RECEIVED
JUN 10 2024
S.C. SUPREME COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON/GREENWOOD DIVISION

CARNIE NORRIS, Petitioner,	§ § §	
vs.	§	CIVIL ACTION NO. 8:21-3353-MGL-BM
CHARLES WILLIAMS, *Warden*, Respondent.	§ § §	

MEMORANDUM OPINION AND ORDER
DENYING PETITIONER'S MOTION TO ALTER OR AMEND

I. INTRODUCTION

Petitioner Carnie Norris (Norris) filed this 28 U.S.C. § 2254 petition against Respondent Charles Williams, Warden (Williams). But, "[t]he writ . . . [should] be directed to the person having custody of the person detained." 28 U.S.C. § 2243.

Inasmuch as Norris is now incarcerated at Perry Correctional Institution, where Curtis Earley is the warden (Earley), Earley is the proper respondent in this action. Therefore, the Court will direct the clerk of court to substitute Earley for Williams. *See* Fed. R. Civ. P. 25(d) (allowing for the automatic substitution of parties).

Norris was representing himself when he filed his petition and motion to alter or amend.

The matter is before the Court for consideration of Norris's motion to alter or amend the Court's Order dismissing without prejudice Williams's motion to dismiss, construed as a motion for summary judgment, Norris's motion for an appeal bond, and Norris's motion for summary judgment.

In addition, the Court denied Norris's requests for a hearing and for the appointment of counsel. The Court also stayed the case.

Having carefully considered Norris's motion to alter or amend, Williams's response, the record, and the relevant law, the Court will deny the motion.

II. FACTUAL AND PROCEDURAL HISTORY

In September 2008, a grand jury indicted Norris for armed robbery. After a July 6–7, 2009, trial, the jury found Norris and his co-defendant guilty. The trial court judge sentenced Norris to twenty-eight years in state prison. Norris filed a direct appeal, which the South Carolina Court of Appeals dismissed on April 18, 2012.

Norris filed a pro se application for Post Conviction Relief (PCR) on November 7, 2012, alleging his trial and appellate counsel had provided ineffective assistance. On September 15, 2014, Judge Roger L. Couch, the judge presiding over Norris's PCR case (the PCR court), held a hearing on Norris's application. The PCR court then asked for additional briefing.

In a September 6, 2017, order, the PCR court granted Norris's PCR application, vacated his conviction, and remanded his charges for a new trial (the PCR order). The clerk of court served the parties by mail with a copy of the order on the same date.

On September 19, 2017, the state served, in regards to the PCR order, a motion to alter or amend judgment pursuant to Fed. R. Civ. P. 59(e) and 60. The state subsequently filed the motion on September 25, 2017.

In the motion, the state says it received a copy of the PCR order on September 8, 2017. Thus, the state's September 19, 2017, service of the motion occurred eleven days after receipt of the PCR

order. After considering the merits of the state's motion, the PCR court denied it on February 15, 2019.

The state thereafter served its notice of appeal on March 1, 2019, as to the PCR order. It then filed a petition for a writ of certiorari, dated September 20, 2019. The notice of appeal stayed the PCR order such that Norris remains in custody. *See* SCACR Rule 241(a) ("As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision.").

Norris, who was represented by counsel for the appeal, filed a pro se motion to dismiss the appeal, which was docketed on June 4, 2019. In the motion, as is applicable here, Norris questioned the timeliness of the state's Rule 59(e) motion and notice of appeal. The motion was summarily denied on September 19, 2019.

Although that court failed to say why it denied Norris's motion, the Court surmises the denial was based on that court's disallowance of "substantive documents, with the exception of motions to relieve counsel, filed pro se by a party who is represented by counsel." *State v. Devore*, 784 S.E.2d 690, 693 (S.C. Ct. App. 2016). In South Carolina appellate courts, "there is no right to hybrid representation." *Id.* (internal quotation marks omitted) (citation omitted).

On August 19, 2022, the South Carolina Court of Appeals granted certiorari, held oral argument on November 7, 2023, and, on December 20, 2023, issued an order reversing the PCR order, which had granted Norris's application for PCR relief.

Norris subsequently filed a petition for certiorari with the South Carolina Supreme Court, which is presently pending with that court.

While the state's appeal of the PCR order was pending with the South Carolina Court of Appeals, Norris filed this Section 2254 petition, after which, as is relevant here, Williams filed a motion to dismiss; and Norris filed a motion for an appeal bond, a motion for summary judgment, and requests for a hearing and the appointment of counsel.

As the Court mentioned above, it dismissed without prejudice the state's motion to dismiss, construed as a motion for summary judgment, Norris's motion for an appeal bond, and Norris's motion for summary judgment. In addition, the Court denied Norris's requests for a hearing and the appointment of counsel. The Court also stayed the case.

Norris next filed a motion to alter or amend the Court's Order. Thereafter, Williams filed a response in opposition, after being directed by the Court to do so. The Court subsequently appointed counsel for Norris. Norris then filed a pro se reply in support of his motion.

The Court, having been briefed on the relevant issues, is now prepared to adjudicate Norris's motion.

III. STANDARD OF REVIEW

Under Fed. R. Civ. P. 59(e), a Court may alter or amend a judgment "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." *Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993). "A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment." Fed. R. Civ. P. 59(e).

A Rule 59(e) motion "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." *Exxon Shipping Co.*

v. Baker, 554 U.S. 471, 485 n.5 (2008) (internal quotation marks omitted). Further, "mere disagreement [with a district court's ruling] does not support a Rule 59(e) motion." *Hutchinson*, 994 F.2d at 1082. "In general[,] reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly." *Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998) (internal quotation marks omitted).

IV. DISCUSSION AND ANALYSIS

Norris argues the state "filed an untimely [Rule] 59(e) motion in state court . . .causing the state court to lack jurisdiction to rule on it. The record will show . . . [the state's Rule 59(e) motion] was served on September 25, 2017, way out of time." Norris's Motion at 2. Additionally, according to Norris, "[t]he order should be reconsidered . . . to reflect . . . the state['s] appeal is void because of lack of jurisdiction." *Id.*

Williams fails to argue otherwise. Instead of candidly agreeing the state's Rule 59(e) motion and notice of appeal were untimely, however, he insists this Court lacks any authority to correct the state courts' alleged errors.

According to Williams, "this Court should find this issue is not cognizable in a federal habeas matter and deny the motion for reconsideration." Williams's Response at 3. He further states Norris failed to "raise the timeliness issue to a court in a manner that it could be addressed. He was and is represented by two seasoned attorneys at both stages of his PCR appeal, and neither of them raised the issue in a way it could be addressed." *Id.*

A. *Whether the state's Rule 59(e) motion was timely such that it tolled the appellate clock*

"[T]he ten-day deadline in Rule 59(e) is an absolute deadline. A trial court does not have the power to alter or amend a final order if more than ten days passes and no Rule 59(e) motion has been served[.]" *Overland, Inc. v. Nance*, 815 S.E.2d 431, 433 (S.C. 2018). "The failure to serve a Rule 59(e) motion within ten days of receipt of notice of entry of the order converts the order into a final judgment, and the aggrieved party's only recourse is to file a notice of intent to appeal." *Id.*

As the Court noted above, the state received the PCR order on September 8, 2017. But, it waited eleven days from then, until September 19, 2017, to serve its Rule 59(e) motion to alter or amend. In other words, the state served its Rule 59(e) motion one day past the "Rule 59(e) . . . absolute deadline[ ]" of ten days. *Id.*

SCRCP 59(f) provides that "[t]he time for appeal for all parties shall be stayed by a timely motion under this Rule and shall run from the receipt of written notice of entry of the order granting or denying such motions." But, because the state's Rule 59(e) motion was untimely, the serving of that motion failed to toll the time for the state to serve its notice of appeal concerning the PCR court's September 6, 2017, order. As per the plain language of the Rule, only a timely-served Rule 59(e) tolls the time for serving notice of an appeal.

As per SCRACT 203(b)(1), "[a] notice of appeal shall be served on all respondents within thirty . . . days after receipt of written notice of entry of the order or judgment." So, because the state's Rule 59(e) motion was untimely, it had thirty days from September 8, 2017, the date it received the PCR order, to serve its notice of appeal. But, it waited until March 1, 2019, well past the thirty-day deadline.

As a result, the notice of appeal was also untimely. Accordingly, the South Carolina Court of Appeals lacked jurisdiction to consider the state's appeal. *See Camp v. Camp*, 689 S.E.2d 634, 636 (S.C. 2010) (holding service of the notice of appeal is a jurisdictional requirement, and the appellate courts lack the authority to extend or expand the time in which the notice of intent to appeal must be served).

B. Whether the state is entitled to the five additional mailing days provided by SCRCP 6(e) to make its Rule 59(e) motion timely

SCRCP 6(e) provides

> [w]henever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail or upon a person designated by statute to accept service, five days shall be added to the prescribed period.

Id. So, Rule 6(e) comes into play only when one is supposed to do something "within a prescribed period after the service of a notice or other paper upon him[.]"

But, the ten-day time clock for the state's Rule 59(e) motion commenced on the date the state received a copy of the PCR order, on September 8, 2017, as opposed to the date the clerk of court served it on the state by mail, on September 6, 2017. Thus, Rule 6(e) is inapplicable here.

In addition, Rule 6(b) makes clear "[t]he time for taking any action under rules 50(b), 52(b), 59, and 60(b) may not be extended except to the extent and under the conditions stated in them." Rule 59 fails to provide for any extensions of the ten-day time period for serving a motion to alter or amend.

C. Whether the state's Rule 60 motion tolled the appellate clock

The Court notes the state also brought its motion to alter of amend under Fed. R. Civ. P. 60. The state had one year from the time the PCR court issued its September 6, 2017, order granting PCR relief to Norris to bring its Rule 60 motion. *See* SCRCP 60 ("The motion shall be made . . . not more than one year after the . . . order . . . was entered or taken."). As the Court noted above, the state served its motion on September 19, 2017, and filed it on September 25, 2017. So, the motion was timely.

But, "Rule 60 . . . [does] not toll the time for the filing and service of [a] notice of appeal." *Coward Hund Const. Co., Inc. v. Ball Corp.*, 518 S.E.2d 56, 59 (S.C. Ct. App. 1999). "Unlike timely Rule 59 motions, Rule 60 motions do not have any tolling effect on the right to appeal from the challenged judgment. Therefore, the time to appeal continues to run from the entry of the judgment that the Rule 60(b) motion challenges." 12 James W. Moore et al., Moore's Federal Practice ¶ 59.11[4][b] at 59–38 (3d ed. 1999).

Again, the state received a copy of the PCR order on September 8, 2017. Thus, as for the state's motion under Rule 60, it had thirty days from that date to serve its notice of appeal. *See* SCRACT 203(b)(1) ("A notice of appeal shall be served on all respondents within thirty . . .days after receipt of written notice of entry of the order or judgment."). But, as the Court stated earlier, the state served its notice of appeal on March 1, 2019. Therefore, the state's notice of appeal under Rule 60 was untimely, too.

D. Whether the Court is able to adjudicate Norris's Section 2254 petition

It appears Norris is correct that both the state's Rule 59(e) motion and its notice of appeal were untimely. Nevertheless, until Norris has exhausted his state remedies, the Court is unable to adjudicate the claims in his petition. *See Spencer v. Murray*, 18 F.3d 237, 239 (4th Cir.1994)

(denying certain claims on exhaustion principles where claims were not raised on direct appeal to the state's supreme court). As such, the timeliness questions presented by Norris here are a determination for the South Carolina Supreme Court to make in the first instance.

And, Williams might be correct. Norris's timeliness arguments may well be incognizable in the context of a Section 2254 petition such that this Court will be unable to do anything to correct them or provide any relief, even after Norris has exhausted his state remedies. State court may be the only place this argument can be properly considered and remedied.

Therefore, Norris's counsel should ensure these timeliness argument are presented to the South Carolina Supreme Court immediately and without delay.

Norris's remaining arguments are so lacking in merit as to make discussion of them unnecessary.

E. Whether counsel for the state and counsel for Williams are in violation of the South Carolina Rules of Professional Conduct

Although the PCR court and the South Carolina Court of Appeals could have sua sponte raised questions about the timeliness of the state's Rule 59(e) motion and notice of appeal, the Court is profoundly troubled neither counsel for Norris nor for the state did so. Given the dispositive nature of this issue, it is inexplicable as to why they failed to do so.

Norris's counsel, of course, had an obligation to raise the matter to the state courts. But, so did counsel for the state. Unfortunately for Norris, however, neither his counsel nor state's counsel satisfied their most basic obligations.

Surely, the state knew their Rule 59(e) motion was due ten days after they received a copy of the PCR order on September 8, 2017, and that serving it on September 19, 2017, made it late, which subsequently made their notice of appeal untimely. Williams is obviously aware of the time defects as well.

According to the "Candor Toward the Tribunal" section of the South Carolina Rules of Professional Conduct, "[a] lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel[.]" SCACR 3.3.

Consequently, the Court may later request briefing as to whether it is obligated to report counsel for the state's arguable breach of Rule 3.3 to the Office of Disciplinary Counsel and whether their immediate correction of their possible violation, by bringing the timeliness issues to the attention of the South Carolina Supreme Court, might ameliorate their culpability for their lack of candor.

In addition, given Williams's counsel's lack of candor when addressing the timeliness issues here, the Court may also request briefing on whether they are in violation of the South Carolina Rules of Professional Conduct and, like the state's counsel, whether their immediate correction of their possible violation, by bringing the timeliness issues to the attention of the South Carolina Supreme Court, might ameliorate their culpability for their lack of candor.

V. CONCLUSION

In light of the foregoing discussion and analysis, the Court is of the opinion Norris's Rule 59(e) motion must be **DENIED**. To the extent Norris moves for a certificate of appealability, such request is also **DENIED**.

As explained above, the clerk of court is instructed to substitute Earley for Williams as the respondent in this matter.

Williams shall serve a copy of this Order on Norris's appellate PCR counsel and the state's trial court and appellate PCR counsel forthwith; and he must file his certificates of service with the Court not later than June 7, 2024.

The parties shall use their own judgment as to whether to serve a copy of this Order on the

South Carolina Supreme Court, either jointly or individually. If they serve the court, they shall file their certificate[s] of service with this Court within one day of doing so.

IT IS SO ORDERED.

Signed this 6th day of June, 2024, in Columbia, South Carolina.

/s/ Mary G. Lewis
MARY G. LEWIS
UNITED STATES DISTRICT JUDGE

*****

NOTICE OF RIGHT TO APPEAL

Norris is hereby notified of the right to appeal this Order within thirty days from the date hereof, pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure.

Attachment 2

ALAN WILSON
ATTORNEY GENERAL

September 12, 2017

The Honorable M. Hope Blackley
Clerk of Court, Spartanburg County
Post Office Box 3483
Spartanburg, South Carolina 29304-3483

Re: **Carnie Norris, #227226 v. State of South Carolina**
2014-CP-42-4651

Dear Ms. Blackley:

Enclosed please find the original **Motion to Alter or Amend Judgment Pursuant to Rule 59(e), SCRCP** in the above-captioned case for filing in your office.

Sincerely,

Valerie Garcia Giovanoli
Assistant Attorney General

VGG/lm
Enclosure

cc: John Brandt Rucker, Esquire

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG Carnie Norris, #227226, Applicant, v. State of South Carolina, Respondent.	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT **2014-CP-42-4651** **MOTION TO ALTER OR AMEND JUDGMENT PURSUANT TO RULE 59(e), SCRCP**

Respondent now moves pursuant to Rule 59(e) and Rule 60, SCRCP, and all other applicable rules to alter or amend the judgement.

This matter is before this Court by way of an application for post-conviction relief (PCR). An evidentiary hearing into the matter was convened on September 15, 2014 at the Spartanburg County Courthouse. This Court granted relief by order dated September 6, 2017. Respondent received the filed signed order via the Spartanburg County Clerk of Court on September 8, 2017. The Court granted relief on the basis that:

(1) "[C]ounsel failed to render reasonably effective assistance regarding the improper introduction of portions of the applicant's prior record."

(Order p. 6).

DISCUSSION

In making this motion, Respondent reserves and incorporates all previous arguments and authority presented to this Court. Respondent would submit that the judgment should be altered or amended based on the following:

Applicability of Rule 609(a) versus Rule 609(b)

Prior to Applicant's trial testimony, the Solicitor indicated that he planned on impeaching Applicant with prior convictions for common law robbery and second degree burglary. (ROA p.

226). Counsel stated on the record that the Solicitor had provided her with documentation of those prior convictions and referenced a 1996 common law robbery and 1995 second degree burglary. (ROA p. 227-8). On direct, Counsel preemptively asked Applicant about both charges, pointing out that the charges were from 1995. (ROA p. 267). Additionally, Counsel pointed out that the Applicant was suffering from a drug problem at the time of the charge and had admitted his involvement in both. (ROA p. 267). On cross examination, the Solicitor asked Applicant if he'd "done robbery before," and if he'd "broke[n] into buildings before." (ROA p. 283). In response, Applicant stated that those incidents were from the past and he hoped the past would not harm him. (ROA p. 283).

This Court found Applicant's prior "conviction dates were well in excess of ten years before this case." (Order p. 11). In its order, this Court found Applicant's two prior convictions were "unduly prejudicial under South Carolina Rule 609 (B)(2)(b) [*sic*] in that they were not supported by specific facts and circumstances as required by the Rule," and that, "the use of those convictions therefore could not substantially outweigh its prejudicial effect." (Order p. 11). Rule 609(b), SCRE, establishes that 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.**" (Emphasis added).

Although the conviction dates are past the ten year mark, Applicant was released from confinement imposed for both convictions inside the ten year mark.[1] The 1995 sentence for second degree burglary was 15 years and the 1996 sentence for common law robbery was suspended to nine years plus five years of probation, consecutive to the burglary sentence. Applicant was released on parole in 2004, but then returned to confinement based upon the

[1] See attached Applicant's SCDC records.

parole/probation revocation in 2008 following his arrest on the charges in this case. Therefore, the crimes were not remote in time and would not invoke Rule 609(b). Rather, these crimes were admissible for use in impeaching Applicant under Rule 609(a) and would not raise issues under Rule 609(b).

Rule 609(a) requires that there be a finding by the court "that the probative value of admitting the evidence [of the prior convictions] outweighs the prejudicial effect to the [defendant]." Rule 609(a), SCRE. In contrast to admitting prior convictions under Rule 609(b), Rule 609(a) does not require that the probative value of the conviction **supported by specific facts and circumstances substantially** outweighs the prejudicial effect. Rather, Rule 609(a) only requires the court to determine the probative value of admitting the evidence outweighs its prejudicial effect. The rule assumes there will be **some** prejudicial effect.

There are five factors that should be considered by the trial judge in making the decision to admit prior convictions for impeachment purposes: "(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. Bryant, 369 S.C. 511, 633 S.E.2d 152 (2006).

Deficiency Analysis

As the record reflects, the court failed to make a finding on the record as to the probative versus prejudicial value of the prior convictions and there was no objection to the introduction of the prior convictions. (ROA p. 226-8). Trial counsel testified that had she objected to the prior robbery conviction, Applicant would have still been impeached based on the burglary. This assessment is reasonable and consistent with the factors set forth in Bryant. (1) A prior

conviction for burglary has impeachment value against a defendant's testimony; (2) Applicant was on parole for the burglary when he committed the instant robbery; (3) burglary is not identical or similar to armed robbery; (4) Applicant's testimony was not critical to his defense since his co-defendant testified consistent with Applicant's version of events[2]; and (5) credibility was central to the case thus allowing impeachment using prior convictions was important. It would have been reasonable to assume the burglary conviction would be admissible for impeachment purposes. Although an objection to require the trial court to make the findings required by 609(a) would have established a more thorough record, the result would have been the same in that the burglary would have been admissible to impeach Applicant. Therefore, trial counsel was not deficient in failing to object to the admissibility of the prior burglary conviction.

With regard to Applicant's prior common law robbery conviction: (1) A prior conviction for robbery has impeachment value against a defendant's testimony; (2) Applicant was on probation for the prior common law robbery when he committed the instant armed robbery; (3) while Applicant's prior conviction for common law robbery is similar to armed robbery in that they are both robberies, they are not identical; (4) Applicant's testimony was not critical to his defense since his co-defendant testified consistent with Applicant's version of events; and (5) credibility was central to the case thus allowing impeachment using prior convictions was important. Because 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.

Additionally, all articulable arguments which can be inferred from the record as trial strategy can be argued in favor of competence. A strategic or tactical decision does not have to be articulated by counsel on the record, as the passage of time can often wear on the memories of

[2] Trial counsel strongly encouraged Applicant not to testify. (PCR Tr. p. 62-63).

well-reasoned decisions made in the heat of battle of avenues not pursued, objections withheld, or evidence not presented. It is enough that the record show a basis for strategy, not that counsel announce that strategy on the record. See Wood v. Allen, 558 U.S. 290 (2010). (affirming state PCR court's finding that counsel made a strategic decision not to inquire further into a the petitioner's report about his mental deficiencies where the record supported that finding, despite Counsel not articulating the strategy). Notwithstanding the 609(a) test and the Bryant factors to be considered, Applicant's trial counsel elicited the prior convictions during her direct examination of Applicant. This was obviously a strategic decision by trial counsel to elicit unfavorable testimony from Applicant regarding his prior criminal history in an effort to garner the jury's trust and establish credibility. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Strickland, 466 U.S. 668, 693 (1984). Just because the strategy did not actually garner the jury's trust or establish Applicant's credibility does not necessarily mean it was an unreasonable strategy.

However, even if this Court finds that Counsel was deficient for failing to object to the use of those prior convictions, Respondent submits that the Applicant failed to meet his burden of proof as to prejudice.

Prejudice/Harmless Error Analysis

When an ineffectiveness claim is presented the defendant must show that counsel's representation was deficient. Deficient representation amounts to conduct that is not objectively reasonable under the circumstances. Strickland v. Washington, 466 U.S. 668, 688 (1984). In addition, Applicant must show prejudice by establishing that the outcome would have been different **but for** counsel's deficient performance. Strickland, 466 U.S. at 694. (emphasis added). The equivalent in a direct appeal of a criminal conviction is harmless error. If the appellate court

finds an error at trial could not reasonably have affected the result of the trial, then it is deemed harmless. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985).

Respondent submits that Applicant failed to meet his burden of proof of establishing that the alleged deficient conduct of Counsel affected the outcome of his trial. Respondent also submits that Applicant was not prejudiced by any alleged deficient performance because of the overwhelming evidence against him.

Victim Andrew Bond testified he was pushed to the ground by a man from behind who asked Bond for his ID and told Bond he was under arrest. (ROA p. 115). Bond testified the man reached in to take Bond's wallet and start looking through it. Bond identified the man as Applicant, Carnie Norris. (ROA p. 115). Bond testified that when he asked to see Applicant's badge, Applicant pulled a knife out and held it to Bond's throat. Bond identified the knife that was found on Applicant as the knife used to assault him. (ROA p. 116; p. 123). Bond testified that as the incident went on, Bond tried to get up, but Applicant put the knife to Bond's throat and threatened to kill Bond if he tried to get away. (ROA p. 117). Once the co-defendant arrived on the scene and began rifling through Bond's wallet, Bond testified Applicant continued to tell him to stay down and not move or Applicant would kill him. (ROA p. 119). Bond testified that once his friends began to pull up in their cars and the first police officers arrived, Applicant and his co-defendant handed Bond his empty wallet and cell phone before walking across the street. (ROA p. 120).

Herbert Blankenship, a witness, also testified he saw Applicant grab Bond, put him on the ground, announce he was a security officer and pull out a knife. (ROA p. 145). Blankenship testified that as they approached Applicant and Bond, Applicant pulled the knife out and pointed it at the others and told them to get on the ground. (ROA p. 146, p. 147). Blankenship identified

Applicant as the man who held the knife on Bond and the other witnesses. (ROA p. 146). Once Blankenship and the others had security call the police, he testified he drove over to the scene and directed his headlights at the area where Applicant had Bond on the ground. (ROA p. 148). Blankenship also identified the knife found on Applicant. (App. p. 149; p. 161).

Another witness, Daniel Mayfield, testified he saw Applicant approach Bond, put him on the ground, and remove his wallet. (ROA p. 170). Mayfield testified that as he and the others approached Bond and Applicant, Applicant pointed a knife towards the group and told them to get on the ground. (ROA p. 170). Mayfield identified the knife found on Applicant. (ROA p. 170). Mayfield also testified the Applicant identified himself as a security guard before removing Bond's wallet from his pocket and rifling through it. (ROA p. 175-6; p. 183-4).

Officer Brad James testified he received a call about a disturbance with weapons, which is what he was looking for when he arrived on the scene, and not anything related to a break-in as Applicant suggested. (ROA p. 193, p. 205, p. 209). James testified that as he arrived on the scene after receiving a dispatch, he saw two black males standing and a white male lying on the ground. (ROA p. 187). James testified the white male told him the black males were robbing him. (ROA p. 188). James, after receiving consent from Applicant, searched Applicant and found a black-handled kitchen knife. (ROA p. 190). The co-defendant turned over several cards that had been retrieved from Bond's wallet. (ROA p. 190).

Officer John Guest also testified they received two calls regarding a disturbance with weapons, which they found out later were from the Hangar security guard and one of Bond's friends. (ROA p. 210). Guest testified the co-defendant handed over several of Bond's cards from the wallet after being asked by Guest. (ROA p. 212). Guest also saw James recover the black kitchen knife from Applicant. (ROA p. 212). Guest testified Bond identified the knife as

the one used in the robbery. (ROA p. 213). Guest confirmed dispatch never received a call in regard to a break-in in that area. (ROA p. 213).

In contrast, both Applicant and co-defendant acknowledge going over to the group and rifling through Bond's cards from his wallet. However, both deny a knife being used or present. (ROA p. 258, p. 279). The testimony is not credible when contrasted with the testimony of three witnesses who saw the knife and could identify it and the police officers who testified they responded to a report of a disturbance involving someone being held at knifepoint. Further, the knife was found on Applicant. The witnesses had no way of knowing the Applicant had a knife on him at the time of the 911 calls if they had not seen the knife being held at the neck of their friend, Bond. The evidence against Applicant was, in a word, overwhelming. Additionally, Applicant and his co-defendant's lack of credibility was primarily caused by the stark contrast in their story versus that of various bystanders and law enforcement as well as the peculiarity of Applicant and his co-defendant's version of events – and not by his prior criminal history.

Even if this Court found that there was deficient conduct on behalf of Counsel, Respondent submits that because of the overwhelming evidence of guilt, there was no prejudice. "[N]o prejudice occurs, despite trial counsel's deficient performance, where there is otherwise overwhelming evidence of the defendant's guilt. Smith v. State, 386 S.C. 562, 566, 689 S.E.2d 629, 631 (2010) (citing Rosemond v. Catoe, 383 S.C. 320, 325, 680 S.E.2d 5, 8 (2009)). The trial testimony from Applicant was ludicrous. Jurors are expected to use common sense for just such testimony as this. They were called upon to assess the credibility of a story that was ridiculous *per se*. Prejudice from trial counsel's failure to require the trial judge to make his Rule 609(a) analysis on the record was not, under these circumstance, a defect in representation that could have realistically affected the outcome.

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). Broadnax was tried for armed robbery. The trial court held a hearing in camera to determine what prior convictions could be used to impeach Broadnax's testimony. The trial court admitted three of Broadnax's four prior armed robbery convictions. The Court held the error to be harmless, despite the convictions admitted were **identical** to those for which Broadnax was on trial. Id. at 478-479. In this case, the prior conviction was **not identical** to the conviction for which Applicant stood trial. Respondent submits the alleged error in admitting Applicant's prior common law robbery conviction was harmless, similar to Broadnax, and therefore, Applicant was not prejudiced by trial counsel's failure to object to it.

[*Remainder of page left blank intentionally*]

CONCLUSION

WHEREFORE, the Respondent respectfully requests the order be amended and the PCR application denied and dismissed with prejudice.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

VALERIE GARCIA GIOVANOLI
Assistant Attorney General

By:
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

September 12, 2017

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	
	)	2014-CP-42-4651
Carnie Norris, #227226,	)	
Applicant,	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
STATE OF SOUTH CAROLINA,	)	
Respondent.	)	

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the **Motion to Alter or Amend Judgment Pursuant to Rule 59(e), SCRCP** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

John Brandt Rucker, Esquire
The Rucker Law Firm, LLC
128 Millport Circle STE 200
Greenville, South Carolina 29607

DATED this 12th day of September, 2017.

Lindsey McCoy, Legal Assistant

Spartanburg County

Spartanburg County Court House
180 Magnolia Street
P. O Box 3483
Spartanburg, SC 29304-3483

Phone (864) 596-2591
Fax (864) 596-2259

M. Hope Blackley
Clerk of Court

Gail Moffitt
Assistant Clerk of Court

From: Spartanburg County Clerk of Court Office

The enclosed document(s) is being returned for the following reason(s):

____ Master's fee required

____ Signature required

____ Original document required

____ Satisfaction of Judgment required

____ Check or Money Order must be made payable to the Clerk of Court

____ Check not signed

____ Insufficient filing fee: Please submit a business check or money order in the amount of $ ______

____ Lis Pendens cancellation fee require (*$1.00*)

____ Coversheet not included (*SCCA/23*)

____ This is not a Spartanburg County Case

____ Please check our website for the requested information www.spartanburgcounty.org

____ Please submit all 7 pages of your completed PCR Application

____ I suggest you contact your attorney

✓ Other: wrong Case #

Please make the necessary corrections and return for processing.

From: [signature] Date: 9/15/17

ALAN WILSON
ATTORNEY GENERAL

2017 SEP 15 AM 9:44
VOID CLOCKED IN ERROR
M. HOPE BLACKLEY

September 12, 2017

The Honorable M. Hope Blackley
Clerk of Court, Spartanburg County
Post Office Box 3483
Spartanburg, South Carolina 29304-3483

Re: **Carnie Norris, #227226 v. State of South Carolina**
2014-CP-42-4651

Dear Ms. Blackley:

Enclosed please find the original **Motion to Alter or Amend Judgment Pursuant to Rule 59(e), SCRCP** in the above-captioned case for filing in your office.

Sincerely,

Valerie Garcia Giovanoli
Assistant Attorney General

VGG/lm
Enclosure

cc: John Brandt Rucker, Esquire

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Carnie Norris, #227226,

Applicant,

v.

State of South Carolina,

Respondent.

2014-CP-42-4651

MOTION TO ALTER OR AMEND JUDGMENT PURSUANT TO RULE 59(e), SCRCP

Respondent now moves pursuant to Rule 59(e) and Rule 60, SCRCP, and all other applicable rules to alter or amend the judgement.

This matter is before this Court by way of an application for post-conviction relief (PCR). An evidentiary hearing into the matter was convened on September 15, 2014 at the Spartanburg County Courthouse. This Court granted relief by order dated September 6, 2017. Respondent received the filed signed order via the Spartanburg County Clerk of Court on September 8, 2017. The Court granted relief on the basis that:

(1) "[C]ounsel failed to render reasonably effective assistance regarding the improper introduction of portions of the applicant's prior record."

(Order p. 6).

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2017 SEP 15 AM 9:14
M. HOPE BLACKLEY
VOID DOCKETED IN ERROR

DISCUSSION

In making this motion, Respondent reserves and incorporates all previous arguments and authority presented to this Court. Respondent would submit that the judgment should be altered or amended based on the following:

Applicability of Rule 609(a) versus Rule 609(b)

Prior to Applicant's trial testimony, the Solicitor indicated that he planned on impeaching Applicant with prior convictions for common law robbery and second degree burglary. (ROA p.

226). Counsel stated on the record that the Solicitor had provided her with documentation of those prior convictions and referenced a 1996 common law robbery and 1995 second degree burglary. (ROA p. 227-8). On direct, Counsel preemptively asked Applicant about both charges, pointing out that the charges were from 1995. (ROA p. 267). Additionally, Counsel pointed out that the Applicant was suffering from a drug problem at the time of the charge and had admitted his involvement in both. (ROA p. 267). On cross examination, the Solicitor asked Applicant if he'd "done robbery before," and if he'd "broke[n] into buildings before." (ROA p. 283). In response, Applicant stated that those incidents were from the past and he hoped the past would not harm him. (ROA p. 283).

This Court found Applicant's prior "conviction dates were well in excess of ten years before this case." (Order p. 11). In its order, this Court found Applicant's two prior convictions were "unduly prejudicial under South Carolina Rule 609 (B)(2)(b) [*sic*] in that they were not supported by specific facts and circumstances as required by the Rule," and that, "the use of those convictions therefore could not substantially outweigh its prejudicial effect." (Order p. 11). Rule 609(b), SCRE, establishes that 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**." (Emphasis added).

Although the conviction dates are past the ten year mark, Applicant was released from confinement imposed for both convictions inside the ten year mark.[1] The 1995 sentence for second degree burglary was 15 years and the 1996 sentence for common law robbery was suspended to nine years plus five years of probation, consecutive to the burglary sentence. Applicant was released on parole in 2004, but then returned to confinement based upon the

[1] See attached Applicant's SCDC records.

parole/probation revocation in 2008 following his arrest on the charges in this case. Therefore, the crimes were not remote in time and would not invoke Rule 609(b). Rather, these crimes were admissible for use in impeaching Applicant under Rule 609(a) and would not raise issues under Rule 609(b).

Rule 609(a) requires that there be a finding by the court "that the probative value of admitting the evidence [of the prior convictions] outweighs the prejudicial effect to the [defendant]." Rule 609(a), SCRE. In contrast to admitting prior convictions under Rule 609(b), Rule 609(a) does not require that the probative value of the conviction **supported by specific facts and circumstances substantially** outweighs the prejudicial effect. Rather, Rule 609(a) only requires the court to determine the probative value of admitting the evidence outweighs its prejudicial effect. The rule assumes there will be **some** prejudicial effect.

There are five factors that should be considered by the trial judge in making the decision to admit prior convictions for impeachment purposes: "(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. Bryant, 369 S.C. [illegible], 633 S.E.2d 152 (2006).

HOPE BLACKLEY

Deficiency Analysis

As the record reflects, the court failed to make a finding on the record as to the probative versus prejudicial value of the prior convictions and there was no objection to the introduction of the prior convictions. (ROA p. 226-8). Trial counsel testified that had she objected to the prior robbery conviction, Applicant would have still been impeached based on the burglary. This assessment is reasonable and consistent with the factors set forth in Bryant. (1) A prior

conviction for burglary has impeachment value against a defendant's testimony; (2) Applicant was on parole for the burglary when he committed the instant robbery; (3) burglary is not identical or similar to armed robbery; (4) Applicant's testimony was not critical to his defense since his co-defendant testified consistent with Applicant's version of events[2]; and (5) credibility was central to the case thus allowing impeachment using prior convictions was important. It would have been reasonable to assume the burglary conviction would be admissible for impeachment purposes. Although an objection to require the trial court to make the findings required by 609(a) would have established a more thorough record, the result would have been the same in that the burglary would have been admissible to impeach Applicant. Therefore, trial counsel was not deficient in failing to object to the admissibility of the prior burglary conviction.

With regard to Applicant's prior common law robbery conviction: (1) A prior conviction for robbery has impeachment value against a defendant's testimony; (2) Applicant was on probation for the prior common law robbery when he committed the instant armed robbery; (3) while Applicant's prior conviction for common law robbery is similar to armed robbery in that they are both robberies, they are not identical; (4) Applicant's testimony was not critical to his defense since his co-defendant testified consistent with Applicant's version of events; and (5) credibility was central to the case thus allowing impeachment using prior convictions was important. Because 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.

Additionally, all articulable arguments which can be inferred from the record as trial strategy can be argued in favor of competence. A strategic or tactical decision does not have to be articulated by counsel on the record, as the passage of time can often wear on the memories of

2017 SEP 5 PM 9:4
M. HOPE BLACKLEY
CLERK OF COURT SPARTANBURG COUNTY

[2] Trial counsel strongly encouraged Applicant not to testify. (PCR Tr. p. 62-63).

well-reasoned decisions made in the heat of battle of avenues not pursued, objections withheld, or evidence not presented. It is enough that the record show a basis for strategy, not that counsel announce that strategy on the record. See Wood v. Allen, 558 U.S. 290 (2010). (affirming state PCR court's finding that counsel made a strategic decision not to inquire further into a the petitioner's report about his mental deficiencies where the record supported that finding, despite Counsel not articulating the strategy). Notwithstanding the 609(a) test and the Bryant factors to be considered, Applicant's trial counsel elicited the prior convictions during her direct examination of Applicant. This was obviously a strategic decision by trial counsel to elicit unfavorable testimony from Applicant regarding his prior criminal history in an effort to garner the jury's trust and establish credibility. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Strickland, 466 U.S. 668, 693 (1984). Just because the strategy did not actually garner the jury's trust or establish Applicant's credibility does not necessarily mean it was an unreasonable strategy.

However, even if this Court finds that Counsel was deficient for failing to object to the use of those prior convictions, Respondent submits that the Applicant failed to meet his burden of proof as to prejudice.

HOPE BLACKLEY
CLERK OF COURT
SPARTANBURG COUNTY

Prejudice/Harmless Error Analysis

When an ineffectiveness claim is presented the defendant must show that counsel's representation was deficient. Deficient representation amounts to conduct that is not objectively reasonable under the circumstances. Strickland v. Washington, 466 U.S. 668, 688 (1984). In addition, Applicant must show prejudice by establishing that the outcome would have been different **but for** counsel's deficient performance. Strickland, 466 U.S. at 694. (emphasis added). The equivalent in a direct appeal of a criminal conviction is harmless error. If the appellate court

finds an error at trial could not reasonably have affected the result of the trial, then it is deemed harmless. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985).

Respondent submits that Applicant failed to meet his burden of proof of establishing that the alleged deficient conduct of Counsel affected the outcome of his trial. Respondent also submits that Applicant was not prejudiced by any alleged deficient performance because of the overwhelming evidence against him.

Victim Andrew Bond testified he was pushed to the ground by a man from behind who asked Bond for his ID and told Bond he was under arrest. (ROA p. 115). Bond testified the man reached in to take Bond's wallet and start looking through it. Bond identified the man as Applicant, Carnie Norris. (ROA p. 115). Bond testified that when he asked to see Applicant's badge, Applicant pulled a knife out and held it to Bond's throat. Bond identified the knife that was found on Applicant as the knife used to assault him. (ROA p. 116; p. 123). Bond testified that as the incident went on, Bond tried to get up, but Applicant put the knife to Bond's throat and threatened to kill Bond if he tried to get away. (ROA p. 117). Once the co-defendant arrived on the scene and began rifling through Bond's wallet, Bond testified Applicant continued to tell him to stay down and not move or Applicant would kill him. (ROA p. 119). Bond testified that once his friends began to pull up in their cars and the first police officers arrived, Applicant and his co-defendant handed Bond his empty wallet and cell phone before walking across the street. (ROA p. 120).

Herbert Blankenship, a witness, also testified he saw Applicant grab Bond, put him on the ground, announce he was a security officer and pull out a knife. (ROA p. 145). Blankenship testified that as they approached Applicant and Bond, Applicant pulled the knife out and pointed it at the others and told them to get on the ground. (ROA p. 146, p. 147). Blankenship identified

Applicant as the man who held the knife on Bond and the other witnesses. (ROA p. 146). Once Blankenship and the others had security call the police, he testified he drove over to the scene and directed his headlights at the area where Applicant had Bond on the ground. (ROA p. 148). Blankenship also identified the knife found on Applicant. (App. p. 149; p. 161).

Another witness, Daniel Mayfield, testified he saw Applicant approach Bond, put him on the ground, and remove his wallet. (ROA p. 170). Mayfield testified that as he and the others approached Bond and Applicant, Applicant pointed a knife towards the group and told them to get on the ground. (ROA p. 170). Mayfield identified the knife found on Applicant. (ROA p. 170). Mayfield also testified the Applicant identified himself as a security guard before removing Bond's wallet from his pocket and rifling through it. (ROA p. 175-6; p. 183-4).

Officer Brad James testified he received a call about a disturbance with weapons, which is what he was looking for when he arrived on the scene, and not anything related to a break-in as Applicant suggested. (ROA p. 193, p. 205, p. 209). James testified that as he arrived on the scene after receiving a dispatch, he saw two black males standing and a white male lying on the ground. (ROA p. 187). James testified the white male told him the black males were robbing him. (ROA p. 188). James, after receiving consent from Applicant, searched Applicant and found a black-handled kitchen knife. (ROA p. 190). The co-defendant turned over several cards that had been retrieved from Bond's wallet. (ROA p. 190).

Officer John Guest also testified they received two calls regarding a disturbance with weapons, which they found out later were from the Hangar security guard and one of Bond's friends. (ROA p. 210). Guest testified the co-defendant handed over several of Bond's cards from the wallet after being asked by Guest. (ROA p. 212). Guest also saw James recover the black kitchen knife from Applicant. (ROA p. 212). Guest testified Bond identified the knife as

2017 SEP 5
M. HOPE BLACKLEY
CLERK OF COURT
SPARTANBURG COUNTY

the one used in the robbery. (ROA p. 213). Guest confirmed dispatch never received a call in regard to a break-in in that area. (ROA p. 213).

In contrast, both Applicant and co-defendant acknowledge going over to the group and rifling through Bond's cards from his wallet. However, both deny a knife being used or present. (ROA p. 258, p. 279). The testimony is not credible when contrasted with the testimony of three witnesses who saw the knife and could identify it and the police officers who testified they responded to a report of a disturbance involving someone being held at knifepoint. Further, the knife was found on Applicant. The witnesses had no way of knowing the Applicant had a knife on him at the time of the 911 calls if they had not seen the knife being held at the neck of their friend, Bond. The evidence against Applicant was, in a word, overwhelming. Additionally, Applicant and his co-defendant's lack of credibility was primarily caused by the stark contrast in their story versus that of various bystanders and law enforcement as well as the peculiarity of Applicant and his co-defendant's version of events – and not by his prior criminal history.

Even if this Court found that there was deficient conduct on behalf of Counsel, Respondent submits that because of the overwhelming evidence of guilt, there was no prejudice. "[N]o prejudice occurs, despite trial counsel's deficient performance, where there is otherwise overwhelming evidence of the defendant's guilt. Smith v. State, 386 S.C. 562, 566, 689 S.E.2d 629, 631 (2010) (citing Rosemond v. Catoe, 383 S.C. 320, 325, 680 S.E.2d 5, 8 (2009)). The trial testimony from Applicant was ludicrous. Jurors are expected to use common sense for just such testimony as this. They were called upon to assess the credibility of a story that was ridiculous *per se*. Prejudice from trial counsel's failure to require the trial judge to make his Rule 609(a) analysis on the record was not, under these circumstance, a defect in representation that could have realistically affected the outcome.

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). Broadnax was tried for armed robbery. The trial court held a hearing in camera to determine what prior convictions could be used to impeach Broadnax's testimony. The trial court admitted three of Broadnax's four prior armed robbery convictions. The Court held the error to be harmless, despite the convictions admitted were **identical** to those for which Broadnax was on trial. Id. at 478-479. In this case, the prior conviction was **not identical** to the conviction for which Applicant stood trial. Respondent submits the alleged error in admitting Applicant's prior common law robbery conviction was harmless, similar to Broadnax, and therefore, Applicant was not prejudiced by trial counsel's failure to object to it.

[Remainder of page left blank intentionally]

CLERK OF COURT
SPARTANBURG COUNTY
2017 SEP 15 AM 9:45
VOID CLOCKED IN ERROR
M. HOPE BLACKLEY

CONCLUSION

WHEREFORE, the Respondent respectfully requests the order be amended and the PCR application denied and dismissed with prejudice.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

VALERIE GARCIA GIOVANOLI
Assistant Attorney General

By:
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

September 12, 2017

2017 SEP 15 AM 9:45
VOID CLOCKED IN ERROR
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

2014-CP-42-4651

Carnie Norris, #227226,

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the **Motion to Alter or Amend Judgment Pursuant to Rule 59(e), SCRCP** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

John Brandt Rucker, Esquire
The Rucker Law Firm, LLC
128 Millport Circle STE 200
Greenville, South Carolina 29607

VOID CLOCKED IN ERROR
2017 SEP 13 AM 9:45
M. HOPE BLACKLEY

DATED this 12th day of September, 2017.

Lindsey McCoy, Legal Assistant

ALAN WILSON
ATTORNEY GENERAL

September 19, 2017

The Honorable M. Hope Blackley
Clerk of Court, Spartanburg County
Post Office Box 3483
Spartanburg, South Carolina 29304-3483

Re: **Carnie Norris, #227226 v. State of South Carolina**
2012-CP-42-4651

Dear Ms. Blackley:

Enclosed please find the corrected original **Motion to Alter or Amend Judgment Pursuant to Rule 59(e), SCRCP** in the above-captioned case for filing in your office. The previous Motion was submitted inadvertently with the wrong case number.

Sincerely,

for Valerie Garcia Giovanoli
Assistant Attorney General

VGG/lm
Enclosure

cc: John Brandt Rucker, Esquire

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Carnie Norris, #227226,

Applicant,

v.

State of South Carolina,

Respondent.

2012-CP-42-4651

MOTION TO ALTER OR AMEND JUDGMENT PURSUANT TO RULE 59(e), SCRCP

Respondent now moves pursuant to Rule 59(e) and Rule 60, SCRCP, and all other applicable rules to alter or amend the judgement.

This matter is before this Court by way of an application for post-conviction relief (PCR). An evidentiary hearing into the matter was convened on September 15, 2014 at the Spartanburg County Courthouse. This Court granted relief by order dated September 6, 2017. Respondent received the filed signed order via the Spartanburg County Clerk of Court on September 8, 2017. The Court granted relief on the basis that:

(1) "[C]ounsel failed to render reasonably effective assistance regarding the improper introduction of portions of the applicant's prior record."

(Order p. 6).

DISCUSSION

In making this motion, Respondent reserves and incorporates all previous arguments and authority presented to this Court. Respondent would submit that the judgment should be altered or amended based on the following:

Applicability of Rule 609(a) versus Rule 609(b)

Prior to Applicant's trial testimony, the Solicitor indicated that he planned on impeaching Applicant with prior convictions for common law robbery and second degree burglary. (ROA p.

226). Counsel stated on the record that the Solicitor had provided her with documentation of those prior convictions and referenced a 1996 common law robbery and 1995 second degree burglary. (ROA p. 227-8). On direct, Counsel preemptively asked Applicant about both charges, pointing out that the charges were from 1995. (ROA p. 267). Additionally, Counsel pointed out that the Applicant was suffering from a drug problem at the time of the charge and had admitted his involvement in both. (ROA p. 267). On cross examination, the Solicitor asked Applicant if he'd "done robbery before," and if he'd "broke[n] into buildings before." (ROA p. 283). In response, Applicant stated that those incidents were from the past and he hoped the past would not harm him. (ROA p. 283).

This Court found Applicant's prior "conviction dates were well in excess of ten years before this case." (Order p. 11). In its order, this Court found Applicant's two prior convictions were "unduly prejudicial under South Carolina Rule 609 (B)(2)(b) [*sic*] in that they were not supported by specific facts and circumstances as required by the Rule," and that, "the use of those convictions therefore could not substantially outweigh its prejudicial effect." (Order p. 11). Rule 609(b), SCRE, establishes that 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.**" (Emphasis added).

Although the conviction dates are past the ten year mark, Applicant was released from confinement imposed for both convictions inside the ten year mark.[1] The 1995 sentence for second degree burglary was 15 years and the 1996 sentence for common law robbery was suspended to nine years plus five years of probation, consecutive to the burglary sentence. Applicant was released on parole in 2004, but then returned to confinement based upon the

[1] See attached Applicant's SCDC records.

parole/probation revocation in 2008 following his arrest on the charges in this case. Therefore, the crimes were not remote in time and would not invoke Rule 609(b). Rather, these crimes were admissible for use in impeaching Applicant under Rule 609(a) and would not raise issues under Rule 609(b).

Rule 609(a) requires that there be a finding by the court "that the probative value of admitting the evidence [of the prior convictions] outweighs the prejudicial effect to the [defendant]." Rule 609(a), SCRE. In contrast to admitting prior convictions under Rule 609(b), Rule 609(a) does not require that the probative value of the conviction **supported by specific facts and circumstances substantially** outweighs the prejudicial effect. Rather, Rule 609(a) only requires the court to determine the probative value of admitting the evidence outweighs its prejudicial effect. The rule assumes there will be **some** prejudicial effect.

There are five factors that should be considered by the trial judge in making the decision to admit prior convictions for impeachment purposes: "(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. Bryant, 369 S.C. 511, 633 S.E.2d 152 (2006).

Deficiency Analysis

As the record reflects, the court failed to make a finding on the record as to the probative versus prejudicial value of the prior convictions and there was no objection to the introduction of the prior convictions. (ROA p. 226-8). Trial counsel testified that had she objected to the prior robbery conviction, Applicant would have still been impeached based on the burglary. This assessment is reasonable and consistent with the factors set forth in Bryant. (1) A prior

conviction for burglary has impeachment value against a defendant's testimony; (2) Applicant was on parole for the burglary when he committed the instant robbery; (3) burglary is not identical or similar to armed robbery; (4) Applicant's testimony was not critical to his defense since his co-defendant testified consistent with Applicant's version of events[2]; and (5) credibility was central to the case thus allowing impeachment using prior convictions was important. It would have been reasonable to assume the burglary conviction would be admissible for impeachment purposes. Although an objection to require the trial court to make the findings required by 609(a) would have established a more thorough record, the result would have been the same in that the burglary would have been admissible to impeach Applicant. Therefore, trial counsel was not deficient in failing to object to the admissibility of the prior burglary conviction.

With regard to Applicant's prior common law robbery conviction: (1) A prior conviction for robbery has impeachment value against a defendant's testimony; (2) Applicant was on probation for the prior common law robbery when he committed the instant armed robbery; (3) while Applicant's prior conviction for common law robbery is similar to armed robbery in that they are both robberies, they are not identical; (4) Applicant's testimony was not critical to his defense since his co-defendant testified consistent with Applicant's version of events; and (5) credibility was central to the case thus allowing impeachment using prior convictions was important. Because 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.

Additionally, all articulable arguments which can be inferred from the record as trial strategy can be argued in favor of competence. A strategic or tactical decision does not have to be articulated by counsel on the record, as the passage of time can often wear on the memories of

[2] Trial counsel strongly encouraged Applicant not to testify. (PCR Tr. p. 62-63).

well-reasoned decisions made in the heat of battle of avenues not pursued, objections withheld, or evidence not presented. It is enough that the record show a basis for strategy, not that counsel announce that strategy on the record. See Wood v. Allen, 558 U.S. 290 (2010). (affirming state PCR court's finding that counsel made a strategic decision not to inquire further into a the petitioner's report about his mental deficiencies where the record supported that finding, despite Counsel not articulating the strategy). Notwithstanding the 609(a) test and the Bryant factors to be considered, Applicant's trial counsel elicited the prior convictions during her direct examination of Applicant. This was obviously a strategic decision by trial counsel to elicit unfavorable testimony from Applicant regarding his prior criminal history in an effort to garner the jury's trust and establish credibility. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Strickland, 466 U.S. 668, 693 (1984). Just because the strategy did not actually garner the jury's trust or establish Applicant's credibility does not necessarily mean it was an unreasonable strategy.

However, even if this Court finds that Counsel was deficient for failing to object to the use of those prior convictions, Respondent submits that the Applicant failed to meet his burden of proof as to prejudice.

Prejudice/Harmless Error Analysis

When an ineffectiveness claim is presented the defendant must show that counsel's representation was deficient. Deficient representation amounts to conduct that is not objectively reasonable under the circumstances. Strickland v. Washington, 466 U.S. 668, 688 (1984). In addition, Applicant must show prejudice by establishing that the outcome would have been different **but for** counsel's deficient performance. Strickland, 466 U.S. at 694. (emphasis added). The equivalent in a direct appeal of a criminal conviction is harmless error. If the appellate court

finds an error at trial could not reasonably have affected the result of the trial, then it is deemed harmless. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985).

Respondent submits that Applicant failed to meet his burden of proof of establishing that the alleged deficient conduct of Counsel affected the outcome of his trial. Respondent also submits that Applicant was not prejudiced by any alleged deficient performance because of the overwhelming evidence against him.

Victim Andrew Bond testified he was pushed to the ground by a man from behind who asked Bond for his ID and told Bond he was under arrest. (ROA p. 115). Bond testified the man reached in to take Bond's wallet and start looking through it. Bond identified the man as Applicant, Carnie Norris. (ROA p. 115). Bond testified that when he asked to see Applicant's badge, Applicant pulled a knife out and held it to Bond's throat. Bond identified the knife that was found on Applicant as the knife used to assault him. (ROA p. 116; p. 123). Bond testified that as the incident went on, Bond tried to get up, but Applicant put the knife to Bond's throat and threatened to kill Bond if he tried to get away. (ROA p. 117). Once the co-defendant arrived on the scene and began rifling through Bond's wallet, Bond testified Applicant continued to tell him to stay down and not move or Applicant would kill him. (ROA p. 119). Bond testified that once his friends began to pull up in their cars and the first police officers arrived, Applicant and his co-defendant handed Bond his empty wallet and cell phone before walking across the street. (ROA p. 120).

Herbert Blankenship, a witness, also testified he saw Applicant grab Bond, put him on the ground, announce he was a security officer and pull out a knife. (ROA p. 145). Blankenship testified that as they approached Applicant and Bond, Applicant pulled the knife out and pointed it at the others and told them to get on the ground. (ROA p. 146, p. 147). Blankenship identified

Applicant as the man who held the knife on Bond and the other witnesses. (ROA p. 146). Once Blankenship and the others had security call the police, he testified he drove over to the scene and directed his headlights at the area where Applicant had Bond on the ground. (ROA p. 148). Blankenship also identified the knife found on Applicant. (App. p. 149; p. 161).

Another witness, Daniel Mayfield, testified he saw Applicant approach Bond, put him on the ground, and remove his wallet. (ROA p. 170). Mayfield testified that as he and the others approached Bond and Applicant, Applicant pointed a knife towards the group and told them to get on the ground. (ROA p. 170). Mayfield identified the knife found on Applicant. (ROA p. 170). Mayfield also testified the Applicant identified himself as a security guard before removing Bond's wallet from his pocket and rifling through it. (ROA p. 175-6; p. 183-4).

Officer Brad James testified he received a call about a disturbance with weapons, which is what he was looking for when he arrived on the scene, and not anything related to a break-in as Applicant suggested. (ROA p. 193, p. 205, p. 209). James testified that as he arrived on the scene after receiving a dispatch, he saw two black males standing and a white male lying on the ground. (ROA p. 187). James testified the white male told him the black males were robbing him. (ROA p. 188). James, after receiving consent from Applicant, searched Applicant and found a black-handled kitchen knife. (ROA p. 190). The co-defendant turned over several cards that had been retrieved from Bond's wallet. (ROA p. 190).

Officer John Guest also testified they received two calls regarding a disturbance with weapons, which they found out later were from the Hangar security guard and one of Bond's friends. (ROA p. 210). Guest testified the co-defendant handed over several of Bond's cards from the wallet after being asked by Guest. (ROA p. 212). Guest also saw James recover the black kitchen knife from Applicant. (ROA p. 212). Guest testified Bond identified the knife as

the one used in the robbery. (ROA p. 213). Guest confirmed dispatch never received a call in regard to a break-in in that area. (ROA p. 213).

In contrast, both Applicant and co-defendant acknowledge going over to the group and rifling through Bond's cards from his wallet. However, both deny a knife being used or present. (ROA p. 258, p. 279). The testimony is not credible when contrasted with the testimony of three witnesses who saw the knife and could identify it and the police officers who testified they responded to a report of a disturbance involving someone being held at knifepoint. Further, the knife was found on Applicant. The witnesses had no way of knowing the Applicant had a knife on him at the time of the 911 calls if they had not seen the knife being held at the neck of their friend, Bond. The evidence against Applicant was, in a word, overwhelming. Additionally, Applicant and his co-defendant's lack of credibility was primarily caused by the stark contrast in their story versus that of various bystanders and law enforcement as well as the peculiarity of Applicant and his co-defendant's version of events – and not by his prior criminal history.

Even if this Court found that there was deficient conduct on behalf of Counsel, Respondent submits that because of the overwhelming evidence of guilt, there was no prejudice. "[N]o prejudice occurs, despite trial counsel's deficient performance, where there is otherwise overwhelming evidence of the defendant's guilt. Smith v. State, 386 S.C. 562, 566, 689 S.E.2d 629, 631 (2010) (citing Rosemond v. Catoe, 383 S.C. 320, 325, 680 S.E.2d 5, 8 (2009)). The trial testimony from Applicant was ludicrous. Jurors are expected to use common sense for just such testimony as this. They were called upon to assess the credibility of a story that was ridiculous *per se*. Prejudice from trial counsel's failure to require the trial judge to make his Rule 609(a) analysis on the record was not, under these circumstance, a defect in representation that could have realistically affected the outcome.

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). Broadnax was tried for armed robbery. The trial court held a hearing in camera to determine what prior convictions could be used to impeach Broadnax's testimony. The trial court admitted three of Broadnax's four prior armed robbery convictions. The Court held the error to be harmless, despite the convictions admitted were **identical** to those for which Broadnax was on trial. Id. at 478-479. In this case, the prior conviction was **not identical** to the conviction for which Applicant stood trial. Respondent submits the alleged error in admitting Applicant's prior common law robbery conviction was harmless, similar to Broadnax, and therefore, Applicant was not prejudiced by trial counsel's failure to object to it.

[*Remainder of page left blank intentionally*]

CONCLUSION

WHEREFORE, the Respondent respectfully requests the order be amended and the PCR application denied and dismissed with prejudice.

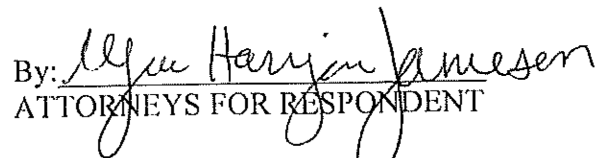
Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

VALERIE GARCIA GIOVANOLI
Assistant Attorney General



By: ______________________
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

September 19, 2017

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS 2012-CP-42-4651
Carnie Norris, #227226, Applicant, vs STATE OF SOUTH CAROLINA, Respondent.	AFFIDAVIT OF SERVICE BY MAIL

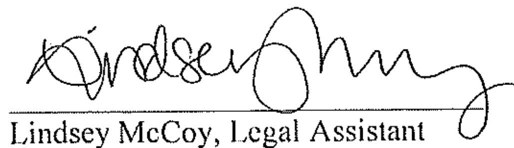
1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the **Motion to Alter or Amend Judgment Pursuant to Rule 59(e), SCRCP** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

John Brandt Rucker, Esquire
The Rucker Law Firm, LLC
128 Millport Circle STE 200
Greenville, South Carolina 29607

DATED this 19th day of September, 2017.



Lindsey McCoy, Legal Assistant