing professional norms despite the absence of "pointed guidance." Contrary to the state's argument on appeal, which was not raised to the PCR court, Respondent's convictions for armed robbery and burglary were not automatically admissible as crimes of dishonesty and false statement pursuant to Rule 609(a)(2), SCRE; thus, trial counsel erred by consenting to their admission.

Application of Rule 609(a)(1), SCRE

Having determined that Rule 609(a)(2), SCRE is inapplicable, it is necessary to determine whether trial counsel's erred in failing to object to the admissibility of Respondent's prior convictions based upon Rule 609(a)(1), SCRE. "[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. 579, 593, 828 S.E.2d 203, 210 (2019).

In Horton v. State, 306 S.C. 252, 411 S.E.2d 223 (1991), the Supreme Court found trial counsel provided ineffective assistance based upon his erroneous advice concerning Horton's prior record. Trial counsel advised Horton not to testify in his own defense because counsel feared Horton would be cross-examined about two prior criminal convictions. The Court determined that one prior conviction, simple possession of marijuana, was clearly not admissible pursuant to governing legal rules and precedent. Turning to Horton's second conviction, the Court found that trial counsel was ineffective for failing to seek a ruling on the admissibility of the second conviction where the admissibility was within the discretion of the trial judge. Although the PCR court determined that trial counsel's advice was based on tactical decision, the Court found that errors of law were involved which were "rendered more egregious by lack of ambiguity in the law." Further, the Court found trial counsel's errors to have prejudiced Horton where the sole evidence against him was testimony of an undercover police officer concerning an alleged drug buy. Id. at 254-255, 411 S.E.2d at 224-225.

In Green v. State, 338 S.C. 428, 527 S.E.2d 98 (2000), the Court found trial counsel ineffective for failing to argue the prejudicial effect of the defendant's prior convictions outweighed their probative value. At Green's trial for distribution of crack cocaine and distribution of crack cocaine within proximity of a school, the prosecutor impeached Green with two prior convictions of possession of crack cocaine and possession of cocaine. Id. at 431, 527 S.E.2d at 100. Although the Court declined to hold that all similar prior convictions are inadmissible, the Court held that trial courts must weigh the probative value of the prior convictions against their prejudicial effect to the accused and determine in their discretion whether to admit the evidence. Id. at 433-434, 527 S.E.2d

at 101. The Court held the trial counsel's failure prejudiced Green where his credibility was critical because the jury was forced to choose between his version of events and those expressed by flat agents. Id. at 434, 527 S.E.2d at 101. Rejecting the state's argument that any error was cured by the trial court's limiting instruction, the Court found persuasive authority in a Fourth Circuit Court of Appeals case:

> Admission of evidence of a similar offense often does little to impeach the credibility of a testifying defendant while undoubtedly prejudicing him. The jury, despite limiting instructions, can hardly avoid drawing the inference that the past conviction suggests some probability that the defendant committed the similar offense for which he is currently charged.

Id. at 434, 527 S.E.2d at 101 (quoting United States v. Beahm, 664 F.2d 414, 418-419 (4th Cir. 1981)).

At the PCR hearing and in the pleadings before the PCR court, the parties seemed to agree that the factors announced in Bryant governed whether Respondent's prior convictions were admissible.

> When considering whether to admit prior convictions, a trial judge should consider the following factors: (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; and (5) the centrality of the credibility issue.

Bryant, 369 S.C. at 516, 633 S.E.2d at 155 (citing State v. Colf, 337S.C. 622, 625-626, 525 S.E.2d 246, 247-248 (2000)); see also State v. Howard, 396 S.C. 173, 178, 720 S.E.2d 511, 514 (Ct. App. 2011); State v. Scriven, 339 S.C. 333, 341-42, 529 S.E.2d 71, 75-76 (Ct. App. 2000). On appeal, the state argued for the application of these same factors. See BOP at 15. Notably, this is the exact test used by the PCR judge. Recently, the Supreme Court explained that "under 609(a)(1), if the witness is the accused and has a prior conviction of a crime punishable by death or imprisonment for more than one year, the trial court must balance the Colf factors and determine whether the probative value of the conviction outweighs its prejudicial effect to the accused. The burden of

admissibility is upon the state, the proponent of the evidence." Robinson, at 595, 828 S.C. at 211. In State v. Broadnax, 414 S.C. 468, 478, 779 S.E.2d 789, 794 (2015), the Court cautioned that "[u]ltimately, the Rule [609, SCRE] is designed to help the jury discern the truth. It is not a tool for the state to bolster its case against the criminal defendant for the mere fact that the defendant has engaged in prior criminal activity."

"The starting point in the analysis is the degree to which the prior convictions have probative value, meaning the tendency to prove the issue at hand – the witness's propensity for truthfulness, or credibility." Robinson, 426 S.C. at 597, 828 S.E.2d at 212 (internal quotation omitted). "The tendency to impact credibility ... determines the impeachment value of the prior conviction. Impeachment value refers to how strongly the nature of the conviction bears on the veracity, or credibility, of the witness." Id. at 598, 828 S.E.2d at 212-213. "The purpose of the impeachment is not to show the witness is a bad person but rather to show background facts which impact the witness's credibility." Id. at 598, 828 S.E.2d at 213.

Contrary to the state's contention, the PCR judge properly analyzed the first factor and his findings are supported by the record. The PCR judge recognized that common law robbery and burglary are not crimes that inherently point to dishonesty, and therefore, they provided little impeachment value. The PCR judge also correctly pointed out that the state – at trial and the PCR hearing – failed to offer any additional evidence about the two prior convictions in order to prove its allegation that they offered significant impeachment value. While the prior convictions may have offered some impeachment value, it was very low in light of the nature of the crimes involved.

The Supreme Court explained "'[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.'" Robinson, 426 S.C. at 598-599, 828 S.C. at 213 (quoting State v. Black,

400 S.C. 10, 22, 732 S.E.2d 880 (2012)). "Although prior convictions for robbery, burglary, theft, and drug possession are not crimes of dishonesty or false statement, which would result in automatic admissibility under Rule 609)(a)(2), such convictions may still have impeachment value under Rule 609(a)(1)." Id. at 599, 828 S.E.2d at 213. The Supreme Court affirmed a trial judge's discretionary ruling that a prior conviction for breaking and entering an automobile had impeachment value. Id. at 600, 828 S.E.2d at 214. The Court concluded that it was within a trial court's discretion to conclude how much impeachment value prior convictions, such as the ones presented here, have.

Here, the PCR judge did not find that the prior convictions had no impeachment value. Rather, he found the convictions "on their face, did not involve crimes of dishonesty[, and n]o additional evidence was given by the prosecution when those convictions were proffered that there was anything about the facts surrounding the convictions that showed any dishonesty." App. 507. Thus, the judge did not conclude the prior convictions had "no impeachment value," as argued by the state. See BOP at 16.

Turning to the second factor, consideration of the point in time of the conviction and the witness's subsequent history, Judge Couch did not "look[] back only to the date of the conviction, rather than the date of release as required by Rule 609(b), SCRE." BOP at 16. Rather, Judge Couch analyzed exactly what the second factor required – consideration of the point in time of the conviction and the witness's subsequent history. It was undisputed the two prior convictions were from 1995 and 1996 and the state failed to show any subsequent criminal history. Further, Judge Couch was well aware that Respondent was in prison for a significant period of time for those offenses, and that upon his release, he had no subsequent criminal history. Quite simply, Judge Couch made a factual finding that Respondent's prior convictions were too remote to offer much,

if any, probative value as to credibility. This scenario was unlike the one in Robinson where the "prior convictions revealed a pattern of criminal behavior that could legitimately impact his credibility in the eyes of the jury." Robinson, 426 S.C. at 600, 828 S.E.2d at 214.

Regarding the third factor, the state conceded "a fundamental similarity between strong-arm robbery and armed robbery." BOP at 16. Thus, the state appears to have conceded that this third factor weighs heavily against admission of the prior conviction of robbery. "[E]vidence of similar offenses inevitably suggests to the jury the defendant's propensity to commit the crime with which he is charged. This risk is not eliminated by limiting instructions." Robinson, 426 S.C. at 600, 828 S.E.2d 214 (internal quotation omitted). "[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." Id. (internal quotation omitted).

However, the state faulted the PCR judge for "fail[ing] entirely to note the dissimilarity between the prior burglary and armed robbery." BOP at 16. To the contrary, Judge Couch analyzed the third factor sufficiently. While the state correctly notes that "[r]obbery involves different conduct than burglary," the state asks this Court to supplant its judgment for that of Judge Couch. He examined the prior convictions and determined they were sufficiently similar such that this factor weighed in favor of exclusion. Nevertheless, even the state was forced that admit "the fact that most burglaries are undertaken with an eye toward stealing something." BOP at 17. Despite this concession, the state still claimed this "fact" did "not render it overly similar for impeachment purposes in a trial for robbery or armed robbery." BOP at 17. Just as the trial judge in Robinson did not abuse his discretion in weighing the third factor as he did, which involved comparing a burglary to a robbery, the PCR judge did not abuse his discretion in weighing this factor as he did here. See Robinson, 426 S.C. at 602, 828 S.E.2d at 215.

Finally, the state argued that Judge Couch erred in declaring Respondent's testimony and credibility essential because he "ignore[d] counsel's advice to her client that he not testify, but instead rely exclusively on the helpful testimony of co-defendant Chiles, whose impeachable record was less severe." BOP at 17. To the extent Judge Couch ignored trial counsel's testimony at the PCR hearing that she advised Respondent not to testify, it was entirely within Judge Couch's prerogative to give the evidence presented the weight it deserved and to assess the witnesses' credibility. A simple review of the transcript alone showed Respondent's testimony was critical to his defense as Chiles was not present for the entirety of his interactions with the alleged Frisbee players. Further, a simple review of the transcript revealed the central role Respondent's credibility played in the trial because the entirety of the case boiled down to whether the jury believed the state's witnesses or Respondent and Chiles. The solicitor even argued to the jury that there were "two sides that are so diametrically opposed on what happened that night. You've got the state's version and you've got the defendant's version." App. 304, ll. 15-18. He asked the jurors, "[w]hich side do you want to believe? Do you want to believe them or the state's witnesses? That's what it comes down to, ladies and gentlemen." App. 310, ll. 19-21.

Furthermore, the right of a criminally accused to testify or not to testify is fundamental. State v. Rivera, 402 S.C. 225, 241, 741 S.E.2d 694, 702 (2013); Rock v. Arkansas, 483 U.S. 44, 52 (1987) ("[F]undamental to a personal defense ... is an accused's right to present his own version of the events *in his own words.*" (emphasis added)). "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so." Rivera, 402 S.C. at 241, 741 S.E.2d at 702. "The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution," including the due process clause of the Fifth Amendment and the compulsory process clause of the Sixth Amendment, applicable to the states through the Fourteenth

Amendment. Id. at 214-42, 741 S.E.2d at 703. "The opportunity to testify is also a necessary corollary to the Fifth Amendment's guarantee against compelled testimony." Id. "A person's right to be heard in his defense—a right to his day in court—is basic in our system of jurisprudence." Id. (citations omitted).

Trial counsel's deficient performance in failing to move to exclude the prior convictions was prejudicial to Respondent. To the PCR judge, the state argued any deficient performance was not prejudicial due to a reason other than overwhelming evidence of guilt, this argument is not preserved as it was not presented to the PCR judge. Nevertheless, the state's argument of overwhelming evidence of guilt must fail. First, "[o]rdinarily, the existence of 'overwhelming evidence' does not automatically preclude a finding of prejudice." Smalls v. State, 422 S.C. 174, 189, 810 S.E.2d 836, 844 (2018). In order for overwhelming evidence to serve as a categorical bar to preclude a finding of prejudice, the "evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong" that the prejudice test cannot possibly be met. Id. at 191, 810 S.E.2d at 845. The evidence in this case was far from overwhelming. The state's case consisted entirely of the testimony of young men who provided inconsistent, and at times, incredible testimony. What was so strikingly unbelievable was that the young men were playing Frisbee golf in the dead of night in an area that was not well lit. The very nature of Frisbee golf requires the participants to be able to see the targets and the Frisbee itself. Furthermore, it was incredible that the young men would climb atop a building to retrieve a Frisbee in the dead of night in an area of low visibility. The sport requires the use of multiple Frisbees – various sizes and weights. Therefore, it was likely that one of the seven individuals would have had a replacement. Finally, not a single person produced a Frisbee that was used during the game or the one that landed on the roof. In fact, the

police did not even look for it. Although the officers took photographs of various items and seized several items, the state did not produce a single Frisbee. Shockingly, the state did not even produce a witness – other than the young men – who could testify to even seeing a Frisbee that night.

Contrary to the state's assertion, Respondent's testimony was not "facially ludicrous and self-serving." See BOP at 19. Respondent saw multiple individuals on top of a building in the middle of the night. Such a sight would invoke curiosity – and suspicion – in every person's mind. Respondent's further inquiry was reasonable as well. He was trying to determine if the young men were burgling one of the buildings. Knowing that one of the buildings contained a medical clinic, it was not unreasonable to fear that someone was trying to enter the building and steal items.

Respondent and Chiles did not flee the scene. Instead, when the police arrived to effectuate an arrest, Respondent and Chiles calmly walked across the street to Chiles' home where the two men stood on the porch. Contra State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 266 (2006). The two men did not attempt to dispose of anything allegedly involved in the supposed armed robbery. Instead, the police found Respondent's kitchen knife, which he had used earlier in the day for cleaning fish, and Chiles showed the police the cards from Bond, which he had placed in his pocket during the citizen's arrest. See State v. McDowell, 266 S.C. 508, 515, 224 S.E.2d 889, 892 (1976) ("As a general rule, any guilty act, conduct, or statements on the part of the accused are admissible as some evidence of consciousness of guilt."); State v. Kornahrens, 290 S.C. 281, 289, 350 S.E.2d 180, 186 (1986) (assigning probative value to photographs as "relevant to show [Kornahrens'] efforts to conceal his crime); State v. Cope, 385 S.C. 274, 296, 684 S.E.2d 177, 188 (Ct. App. 2009) (noting the state introduced evidence of "Cope's staging of the crime scene" as "evidence that a cover-up had begun"). When the police arrived, Respondent and Chiles fully cooperated, even providing statements to the police of what occurred.

Just as Judge Couch found, "this case had two competing and diametrically opposed narratives, one for the prosecution and one for the defense. The use of the prior convictions harmed undoubtedly [Respondent]'s ability to have the jury fairly consider his version of events." App. 508. Furthermore, the competing story put forward by the prosecution was far from the consistent story claimed by the state on appeal. See BOP at 4 (claiming the witnesses consistently testified). Bond claimed he was pushed down from behind. App. 114, l. 25 – App. 115, l. 1. Herbert claimed Bond was grabbed and put on the ground. App. 145, ll. 20-22. Mayfield told a different story, explaining a man approached the group and said he was a security guard and the group did not need to be where they were. App. 169, ll. 22-24. Herbert also claimed the man who put Bond on the ground told everyone to get on the ground, but Bond never mentioned this happening until much later. App. 145, ll. 20-22; App. 117, ll. 5-8. Bond was certain that as his friends walked up to see what was going on, another individual approached from across the street. App. 117, ll. 2-4. However, Herbert asserted the other man arrived simultaneously with the first man pulling out a knife. App. 145, ll. 22-23. Bond described two friends running away, but Herbert said that he and at least two others ran away. Cf. App. 117, ll. 9-12 with App. 146, ll. 10-11; App. 147, ll. 15-18. Mayfield also described a larger group running away. App. 172, ll. 3-7.

Not only were the witness's stories inconsistent, but the witnesses also gave "facially ludicrous and self-serving" stories in light of their claims of playing Frisbee golf in the middle of the night, the need to retrieve a Frisbee that had gone on top of a building instead of using a replacement, the lack of a Frisbee being recovered by police or produced at trial. Contra BOP at 19. Where the jury was asked to decide whether the state proved its case beyond a reasonable doubt where there were two competing stories, the improper and erroneous use of the prior

convictions harmed undoubtedly Respondent's ability to have the jury fairly consider his version of events.

CONCLUSION

Respondent respectfully requests this Court affirm the PCR court or dismiss the writ as improvidently granted.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR RESPONDENT

This 27th day of January, 2023.