STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Berkeley County

Honorable Michael G. Nettles, Circuit Court Judge

WILTON Q. GREENE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000339

PETITION FOR WRIT OF CERTIORARI

JOANNA K. DELANY
Appellate Defender

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

ATTORNEY FOR PETITIONER

INDEX

ISSUES PRESENTED

1.

Whether the PCR court erred in finding counsel provided effective assistance where counsel did not object to the admission of petitioner's prior conviction for strong arm robbery, a similar crime to armed robbery, for which petitioner was on trial, since trial counsel testified he did not know why he failed to challenge the conviction's admissibility, and evidence of this prior conviction was only admissible if its probative value outweighed its prejudicial effect pursuant to Rule 609(a)(1), SCRE?

2.

Whether the PCR court erred in finding trial counsel provided effective assistance where counsel did not request a limiting instruction regarding petitioner's prior conviction for a similar crime since the trial judge should, on request, instruct the jury on the limited purpose for which a prior crime can be considered, and this improperly left the jury to consider the prior conviction as propensity evidence?

3.

Whether the PCR court erred in finding overwhelming evidence of guilt precluded petitioner from showing prejudice where the jury deliberated for over five hours and asked to rehear the testimony of petitioner and the alleged victim, the jury said it was deadlocked, resulting in an *Allen* charge, and trial counsel admitted the case was a "swearing match" between petitioner and the alleged victim, since overwhelming evidence is only a categorical bar to prejudice if it includes "something conclusive"?

STATEMENT

On May 22, 2012, petitioner lived with his godfather in Monck's Corner, behind a Bojangles restaurant and the First Federal Bank. App. 172, ll. 6-24; App. 177, ll. 22-24; App. 178, ll. 6-8. Petitioner had a fair amount of cash that day, and around 9:30 a.m. he went to Big Lots and purchased three grams of crack cocaine. App. 173, ll. 8-22; App. 178, ll. 14-16; App. 179, ll. 3-5. Petitioner then stood around in the heat, unsuccessfully trying to sell the drugs before deciding to go home. App. 179, ll. 7-13.

Petitioner said: "When I started leaving Big Lots parking lot that's when I saw Mr. Bing. I met with Mr. Bing before. I did business with Mr. Bing." App. 179, ll. 13-15. "[H]e asked me did I have drugs on me. I told him yes. So I asked him could he give me a ride." App. 179, ll. 17-20. It was undisputed that Bing Ho Zhang agreed to give petitioner a ride, and the two men drove away in agreement that Zhang would drop petitioner off at a fast food restaurant. App. 180, ll. 4-8; App. 82, ll. 4-6.

Petitioner said Zhang was confused about whether they were going to Bojangles or McDonalds. App. 180, l. 21 – 181, l. 3. Zhang was from China and spoke Mandarin. App. 95, ll. 22-23; App. 96, ll. 3-6. During Zhang's testimony, Judge Nicholson[1] stopped proceedings and asked the state to find an interpreter, saying: "I don't think he understands what anybody is even asking him, okay." App. 94, ll. 23-25; App. 95, ll. 19-20; App. 97, l. 21 – 98, l. 3.

Petitioner testified Zhang wanted to buy sixty dollars' worth of cocaine, but did not have enough money, so petitioner agreed to hold Zhang's wallet as collateral until he paid. App. 180,

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[1] Petitioner was tried before the Honorable J.C. Nicholson, Jr., and a jury May 20 – 23, 2013, for armed robbery and kidnapping. App. 1; App. 60; App. 205; App. 263; App. 475 – 476; App. 478 – 479. Petitioner was represented by Chad D. Shelton and David Schwacke. App. 2. The state was represented by Adrian G. Dejeu and Bryan Alfaro. App. 2.

ll. 9-19. The wallet did not contain any cash but contained Zhang's green card. App. 83, ll. 21-24; App. 180, ll. 17-18; App. 380, ll. 2-3. Petitioner said he and Zhang had engaged in a similar transaction previously, with Zhang's green card held as collateral. App. 180, ll. 16-19.

Petitioner said he used a knife and began to "cut pieces of the crack cocaine and I gave it to Mr. Bing. He hit it and then we started driving." App. 180, ll. 23-25. Petitioner said he asked Zhang to take him to the bank several times since Zhang did not seem to know where Bojangles was, but that Zhang did not understand and said: "[O]h I get it you want all the money. You want all the money." App. 181, ll. 11-19. According to petitioner, Zhang "started acting a little funny. I kept telling him to go to the bank. He would keep saying I don't got no money." App. 181, ll. 23-25. Petitioner said Zhang tried to give him some small bills, but petitioner told him he would keep the wallet until he got full payment. App. 182, ll. 4-16.

While they were driving, Zhang saw a police car and swerved towards it. App. 183, ll. 10-20. Petitioner said when he saw the police car: "I was thinking about just getting away from the police because I had drugs on me." App. 189, ll. 20-21. "And as soon as he stopped I ran to get the drugs off me; that I could throw the drugs off me." App. 183, ll. 20-22. Petitioner said he was able to get rid of the drugs before being caught by Officer Judy. App. 191, ll. 21-25.

Zhang said he agreed to give petitioner a ride to McDonald's but claimed that on the way there petitioner pulled a knife and told Zhang to go to the bank. App. 82, ll. 4-6; App. 83, ll. 7-9. Zhang alleged petitioner took his wallet at knifepoint. App. 83, ll. 19-21. According to Zhang, he began looking for a police car, and when he saw one, he swerved towards it and honked his horn. App. 85, l. 15 – 86, l. 3.

Officer Anthony Judy of the Monck's Corner Police Department was on patrol when a car came at him "head on" through the median. App. 133, l. 22 – 133, l. 15. Officer Judy said he

"locked up the brakes" and jumped out of his car in case he was being ambushed. App. 134, ll. 15-23. The officer said the driver "had a very wild look in his face," and "bailed out yelling he robbed me, he robbed me." App. 134, l. 23 – 135, l. 1. Officer Judy said the passenger then got out of the car and started running toward the Huddle House. App. 135, ll. 1-4.

Officer Judy said after he saw "how frantic the driver was I realized there definitely was a problem and the black male was exiting and leaving the area." App. 135, ll. 7-9. Judy got back in his patrol car and began chasing petitioner. App. 135, ll. 10-12. "At one point I was actually running parallel with him down the sidewalk, lights on siren flashing—siren on." App. 135, ll. 12-14. Judy said he cut petitioner off in a parking lot and a brief foot chase began. App. 135, ll. 17-19; App. 138, l. 22 – 139, l. 5. According to Judy, petitioner dropped a knife in the parking lot, tripped and fell, and was arrested. App. 139, ll. 19-25.

Zhang's wallet was found in petitioner's pocket. App. 152, ll. 17-24. Officer Judy said petitioner told him: "[T]his is bull. I asked him to take me to Bojangles and drop me off by the bank beside it." App. 145, l. 24 – 146, l. 1. Petitioner told Officer Judy that he was a "victim of circumstances." App. 145, ll. 6-9.

Petitioner observed that, "[I]t's my word against his word," and wanted to testify. App. 388, l. 25; App. 372, ll. 12-14. Petitioner told his trial counsel, Chad Shelton, that he wanted to testify. App. 372, ll. 1-11. Trial counsel later agreed the case was a "swearing match" between petitioner and Zhang. App. 417, ll. 5-8; App. 421, ll. 2-3. However, trial counsel put on the record that petitioner was going to testify "against my advice." App. 168, ll. 7-9.

Petitioner told counsel prior to trial that his charges were the result of a drug deal gone bad, and that he had Zhang's wallet for collateral. App. 379, l. 23 – 380, l. 4. Trial counsel would later agree that petitioner said the incident arose out of a drug deal. App. 405, ll. 14-15.

However, trial counsel said that when he had petitioner transported to relay a plea offer and urged petitioner to take the plea bargain, petitioner said he did commit the armed robbery. App. 402, ll. 8-11; App. 411, ll. 13-16; App. 405, l. 22 – 406, l. 6. Trial counsel said that because petitioner's version of the facts changed, he had petitioner testify in narrative fashion at trial. App. 405, ll. 5-15; App. 418, ll. 15-22.

Petitioner had a recent prior conviction, which the parties referred to as "strong arm robbery."[2] App. 164, ll. 13-23; App. 165, ll. 5-10. The state did not argue the conviction was admissible. Instead, the court asked trial counsel: "So that would be an impeachable offense is that correct?" App. 164, ll. 24-25. Trial counsel replied: "Yes, Your Honor." App. 165, l. 1. Without any further discussion, the court then advised petitioner that the state could ask him about the prior conviction if he testified. App. 165, ll. 17-19.

Trial counsel, rather than the solicitor, brought up petitioner's prior conviction to the jury, and trial counsel said that was because he wanted to take the wind out of the state's "sails." App. 414, ll. 13-24. Rather than taking the sting out of the conviction, however, it was the last question trial counsel asked petitioner on direct, and there was no explanation or qualification. App. 183, l. 23 – 184, l. 2. The last thing the jury heard petitioner testify to on direct was: "I plead to Strong Arm Robbery," and then heard trial counsel say: "No further questions." App. 184, ll. 1-2.

Prior to the jury charge, the parties had an "informal charge conference" at the bench that was not reported. App. 203, ll. 6-11. The court did not give the jury a limiting charge or otherwise explain in its charge that petitioner's prior conviction should not be considered as

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[2] "Common law robbery and 'strong arm' robbery are synonymous terms for a common law offense whose penalty is provided for by statute." *State v. Rosemond*, 348 S.C. 621, 628, 560 S.E.2d 636, 640 (Ct. App. 2002), *aff'd as modified,* 356 S.C. 426, 589 S.E.2d 757 (2003).

evidence he committed the crime in the instant case. App. 236, l. 10 – 247, l. 24. Before submitting the case to the jury, the court asked the parties if they had any exceptions to the charge as given and trial counsel said that he did not. App. 248, ll. 1-6.

The jury deliberated for a total of five and a half hours. App. 249, ll. 9-10; App. 254, ll. 13-14. During that time it sent a note to the court asking, "Is there a possibility of a lesser included charge?" App. 454. After receiving an answer in the negative, the jury sent another note asking, "Can we have Mr. Zhang and [petitioner's] testimony read back to us or a copy?" App. 455. The testimony of petitioner and of Zhang was then replayed for the jury. App. 249, ll. 19-21. Then the jury sent another note that said, "We would like to see the police report of the incident and transcript."[3] App. 456.

Finally, the "jury sent in a note saying they're decided on one charge, deadlocked on another. They voted three times; some are unwavering."[4] App. 249, ll. 23-24. The court accepted and sealed the verdict on one count and issued an *Allen* charge[5] to the jury as to the second count. App. 250, l. 11 – 254, l. 5. The jury deliberated for another hour before reaching a verdict. App. 254, ll. 6-7.

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3 Police officers recorded their interview of Zhang, possibly due to confusion caused by the language barrier, and a transcript made of the interview was mentioned at trial—it appears this was the transcript the jury referenced in its note. App. 93, ll. 3-6; App. 95, ll. 3-9. The court replied to the jury that neither the transcript nor the police report was evidence and therefore could not be provided. App. 456.

4 For unknown reasons, this note was not made a court's exhibit, but the judge read it into the record.

5 *Allen v. United States*, 164 U.S. 492, 501 (1896).

Although petitioner was found guilty on both counts, he continued to maintain the incident was a misunderstanding at sentencing. App. 255, ll. 2-9; App. 273, ll. 21-22. The court sentenced petitioner to imprisonment for twenty years for the armed robbery and twenty years for the kidnapping, to be served concurrently. App. 477; App. 480.

After his conviction and sentence were affirmed on direct appeal,[6] petitioner timely filed an application for post-conviction relief (PCR). App. 331 – 353. The state made its return May 13, 2016, and a hearing was held before the Honorable Michael G. Nettles on December 4, 2017. App. 354 – 358; App. 359. Rodney Davis represented petitioner and Julie Coleman represented the state. App. 359.

At the PCR hearing, trial counsel said his strategy was to "minimize the selling of drugs." App. 406, ll. 15-16. However, PCR counsel pointed out that while trial counsel has control over strategy decisions, counsel must choose among strategies that are supported by the evidence. "[Petitioner] testified that this was a drug deal gone bad . . . even though that was not the strategy [trial counsel] would have preferred . . ." App. 431, ll. 4-6. "[W]e must present the strategy that we are afforded by our client and by the evidence." App. 431, l. 24 – 432, l. 3.

Trial counsel testified at the PCR hearing that he did not know why he did not argue to keep petitioner's prior conviction out. App. 413, l. 25 – 414, l. 12. Trial counsel said that when prior convictions were similar to the crime charged, he has asked in other cases that the conviction be referred to only as a "felony." App. 414, ll. 3-7. "I know I have done that on other cases. I don't know why I didn't do it on this one." App. 414, ll. 10-12.

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6 The PCR court's order of dismissal incorrectly states that petitioner's appeal was perfected pursuant to *Anders v. California*. App. 458. Petitioner's appellate counsel submitted a brief on the merits. App. 277 – 301.

In summation, PCR counsel argued that counsel was ineffective because he did not object to petitioner's prior conviction being admitted and the trial court did not articulate a finding that the probative value of petitioner's prior conviction outweighed its prejudicial effect. App. 430, l. 23 – 431, l. 23. PCR counsel correctly explained that trial counsel was ineffective when he failed to request the trial court articulate the reasons for its ruling that petitioner's prior conviction was admissible pursuant to Rule 609(a)(1), SCRE. App. 431, ll. 21-23; App. 430, l. 23 – 431, l. 5.

PCR counsel correctly argued that trial counsel was ineffective because he did not ask the court to give a limiting instruction to the jury about the purpose for which it could consider petitioner's prior conviction. App. 431, ll. 10-13.

However, the PCR court denied petitioner relief and issued an order of dismissal on January 30, 2018. App. 457 – 474. As to petitioner's allegation that counsel was ineffective for not objecting to the admission of his prior conviction, the order of dismissal reads: "Applicant's prior conviction was within the ten year period allowed under the rules of evidence, and its introduction at trial was not objectionable in any manner **other than its potential prejudice as a similar offense with little probative value**." App. 466 (emphasis added).

The order of dismissal reflects: "Trial counsel credibly testified he saw no reason to object to the admission of the prior conviction at the time of trial. Although he was unsure at the evidentiary hearing why he did not make the argument, he did not believe at the time of trial that an objection was necessary." App. 467.

The PCR court's order of dismissal also states: "Trial Counsel's failure to object to request a curative instruction was not deficient." App. 467. "More importantly, even if Trial Counsel were deficient in failing to object or request the balancing test [of Rule 609(a)(1) and

State v. Colf[7]], Applicant can show no prejudice that would entitle him to a new trial," because the "evidence against Applicant was overwhelming." App. 467 – 468.

The PCR court concluded that: "**Applicant cannot meet his burden to show that he was prejudiced by any alleged deficiencies because there is overwhelming evidence of his guilt.**" (emphasis added) App. 470. The order states the overwhelming evidence against appellant consisted of: testimony by the alleged victim, testimony by the police officer who arrested appellant, the fact that a knife was introduced, and the fact that the alleged victim's wallet was found in appellant's pocket. App. 470.

This petition for writ of certiorari follows.

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[7] The PCR court cited *State v. Colf*, 337 S.C. 622, 627, 525 S.E.2d 246, 248 (2000), in its order of dismissal for the rule that the following factors should be considered by the trial court: (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. App. 467.

ARGUMENT

1.

The PCR court erred in finding counsel provided effective assistance where counsel did not object to the admission of petitioner's prior conviction for strong arm robbery, a similar crime to armed robbery, for which petitioner was on trial, since trial counsel testified he did not know why he failed to challenge the conviction's admissibility, and evidence of this prior conviction was only admissible if its probative value outweighs its prejudicial effect pursuant to Rule 609(a)(1), SCRE.

When a prior offense is similar to the charged offense the "danger of unfair prejudice to the defendant from impeachment by that prior offense weighs against its admission." *State v. Bryant*, 369 S.C. 511, 517-18, 633 S.E.2d 152, 156 (2006). Where convictions "are either similar or identical to the charged offenses . . . the likelihood of a high degree of prejudice to the accused is inescapable." *State v. Scriven*, 339 S.C. 333, 343, 529 S.E.2d 71, 76 (Ct. App. 2000).

Rule 609(a)(1), SCRE provides in relevant part that for the purpose of attacking the credibility of a witness,

> [E]vidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, **and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused.**

(emphasis added).

In *State v. Colf*, 337 S.C. 622, 628, 525 S.E.2d 246, 249 (2000), this Court explained that when performing a Rule 609 analysis, the similarity of a prior crime to the crime charged increases its prejudicial effect as it inevitably suggests propensity. This Court found the following factors relevant to admission of a prior crime for impeachment purposes under Rule 609: (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. *Colf*, 337 S.C. at 627, 525 S.E.2d at 248.

"Whether the probative value of admitting prior convictions substantially[8] outweighs the prejudicial impact is a determination the trial court should make after carefully balancing the *Colf* factors and articulating for the record the specific facts and circumstances supporting its decision." *State v. Howard*, 396 S.C. 173, 180, 720 S.E.2d 511, 515 (Ct. App. 2011); *accord State v. Scriven*, 339 S.C. 333, 342, 529 S.E.2d 71, 75–76 (Ct. App. 2000) (urging trial court to "articulate its ruling and the basis for [the conviction's admission], thereby clearly and easily informing the appellate courts that a meaningful balancing of the probative value and the prejudicial effect has taken place as required by Rule 609(a)(1)").

Counsel testified he did not know why he failed to object to the admission of appellant's prior conviction for strong arm robbery—this was not a strategic decision. The record reflects that the state did not attempt to introduce the prior conviction or argue that it was admissible, and the trial court did not conduct an analysis of the conviction's admissibility. Under *Colf*, the

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[8] In performing a Rule 609(b) analysis pertaining to a remote conviction, the court must determine whether its probative value "substantially outweighs" its prejudicial effect. In performing a Rule 609(a)(1) analysis pertaining to a conviction less than ten years old, the court must determine whether its probative value simply "outweighs" its prejudicial effect. *State v. Black*, 400 S.C. 10, 18, 732 S.E.2d 880, 885 (2012).

similarity of the prior crime (strong arm robbery) and the crime charged (armed robbery) increased the conviction's prejudicial effect on petitioner, weighing against its admission.

In *Green v. State*, 338 S.C. 428, 434, 527 S.E.2d 98, 101 (2000), this Court found the defendant was prejudiced by his counsel's "failure to argue the prejudicial effect of the convictions outweighed their probative value." Green was charged with distribution of crack cocaine and was impeached with two convictions for possession of cocaine that occurred within five years of his trial. Id. at 431, 527 S.E.2d at 100. Prejudice resulted: "His credibility was critical, as the jury had to choose between his version of events and that of the SLED agents." *Id.* at 434, 527 S.E.2d at 101.

"[I]n the absence of a prior conviction for a crime of dishonesty, when a defendant's credibility is key it is the prejudice from the conviction that is heightened, not its probative value." *State v. Dunlap*, 346 S.C. 312, 328, 550 S.E.2d 889, 898 (Ct. App. 2001) (Shuler, J., concurring), *aff'd as modified,* 353 S.C. 539, 579 S.E.2d 318 (2003).

Here, as in *Green*, petitioner's credibility was critical, because the jury had to choose between his version of events and the alleged victim's. Because credibility was central, this fifth *Colf* factor—the centrality of the credibility issue—also weighs against the admission of petitioner's prior conviction.

Additionally, the first *Colf* factor—the impeachment value of the prior crime—weighs against the conviction's admission. Robbery is generally not probative of truthfulness. *State v. Bryant*, 369 S.C. 511, 517, 633 S.E.2d 152, 155 (2006); *State v. Broadnax*, 414 S.C. 468, 476, 779 S.E.2d 789, 793 (2015). The impeachment value of crimes that are "not particularly probative of the specific trait of truthfulness" is limited. *State v. Black*, 400 S.C. 10, 23, 732 S.E.2d 880, 887 (2012). While robbery involves stealing, it does not involve deceit, fraud,

cheating, or otherwise show a propensity to lie. No argument was advanced by the state that petitioner's prior conviction had impeachment value. Rather, trial counsel stated the conviction was admissible for impeachment, absent any explanation, other than that it occurred within the last ten years.

The prosecution has the burden of proof under Rule 609(a)(1), SCRE to show a conviction meets the five-factor *Colf* test. *State v. Brayboy*, 401 S.C. 207, 213, 736 S.E.2d 679, 682 (Ct. App. 2012). As noted above, the state did not argue for the admission of petitioner's prior conviction. Trial counsel was deficient in failing to hold the prosecution to its burden of proof.

The PCR court erred in finding trial counsel provided effective representation where counsel did not argue to keep petitioner's prior conviction for strong arm robbery out in his trial for armed robbery. Counsel said he did not know why he failed to object to its admissibility. The state did not attempt to impeach petitioner with his prior conviction, and the trial court did not perform a Rule 609(a)(1) analysis as to its admissibility.

2.

The PCR court erred in finding trial counsel provided effective assistance where counsel did not request a limiting instruction regarding petitioner's prior conviction for a similar crime since the trial judge should, on request, instruct the jury on the limited purpose for which a prior crime can be considered, and this improperly left the jury to consider the prior conviction as propensity evidence.

Because trial counsel did not request a limiting instruction, the jury was never told of the limited purpose for which petitioner's prior conviction was admissible, and was free to improperly consider his prior strong arm robbery as propensity evidence in its deliberations. "When evidence of other crimes is admitted for a specific purpose, the trial judge should instruct the jury to limit its consideration of this evidence to the particular purpose for which it is offered." *State v. Hamilton*, 327 S.C. 440, 447, 86 S.E.2d 512, 516 (Ct. App. 1997).

"The general rule is that when evidence of other crimes is admitted for a specific purpose, the judge is required to instruct the jury to limit their consideration of this evidence for the particular purpose for which it is offered." *State v. Johnson*, 306 S.C. 119, 126, 410 S.E.2d 547, 552 (1991). "The reasoning behind this rule is to protect against a jury convicting a defendant just because he has committed other crimes and not because it has been proven that he is guilty of the crime for which he is accused." *Id.*

"[W]here the evidence of other crimes is admissible only to impeach an accused when he testifies, the court, particularly on request, should instruct the jury that such evidence shall be considered by the jury only on the question of the credibility of the accused, and not to show his guilt." *State v. Smalls*, 260 S.C. 44, 47, 194 S.E.2d 188, 189 (1973).

In *Smalls*, "the trial judge refused a request to instruct the jury that evidence of [the defendant's] prior criminal record could only be considered on the issue of his credibility as a witness and not upon the question of his guilt." *Id.* at 46, 194 S.E.2d at 189. This court found that the "failure of the trial judge to instruct the jury as requested was prejudicial error and a new trial must be granted." *Id.* "Since the jurors were not so instructed, they were free to consider the prior convictions for any purpose, including the probability that [the defendant] committed the crime because he had demonstrated a prior criminal tendency. This was highly prejudicial." *Id.* at 47-48, 194 S.E.2d at 189-90.

The failure to give a limiting charge that evidence of a defendant's prior conviction was admissible only for impeachment purposes is reversible error. *State v. Bryant*, 307 S.C. 458, 460-61, 415 S.E.2d 806, 808 (1992). *Accord State v. Staley*, 294 S.C. 451, 452, 365 S.E.2d 729, 729 (1988). "Under our system of justice, a conviction must be based upon evidence of the offense for which the accused is on trial rather than prior criminal or immoral acts." *State v. Gore,* 283 S.C. 118, 120, 322 S.E.2d 12, 13 (1984).

Although the PCR court recognized the prior conviction's "potential prejudice as a similar offense with little probative value," it erred in determining counsel provided effective representation where he did not request a limiting instruction. App. 466. Had counsel requested a limiting instruction, the court would have been required to give one. Petitioner was prejudiced because the jury was left to consider his prior conviction for any purpose, including the likelihood that petitioner committed the crime because he had a demonstrated criminal propensity.

3.

The PCR court erred in finding overwhelming evidence of guilt precluded petitioner from showing prejudice where the jury deliberated for over five hours and asked to rehear the testimony of petitioner and the alleged victim, the jury said it was deadlocked, resulting in an *Allen* charge, and trial counsel admitted the case was a "swearing match" between petitioner and the alleged victim, since overwhelming evidence is only a categorical bar to prejudice if it includes "something conclusive."

This Court explained the correct application of *Strickland*'s prejudice prong in *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). "In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial." *Id.* at 188, 810 S.E.2d at 843 (citing *Strickland*, 466 U.S. at 695-96). "When potentially strong evidence "is tainted by a significant error of counsel, it should not be considered as part of the 'overwhelming evidence' that precludes a finding of prejudice." *Id.* at 194, 810 S.E.2d at 846.

"In addition, the PCR court should consider the strength of the State's case in light of all evidence presented to the jury." *Id.* Generally, "the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice." *Id.*

In *Franklin v. Catoe*, 346 S.C. 563, 552 S.E.2d 718 (2001), this Court discussed what constitutes "overwhelming evidence." In *Franklin*, overwhelming evidence of guilt existed where Franklin's bloody palm print was found on the murder weapon, his DNA was in the semen on the victim's body, and it was impossible to believe a reasonable juror could find the violent brutality of the murder was the result of consensual sex as Franklin claimed. *Id.* at 574, 552 S.E.2d at 724.

In *Brown v. State*, 383 S.C. 506, 518-19, 680 S.E.2d 909, 916 (2009), this Court found overwhelming evidence of guilt where the state presented four eyewitnesses who testified to seeing Brown commit the sexual misconduct against the child, both Brown and the three-year-old child had been diagnosed with gonorrhea, and Brown said he may have accidentally penetrated the child with his penis.

In *Thompson v. State*, 423 S.C. 235, 249, 814 S.E.2d 487, 494 (2018), this Court held that the PCR court's finding of no prejudice was without evidentiary support where the outcome of the trial hinged on the alleged victim's credibility, and there was otherwise an absence of overwhelming evidence of guilt.

This Court has explained that for evidence to be so overwhelming 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 there is no reasonable possibility counsel's error contributed in any way to the conviction. *Smalls*, 422 S.C. at 191, 810 S.E.2d at 845 (emphasis added).

A fair reading of this record does not support the PCR judge's conclusion that overwhelming evidence precluded petitioner from showing prejudice. Although physical evidence was present in form of the knife and wallet, the case still came down to a "swearing match." The physical evidence could be explained either by the alleged victim's version of events or by petitioner's.

The jury deliberated for a total of five and a half hours. App. 249, ll. 9-10; App. 254, ll. 13-14. The jury peppered the court with questions and requests: whether it could convict petitioner of a lesser offense; whether it could re-hear the testimony of petitioner and the alleged victim; whether it could view a police report and transcript of the alleged victim's statement to

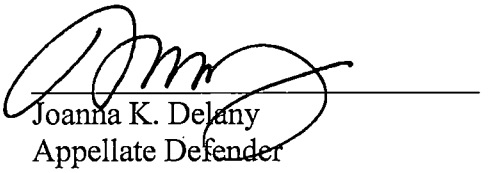
police. The jury sent a note saying it was deadlocked, received an *Allen* charge, and still continued to deliberate for another hour. App. 249, ll. 23-24; App. 254, ll. 6-7.

Balancing the errors of trial counsel—allowing and eliciting petitioner's prior conviction for strong arm robbery and failing to request a limiting instruction as to its use—against the strength of the state's case, the errors significantly undermine confidence in the outcome of petitioner's trial, and leave a reasonable probability that, but for counsel's deficiencies, the result of the trial would have been different. *Cherry v. State*, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989).

Petitioner respectfully submits that the PCR court erred in using "overwhelming evidence of guilt" as a categorical bar to post-conviction relief where the state did not present conclusive proof of guilt. *Smalls*, 422 S.C. at 191, 810 S.E.2d at 845; *Franklin*, 346 S.C. at 574, 552 S.E.2d at 724-25.

CONCLUSION

Based on the foregoing arguments, petitioner respectfully requests that a writ of certiorari be granted to allow full briefing on these issues.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of August, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Berkeley County

Honorable Michael G. Nettles, Circuit Court Judge

WILTON Q. GREENE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Benjamin Limbaugh, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Wilton Q. Greene, #351286, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 29th day of August, 2018.

Joanna K. Delany
Appellate Defender

SUBSCRIBED AND SWORN TO before me this 29th day of August, 2018.

ATTORNEY FOR PETITIONER

(L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2028