

STATE OF SOUTH CAROLINA  
In the Supreme Court

**RECEIVED**

SEP 20 2019

S.C. SUPREME COURT

CERTIORARI TO SPARTANBURG COUNTY  
Court of Common Pleas  
Roger L. Couch, Circuit Court Judge

Appellate Case No. 2019-000334

Carnie Norris,

Respondent,

v.

State of South Carolina,

Petitioner.

**PETITION FOR WRIT OF CERTIORARI**

ALAN WILSON  
Attorney General

MEGAN HARRIGAN JAMESON  
Senior Assistant Deputy Attorney General

JOHNNY ELLIS JAMES JR.  
S.C. Bar No. 101260  
Assistant Attorney General

Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-3737

ATTORNEYS FOR PETITIONER

## TABLE OF CONTENTS

ISSUE PRESENTED.....	ii
STATEMENT OF THE CASE.....	1
STATEMENT OF THE FACTS .....	4
a. The victims and witnesses consistently testified that they were out playing Frisbee-golf when Norris approached, forced Bond to the ground, identified himself as a security guard, rifled through Bond’s wallet, and held Bond at knifepoint, and that there was no report of any burglary. ....	4
b. Norris and Chiles testified that they were performing a “citizen’s arrest,” but were inconsistent with one another at trial, and inconsistent with Norris’ testimony at the evidentiary hearing.....	7
c. The prior convictions were admitted solely for impeachment, argued solely for impeachment, and comprised a very small part of the trial. ....	9
d. Counsel concluded the prior convictions were admissible under the rules, built a strategy that would avoid their use and not require Norris’ to testify, and was primarily focused on advising Norris to not testify. ....	11
STANDARD OF REVIEW .....	13
ARGUMENT .....	14
THE PCR COURT ERRED GRANTING RELIEF BECAUSE THE PRIOR CONVICTIONS WERE GOING TO BE ADMITTED UNDER THE LAW AT THE TIME OF TRIAL, AND WERE ULTIMATELY INCONSEQUENTIAL BECAUSE NORRIS WAS APPREHENDED MERE YARDS AWAY FROM HIS VICTIMS WHILE IN POSSESSION OF THEIR PROPERTY AND THE WEAPON DESCRIBED, SUCH THAT THERE IS NO REASONABLE PROBABILITY THE FLEETING REFERENCES TO HIS PRIOR CONVICTIONS CHANGED THE OUTCOME OF THE TRIAL.....	14
a. Counsel’s concession that the prior convictions could be used to impeach her client did not constitute deficient performance because the convictions were both crimes of dishonesty at the time of trial, and the lower court’s reliance on State v. Bryant is misplaced, and amounts to an error of law which requires reversal. ....	16
b. The lower court’s analysis under Rule 609(a)(1), SCRCP, and the five factors set forth in State v. Colf is infected by its misapplication of State v. Bryant and is riddled with errors of law. ....	17
c. Even if Norris’ prior convictions should have been excluded, his testimony was already so devoid of credibility that there is no reasonable probability the inclusion of the convictions changed the outcome of trial, such that the PCR court’s finding of prejudice is error. ....	20
CONCLUSION.....	22

## **ISSUE PRESENTED**

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

## STATEMENT OF THE CASE

Carnie Norris is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Norris was indicted at the September 2008 term of the Spartanburg County Grand Jury for armed robbery (2008-GS-42-05631). Beverly Jones, Esq., represented Norris, and Barry J. Barnette, Esq., of the Seventh Circuit Solicitor's Office,<sup>1</sup> prosecuted the case. On July 6, 2009, Norris proceeded to trial before the Honorable J. Derham Cole and a jury.<sup>2</sup> The jury found Norris guilty as indicted on July 7, 2009. Judge Cole sentenced Norris to imprisonment for a term of 18 years.

Norris filed a timely notice of appeal and a direct appeal was perfected by Kathrine H. Hudgins, Esq., filing a brief pursuant to Anders v. California, 386 U.S. 738 (1967), which raised the following issue:

In this armed robbery case, did the judge err in failing to instruct the jury on S.C. Code §§ 17-13-10, 20 dealing with the right of citizens to make arrests when appellant testified that he was making a citizen's arrest and not committing an armed robbery?

The South Carolina Court of Appeals dismissed Norris' appeal by unpublished opinion. State v. Norris, Op. No. 2012-UP-226 (S.C. Ct. App. filed April 18, 2012). The Remittitur was issued on June 19, 2012.

Norris filed his application for post-conviction relief on November 7, 2012 (2012-CP-42-04651). He alleged the following grounds for relief in his application, as summarized in the State's Return:

1. Ineffective assistance of counsel, in that:

---

<sup>1</sup> Now the elected Solicitor for the Seventh Judicial Circuit.

<sup>2</sup> Norris was tried alongside his co-defendant Kenneth Wayne Chiles (2008-GS-42-05630), who was also convicted. Judge Cole sentenced Chiles to imprisonment for a term of eighteen years. (Appx. 344).

- a. Counsel failed to put the State's case through adversarial testing;
  - b. Counsel labored under a conflict of interest;
  - c. Counsel failed to challenge the outside influence by the bailiff;
  - d. Counsel abandoned her professional duties of loyalties to the applicant;
  - e. Counsel failed to motion for arrest of judgment;
  - f. Counsel failed to object to trial court's erroneous jury charge and supplemental jury charge;
  - g. Counsel agreed to the trial court's response to the jury's inquiry;
  - h. Counsel failed to object to trial court's burden shifting instruction;
  - i. Counsel failed to object to Applicant's Due Process rights being violated;
  - j. Counsel failed to object to reasonable doubt charge;
  - k. Counsel failed to object to trial court's constructive amendment of the indictment;
  - l. Counsel failed to object to the material variance in indictment/due process;
  - m. "Due process verdict."
  - n. Counsel partially argued to the jury a theory without any evidence to support it with all evidence clearly contrary to that theory;
  - o. Counsel failed to request/propose a jury instruction on the theory of defense;
  - p. Counsel allowed the alleged co-defendant's counsel to deprive applicant of a fair trial;
  - q. Counsel failed to object to solicitor's closing argument, pitting, vouching, blistering;
  - r. Counsel failed to "consult" with the applicant about appeal process/post-trial;
  - s. Counsel abandoned her duties of loyalty when she impeached defendant with a 1995 burglary second and a 1996 common law robbery conviction when it had been established that those particular convictions were inadmissible;
  - t. Counsel failed to exclude the name and basic nature of the Applicant's prior felony convictions;
  - u. Counsel used the rules of evidence against Applicant;
2. Trial court abuse of discretion, in that:
    - a. Trial court failed to exclude the name and basic nature of the Applicant's felony convictions;
    - b. Trial court erred in dismissing Applicant's post-trial motion and reconsideration motion as untimely;
  3. Ineffective assistance of appellate counsel, in that:
    - a. Appellate counsel failed to raise applicant's preserved issues on appeal;
    - b. Appellate counsel failed to comply with the mandates of Anders;

4. Sentence classification correction, in that:

- a. Applicant requests to be awarded 358 days to his present sentence starting from July 16, 2008, to July 9, 2009.

The State made its return on February 28, 2014, and an evidentiary hearing into the matter was convened on September 15, 2014, before the Honorable Roger L. Couch. Norris was present at the hearing and represented by J. Brandt Rucker, Esq. Suzanne H. White, Esq., of the South Carolina Attorney General's Office, represented Respondent. Both parties submitted written memoranda/briefs in lieu of closing arguments. By written order dated September 6, 2017, and filed September 6, 2017, Judge Couch granted the application for post-conviction relief on a single ground: "Trial counsel's consent to the introduction of the prior convictions, and her introduction of the prior convictions during her direct examination of the Applicant was error." (Appx. 505). The State filed a motion to alter or amend the order on September 25, 2017.<sup>3</sup> Judge Couch denied the State's motion by Order filed February 15, 2019.

This appeal follows.

---

<sup>3</sup> The State initially made its motion on September 12, 2017, and clocked it September 15, 2017. However, the Spartanburg County Clerk of Court void-clocked the filing due to a scrivener's error in the caption, which read **2014-CP-42-4651** instead of **2012-CP-42-4651**.

## STATEMENT OF THE FACTS

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

At trial, victim Andrew Bond testified that on July 16, 2008, he and a number of friends were out playing Frisbee-golf near a medical clinic when he was pushed to the ground by a man from behind who asked him for his ID and told Bond that he was under arrest. (Appx. 113-15). The man reached in to take Bond's wallet and start looking through it. (Appx. 115, ll. 5-6). Bond identified the man as Respondent, Carnie Norris. (Appx. 115, ll. 7-23). When Bond asked to see Norris' badge, Norris pulled a knife out and held it to Bond's throat. (Appx. 116, ll. 1-7). Law enforcement later found a knife on Norris' person, which Bond identified at trial as the knife used in the assault. (Appx. 116, ll. 10-24; Appx. 123, ll. 9-14; Appx. 190, ll. 10-11). As the incident progressed, Bond tried to get up, but Norris put the knife to his throat and threatened to kill him if he tried to get away. (Appx. 117, 5-17). Once the co-defendant arrived on scene and began rifling through Bond's wallet, Norris continued to tell Bond to stay down and not move or Norris would kill him. (Appx. 117-19). Once Bond's friends began to pull up in their cars and the first police officers arrived, Norris and his co-defendant handed Bond his empty wallet and cell phone before walking across the street. (Appx. 119-20).

Herbert Blankenship,<sup>4</sup> a fellow Frisbee-golf player, saw Norris grab Bond, put him on the ground, announce he was a security officer and pull out a knife. (Appx. 144-45). As Blankenship and company approached Norris and Bond, Norris pulled the knife out, pointed it at the others, and told them to get on the ground. (Appx. 145-47). Blankenship identified Norris as

---

<sup>4</sup> Referred to at times in testimony by a nickname: "Hub."

the man who held the knife on Bond and the other witnesses. (Appx. 146-47; Appx. 160-61). Blankenship and his associates retreated and contacted security, who called the police. (Appx. 147-48). The group drove back to the scene and Blankenship directed his headlights at the area where Norris had Bond on the ground until law enforcement arrived. (Appx. 148-49). Blankenship identified the knife found on Norris as the knife used in the attack. (Appx. 149, ll. 15-22; Appx. 161, ll. 2-5).

Daniel Mayfield, another Frisbee-golfer with Bond and Blankenship, saw Norris approach Bond, put him on the ground, and remove his wallet. (Appx. 169-70). As Mayfield and the others approached Bond and Norris, Norris pointed a knife towards the group and told them to get on the ground. (Appx. 170, ll. 8-13). Mayfield identified the knife found on Norris as the knife used in the attack. (Appx. 170, ll. 14-19). Mayfield identified Norris as the attacker in court, and additionally identified co-defendant Kenneth Chiles. (Appx. 170-72). Mayfield and company fled the around the building and agreed they needed to call the police. (Appx. 172, ll. 4-23). Blankenship, who had left to retrieve his car, returned "a minute or two later" and the group left to alert a real security guard. (Appx. 172-73). Mayfield also testified that Norris identified himself as a security guard before removing Bond's wallet from his pocket and rifling through it. (Appx. 175-76; Appx. 183-84).

Officer Brad James, of the Spartanburg Public Safety Department, responded to a call about a disturbance involving "a friend being held at knifepoint," and found Norris standing over Bond with "a black object in his hand." (Appx. 186-87; Appx. 192-93; Appx. 209, ll. 2-6). James was not looking for anything related to a break-in as Norris later suggested. (Appx. 193, ll. 10-14; Appx. 204-05; Appx. 209, ll. 2-6). As James approached, the suspect "handed the black object back to the white male that was one the ground[,] and then walked across the street

to a house. (Appx. 187-88). The man on the ground told James the men had been robbing him after one identified himself as a security guard; the man's friends reported the same. (Appx. 188-89). James, after receiving backup from Officer John Guest, walked across the street to the still visible Norris and Chiles, and informed them that Bond and his friends accused them of robbing him. (Appx. 189, ll. 10-23). Both men initially denied possessing anything belonging to Bond, but Chiles surrendered a few cards from his pocket. (Appx. 189-90; Appx. 191, ll. 7-17). After receiving consent from Norris, James searched him and found a black-handled kitchen knife. (Appx. 190, ll. 4-11; Appx. 206, ll. 6-8). James took the knife and presented it to Bond, who identified it as the weapon used in the robbery. (Appx. 190-91).

Officer John Guest also testified law enforcement 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. (Appx. 210, ll. 1-11). Guest testified that he arrived on scene and saw Norris and Chiles sitting on the porch of a house across the street. (Appx. 210-11). Guest spoke with James and both officers crossed over to interview Norris and Chiles. (Appx. 211, ll. 3-9). Guest explained that the men mentioned something about the Frisbee golfers being on the roof of the building, but that they only did so upon prodding. (Appx. 211, ll. 13-21). Guest asked for consent to search Chiles, who consented and handed over several of Bond's business and credit cards. (Appx. 211-12; Appx. 214, ll. 11-17). Guest saw James recover the black kitchen knife from Norris. (Appx. 212-13). Guest testified Bond identified the knife as the one used in the robbery. (Appx. 213, ll. 3-7). The officers then detained Norris and Chiles. (Appx. 213, ll. 8-12). Guest confirmed he never received a call in regard to a break-in in that area, and did not search the premises consistent with any such call. (Appx. 213, ll. 13-17; Appx. 217, ll. 10-22).

**b. Norris and Chiles testified that they were performing a “citizen’s arrest,” but were inconsistent with one another at trial, and inconsistent with Norris’ testimony at the evidentiary hearing.**

Both Chiles and Norris testified in their defense. Chiles testified first, and recalled that he fell asleep after watching television and drinking a single beer with a friend, only to be woken by Norris knocking on his door. (Appx. 240, ll. 2-15; Appx. 247, ll. 13-19; Appx. 248-49). Chiles testified Norris told him somebody was trying to break into a building, and asked to use his phone. (Appx. 240-41). Chiles retrieved his phone, put on a pair of pants, and went outside to see a tree shaking with two to three people on top of the building. (Appx. 241, ll. 10-22; Appx. 247-48; Appx. 252, ll. 6-18; Appx. 255-56). Chiles recalled that by the time he had put pants on and come back outside, Norris already had Bond sitting on the ground, with his hand on the man’s shoulder. (Appx. 241-42; Appx. 248, ll. 4-21; Appx. 256, ll. 7-11; Appx. 257-58).

Chiles testified Norris asked him to hold the man’s I.D., among a stack of other cards, so Chiles pocketed them. (Appx. 242, ll. 2-6; Appx. 243, ll. 9-24; Appx. 257, ll. 14-20). Chiles denied going through Bond’s wallet, or that he had even seen the wallet, despite his reported statement of having seen the cards fall out of Bond’s wallet. (Appx. 243, ll. 15-17; Appx. 246, ll. 6-22; Appx. 257, ll. 18-20; Appx. 259, ll. 20-25). The cards had been on the ground before Norris picked them up and handed them to Chiles. (Appx. 259, ll. 11-19).

Chiles testified that law enforcement arrived before he could call them, and that he had waited to see for himself what was happening before calling. (Appx. 242, ll. 7-11; Appx. 254, ll. 9-18; Appx. 256-57; Appx. 260-61). Chiles claimed they spoke to two or three officers before crossing the street to the porch, and that he surrendered the cards to the police when they approached the porch and asked about them. (Appx. 244-45; Appx. 260, ll. 1-16; Appx. 262-63). Chiles described the whole affair as a “citizen’s arrest,” and that had he known it was “just kids playing” he would have stayed in bed. (Appx. 242-43; Appx. 246-47). Chiles denied knowing

anything about the knife, or ever possessing a weapon. (Appx. 249, ll. 17-22; Appx. 258-59; Appx. 263, ll. 4-6). Chiles did not know why Norris had been out and about after midnight. (Appx. 254-55). Chiles denied hearing Norris identify himself as a security guard to Bond or anybody else. (Appx. 261-62).

Chiles' friend, A.C. Worthy also testified in his defense, and recalled that he and Chiles drank multiple beers while watching wrestling on television that evening. (Appx. 229-30). After wrestling ended, Worthy changed the channel to the news, and then heard Norris call for Chiles from the window. (Appx. 231, ll. 1-5). After repeated calls from Norris, Chiles finally got up and asked Norris what he wanted, and thereafter got dressed over the course of five to ten minutes. (Appx. 232-34). Worthy testified Chiles left, then came back to get his cell phone. (Appx. 234-35). Worthy did not know what happened after Chiles retrieved his cell phone, but recalled he "was sitting looking at the wrestling when the officers come back, and they had Mr. Chiles with them in handcuffs." (Appx. 235, ll. 7-13). Worthy testified he never heard sirens from patrol cruisers, only "some guys on the porch talking." (Appx. 236, ll. 12-19).

Norris testified he was walking up the street when he heard leaves rustle, prompting him to look up and see two people on top of the medical clinic. (Appx. 265-66). Norris summoned a sleeping Chiles, and explained something was occurring at the clinic. (Appx. 266-68). Chiles retrieved his cell phone, the two went over to the people near the clinic, and asked what they were doing. (Appx. 268-69). Norris testified that when he asked Bond who he was, Bond became afraid, pulled out his wallet and cell phone, produced cards from the wallet, and showed it all to Norris, but that he never actually possessed Bond's wallet. (Appx. 270-71; Appx. 276, ll. 2-9). Norris claimed Bond "just sat down because he knew – I guess he kind of figured he wasn't, he wasn't going to be able to move anywhere. So he sat down." (Appx. 271, ll. 5-10).

Norris denied preventing Applicant from moving or leaving, but also testified that he initially prevented Bond from fleeing by holding his arms out, and testified he instructed Bond to wait until police arrived. (Appx. 269, ll. 7-14; Appx. 271, ll. 11-22). Norris also denied using a knife during the interaction, but admitted to possessing a knife he used to clean fish earlier that evening, and that he alerted the police to it prior to the search. (Appx. 279-80). Norris asserted Bond just handed the cards over when he asked to see them, and dropped some others which Norris instructed Chiles to hold, inconsistent with Chiles' statement to Guest. (Appx. 259, ll. 7-25; Appx. 275-76). Norris and Chiles provided inconsistent testimony as to whether Bond actually had an identification card on his person. (Appx. 258, ll. 6-8; Appx. 276, ll. 13-19).

At the PCR evidentiary hearing, Norris attempted to present a claim of prosecutorial misconduct and, in the process, presented new facts. Norris testified he had not one, but *two* knives on his person that evening: a pocket knife in his right front pocket and a fish paring knife wrapped in a piece of paper in his back pocket. (Appx. 436, ll. 7-11). Norris testified that they were *taken* across the street to the porch by law enforcement, and that law enforcement again approached them with guns drawn and (impliedly) aimed. (Appx. 436, ll. 12-23). Norris turned his own inconsistent testimony on its head and accused the officers of perjuring themselves for (1) stating the search was consensual and (2) mentioning only the one knife. (Appx. 436-37).

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

Prior to the testimony of either defendant, the trial court took up the matter of impeachable prior convictions. (Appx. 225-28). The State asserted, Norris had two timely prior convictions: an October 12, 1995, conviction for burglary, second degree, non-violent; and a January 17, 1996, conviction for common law robbery. (Appx. 226, ll. 1-3). Counsel did not

object to the use of the convictions for impeachment purposes, but asked the solicitor to confirm that those were the only two convictions that would come up. (Appx. 227-28).

Near the outset of Norris' testimony, Counsel quickly drew the sting of his prior convictions before continuing on. (Appx. 267, ll. 6-20). Counsel asked Norris if he had suffered from a drug problem during that period of his life, which Norris admitted, and further explained "[t]hat was over 15 years ago," and that he had pled guilty. (Appx. 267, ll. 15-20). The State briefly questioned Norris on the subject at the end of cross-examination:

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

A. Yes, sir.

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

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

(Appx. 283, ll. 16-22). No details of the crimes were ever brought out before the jury. The State primarily focused its closing argument on the inconsistencies in the defendants' testimony, and briefly mentioned the priors in closing:

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

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

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

. . . that evidence may be used for a very and strictly limited purpose by the jury, and that is as it relates to the impeachment of a witness' or a defendant's testimony given during the trial. In other words, you may consider such evidence on the issue of the credibility and/or the believability of a defendant and that defendant's testimony, but you may not consider it for any other purpose.

It is not being introduced as evidence of a defendant's guilt for the crime for which he now stands charged, and you are not permitted to consider it on that issue.

The sole purpose for which it is introduced, the sole reason that it is allowed and the sole purpose for which you may consider it is solely as to the issue of the credibility and the believability of a defendant's testimony in the event you find such evidence to be probative on that particular point or issue.

(Appx. 318-19). The jury retired to deliberate at 4:04 p.m. (Appx. 334, ll. 10-11). The jury returned with a guilty verdict at 4:25 p.m. (Appx. 335, ll. 2-3).

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

Counsel testified at the evidentiary hearing that she understood the convictions were recent enough under the rules, such that they would be admissible. (Appx. 465, ll. 7-13). Speaking to other issues, Counsel testified she believed that a joint trial with co-defendant Chiles was to Norris' benefit, and explained "if there was another individual who could provide helpful testimony and thereby eliminate the need [for] Mr. Norris' testimony, that would have been helpful to him." (Appx. 464-65). Counsel further articulated how she confirmed that Chiles would testify first, due to the alphabetization of the defendants, and requested additional time from the trial court to conference with Norris "in an attempt to prevent him from testifying or at least impose my recommendation that he not testify." (Appx. 466, ll. 1-16). Counsel testified

she did discuss with Norris that he would be tried jointly with Chiles, that Chiles would testify, and what he would testify to. (Appx. 468-69). When challenged on cross-examination that she could have challenged the armed robbery conviction coming in, Counsel noted that it would not have made a difference because the burglary conviction would have still come in. (Appx. 473-74).

## STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Id.; Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

## ARGUMENT

**THE PCR COURT ERRED GRANTING RELIEF BECAUSE THE PRIOR CONVICTIONS WERE GOING TO BE ADMITTED UNDER THE LAW AT THE TIME OF TRIAL, AND WERE ULTIMATELY INCONSEQUENTIAL BECAUSE NORRIS WAS APPREHENDED MERE YARDS AWAY FROM HIS VICTIMS WHILE IN POSSESSION OF THEIR PROPERTY AND THE WEAPON DESCRIBED, SUCH THAT THERE IS NO REASONABLE PROBABILITY THE FLEETING REFERENCES TO HIS PRIOR CONVICTIONS CHANGED THE OUTCOME OF THE TRIAL.**

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

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

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, an applicant must prove that counsel's performance was deficient. Strickland, 466 U.S. at 686; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the

attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). “When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect.” Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing Strickland, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. Cullen v. Pinholster, 563 U.S. 170, 196 (2011); Harrington v. Richter, 562 U.S. 86, 109-10 (2011). “[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.” Yarborough at 6; see also Murphy v. Davis, 901 F.3d 578, 592 (5th Cir. 2018) (“[C]ounsel’s performance need not be optimal to be reasonable.”). An applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

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

- a. **Counsel's concession that the prior convictions could be used to impeach her client did not constitute deficient performance because the convictions were both crimes of dishonesty at the time of trial, and the lower court's reliance on State v. Bryant is misplaced, and amounts to an error of law which requires reversal.**

“For the purpose of attacking the credibility of a witness, . . . evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.” Rule 609(a)(2), SCRE. Evidence of prior convictions are “not admissible if a period of more than ten years has elapsed since the date of the conviction *or of the release of the witness from the confinement imposed for that conviction*, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.” Rule 609(b), SCRE (emphasis added); see also State v. Shands, 424 S.C. 106, 123, 817 S.E.2d 524, 533 (Ct. App. 2018) (parole does not count as confinement for the purposes of Rule 609(b), SCRE).

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

The lower court cites to State v. Bryant for the proposition that “a conviction for robbery, burglary, theft, and drug possession, beyond the basic crime itself, is not probative of

truthfulness. 369 S.C. at 517, 633 S.E.2d at 155-56. However, as the State argued in Broadnax, the case in Bryant involved convictions for firearms offenses, not any robbery or other larceny, such that the language relied upon by the PCR court was dicta, and not binding law at the time of trial. 414 S.C. at 475, 779 S.E.2d at 792-93. Al-Amin remained as good law in 2009, and Counsel was well within the bounds of reasonably effective assistance to rely upon it, concede the issue, and instead focus her efforts on advising her client not to testify and instead bootstrap their cause to the testimony of co-defendant Chiles. The PCR court thus erred as a matter of law—Counsel was not deficient.

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

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

1. The impeachment value of the prior crime;
2. The point in time of the conviction and the witness’s subsequent history;
3. The similarity between the past crime and the charged crime;
4. The importance of the defendant’s testimony;
5. The centrality of the credibility issue.

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

First, the lower court improperly relies upon the fact that the prosecution did not set forth additional details about the prior crimes to establish their dishonest character (Appx. 507). The prosecution had no reason to do so because common law robbery was a crime of dishonesty at the time of trial. Furthermore, the analysis under the first Colf prong appears to muddy and mix the challenges of weighing the impeachment value of a prior crime under Rule 609(a)(1), SCRE, and the dishonest character of a prior conviction under Rule 609(a)(2), SCRE. “Although prior convictions for robbery, burglary, theft, and drug possession are not crimes of dishonesty or false statement, which would result in automatic admissibility under Rule 609(a)(2), such convictions may still have impeachment value under Rule 609(a)(1).” Robinson, 828 S.E.2d at 213. In Robinson, this Court reversed the South Carolina Court of Appeals vacation of a conviction where the Court of Appeals made the same error as made in the lower court in this matter: both courts noted no details as to the convictions were provided and concluded as a consequence that they had no impeachment value.

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

took place in July 2009, only five years passed between Norris' release and trial, easily satisfying the time requirements of Rule 609(b), SCRE.

Third, though there is concededly a fundamental similarity between strong-arm robbery and armed robbery, the lower court failed entirely to note the dissimilarity between the prior burglary and armed robbery. (Appx. 508; Appx. 526). Robbery involves different conduct than burglary, and the fact that most burglaries are undertaken with an eye toward stealing something does not render it overly similar for impeachment purposes in a trial for robbery or armed robbery. Robinson, 828 S.E.2d at 215. The failure to acknowledge the dissimilarity of the prior burglary is particularly notable where, as here, Counsel herself emphasized the point during the PCR evidentiary hearing as part of her explanation as to why expending time and preparatory resources on fighting to exclude the prior convictions was pointless: the burglary was coming in.

Fourth and fifth, the PCR court declares Norris' testimony and credibility essential. (Appx. 508). In doing so, the lower court again ignores Counsel's advice to her client that he not testify, but instead rely exclusively on the helpful testimony of co-defendant Chiles, whose impeachable record was less severe. In that context, Norris testimony was not at all essential, nor his credibility of any consequence in Counsel's design. Counsel clearly understood that her client lacked credibility, and would testify poorly, endeavored to compensate for those facts, and then did the best she could given the circumstances when Norris refused her advice and exercised his right to testify, to his own detriment.

Considering the case under each of the five factors above, the only reasonable conclusion was that (1) the prior convictions had substantial impeachment value, (2) the moderately close proximity of Applicant's release from custody for the prior convictions to the acts alleged revealed a pattern of criminal conduct to legitimately impeach his credibility, (3) the burglary

was sufficiently dissimilar from the new charges as to not raise constitutional concerns, (4) Norris' testimony was not necessary given the co-defendant had already favorably testified, and (5) Norris' credibility was not crucial to the case given his testimony was not necessary. The PCR court's legal conclusions to the contrary are entirely without support in the record, and thus constitute an error of law that must be reversed.

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

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

Not one iota of credibility can be drawn from Norris' testimony at trial or the evidentiary hearing when set against the testimony of three witnesses who consistently testified they saw the knife and identified it, and the police officers who testified they responded to a report of a disturbance involving someone being held at knifepoint. The witnesses had no way of knowing Norris had a knife on him at the time of the 911 calls if they had not seen the knife being held at the neck of their friend, Bond. Despite both defendants testifying, neither affirmatively sought to

return Bond's credit cards to him or law enforcement, and only did so when demanded by the police.<sup>5</sup>

Furthermore, Chiles had no prior robbery or burglary convictions, merely shoplifting and criminal domestic violence convictions introduced at trial, and was similarly convicted. (Appx. 238-39). Norris' prior convictions did not and could not cast a shadow over Chiles testimony.

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

The PCR court granted relief upon finding that “[a]bsent the knowledge of these prior convictions, the jury would have been confronted with two competing versions of the event in question.” (Appx. 509). Credibility was an issue, and “two competing versions of the event in question” were presented only in the same sense that football game between an NFL team and a recreational league team could be a “competition.” Norris' “citizen's arrest” story is simply not plausible given its inconsistencies with his co-defendant, itself, and when he was apprehended in possession of both a weapon identified by the victims and the victims' property.

---

<sup>5</sup> Here, Norris' new story that the police approached him and Chiles on the porch at gunpoint becomes especially damaging, as it runs contrary to Chiles' trial effort to show that he immediately and freely returned the cards to law enforcement as soon as the police asked. Still further, assuming *ad arguendo* the police had their guns drawn as Norris now claims, Chiles could not have simultaneously held his hands up and reached into his pocket to produce the cards, and an attempt to suddenly reach into his pocket would have likely ended with tragic consequences.

**CONCLUSION**

For the foregoing reasons, this Court should grant this Petition for Writ of Certiorari and reverse the grant of post-conviction relief. Should this Court grant the petition and deem so necessary, the State can more fully brief the issues set forth.

Respectfully submitted,

ALAN WILSON  
Attorney General

MEGAN HARRIGAN JAMESON  
Senior Assistant Deputy Attorney General

JOHNNY ELLIS JAMES JR.  
S.C. Bar No. 101260  
Assistant Attorney General

By:   
ATTORNEYS FOR PETITIONER

Office of the Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-3737

*20 Sept.*, 2019

STATE OF SOUTH CAROLINA  
In the Supreme Court

---

CERTIORARI TO SPARTANBURG COUNTY  
Roger L. Couch, Circuit Court Judge

---

Appellate Case No. 2019-000334

---

CARNIE NORRIS,

RESPONDENT,

v.

THE STATE OF SOUTH CAROLINA,

PETITIONER,

---

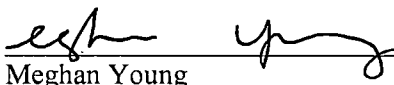
**CERTIFICATE OF SERVICE**

---

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and Appendix has been served upon opposing counsel by hand-delivering two copies addressed to:

**Robert Michael Dudek**  
**S.C. Commission on Indigent Defense**  
**1330 Lady Street, Suite 401**  
**Columbia, SC 29201**

This 20<sup>th</sup> day of September, 2019.

  
\_\_\_\_\_  
Meghan Young  
Legal Assistant for Petitioner



RECEIVED

SEP 20 2019

S.C. SUPREME COURT

ALAN WILSON  
ATTORNEY GENERAL

September 20, 2019

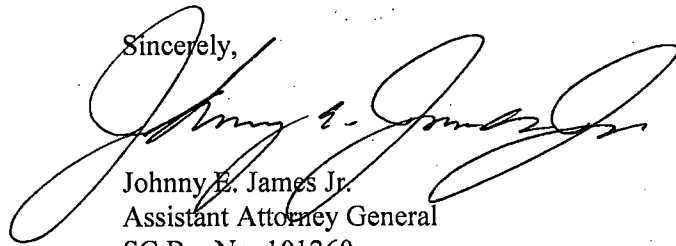
The Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

**Re: Carnie Norris v. State of South Carolina**  
**Appellate Case No. 2019-000334**  
**Lower Court Case No. 2012-CP-42-04651**

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the Petition for Writ of Certiorari and an original appendix and one copy. By copy of this letter, we are serving opposing counsel today.

Sincerely,



Johnny E. James Jr.  
Assistant Attorney General  
SC Bar No. 101260

JEJ/my  
Enclosures

cc: Robert M. Dudek, Esquire