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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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

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

Lower Court Case No. 2008-GS-42-05631

STATE OF SOUTH CAROLINA,

RESPONDENT

V.

CARNIE NORRIS,

PETITIONER

APPELLATE CASE NO. 2024-000216

AMENDED PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on January 19, 2024.

QUESTIONS PRESENTED

I. Whether the Court of Appeals erred in failing to review the record for any evidence of probative value that supported the PCR court's ruling that a balancing under *State v. Bryant*, 369 S.C. 511, 633 S.E.2d 152 (2006) weighed against the admission of Petitioner's prior convictions?

II. Whether the Court of Appeals erred in failing to review the record for any evidence of probative value that supported the PCR court's ruling that the admission of petitioner's prior criminal convictions, including for common law robbery, was prejudicial in a case which turned on whether or not the jury believed appellant was committing an armed robbery rather than simply holding a potential burglar until police arrived on scene?

III. Whether the Court of Appeals has jurisdiction to review the PCR order in light of the factual findings made by the Federal District Court for South Carolina in connection with Petitioner's action under 28 U.S.C. § 2243 that the state failed timely serve its Rule 59(e), SCRCP, motion thereby making its notice of appeal untimely?

STATEMENT OF THE CASE

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. Blankenship climbed on top of the roof to attempt to retrieve the frisbee. App. 114, ll. 18-20; App. 145, ll. 7-9; App. 169, ll. 19-20.

Around this time, Petitioner Carnie Norris was walking towards Chiles' house. App. 231, ll. 4-5; App. 266, ll. 18-24. Petitioner "saw a couple of individuals on the top of the building." App. 266, ll. 10-17; see also App. 241, ll. 9-10. Petitioner 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, Petitioner 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.

At this point, the factual story of what happened on July 16, 2008, diverges substantially. Bond and his frisbee playing companions testified that Petitioner pulled a knife and physically threatened them. App. 114, l. 25 – 116, l. 7. During the confrontation, Bond claimed petitioner took his wallet and pulled material out of it. App. 115, ll. 1 – 6.

In contrast, Petitioner testified that when he arrived and yelled out to ask what the young men were doing, they acted scared and ran. App. 268, l. 25 – App. 269, l. 1; App. 269, ll. 4-6. Bond tried to run away as well, but Petitioner extended his arms to stop him. App. 269, ll. 7-11. Petitioner 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, Bond removed some cards from his wallet, which he showed to Petitioner. App. 271, ll. 4-5. Bond then sat down on the ground. App. 271, ll. 5-10.

When Chiles walked across the street, he testified that Petitioner "had one of the guys" "sitting on the ground." App. 242, l. 22 – App. 243, l. 1; App. 256, ll. 7-11. Petitioner handed Chiles the Bond'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.

At this point, according to Bond, Petitioner returned Bond's cell phone and empty wallet to him. App. 120, ll. 18-22. Bond claimed "six dollars and a debit card" were missing from the wallet. App. 121, ll. 4-7. Bond claimed that Petitioner then "walked across the street back to the house that he came out of." App. 120, ll. 23-25.

Officer Bradford James arrived on the scene 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 Petitioner and Chiles. App. 189, ll. 16-17. Petitioner 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 Petitioner's pocket that he had used earlier in the day to clean some fish. 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 Petitioner and Chiles. App. 190, ll. 12-14; App. 213, ll. 8-10; App. 279, ll. 11-21.

On September 19, 2008, a Spartanburg County grand jury indicted Petitioner 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 Petitioner. App. 1. Petitioner was tried along with his co-defendant Kenneth Wayne Chiles, who was represented by J. Roger Poole. App. 1. The jury found Petitioner 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.

Petitioner filed a notice of appeal. On Petitioner's behalf, Kathrine H. 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 Petitioner 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 error preservation rules. Petitioner 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 was 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 Petitioner relief from his conviction and sentence and ordered a new trial. App. 498-512. Judge Couch found that trial counsel "failed to render reasonably effective assistance regarding the improper introduction of portions of [Petitioner]'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 . . . was error." App. 505. Rather, Judge Couch found trial counsel should have objected and required a balancing by the trial court before admission of the prior convictions under State v. Bryant, 369 S.C. 511, 633 S.E.2d 152 (2006). App. 506. Judge

Couch found that the error undermined confidence in the outcome of the trial. App. 505. Moreover, Judge Couch performed the balancing of the Bryant factors and found if "trial counsel had opposed the introduction of the two prior conviction it is more likely than not that the trial judge would have excluded the use of those conviction." App. 509.

Subsequently, the state moved to alter or amend the judgment pursuant to Rule 59(e), SCRCP.[1] 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. 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.

This Court transferred the case to the Court of Appeals on February 18, 2020. On August 19, 2022, the Court of Appeals granted the state's petition for writ of certiorari and ordered full briefing on the issue presented. Following briefing by both parties and oral argument, on December 20, 2023, the Court of Appeals issued an unpublished opinion reversing the decision of the PCR court granting Petitioner a new trial. *See* Norris v. State, No. 2023-UP-406 (S.C. Ct. App. filed Dec. 20, 2023). In reversing, the Court of Appeals 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.

Counsel for Petitioner file for rehearing on January 4, 2024, with the Court of Appeals denying rehearing on January 19, 2024.

This Petition follows.

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[1] The timeliness of this motion is in question in light of the proceedings before the United States District Court between the parties. That issue has been added to this Petitioner as Argument III, *infra*.

ARGUMENT

I. The Court of Appeals erred in failing to review the record for any evidence of probative value that supported the PCR court's ruling that a balancing under *State v. Bryant*, 369 S.C. 511, 633 S.E.2d 152 (2006) weighed against the admission of Petitioner's prior convictions.

An appellate court must give "great deference to the factual findings of the PCR court and will uphold them if there is any evidence of probative value to support them." Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed "de novo" and the PCR court's decision will be reversed "when it is controlled by an error of law." Id. In this case, the Court of Appeals failed to observe this standard for appellate review and substituted its own view of the facts with no deference to the PCR court's findings of fact.

The Court of Appeals appears to accept that trial counsel was in error in not contesting the admission of the prior felony convictions.[2] This finding is in keeping with the Court of Appeal's earlier opinion in State v. Broadnax, 401 S.C. 238, 246, 736 S.E.2d 688, 692 (Ct. App. 2013) which acknowledged this 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. As such, any admission of such crimes would fall within Rule 609 (a)(1), SCRE, which is subject to balancing under Rule 403, SCRE. Moreover, under Rule 609(a)(1), SCRE, "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

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

S.E.2d 203, 210 (2019). This Court's guidance on the required balancing outlines factors the trial court should consider in this gatekeeper role:

> (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).

The PCR court applied the correct standard, but reached a conclusion that the Court of Appeals does not like and second guesses.

A. Impeachment value of the prior crimes.

The Court of Appeals improperly interpreted the PCR court's order as stating the prior convictions held "no impeachment value." 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. Moreover, the PCR court noted, in an acknowledgement the state had the burden to demonstrate the probative value outweighed the prejudicial impact under Coif, the "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. The Court of Appeals held it was improper for the PCR court to hold the lack of additional information surrounding the convictions against their

admissibility since, at a PCR hearing, the applicant bears the burden of proof. Norris, No. 2023-UP-406 at 5. This finding confused the import of the PCR court's finding, which focused on a lack of evidence the crimes involved false statements or dishonesty, which would have increased their probative value (a burden that the state was required to shoulder under 609(a)(1), SCRE), rather than the probative value of having committed a crime in and of itself.

The Court of Appeals appears to have combed the record for reasons to disagree with the PCR court's finding on this issue and did not give any "deference to the factual findings of the PCR court." Sellner, 416 S.C. at 610, 787 S.E.2d at 527. The Court of Appeals took this action even though the state, in briefing this issue to the PCR court, acknowledged "the [trial] 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 lodged." App 490.

B. The point in time of the conviction and the witness's subsequent history.

On the timing aspect of the criminal charges, the Court of Appeals noted "[w]hile 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, the Court of Appeal's phrasing also acknowledges the trial court could have, as the PCR court did, find the delay between Petitioner's release and new charges weighed against admission. Again, the Court of Appeals misapprehended its role in evaluating the PCR court's balancing of the Coif factors by substituting its own view of the weighed to be applied to the individual factor and second guesses a factual determination made by the PCR court that it acknowledged could have "cut" the other way.

C. The similarity of the past crime and the charged crime.

On the similarity of the crimes, the Court of Appeals discounted 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, the Court of Appeals' concern on the need of petitioner to have added additional facts in this regard would be redundant. App. 516.

"[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." Colf, 337 S.C. at 628, 525 S.E.2d at 249. "[W]hen the prior offense is similar to the offense for which the defendant is on trial, the danger of unfair prejudice to the defendant from impeachment by that prior offense weighs against its admission." Bryant, 369 S.C. at 517-18, 633 S.E.2d at 156.

As the PCR court held, this factor weighed against the admission of the common law robbery in his armed robbery trial.

D. The importance of the defendant's testimony.

The PCR court correctly outlined the importance of Petitioner's testimony, and that factual finding was not questioned by the Court of Appeals. App. 508.

E. Importance of credibility.

Under credibility, the Court of Appeals 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 particular 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. The Court of Appeals even noted 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 of Appeals, that there was unfair prejudice, precludes a finding that the PCR court abused its discretion in reaching the same conclusion.

F. Summary.

The PCR court and the Court of Appeals disagreed 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 as this Court has cautioned:

> 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.*

Robinson, 426 S.C. at 607, 828 S.E.2d at 217 (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 the PCR court. Sellner, 416 S.C. at 610, 787 S.E.2d at 527. "Under the proper standard of review, the appellate court's 'view' must be limited to whether there is probative evidence to support the PCR court's factual findings. Ordinarily, the appellate court is not free to make its own factual findings." Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018). Here, the Court of Appeals erred in elevating its disagreement over the factual conclusions by the PCR court and does not give appropriate deference to the PCR court's factual rulings on the balancing required before the admission of evidence of past crimes against and accused under Rule 609(a)(1), SCRE.

II. The Court of Appeals erred in failing to review the record for any evidence of probative value that supported the PCR court's ruling that the admission of petitioner's prior criminal convictions, including for common law robbery, was prejudicial in a case which turned on whether or not the jury believed appellant was committing an armed robbery rather than simply holding a potential burglar until police arrived on scene.

The Court of Appeals also improperly discounted 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). In contrast, the Court of Appeals reviewed the same record and same arguments (the state has consistently argued lack of prejudice due to the weight of evidence including before the PCR court) but found "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.

The Court of Appeals, particularly in a factual driven, prejudicial impact question, was required to provide appropriate deference to the PCR court's finding of fact concerning prejudice. It should have reviewed the record for any evidence that would support the PCR court's factual findings.

If it had done so, the Court of Appeals would have cited the strange behavior of the frisbee players in climbing on the roof of buildings, near a free medical clinic, in a "seedy" area of town. The Court of Appeals would have taken both Petitioner and Chiles at their words that they were simply trying to prevent the strange behaving people from leaving the area while they

called police. 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. Instead, the Court of Appeals cited the testimonial evidence from the alleged victim (Bond) and his companions without acknowledging the irony that the Court of Appeals was actively weighing credibility and ignoring its role to examine the record for any evidence that supported the PCR court's factual conclusion that the admission of the convictions had a prejudicial impact. Norris, No. 2023-UP-406 at 6.

The PCR court acknowledged these facts that supported the guilty verdict. App. 508; 518 - 520. However, none of these "facts" 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."). "While all of this evidence could indicate the jury was certain to find [Petitioner] guilty . . . 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).

Many of these facts relied upon by the Court of Appeals to negate any finding of prejudice have a counter view that supported Petitioner's innocence. Petitioner told Childs that individuals were on the roof of the church, and Chiles 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. Chiles indicated he arrived shortly after the initial confrontation between Bond and Petitioner and was handed what he believed was identification cards for Bond which Chiles 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 Petitioner 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 Petitioner and Childs denied the criminal intent element of the crime charged, with each testifying that their only 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 Petitioner and Childs had guns. App.

159, ll. 14 – 22 (emphasis added). 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 (emphasis added). The mere existence of the knife does not rise to the level of overwhelming evidence which would preclude a finding of prejudice. *See* Smalls v, 422 S.C. at 191, 810 S.E.2d at 845.

The Court of Appeals should have deferred to the PCR court's finding of prejudice if there was support in the record for such finding and allow Petitioner to have the jury "fairly consider his version of events" uncolored by the prejudicial introduction of a similar criminal conviction. App. 508 (emphasis added).

"Under the proper standard of review, the appellate court's 'view' must be limited to whether there is probative evidence to support the PCR court's factual findings. Ordinarily, the appellate court is not free to make its own factual findings." Buckson, 423 S.C. at 320, 815 S.E.2d at 440. Here, the Court of Appeals erred in elevating its skepticism over Petitioner's version of the events into a finding that the PCR court's determination of prejudice lacked support in the record.

III. The Court of Appeals lacked jurisdiction to review the PCR order in light of the factual findings made by the Federal District Court for South Carolina in connection with Petitioner's action under 28 U.S.C. § 2243 that the state failed timely serve its Rule 59(e), SCRCP, motion thereby making its notice of appeal untimely.

Petitioner filed an action in the United States District Court for South Carolina under 28 U.S.C. § 2254 alleging his continued confinement was unlawful. *See Carnie Norris v. Charles Williams, Warden*, United States District Court Civil Action No. 8:21-3353-MGL-BM. The State of South Carolina, through its agents as the various wardens of the Department of Corrections facilities confining Petitioner, appeared and contested Petitioner's federal action. On June 6, 2024, the Honorable Mary G. Lewis issued a Memorandum Opinion and Order Denying Petitioner's Motion to Alter or Amend. Supp. App. 115.

In this order, the District Court found that the state admitted receiving notice of the order granting Petitioner a new hearing on September 8, 2017. Supp. App. 90. The District Court then found that the state served a motion under Rule 59(e), SCRCP, on September 19, 2017, eleven days after receiving notice. Supp. App. 90. That the state did not contest the timeliness of its Rule 59(e), SCRCP, motion before the District Court, relying instead on the fact that the issue was not cognizable in a federal habeas petition and was only properly addressed in the state court system. Supp. App. 93. The District Court affirmatively found the state's Rule 59(e), SCRCP, motion to be untimely. As a result, the District Court also found that the Notice of Appeal filed by the state in this action dated March 1, 2019, was untimely. Supp. App. 94 – 96.

Under the doctrine of collateral estoppel, the state is bound by these adverse factual findings. *See* Ashe v. Swenson, 397 U.S. 436, 443 (1970) (noting collateral estoppel "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot

be litigated between the same parties in any future lawsuit"). South Carolina has recognized the use of collateral estoppel by an accused in a criminal matter. *See* State v. Hewins, 409 S.C. 93, 107, 760 S.E.2d 814, 821 (2014). This Court even noted the appropriate use, in the right settings, by the state of collateral estoppel against an accused: "[w]e decline to adopt a blanket prohibition of the State's use of offensive collateral estoppel." Id., 409 S.C. at 111, 760 S.E.2d at 823.

There are three requirements for the imposition of collateral estoppel covering an issue between the parties: 1) that it was actually litigated in the other action; (2) it was directly determined in the other action; and (3) it was necessary to support the other judgement. See Carolina Renewal, Inc. v. S.C. Dep't of Transp., 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). In the present action, the timeliness of the state's Rule 59(e), SCRCP, motion was a central issue before the District Court. The District Court made specific findings of fact concerning the issue and rendered a judgment accordingly. The state has neither moved to alter or amend said judgment or appealed, and it is the law of the case before the Federal Court.

Since the state's Rule 59(e), SCRP, motion has been found untimely, the notice of appeal in this action was also untimely, depriving the South Carolina Court of Appeals of jurisdiction to review the PCR Court's decision to grant Petitioner a new trial. *See* Mears v. Mears, 287 S.C. 168, 337 S.E.2d 206 (1985) ("The requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice."). As subject matter jurisdiction may be raised at any time, the Court should grant the motion to review the timeliness of the current appeal. *See* State v. Gentry, 363 S.C. 93, 100, 610 S.E.2d 494, 498 (2005) ("The lack of subject matter jurisdiction may not

be waived, even by consent of the parties, and should be taken notice of by this Court."); State v. Guthrie, 352 S.C. 103, 107, 572 S.E.2d 309, 311 (Ct. App. 2002) ("The lack of subject matter jurisdiction can be raised at any time, can be raised for the first time on appeal, and can be raised *sua sponte* by the court.").

Petitioner is aware of an attempt by the state to timely comply with Rule 59(e), SCRCP, in the form of its motion dated September 12, 2017. Supp. App. 114 – 125. However, the burden was on the state in the District Court to present the impact, if any, of this earlier attempt on the issue before the District Court. Having failed to do so, the state is bound under the doctrine of collateral estoppel from relitigating the timeliness of their appeal in this matter. Since the Court of Appeals lacked jurisdiction to review the grant of petitioner's new trial, this Court should vacate the decision of the Court of Appeals and remand this matter to the Spartanburg County Court of General Sessions for a new trial.

CONCLUSION

Based on the above arguments, this Court should grant the petition for writ of certiorari to allow for further briefing on the issue and Petitioner respectfully requests this Court vacate the decision of the Court of Appeals and remand this case to the circuit court for a new trial as ordered by the PCR court.

Respectfully Submitted,

Gary H. Johnson
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of September, 2024.