STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Spartanburg County
Roger L. Couch, Circuit Court Judge

Opinion No. 2023-UP-406 (S.C. Ct. App. filed December 20, 2023)

STATE OF SOUTH CAROLINA,

RESPONDENT

V.

CARNIE NORRIS,

PETITIONER

APPELLATE CASE NO. 2019-000334

SUPPLEMENTAL APPENDIX

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

On Petition for Writ of Certiorari to Spartanburg County
Court of Common Pleas

The Honorable J. Derham Cole, Trial Judge
The Honorable Roger L. Couch, PCR Judge

Appellate Case No. 2019-000334

CARNIE NORRIS. .....Respondent.

v.

STATE OF SOUTH CAROLINA. .....Petitioner.

BRIEF OF PETITIONER

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STATEMENT OF ISSUE

Petitioner's Statement of Issue

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?

STATEMENT OF THE CASE

Carnie Norris (hereafter "Norris") is presently confined in the South Carolina Department of Corrections. During its September 2008 term, the Spartanburg County Grand Jury indicted Norris for armed robbery (2008-GS-42-05631). Norris was represented by Beverly D. Jones, Esquire (hereafter "Counsel"). Solicitor Barry J. Barnette, Esquire, from the Seventh Circuit Solicitor's Office, represented the State. On July 6-7, 2009, the case proceeded to trial before the Honorable J. Derham Cole, circuit court judge. On July 7, 2009, the jury found Norris guilty of the crimes charged. Judge Cole sentenced Norris to twenty-eight years' imprisonment.

Norris filed a notice of appeal, which was perfected by Katherine H. Hudgins, Esquire, by filing a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). Norris subsequently made a *pro se Anders* response. The South Carolina Court of Appeals dismissed Applicant's appeal by unpublished opinion. *State v. Norris*, 2012-UP-226 (S.C. Ct. App. filed Apr. 18, 2012). The remittitur was issued on June 19, 2012.

Norris timely filed a PCR application on November 7, 2012. The State made its return on February 28, 2014. The evidentiary hearing occurred on September 15, 2014, before the Honorable Roger L. Couch, circuit court judge. J. Brandt Rucker, Esquire was Norris' attorney. Suzanne H. White, Esquire of the South Carolina Attorney General's Office represented the State. Both parties submitted written memoranda/briefs in lieu of closing arguments. By written order dated September 6, 2017, and filed September 6, 2017, Judge Couch granted the application for post-conviction relief, finding "Trial counsel's consent to the introduction of the prior convictions, and her introduction of the prior convictions during her direct examination of the Applicant was error." (App. 505). The State filed a motion to alter or amend the order on September 25, 2017. Judge Couch denied the State's motion by order filed February 15, 2019.

The State filed a notice of appeal on March 1, 2019. The State filed the petition for writ of certiorari and appendix on September 20, 2019. Williams' filed their return on February 3, 2020. The South Carolina Supreme Court transferred this matter to the South Carolina Court of Appeals on February 18, 2020. The Court of Appeals granted certiorari on August 19, 2022. This Brief of Petitioner follows.

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STATEMENT OF FACTS

I. The victims and witnesses consistently testified that they were out playing Frisbee-golf when Norris approached, forced Bond to the ground, identified himself as a security guard, rifled through Bond's wallet, and held Bond at knifepoint when there was no report of a burglary.

At trial, victim Andrew Bond testified that on July 16, 2008, he and several friends were playing Frisbee-golf when he was pushed to the ground by a man from behind who demanded his ID and told him he was under arrest. (App. 113-15). The man took Bond's wallet and start looking through it. (App. 115). Bond identified him as Carnie Norris. (App. 115). When Bond asked to see Norris' badge, Norris pulled a knife out and held it to his throat. (App. 116). Law enforcement later found a knife on Norris' person, which Bond identified as the knife used in the assault. (App. 116, 123, l 90). Once the co-defendant arrived on scene and began rifling through Bond's wallet, Norris directed Bond to stay down and not move or Norris would kill him. (App. 117-19). Once Bond's friends pulled up in their cars and the officers arrived, Norris and his co-defendant handed Bond his empty wallet and cell phone before leaving. (App. 119-20).

Herbert Blankenship, a fellow Frisbee-golf player, saw Norris grab Bond, put him on the ground, announce he was a security officer, and pull a knife. (App. 144-45). As Blankenship and company approached Norris and Bond, Norris pulled the knife, pointed it at the others, and told them to get on the ground. (App. 145-47). Blankenship identified Norris as the perpetrator. (App. 146-47, 160-61). Blankenship and company retreated and contacted security, who called the police. (App. 147-48). The group drove back to the scene and Blankenship directed his headlights at the area where Norris had Bond on the ground until officers arrived. (App. 148-49). Blankenship identified the knife found on Norris as the knife used in the attack. (App. 149, 161).

Daniel Mayfield, another Frisbee-golfer, saw Norris approach Bond, put him on the

ground, and remove his wallet. (App. 169-70). As Mayfield and the others approached them, Norris pointed a knife towards the group and told them to get on the ground. (App. 170). Mayfield identified the knife found on Norris as the knife used in the attack. (App. 170). Mayfield identified Norris as the attacker in court and identified co-defendant Kenneth Chiles. (App. 170-72). Mayfield and company fled and agreed to call the police. (App. 172). Blankenship, who left to retrieve his car, returned "a minute or two later" and the group left to alert a security guard. (App. 172-73). Mayfield testified that Norris identified himself as a security guard before taking Bond's wallet. (App. 175-76, 183-84).

Officer Brad James, of the Spartanburg Public Safety Department, responded to a call about a disturbance involving "a friend being held at knifepoint," and found Norris standing over Bond with "a black object in his hand." (App. 186-87, 192-93, 209). As James approached, the suspect "handed the black object back to the white male that was one the ground[,]" and then crossed the street. (App. 187-88). The man on the ground told James the men robbed him after one identified himself as a security guard. (App. 188-89). James, after receiving backup from Officer John Guest, walked across the street to the still visible Norris and Chiles, and informed them that Bond and his friends accused them of robbing him. (App. 189). Both men initially denied possessing anything belonging to Bond, but Chiles surrendered a few cards from his pocket. (App. 189-91). After receiving consent from Norris, James searched him and found a black-handled kitchen knife. (App. 190, 206). James took the knife and presented it to Bond, who identified it as the weapon used in the robbery. (App. 190-91).

Officer Guest testified law enforcement received two calls regarding a disturbance with weapons, which they found out were from the Hangar security guard and one of Bond's friends. (App. 210). Guest testified that he arrived on scene and saw Norris and Chiles sitting on the

porch across the street. (App. 210-11). Guest spoke with James and both officers crossed over to interview Norris and Chiles. (App. 211). Guest explained that the men mentioned, after prodding, that Frisbee golfers were on the roof. (App. 211). Guest asked for consent to search Chiles, who consented and handed over several of Bond's business and credit cards. (App. 211-12, 214). Guest saw James recover the knife from Norris. (App. 212-13). Guest testified Bond identified the knife as the one used in the robbery. (App. 213). The officers then detained Norris and Chiles. (App. 213). Guest confirmed he never received a call-in regard to a break-in in that area and did not search the premises consistent with any such call. (App. 213, 217).

II. Norris and Chiles claimed they performed a "citizen's arrest," but were inconsistent with one another at trial, and inconsistent with Norris' testimony at the evidentiary hearing.

Both Chiles and Norris testified in their defense. Chiles testified that he fell asleep while watching television and having a beer when Norris knocked on his door. (App. 240, 247-49). Chiles testified Norris told him somebody was trying to break into a building and asked to use his phone. (App. 240-41). Chiles retrieved his phone and went outside to see a tree shaking with two to three people on top of the building. (App. 241, 247-48, 252, 255-56). Chiles recalled that by the time he had put pants on and come back outside, Norris had Bond on the ground, with his hand on the man's shoulder. (App. 241-42, 248, 256-58).

Chiles testified Norris asked him to hold the man's I.D., among a stack of other cards, so Chiles pocketed them. (App. 242-43, 257). Chiles denied going through Bond's wallet, or that he ever saw the wallet, despite his reported statement of having seen the cards fall out of Bond's wallet. (App. 243, 246, 257, 259). The cards were on the ground before Norris picked them up and handed them to Chiles. (App. 259).

Chiles testified that law enforcement arrived before he could call them. (App. 242, 254,

256-57, 260-61). Chiles claimed that they spoke to two or three officers before crossing the street to the porch, and that he ultimately surrendered the cards upon police inquiry. (App. 244-45, 260, 262-63). Chiles described it as a "citizen's arrest," and that if he thought it was "just kids playing" he would have stayed in bed. (App. 242-43, 246-47). Chiles denied knowledge about the knife or personally possessing a weapon. (App. 249, 258-59, 263). Chiles did not know why Norris was out after midnight. (App. 254-55). Chiles denied hearing Norris identify himself as a security guard. (App. 261-62).

Chiles' friend, A.C. Worthy also testified, recalling that he and Chiles drank multiple beers while watching wrestling. (App. 229-30). After wrestling, Worthy changed the channel to the news, and heard Norris call for Chiles from the window. (App. 231). After repeated calls from Norris, Chiles got up and asked Norris what he wanted, and thereafter got dressed over the course of five to ten minutes. (App. 232-34). Worthy testified Chiles left, then came back to get his cell phone. (App. 234-35). Worthy did not know what happened after Chiles retrieved his cell phone but recalled he "was sitting looking at the wrestling when the officers come back, and they had Mr. Chiles with them in handcuffs." (App. 235). Worthy testified he never heard sirens from patrol cruisers, only "some guys on the porch talking." (App. 236).

Norris testified he was walking up the street when he heard leaves rustle, prompting him to look up and see two people on top of the clinic. (App. 265-66). Norris summoned Chiles and explained something was occurring at the clinic. (App. 266-68). Chiles retrieved his cell phone and the two went over to the people near the clinic and asked what was happening. (App. 268-69). Norris testified that when he asked Bond who he was, Bond became afraid, pulled out his wallet and cell phone, produced cards from the wallet, and showed it to Norris, but that he never possessed Bond's wallet. (App. 270-71, 276). Norris denied preventing Bond from leaving but

testified that he initially prevented Bond from fleeing by holding his arms out, and testified he instructed Bond to wait until police arrived. (App. 269, 271). Norris also denied using a knife during the altercation but admitted to possessing a knife, which he claimed he alerted the police to prior to the search. (App. 279-80). Norris asserted Bond handed the cards over when requested to and dropped some others which Norris instructed Chiles to hold. (App. 259, 275-76). Norris and Chiles provided inconsistent testimony as to whether Bond had an identification card on his person. (App. 258, 276).

At the PCR hearing, Norris attempted to present a claim of prosecutorial misconduct and, in the process, presented new facts. Norris testified he had two knives on his person that evening: a pocketknife and a fish paring knife. (App. 436). Norris testified that they were taken across the street to the porch by law enforcement, and that law enforcement approached again with guns drawn. (App. 436). Norris accused the officers of perjuring themselves for (1) stating the search was consensual and (2) mentioning only the one knife. (App. 436-37).

III. The prior convictions were admitted solely for impeachment, argued solely for impeachment, and comprised a very small part of the trial.

Prior to the testimony of either defendant, the trial court took up the matter of impeachable prior convictions. (App. 225-28). The State asserted Norris had two timely prior convictions: an October 12, 1995, conviction for second-degree burglary, non-violent; and a January 17, 1996, conviction for common law robbery. (App. 226). Counsel did not object to the use of the convictions for impeachment purposes but asked the prosecutor to confirm that those were the only two convictions that would come up. (App. 227-28).

Near the outset of Norris' testimony, Counsel asked about the prior convictions. (App. 267). Counsel asked Norris if he had suffered from a drug problem during that period of his life, which Norris admitted, and explained "[t]hat was over 15 years ago," and that he had pled guilty.

(App. 267). The State questioned Norris at the end of cross-examination:

> 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). No details of the crimes were ever brought out before the jury. The State primarily focused its closing argument on the inconsistencies in Norris's testimony, and briefly mentioned the priors in closing:

> 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. 304-05). After the verdict, the State explained that for the prior burglary, Norris was sentenced to fifteen years, and for the robbery Norris was sentenced to fifteen years suspended to nine years and five years of probation to run consecutive to any other sentence. (App. 337-38). Records from the South Carolina Department of Corrections indicate Norris was released on parole from the prior convictions on January 29, 2004. (App. 534).

The trial court charged the jury at length regarding the burden of proof, the presumption of innocence, and reasonable doubt. (App. 312-15). The trial court instructed the jury on the proper use of evidence of prior convictions, explaining:

> . . . that evidence may be used for a very and strictly limited purpose by the jury, and that is as it relates to the impeachment of a witness' or a defendant's testimony given during the trial. In other words, you may consider such evidence on the issue of the credibility and/or the believability of a defendant and that defendant's testimony, but you may not consider it for any other purpose. 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 the 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. 318-19). The jury retired to deliberate at 4:04 p.m. and returned with a guilty verdict at 4:25 p.m. (App. 334-35).

IV. Counsel concluded the prior convictions were admissible under the rules, built a strategy that would avoid their use and not require Norris' to testify, and was primarily focused on advising Norris to not testify.

At the PCR hearing, Counsel testified that she understood the convictions were admissible. (App. 465). Speaking to other issues, Counsel testified she believed that a joint trial with co-defendant Chiles was to Norris' benefit and explained "if there was another individual who could provide helpful testimony and thereby eliminate the need [for] Mr. Norris' testimony, that would have been helpful to him." (App. 464-65). Counsel confirmed that Chiles would testify first, due to the alphabetization of the defendants, and requested additional time from the trial court to conference with Norris "in an attempt to prevent him from testifying or at least impose my recommendation that he not testify." (App. 466). Counsel testified she discussed with Norris that he would be tried jointly with Chiles, that Chiles would testify, and what he would testify to. (App. 468-69). Counsel noted that admission of the armed robbery charge would not have made a difference because the burglary conviction would have still come in. (App. 473-74).

STANDARD OF REVIEW

The standard of review in PCR matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). Overall, reviewing courts "give[] great deference to the post-conviction relief court's findings of fact and conclusions of law", *Dempsey v. State*, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005), with the applicant shouldering the burden of proof. Rule 71.1(e), SCRCP; *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). A PCR court's findings will be upheld if there is "any evidence of probative value sufficient to support them." *Id.* Reversal of the lower court's findings occurs when there is no probative evidence to support the initial finding. *Pierce v. State*, 338 S.C. 139, 526 S.E.2d 222 (2000). However, courts must conduct a de novo review when evaluating questions of law and are required to reverse the initial holding when the decision is controlled by an error of law. *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40; *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012). Because the PCR Court failed to properly apply *Strickland*'s command to eliminate the distorting effects of hindsight and failed to apply the rule that Counsel is not required to anticipate changes in the law, the issue should be reviewed de novo.

ARGUMENT

The PCR court erred in finding Counsel was deficient for declining to challenge the admissibility of Norris' two prior convictions for burglary and common-law robbery and erred in finding Norris was prejudiced by the deficiency. The PCR court erred by applying dicta as though it was the then-prevailing law and professional norm, by misapplying *each* of the five factors for considering the admissibility of prior convictions which would apply today, and by failing to properly acknowledge the palpably false character of the "citizens arrest" story advanced by Norris and the numerous inconsistencies which provided to wholly discredit his trial and PCR hearing testimony. Accordingly, this Court should reverse the order of the lower court and reinstate Norris' conviction and sentence.

Where the application alleges ineffective assistance of counsel as a ground for relief, an applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*. First, an applicant must prove that counsel's performance was deficient. *Strickland*, 466 U.S. at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional

judgment." *Id.* (citing *Strickland*, 466 U.S. at 690). "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011); *Harrington v. Richter*, 562 U.S. 86, 109-10 (2011). "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough* at 6; *see also Murphy v. Davis*, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable."). An applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625.

Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. "The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury." *United States v. Basham*, 789 F.3d 358, 371-72 (4th Cir. 2015) (quoting *Elmore v. Ozmint*, 661 F.3d 783, 858 (4th Cir. 2011)).

I. Counsel's concession that the prior convictions could be used to impeach Norris did not constitute deficient performance because the convictions were crimes of dishonesty at the time of trial, and the court's reliance on *State v. Bryant* is misplaced and amounts to an error of law requiring reversal.

"For the purpose of attacking the credibility of a witness, . . . 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. Evidence of prior convictions are "not admissible if a period of more than ten years has elapsed since the date of the conviction *or of*

the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect." Rule 609(b), SCRE (emphasis added); *see also State v. Shands*, 424 S.C. 106, 123, 817 S.E.2d 524, 533 (Ct. App. 2018) (parole does not count as confinement for the purposes of Rule 609(b), SCRE).

Both the prior common-law robbery and the burglary would have been considered under Rule 609(a)(2), SCRE, as crimes of dishonesty at the time of trial. *See State v. Al-Amin*, 353 S.C. 405, 425, 578 S.E.2d 32, 43 (Ct. App. 2003) ("It is the larcenous element of taking property of another which makes the action dishonest. . . . To restrict the application of Rule 609(a)(2) only to those offenses which evidence an element of affirmative misstatement or misrepresentation of fact would be to ignore the plain meaning of the word 'dishonesty.'"); *rev'd by State v. Broadnax*, 414 S.C. 468, 475-76, 779 S.E.2d 789, 792-93 (2015) (citing *State v. Bryant*, 369 S.C. 511, 517, 633 S.E.2d 152, 155-56 (2006)). Thus, the prior convictions would have been admitted without a balancing test.

The lower court cites to *State v. Bryant* for the proposition that "a conviction for robbery, burglary, theft, and drug possession, beyond the basic crime itself, is not probative of truthfulness. 369 S.C. at 517, 633 S.E.2d at 155-56. However, as the State argued in *Broadnax*, the case in *Bryant* involved convictions for firearms offenses, not any robbery or other larceny, such that the language relied upon by the PCR court was dicta, and not binding law at the time of trial. 414 S.C. at 475, 779 S.E.2d at 792-93. *Al-Amin* remained as good law in 2009, and Counsel was well within the bounds of reasonably effective assistance to rely upon it and concedes the issue. *See e.g. Thornes v. State*, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765-66 (1993) ("[t]his

court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of trial."). The PCR court thus erred as a matter of law and Counsel was not deficient.

II. The lower court's analysis under Rule 609(a)(1), SCRCP, and the five factors set forth in *State v. Colf* is infected by its misapplication of *State v. Bryant* and is riddled with errors of law.

The PCR court's reliance on *Bryant* and rejection of *Al-Amin* thereafter infects its analysis under the factors set forth in *State v. Colf*, 337 S.C. 622, 627, 525 S.E.2d 246, 248 (2000). In *Colf*, this Court identified and embraced five non-exclusive factors often considered in federal courts for determining whether the probative value of a prior conviction outweighed the prejudicial effect of its introduction to a jury:

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.

Id. Although this Court in *Colf* applied the factors to the admissibility of remote prior convictions, the same factors have been consistently applied for the purpose of Rule 609(a)(1), SCRE, analysis. *State v. Robinson*, 426 S.C. 579, 828 S.E.2d 203, 211 (2019).

First, the lower court improperly relies upon the fact that the State did not set forth additional details about the prior crimes to establish their dishonest character (App. 507). However, the State had no reason to do so because common law robbery was a crime of dishonesty at the time of trial and admissible without further analysis. Furthermore, the analysis under the first *Colf* prong appears to muddy the challenges of weighing the impeachment value

of a prior crime under Rule 609(a)(1), SCRE, and the dishonest character of a prior conviction under Rule 609(a)(2), SCRE. "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)." *Robinson*, 828 S.E.2d at 213. In *Robinson*, this Court reversed the South Carolina Court of Appeals vacation of a conviction where the Court of Appeals made the same error as made in the lower court in this matter: both courts noted no details as to the convictions were provided and concluded that they had no impeachment value.

Second, the lower court declares the convictions were too remote in time, looking back only to the date of the conviction, rather than the date of release as required by Rule 609(b), SCRE. (App. 507-08). As the trial took place on July 6-7, 2009, *only four years* had passed between Norris' release from confinement on parole in 2004 and the July 2008 robbery. The lower court's analysis that over fifteen years had passed since the prior robbery and burglary ignores that Norris was released from prison and committed new crimes after only a few years. Norris' continuing pattern of criminality legitimately diminishes his credibility in front of a jury. *See Robinson*, 828 S.E.2d at 214 ("An analysis of the sentences illustrates closeness in time between the prior offenses and the offense for which Robinson was on trial, revealing a pattern of behavior that legitimately evoked questions of Robinson's credibility."). Further, as the trial took place in July 2009, only five years passed between Norris' release and trial, easily satisfying the time requirements of Rule 609(b), SCRE.

Third, though there is concededly a fundamental similarity between strong-arm robbery and armed robbery, the lower court failed entirely to note the dissimilarity between the prior burglary and armed robbery. (App. 508, 526). Robbery involves different conduct than burglary,

and the fact that most burglaries are undertaken with an eye toward stealing something does not render it overly similar for impeachment purposes in a trial for robbery or armed robbery. *Robinson*, 828 S.E.2d at 215. The failure to acknowledge the dissimilarity of the prior burglary is particularly notable where, as here, Counsel herself emphasized the point during the PCR evidentiary hearing as part of her explanation as to why expending time and preparatory resources on fighting to exclude the prior convictions was pointless: the burglary was coming in.

Fourth and fifth, the PCR court declares Norris' testimony and credibility essential. (App. 508). Accordingly, the lower court again ignores 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. (App. 464-65). Norris testimony was not at all essential, nor his credibility of any consequence by Counsel's design. Counsel clearly understood that her client lacked credibility, and would testify poorly, endeavored to compensate for those facts, and then did the best she could, given the circumstances when Norris refused her advice and exercised his right to testify, to his own detriment.

Considering the case under the five factors above, the only reasonable conclusion was that (1) the prior convictions had substantial impeachment value, (2) the moderately close proximity of Applicant's release from custody for the prior convictions to the acts alleged revealed a pattern of criminal conduct to legitimately impeach his credibility, (3) the burglary was sufficiently dissimilar from the new charges as to not raise constitutional concerns, (4) Norris' testimony was not necessary given the co-defendant had already favorably testified, and (5) Norris' credibility was not crucial to the case given his testimony was not necessary. The PCR court's legal conclusions to the contrary are without support in the record and constitute a reversible error of law.

III. Even if Norris' prior convictions should have been excluded, his testimony was already so devoid of credibility that there is no reasonable probability the inclusion of the convictions changed the outcome of trial, such that the PCR court's finding of prejudice is error.

In the present matter, as set forth in detail in the Statement of the Facts: (1) Bond and his friends all testified Bond were robbed by Norris and Chiles at knifepoint; (2) Norris and Chiles were identified yards from the scene; (3) Chiles was found in possession of the victim's possessions; (4) Norris was found in possession of the knife identified by the victims as the one used in the robbery; (5) law enforcement indicated there was no report of any break-in as insisted upon by the defendants, and (6) Norris was seen handing back the wallet and leaving the scene, abandoning the victim, after the so called "citizen's arrest." Considering these facts, the only potential defense available to Norris (and Chiles) was to cook up a story to try and explain away what looks like robbery. They did so through the citizen's arrest theory.

Norris' testimony at trial and the PCR hearing is not credible when set against the testimony of three witnesses who consistently testified they saw the knife and identified it, and the police officers who testified they responded to a report of a disturbance involving someone being held at knifepoint. The witnesses had no way of knowing Norris had a knife on him at the time of the 911 calls if they had not seen the knife held at Bond's neck. Despite both defendants testifying, neither affirmatively sought to return Bond's credit cards to him or law enforcement, and only did so when demanded to do so by the police.[1]

Furthermore, Chiles had no prior robbery or burglary convictions, merely shoplifting and

[1] Here, Norris' new story that the police approached him and Chiles on the porch at gunpoint becomes especially damaging, as it runs contrary to Chiles' trial effort to show that he immediately and freely returned the cards to law enforcement as soon as the police asked. Still further, assuming the police had their guns drawn as Norris now claims, Chiles could not have simultaneously held his hands up and reached into his pocket to produce the cards, and an attempt to suddenly reach into his pocket would have likely ended with tragic consequences.

criminal domestic violence convictions introduced at trial and was similarly convicted. (App. 238-39). Norris' prior convictions did not and could not cast a shadow over Chiles testimony.

Where the trial testimony from a defendant is so facially ludicrous and self-serving as is the case here, an applicant fails to show prejudice from Counsel's concession to and engagement with evidence of prior convictions which tend to only discredit him. Jurors are expected to use common sense for just such testimony as this, and they did for about twenty minutes. Norris' and Chiles' utter lack of credibility was because their story was facially unbelievable and in stark contrast to the victims, bystanders, and law enforcement, not because of Norris' prior criminal history.

The PCR court granted relief upon finding that "[a]bsent the knowledge of these prior convictions, the jury would have been confronted with two competing versions of the event in question." (App. 509). This ignores the impact varying levels of credibility can have upon a jury's verdict alone. Norris' "citizen's arrest" story is simply not plausible facially, nor when compared to the inconsistencies with his co-defendant, other witnesses' testimonies, and by the fact that he was apprehended in possession of both a weapon identified by the victims and the victims' property.

CONCLUSION

For the reasons stated above, this Court reverse the grant of post-conviction relief.

Respectfully submitted,

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December 15, 2022

RECEIVED
Jan 27 2023
SC Court of Appeals

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

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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.

SCCID
SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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RECEIVED
Nov 03 2023
SC Court of Appeals

November 3, 2023

The Honorable Jenny Abbott Kitchings
Clerk, S.C. Court of Appeals
Post Office Box 11629
Columbia, S.C. 29211

Re: Carnie Norris vs. The State of South Carolina, Appellate Case No. 2019-000334

Dear Ms. Kitchings:

The above-referenced case is scheduled for oral argument on Tuesday, November 7, 2023, before a panel of the Court of Appeals. Pursuant to Rule 208(b)(7), SCACR, I am submitting supplemental authority that is pertinent and significant authority for the sole issue raised in the final brief of respondent. As to ineffective assistance of counsel and prejudice, the respondent would cite Greene v. State, 440 S.C. 165, 889 S.E.2d 636 (Ct. App. 2023) as pertinent and significant authority.

If you have questions or require more information, please contact me.

Sincerely,

Gary H. Johnson
Appellate Defender

cc: Joshua A. Edward, Esquire (via email only)

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Carnie Norris, Respondent,

v.

State of South Carolina, Petitioner.

Appellate Case No. 2019-000334

Appeal From Spartanburg County
Roger L. Couch, Circuit Court Judge

Unpublished Opinion No. 2023-UP-406
Heard November 7, 2023 – Filed December 20, 2023

REVERSED

Attorney General Alan McCrory Wilson and Assistant Attorney General Joshua Abraham Edwards, both of Columbia, for Petitioner.

Gary Howard Johnson, II, of Columbia, for Respondent.

PER CURIAM: Respondent Carnie Norris was granted post-conviction relief (PCR) from his 2009 conviction for armed robbery. This court granted the State of South Carolina's (the State) petition for a writ of certiorari, wherein the State argues the PCR court erred in finding Norris's trial counsel was ineffective for

failing to object to the introduction of Norris's prior convictions for robbery and burglary. We reverse the PCR court's order.

FACTS/PROCEDURAL HISTORY

At Norris's trial in 2009, Andrew Bond (Victim) testified that he and a group of seven high school students were playing Frisbee golf at First Baptist Church in Spartanburg in 2008. The students had permission to play Frisbee golf from the church security guard. While playing, the Frisbee landed on the roof of a building and a student retrieved it from the roof and threw it towards Victim on the ground below. Victim testified that as he bent down to pick up the Frisbee, Norris appeared, pushed him from behind, and told him he was under arrest. Norris claimed to be a security officer. Victim stated Norris took Victim's wallet and put a knife to Victim's throat while he was on the ground. Victim's friends, Herbert Blankenship and Daniel Mayfield, approached and Norris told them to get on the ground. Blankenship and Mayfield testified Norris pointed the knife at them and that they saw Norris with Victim's wallet. Blankenship, Mayfield, and the others ran off to call the police. Victim testified Norris told him that if he tried to escape, he would kill him. Victim stated Norris took his cell phone and removed cash, a debit card, and other cards from his wallet.

Officer Bradford James of the Spartanburg police testified he arrived on the scene in response to "a call for a disturbance with weapons" and observed Victim on the ground with Norris standing over him "in an intimidating fashion." Officer James saw Norris thrust Victim's cell phone back to him before going to stand on the porch of a house across the street. Officer John Michael Guest testified he was the second officer to arrive at the scene in response to a call for a disturbance with weapons. Victim identified Norris to police as the man who robbed him. The police questioned Norris and another man, co-defendant Chiles, on the porch of the house. The officers testified Chiles handed them Victim's cards from the wallet and they found a knife on Norris. Blankenship and Mayfield identified the knife as the one Norris used to threaten them, and Victim identified it as the one Norris held to his throat. The arresting officers testified that the other Frisbee players told them they saw Norris rob Victim and then walk across the street to stand on the porch.

Before Norris's testimony at trial, the State set forth its intent to impeach Norris with two prior convictions, and trial counsel did not object. The following exchange occurred.

> **The Court:** Ms. Jones, do you have any convictions that [the State] has referenced with [Norris] that you contend should not be permitted for impeachment purposes?
>
> **Trial Counsel:** No, sir, Your Honor. The two that [the State] has spoken of, he has provided me documentation. And to clarify for the Court, these will be the only two that are qualifiable and impeachable. Is that correct?
>
> **The State:** That is within the last ten years, Your Honor. Obviously, both of them have records beyond that, but I understand under the rules I can't ask them about that.
>
> **Trial Counsel:** And that would be a 1996 common-law robbery and a 1995 burglary second nonviolent.
>
> **The Court:** Okay.

On direct examination, Norris affirmed that he had been convicted of burglary in 1995 and was convicted of robbery a few months later. Turning to the Frisbee golf incident, Norris stated that he saw the high school students on the roof of a building and thought it was a possible break-in, so he attempted a citizen's arrest. He denied having Victim's wallet or cell phone and denied pulling a knife on anyone.

The trial court comprehensively instructed the jury about the admission of Norris's prior convictions, stating in part:

> Now, during the course of this trial you have heard certain evidence relating to a defendant having prior convictions . . . that evidence may be used for a very and strictly limited purpose . . . you may consider such evidence on the issue of the credibility or believability of a defendant . . . but you may not consider it for any other purpose. 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 jury found Norris guilty of armed robbery, and the trial court sentenced him to twenty-eight years' imprisonment. On direct appeal, this court dismissed Norris's appeal pursuant to *Anders v. California*.[1] *See State v. Norris*, Op. No. 2012-UP-226 (S.C. Ct. App. filed Apr. 18, 2012). Norris filed a PCR application alleging trial counsel was ineffective by "impeaching [Norris] with a 1995 burglary second and a 1996 common-law robbery conviction."

In its order granting Norris PCR, the PCR court ruled that trial counsel was ineffective by failing to oppose the introduction of the two prior convictions and Norris was prejudiced by the ineffective performance. The PCR court stated that "[i]f trial counsel had opposed the introduction of the two prior convictions it is more likely than not that the trial [court] would have excluded the use of those convictions." The PCR court denied the State's Rule 59(e), SCRCP, motion, and this court granted the State's petition for writ of certiorari.

ISSUE ON APPEAL

Did the PCR court err in granting Norris post-conviction relief?

STANDARD OF REVIEW

"In post-conviction proceedings, the burden of proof is on the applicant to prove the allegations in his application." *Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008). "Our standard of review in PCR cases depends on the specific issue before us." *Mangal v. State*, 421 S.C. 85, 91, 805 S.E.2d 568, 571 (2017). "[Appellate courts] do not defer to a PCR court's rulings on questions of law." *Id.* (footnote omitted). "Questions of law are reviewed de novo, and we will reverse the PCR court's decision when it is controlled by an error of law." *Id.* (quoting *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)).

LAW/ANALYSIS

"A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution." *Taylor v. State*, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013) (citations omitted). To establish a claim for ineffective assistance of counsel, a PCR applicant must show (1) counsel's performance was deficient because it "fell below an objective standard of reasonableness" and (2) "there is a reasonable probability that, but for counsel's . . .

[1] 386 U.S. 738 (1967).

errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 687-89, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Id.* "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that of course should be followed." *Id.* at 697.

Regardless of whether trial counsel was deficient, the PCR court erred in finding that there was a reasonable probability the outcome of the trial would have been different but for trial counsel's errors. The PCR court's analysis on prejudice stated the prior convictions held no impeachment value because they were not crimes of dishonesty. It also held the convictions were "remote" under Rule 609(b), SCRE. The court noted the similarity of Norris's past conviction for common law robbery to the charged offense of armed robbery. The court observed that Norris's credibility was crucial. The court emphasized the lack of any background information about Norris's past convictions and found the absence of this information cut against the State, reasoning that the lack of information in the record raised the likelihood the convictions would have been excluded.

The State correctly identifies several problems with this analysis. Even if these crimes were not crimes of dishonesty, they would still have impeachment value if Norris's conduct involved deceit, fraud, a false statement, or anything reflecting on his credibility. *See State v. Robinson*, 426 S.C. 579, 599–600, 828 S.E.2d 203, 213–14 (2019). While the convictions were somewhat dated, they were not remote under Rule 609(b), SCRE. Norris had been released from prison roughly five years before trial. The trial court could have found this proximity cut in favor of admitting the evidence. *See id.* at 600, 828 S.E.2d at 214.

The fact that Norris's credibility was central weighs in favor of admitting the evidence, not against it. *See id.* at 606, 828 S.E.2d at 214. A proper objection may have resulted in the circuit court judge "sanitizing" the prior convictions in an attempt to cure unfair prejudice. *See, e.g., State v. Rollins*, 348 S.C. 649, 653, 560 S.E.2d 450, 452 (Ct. App. 2002); *State v. Elmore*, 368 S.C. 230, 239 n.5, 628 S.E.2d 271, 275–76 n.5 (Ct. App. 2006).

We find the PCR court erred in holding the lack of background information about Norris's past convictions against the State. As the applicant, the burden was on Norris to show that a proper objection, and the background information that would certainly have followed the objection, would have yielded "a reasonable

probability that . . . the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *see also Terry v. State*, 394 S.C. 62, 66, 714 S.E. 2d 326, 329 (2011) ("A PCR applicant bears the burden of establishing he is entitled to relief.").

Further, as our supreme court has noted, "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. 468, 479, 779 S.E.2d 789, 794 (2015) (quoting *State v. Brooks*, 341 S.C. 57, 62–63, 533 S.E.2d 325, 328 (2000)). Here, Victim and two witnesses testified Norris threatened Victim with a knife and took his wallet. They all identified the knife that was found on Norris as the same knife he used to threaten them. Officer James and Officer Guest responded separately to a call for a disturbance with weapons, indicating the presence of a knife. Officer James saw Norris standing over Victim in an intimidating manner. The witnesses saw Norris walk from Victim to the porch across the street, where his co-defendant handed police the items from Victim's wallet a few minutes later. Accordingly, we find the evidence admitted at trial shows Norris's guilt was conclusively proven by competent evidence, such that the jury could reach no other rational conclusion.

Accordingly, the order of the PCR court is

REVERSED.

WILLIAMS, C.J., and HEWITT and VERDIN, JJ., concur.

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Honorable Roger L. Couch, Circuit Court Judge

Opinion No. 2023-UP-406

STATE OF SOUTH CAROLINA,

RESPONDENT

V.

CARNIE NORRIS,

PETITIONER

APPELLATE CASE NO. 2019-000334

PETITION FOR REHEARING

On December 20, 2023, this Court issued an unpublished opinion reversing the decision of the PCR court granting Petitioner a new trial arising out of his armed robbery conviction from July 7, 2009. *See* Norris v. State, No. 2023-UP-406 (S.C. Ct. App. filed Dec. 20, 2023). In reversing, this Court found "the PCR court erred in finding that there was a reasonable probability the outcome of the trial would have been different but for trial counsel's errors." Norris, No. 2023-UP-406 at 5.

Pursuant to Rule 221(a), SCACR, Carnie Norris requests that this Court grant rehearing because this Court has failed to give appropriate deference to the PCR court's findings of fact

concerning whether the prior criminal convictions would have been admissible at trial and the prejudicial impact of the improperly admitted felony convictions and is, in effect, substituting its own finding of facts with that of the PCR court concerning these issues.

This Court does appear to accept trial counsel was in error in not contesting the admission of the prior felony convictions.[1] This finding is in keeping with this Court's opinion in State v. Broadnax, 401 S.C. 238, 246, 736 S.E.2d 688, 692 (Ct. App. 2013) which acknowledged our Supreme Court's holding in State v. Bryant, 369 S.C. 511, 633 S.E.2d 152 (2006) that a "conviction for robbery, burglary, theft, and drug possession, beyond the basic crime itself, is not probative of truthfulness." Id. 369 S.C. at 517, 633 S.E.2d at 155.

The admissibility of the prior convictions.

This Court does question the PCR court's factual finding that had trial counsel "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. This Court notes the PCR court considered the appropriate factors in making this determination:

> (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 of the past crime and the charged crime;
> (4) The importance of the defendant's testimony; and
> (5) The centrality of the credibility issue.

State v. Colf, 337 S.C. 622, 627, 525 S.E.2d 246, 248 (2000).

This Court noted the trial court could have reached a different conclusion than the PCR court regarding the impeachment value, the timing, and the impact on credibility. For example, under the impeachment value factor, this Court noted that "[e]ven if these crimes were not crimes of dishonesty, they would still have impeachment value if Norris's conduct involved

[1] "Regardless of whether trial counsel was deficient . . ." Norris, No. 2023-UP-406 at 5.

deceit, fraud, a false statement, or anything reflecting on his credibility." Norris, No. 2023-UP-406 at 5.

The PCR court did not in fact rule the prior convictions lacked any impeachment value. To the contrary, the PCR court held:

> 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."

App. 507 (emphasis added). In quoting Bryant, the PCR court acknowledged the impeachment value of criminal convictions for the basic crime itself but emphasized the convictions in the present case were not "crimes of dishonesty" as a matter of law. App. 507.

Likewise, on the timing aspect of the criminal charges, this Court noted "While the convictions were somewhat dated, they were not remote under Rule 609(b), SCRE. Norris had been released from prison roughly five years before trial. The trial court could have found this proximity cut in favor of admitting the evidence." Norris, No. 2023-UP-406 at 5. By implication, this Court's phrasing also acknowledges the trial court could have, as the PCR court did, find the delay between release and new charges weighed against admission.

Under credibility, this Court held since "Norris's credibility was central weighs in favor of admitting the evidence." Norris, No. 2023-UP-406 at 5. However, the PCR court never ruled that since Norris' credibility was central, it would weigh this factor against admission of the prior convictions. This portion of the PCR order followed the similarity of convictions analysis which weighed heavily against admission, and the PCR court noted the "use of the prior convictions harmed undoubtedly the Applicant's ability to have the jury fairly consider his version of events." App. 508. This Court even notes the balancing of these two elements would have likely resulted in the "circuit court judge 'sanitizing' the prior convictions in an attempt to cure unfair

prejudice." Norris, No. 2023-UP-406 at 5. This admission by the Court, that there was unfair prejudice, precludes a finding that the PCR court abused its discretion in reaching the same conclusion.

On the similarity of the crimes, this Court discounts the state's *admissions* to the PCR court that the common law robbery was similar to the armed robbery charge and thus enhanced its prejudicial nature:

> Additionally, *while Applicant's prior conviction for common law robbery is similar to armed robbery in that they are both robberies, they are not identical.* The Supreme Court of South Carolina has held although the "admission of identical convictions for impeachment purposes enhances its prejudicial nature, it does not conclusively render the error so prejudicial that it is not subject to a harmless error analysis." State v. Broadnax, 414 S.C. 468, 779 S.E.2d 789 (2015).

App. 521. Since the state admitted both the similar natures of the crimes and the enhanced prejudicial impact inherent in such convictions, this Court's concern on the need of petitioner to have added additional facts in this regard would be redundant. Moreover, the PCR court made the notation regarding the lack of supporting detail in referencing the original trial, not the PCR hearing. "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 (emphasis added).

"[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." State v. Colf, 337 S.C. 622, 628, 525 S.E.2d 246, 249 (2000). "[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." Bryant, 369 S.C. at 517-18, 633 S.E.2d at 156.

The PCR court and this Court disagree on the likely admissibility of the crimes in question, despite both courts applying the same balancing factors outlined in Colf and Bryant. This is the nature of a discretionary ruling. Two different courts may well reach different conclusions in balancing the same factors.

> 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. 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.*

State v. Robinson, 426 S.C. 579, 607, 828 S.E.2d 203, 217 (2019) (emphasis added).

The standard of review in evaluating a balancing of a discretionary ruling by the PCR court dictates such ruling be upheld if there is any evidence of probative value in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Here, this Court's disagreement over the conclusion by the PCR court following that balancing does not give appropriate deference to the PCR court's ruling.

The prejudicial impact.

This Court also improperly discounts the PCR court's findings of fact concerning the prejudicial impact of the admission of the common law robbery conviction. In its order, the PCR court found the "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 the Applicant's ability to have the jury fairly consider his version of events*." App. 508 (emphasis added).

This Court is required to provide appropriate deference to the PCR court's finding of fact concerning prejudice.

> While all of this evidence could indicate the jury was certain to find Briggs guilty—regardless of Arroyo-Staggs' improper bolstering—our decision is governed by the standard of review. *We defer to a PCR court's findings of fact, and we will uphold them if there is evidence in the record to support them*.

Briggs v. State, 421 S.C. 316, 334, 806 S.E.2d 713, 723 (2017) (emphasis added).

As found by the PCR court, Norris was entitled to have the jury "fairly consider his version of events" uncolored by the prejudicial introduction of a similar criminal conviction. App. 508. This Court recounted the facts that supported guilt:

> Here, Victim and two witnesses testified Norris threatened Victim with a knife and took his wallet. They all identified the knife that was found on Norris as the same knife he used to threaten them. Officer James and Officer Guest responded separately to a call for a disturbance with weapons, indicating the presence of a knife. Officer James saw Norris standing over Victim in an intimidating manner. The witnesses saw Norris walk from Victim to the porch across the street, where his co-defendant handed police the items from Victim's wallet a few minutes later. Accordingly, we find the evidence admitted at trial shows Norris's guilt was conclusively proven by competent evidence, such that the jury could reach no other rational conclusion.

Norris, No. 2023-UP-406 at 6.

As acknowledged by the PCR court, each of the above factors would have supported a guilty verdict. App. 508; 518 - 520. However, none of these factors equate to overwhelming evidence of guilt required to set aside the PCR court's factual finding of prejudice. *See* Smalls v. State, 422 S.C. 174, 191, 810 S.E.2d 836, 845 (2018) (finding for the evidence to be "overwhelming" such that it categorically precludes 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 *Strickland* standard of 'a reasonable probability ... the factfinder would have had a reasonable doubt' cannot possibly be met.").

Many of these facts have a counter view that supported Norris' innocence. Norris told Childs that individuals were on the roof of the church, and he got his cell phone so he could call police to report the apparent crime since it was suspicious for people to be climbing on the church roof at midnight. App. 241, l. 8 – 24. As to "taking" of the wallet at knifepoint, Norris indicated Bond was startled by his approach, and Bond took out the wallet and simply gave it to Norris in response to Norris' questioning Bond on the presence of so many people on the roof of a closed church, very late at night, in a questionable neighborhood. App. 268, l. 8 – 271, l. 20. Childs indicated he arrived shortly after the initial confrontation and was handed what he believed was identification cards for Bond which he held pending the arrival of police since he intended to call 911 and help detain the individuals until police arrived. App. 241, l. 8 – 242, l. 24.

Neither Childs nor Norris acted guilty of any crime when police arrived shortly after the initial encounter. They did not flee the area. App. 211, ll. 11 – 21; 271, l. 23 – 272, l. 14. They told the police about the people on the roof and their intention to hold them until the police arrived. App. 211, ll. 13 – 18. They consented to a search. App. 211, l. 22 – 213, l. 7. More importantly, both Norris and Childs denied the criminal intent element of the crime charged, with each testifying that their intention was to hold the individuals until police arrived, not to commit the offense of armed robbery. App. 241, l. 8 – 242, l. 24; 268, l. 8 – 271, l. 20. This version, if believed by the jury, would have negated the intent element of the crime.

The knife that was found on Norris during the consent search was shown immediately to Bond who identified it as the knife Norris allegedly used to threaten Bond. App. 213, ll. 3 – 12. While the knife and its existence certainly support Bond's version of events, it is also possible that the idea of a weapon being used was invented and the knife was a convenient circumstance.

There were, in fact, conflicting stories about the existence of a "weapon" which do support the invention conclusion. Blankenship testified of his desire to protect himself from "these guys that have knives or guns" and that some of his companions said Norris and Childs had guns. App. 159, ll. 14 – 22. The reporting officers indicated a belief a "weapon" was involved, though one also mentioned a possible knife or gun. App. 200, 6 – 22; 210, ll. 7 – 11.

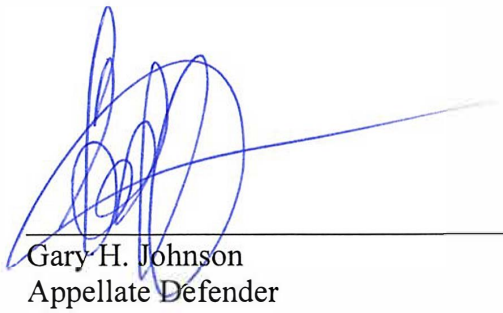
The mere existence of the knife does not rise to the level of overwhelming evidence which would preclude a finding of prejudice. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). This Court should, therefore, defer to the finding of prejudice by the PCR court and allow a jury to determine which version of events was true, untainted by the improperly admitted criminal convictions and they prejudicial nature of the state's use of those prior convictions.[2]

For the above-mentioned reasons, this Court may have overlooked or misapprehended the findings of fact by the PCR court and improperly substituted its view of the evidence for that of the PCR court. As determined by the PCR court, Norris was entitled to have the jury "fairly consider his version of events" uncolored by the prejudicial introduction of a similar criminal conviction. App. 508 (emphasis added). There should be a rehearing for these issues to be addressed once again and be considered by this Court.

[2] And you've *done robbery before*, haven't you, Mr. Norris? A Yes, sir. App. 283, ll. 16 – 18 (emphasis added).

CONCLUSION

For the reasons stated above, Norris petitions for rehearing pursuant to Rule 221(a) SCACR, and requests this Court reinstate the PCR court's order granting Norris a new trial.



Gary H. Johnson
Appellate Defender

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

ATTORNEY FOR PETITIONER

This 4th day of January, 2024.

RECEIVED
Jan 04 2024
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Honorable Roger L. Couch, Circuit Court Judge

STATE OF SOUTH CAROLINA,

RESPONDENT

V.

CARNIE NORRIS,

PETITIONER

APPELLATE CASE NO. 2019-000334

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-referenced case has been served upon Joshua A. Edwards, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Carnie Norris, #227226, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 4th day of January, 2024.

Gary H. Johnson
Appellate Defender

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

ATTORNEY FOR PETITIONER

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
The Honorable Roger L. Couch, Circuit Court Judge

Appellate Case No. 2019-000334
Opinion No. 2023-UP-406

CARNIE NORRIS, Petitioner,

v.

THE STATE, Respondent.

RETURN TO PETITION FOR REHEARING

Respondent Carnie Norris petitions for rehearing from this Court's December 20, 2023, opinion reversing the PCR court's grant of relief. Norris v. State, No. 2023-UP-406 (S.C. Ct.App. filed Dec. 20, 2023). Norris claims this court did not show appropriate deference to the PCR court's factual findings on the prejudice prong of the Strickland analysis for ineffective assistance of counsel. However, this Court's decision was based on the PCR court's errors of law, not its factual findings. This Court correctly determined the PCR court misapplied applicable law resulting in an erroneous grant of relief. The petition should be denied.

In its opinion, this Court correctly explained the numerous errors of law affecting the PCR court's ruling. An error of law is an abuse of discretion, and this

Court does not show deference to erroneous legal rulings. Norris refuses to accept this Court's opinion, and most of his petition essentially asks this Court to reconsider its ruling without identifying any true misapprehension of law.

Norris seeks to portray the PCR court's ruling as factual in nature. He alleges this Court did not apply the correct standard of review because it did not show deference to the PCR court's "finding of fact concerning prejudice." Petition at 5. However, the prejudice analysis in this case is a question of law. This Court is not required to defer to the PCR court's prejudice finding when the finding is based on a question of law.

The trial court's admission of impeachment evidence was an evidentiary ruling reviewed under an "abuse of discretion" standard. As Norris notes, this ruling is subject to a deferential standard of review on direct appeal. But this deference does not work in Norris's favor in PCR, where an applicant has the burden of showing a reasonable probability of a different result. See Strickland v. Washington, 466 U.S. 668, 696 (1984); Terry v. State, 394 S.C. 62, 66, 714 S.E.2d 326, 329 (2011). To show prejudice, Norris was required to show the trial abused its discretion by allowing impeachment. See Wolfe v. State, 326 S.C. 158, 163, 485 S.E.2d 367, 370 (1997) (in context of plea counsel's failure to move for continuance, applicant was required to demonstrate the trial court "would have abused its discretion in refusing to grant a continuance motion"). If the trial court did not abuse its discretion by allowing impeachment, Norris cannot show prejudice.

This Court correctly analyzed the admissibility of Norris's prior convictions and correctly found impeachment was proper. Norris failed to show the trial court would have abused its discretion by allowing impeachment if counsel had objected. This is a question of law, and an objective standard applies. This Court is not required to show deference to the PCR court on this question, particularly when the PCR court's analysis was infected with so many legal errors.

Finally, this Court correctly found the evidence of Norris's guilt was overwhelming. Again, this is a legal question based on an objective standard, much like the harmless error analysis in a direct appeal case. The petition should be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

JOSHUA A. EDWARDS
Assistant Attorney General

BY:_____
Joshua A. Edwards
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ATTORNEYS FOR RESPONDENT

January 16, 2024

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY

Court of Common Pleas
The Honorable Roger L. Couch, Circuit Court Judge

Appellate Case No. 2019-000334

CARNIE NORRIS, Petitioner,

v.

THE STATE, Respondent.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Petitioner for Writ of Certiorari on Gary Johnson, Esquire, counsel of record for the Petitioner, by electronic mail to the address listed for counsel in AIS.

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

This 16th day of January 2024.

Anne Mueller

Anne A. Mueller
Legal Assistant

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The South Carolina Court of Appeals

Carnie Norris, Respondent,

v.

State of South Carolina, Petitioner.

Appellate Case No. 2019-000334

ORDER

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

_____ C.J.

_____ J.

_____ J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
Gary Howard Johnson, II, Esquire
Joshua Abraham Edwards, Esquire

FILED
Jan 19 2024