

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Georgetown County

Honorable William H. Seals, Circuit Court Judge

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RONALD EDWARD GOODEN,

 ORIGINAL  
**RECEIVED**

SEP 17 2018

S.C. SUPREME COURT

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000139

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PETITION FOR WRIT OF CERTIORARI

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<sup>1</sup> State v. Al-Amin, 353 S.C. 405, 578 S.E.2d 32 (Ct. App. 2003).

### **ISSUE PRESENTED**

Did the PCR court err in not finding trial counsel ineffective for not renewing his objection to the admission of Petitioner Gooden's 1992 conviction of strong armed robbery for impeachment purposes pursuant to Rule 403, SCRE as being too prejudicial which was prejudicial to Petitioner because the issue was not preserved for appellate review and because the trial judge initially ruled the conviction was too prejudicial to be admitted until the judge was alerted to State v. Al-Amin,<sup>2</sup> which held that robbery was admissible because it was a crime of dishonesty?<sup>3</sup>

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<sup>2</sup> State v. Al-Amin, 353 S.C. 405, 578 S.E.2d 32 (Ct. App. 2003).

<sup>3</sup> State v. Al-Amin, id. was overruled by State v. Broadnax, 414 S.C. 468, 779 S.E.2d 789 (2015).

## STATEMENT

Ronald Gooden, a forty-one year old single man, lived in Andrews, South Carolina as a child, and moved away when he was twenty. He returned to Andrews in 2009 which was about one year before this incident. App. 144, ll. 3 – 25; App. 145, ll. 1 – 12.

Gooden lived in a trailer that belonged to his father. However, his living conditions were poor as he had no electricity, no water, no stove or refrigerator, and no vehicle. He had only a bed. App. 146, ll. 1 – 25. He would go to Shaw's Corner Store to eat a hot dog and a drink because it was only about a half mile from his house. He washed cars to earn money. App.146, ll. 24 – 25; App. 147, ll. 1 – 15; App. 153, ll. 16 – 19.

At one point, about two weeks before this incident, Gooden allowed Johnny Bradshaw to move in with him. App.147, ll. 16 – 25; App. 148, ll. 1 – 4. Jackie Shaw, the owner of Shaw's Corner Store, told him that the rumor was that Bradshaw was gay. Gooden said he confronted Bradshaw who admitted he was. Then Gooden made him move out. App. 148, ll. 5 – 25; App. 149, ll. 1 – 23.

There were three men who also hung out at Shaw's Corner Store which included the victim, Curtis Anderson, and his friends, Gerry Chandler and Greg Tisdale. App.151, ll. 10 – 13; App.149, ll. 24 – 25. Anderson accused Gooden of being gay, and he and his friends made vulgar comments about possible sexual activities between Gooden and Bradshaw. App. 150, ll. 20 – 25; App. 151, ll. 1 – 25; Tr. 151, ll. 1. Gooden begged them to stop, and to leave him alone. But they continued. They invited him to a barbecue to make fun of him. App. 152, ll. 2 – 25; App. 153, ll. 1 – 12.

Later on another day, they were all in the parking lot at Shaw's, and the three men pulled knives from the trunk of their car and put them to Gooden's neck. App. 153, ll. 13 – 25; App.154, ll. 1 – 25. Then two or three days before the incident, he was sleeping in his trailer, and someone

shot into his trailer. App. 157, ll. 15 – 25; App. 158, ll. 1 – 9. When he asked Anderson about it, Anderson told him it wasn't the first time he tried to get someone. App. 158, ll. 10 – 25; App. 159, ll. 1 – 8.

A couple of days later on October 22, 2010, Gooden went to Shaw's store after work. Anderson and his two friends started making nasty comments to Gooden again. Gooden testified that he told them to stop "lying on him or he was going to set your ass on fire." App. 162, ll. 1 – 25; App. 163, ll. 1 – 8.

A heated argument began. Tisdale threatened to get his gun and walked out. App. 163, ll. 8 – 25; App. 164, ll. 1 – 4. Gooden knew that Anderson and Chandler had each killed a person in the past, and he was scared. App. 164, ll. 5 – 25. Gooden left and went home. He cut a bush axe in half to use if they pulled a gun on him. He then told himself he was not a killer. He returned to the store to get his cell phone which he left there to charge. App. 168, ll. 14 – 25.

When he arrived, he saw the three men returning to the store also. He went in and got his cell phone. App. 169, ll. 1 – App. 170, ll. 1 – 25. Once in the store, Anderson made a motion to him like a pistol as though he were going to shoot him. App. 171, ll. 1 – 25; App. 172, ll. 1 – 13. Gooden then went outside, grabbed a gas can he saw earlier, went back into the store, threw the gas on Anderson, and lit it. Anderson caught on fire. App. 172, ll. 14 – 25; App. 173, ll. 1 – 25; App. 174, ll. 1 – 3.

When the police arrived, Gooden decided to turn himself in. He walked up to the police and told them he did it. Gooden believed the three men were going to kill him. He just wanted them to leave him alone. App. 174, ll. 4 – 25; App. 175, ll. 1 – App. 176, ll. 24.

Curtis Anderson testified that he was burned extensively as he suffered third degree burns on much of his body. He spent three months in the burn center in Augusta and one month in a rehabilitation center. App. 113, ll. 5 – 23; App. 116, ll. 6 – 25; App. 117, ll. 1 – 21.

During his testimony, Gooden told Anderson he was sorry this had happened as he did not mean to mess him up. App. 172, ll. 10 – 13.

During pretrial motions, defense made a motion asking the solicitor to disclose the impeachable offenses they intended to use when Gooden testified. The state told the judge they were planning to use a conviction for strong arm robbery (SAR) from 1992. It met the ten year requirement because he violated parole in 1999 and returned to prison. He was released from confinement January 18, 2002, so the conviction fell within the ten year requirement for an impeachable offense. App. 32, ll. 21 – 25; App. 33, ll. 1 – 18.

Defense counsel argued that the SAR was a 1992 conviction which was almost twenty years ago for the conviction, and the offense occurred before that. Counsel argued the offense was too remote, was not relevant, and the prejudicial effect outweighed any credibility issues. Counsel asked that this SAR conviction be excluded if Gooden testified. App. 33, ll. 20 – 25; App. 34, ll. 1 – 8.

When the judge asked what the probative value was, the state responded that the sole issue was Gooden's credibility because self-defense was an issue in the case based on Gooden's claims of actions by the victim. The state said the victim had a violent record also. The judge said the prior conviction would have a "pretty" prejudicial effect if the state was using it to show him as a violent person. The judge said the SAR was not evidence in this case. App. 34, ll. 8 – 25; App. 35, ll. 1.

The state argued that SAR was a crime of dishonesty. The judge said he still had to balance the probative versus the prejudicial value. App. 35, ll. 5 – 22. Defense counsel argued that the victim had a violent record, and he and his friends were picking on Gooden. Counsel argued again

that the SAR was twenty years ago. The judge ruled that he was not going to let the SAR come in as the prejudicial effect outweighed the probative value. App. 35, ll. 2 – 25; App. 36, ll. 1 – 25; App. 37, ll. 1.

The state then cited the case of State v. Al-Amin, 353 S.C. 405, 578 S.E.2d 32 (Ct. App. filed March 3, 2003) which held that armed robbery was a crime of dishonesty and the court did not need to weigh the prejudicial effect versus the probative. App. 37, ll. 2 – 25. The judge said he thought everything had to be weighed for prejudicial effect. App. 38, ll. 1 – 16. After reviewing the case, the judge reversed his ruling, and said that SAR was a crime of dishonesty and could be used to attack Gooden's credibility. App. 38, ll. 17 – 25.

When Gooden testified, on cross examination, the state asked Gooden if he had been convicted of strong arm robbery, and he said he had. Trial attorney made no objection. App. 187, ll. 7 – 25.

The jury found him guilty of the lesser included offense of ABHAN. App. 267, ll. 17 – 20. The judge sentenced Gooden to the maximum of twenty years. App. 272, ll. 1-4.

Trial counsel filed a notice of appeal. The appeal was perfected by the Division of Appellate Defense of the Commission on Indigent Defense. Following oral arguments on April 10, 2013, the Court of Appeals affirmed Gooden's conviction and sentence finding that the issue on appeal was not preserved. State v. Gooden, Op. No. 2013-UP-167 (Ct. App. filed April 24, 2013). App. 314. The issue on appeal was that the trial court erred in admitting Gooden's 1992 conviction for strong armed robbery for impeachment purposes because it was subject to a 403 analysis because the case was distinguished from State v. Al-Amin, 353 S.C. 405, 578 S.E.2d 32 (Ct. App. 2003). App. 314.

On October 1, 2013, Petitioner Gooden filed an application for post-conviction relief (PCR). The state filed a return on May 14, 2014. An evidentiary hearing was held on September 21, 2017 before the Honorable William H. Seals. Petitioner Gooden was represented by Tristan Shaffer, and the state was represented by Johnny Ellis James, Jr. App. 286.

Petitioner Gooden was present at the hearing but was not called to testify. App. 287. PCR counsel told the court that Petitioner Gooden had decided to proceed only on the issue that trial counsel failed to properly object and therefore failed to preserve the issue of the admission of the strong armed robbery conviction. App. 288, ll. 23 – App. 289, ll. 10.

Trial counsel testified that he felt sorry for Gooden because the “guys drove him to it, and they got hurt.” Counsel said the only defense they had was self-defense which was based on Gooden’s testimony. App. 297, ll. 1 – App. 298, ll. 25.

Trial counsel continued to testify that he had argued pretrial against the strong armed robbery being admitted because the “prejudicial effect outweighed any credibility issues since it happened twenty years ago.” App. 33, ll. 20 – App. 34, ll. 8; App. 301, ll. 7 – App. 303, ll. 10. Trial counsel testified that he did not object during the trial when the state asked Gooden about the strong armed robbery conviction because he did not want “to make a big deal on it because that just highlighted it more to the jury as it being a bigger deal than it was.” App. 303, ll. 11 – App. 304, ll. 3.

Trial counsel then explained that Gooden had confessed which was on videotape and audiotape. Counsel then stated:

So, to me, whether the thing came into evidence or not made zero difference on whether the –how the jury is going to vote in their verdict of whether we threw gas on the man and set it afire because we did set it on fire.

App. 304, ll. 10 – 14.

Counsel continued that that was why he did not object to it again when the state asked the question in front of the jury “for the reason he just got through saying.” Then counsel admitted that he made the motion pretrial because he wanted to keep out the prior conviction. App. 304, ll. 10 – 24.

Counsel said on direct and on cross examination that he did not make an objection under Rule 403 although the judge initially said that the judge felt he had to conduct a 403 analysis. App. 304, ll. 25 – App. 305, ll. 11. When asked, trial counsel said that he thought Al-Amin was good law at the time of trial, but was changed by the Court of Appeals and the Supreme Court that robbery was not a crime of dishonesty which was in 2013. The trial was in 2011. App. 306, ll. 1 – 21.

Counsel also admitted that the judge was not going to allow the state to use the strong armed robbery conviction when the judge talked about weighing the prejudicial effect and probative value. App. 307, ll. 1 – 9. Once the judge read the case of Al-Amin, he reversed his ruling and said he had to admit the conviction as a crime of dishonesty. App. 307, ll. 15 – App. 308, ll. 12; App. 38, l. 1 – 25.

The PCR judge issued an order on January 5, 2018 denying Gooden’s PCR application and dismissing it with prejudice. App. 313 – App. 319. The judge found no deficiency on the part of trial counsel “or prejudice therefrom.” The judge wrote that any error by trial counsel was harmless in light of the overwhelming testimony from numerous witnesses which included Gooden’s own admission of guilt. The order provided that trial counsel was “extremely competent.” App. 318.

The PCR judge also wrote that Al-Amin, id. was the law at the time of Petitioner Gooden’s trial, and did not require a 403 analysis for robbery which was a crime of dishonesty under Al-Amin. PCR counsel filed a notice of appeal. This petition follows.

## ARGUMENT

The PCR court erred in not finding trial counsel ineffective for not renewing his objection to the admission of Petitioner Gooden's 1992 conviction of strong armed robbery for impeachment purposes pursuant to Rule 403, SCRE as being too prejudicial which was prejudicial to Petitioner because the issue was not preserved for appellate review, and because the trial judge initially ruled the conviction was too prejudicial to be admitted until the judge was alerted to *State v. Al-Amin*,<sup>4</sup> which held that robbery was admissible because it was a crime of dishonesty.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, *supra*; Butler v. State, *supra*.

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989).

A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

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<sup>4</sup> State v. Al-Amin, 353 S.C. 405, 578 S.E.2d 32 (Ct. App. 2003).

In Thompson v. State, 423 S.C. 235, 814 S.E.2d 487 (2018), the Supreme Court held that defense counsel's failure to object to inadmissible hearsay by the clinical psychologist and minor's caseworker was deficient performance and supported claim of ineffective assistance of counsel. The Court also held that defense counsel was ineffective for failing to object to impermissible bolstering by the psychologist and detective. The Court found that the defendant showed that he was prejudiced by trial counsel's ineffectiveness because there was a reasonable probability that the outcome would have been different but for trial counsel's deficiencies.

In Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018), the Supreme Court held that to satisfy the prejudice prong of an ineffective assistance of counsel claim, an applicant must demonstrate there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. The Court also held that the PCR court should also consider the strength of the state's case in light of all of the evidence presented as well as considering the impact of trial counsel's error.

The Supreme Court then found in Smalls that for the evidence to be overwhelming such that it precludes a finding of prejudice with regard to an ineffective assistance of counsel claim, 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.

Rule 402 SCRE provides that "all relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible." (emphasis supplied)

Rule 403, SCRE provides where evidence is relevant it “may still be excluded if its probative value is substantially outweighed by the danger of unfair prejudice...” Unfair prejudice Rule 403, SCRE provides where evidence is relevant it “may still be excluded if its probative value is substantially outweighed by the danger of unfair prejudice...” Unfair prejudice “means an undue tendency to suggest decision on an improper basis...” State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991).

Rule 609 (a)(2), SCRE, provides that: “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.”

In State v. Al-Amin, *supra*, the Court of Appeals provided that armed robbery was a “crime of dishonesty” and a prior armed robbery conviction was admissible to attack the defendant’s credibility; it was the larcenous element of taking property of another which made the action dishonest. The court also held that the admission of prior criminal acts involving dishonesty to attack the credibility of a witness did not require the balancing of the probative value against its prejudicial effect.

However, the Supreme Court held in State v. Broadnax, 414 S.C. 468, 779 S.E.2d 789 (2015), that robbery was not a crime of dishonesty for impeachment purposes pursuant to Rule 609 (a) (2), SCRE.. That Court overruled the holding in Al-Amin.

In Estelle v. Williams, 425 U.S. 501 (1976), the United States Supreme Court ruled that due process under the Fourteenth Amendment guaranteed a defendant the fundamental right to a fair trial. South Carolina’s due process clause is found in Article I, Sect. 3 of the South Carolina Constitution.

Gooden's case is distinguished from Al-Amin in that the conviction in Al-Amin's case was only twelve years old. Gooden's conviction was almost twenty years old. The conviction was for SAR and not armed robbery. The judge in Gooden's case believed the SAR was too prejudicial to be admitted and was not relevant until he read the holding in Al-Amin.

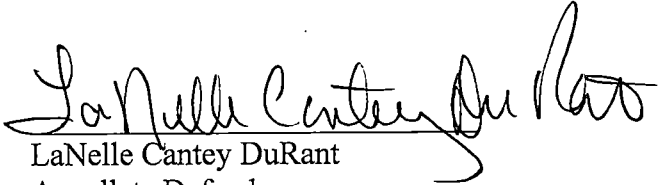
In State v. Gooden, Op. No. 2013-UP-167 (Ct. App. filed April 24, 2013), the Court of Appeals affirmed Gooden's conviction because the court held that the issue was not preserved for appellate review because it was not raised and ruled on below. Citing State v. McEachern, 39 S.C. 125, 731 S.E.2d 604 (Ct. App. 2012).

The PCR court erred in not finding trial counsel ineffective for not renewing his objection to the admission of Petitioner Gooden's 1992 conviction for strong armed robbery. This was prejudicial to Gooden because the issue was not preserved for appellate review. There was a strong reasonable probability that the appellate court could have ruled in Gooden's case that robbery was not a crime of dishonesty as the Court of Appeals' ruling in Broadnax came only sixteen months after Gooden's trial.

The trial judge had already found the 1992 SAR conviction was prejudicial but had to follow Al-Amin. If trial counsel had renewed his objection, the appellate court could have reviewed the issue of prejudice under Rule 403, SCRE based on age and the state painting Gooden as a violent person which was one of the trial judge's concerns.

**CONCLUSION**

Based on the above, certiorari should be granted, and Petitioner's convictions and sentences reversed, and the case remanded for a new trial.

  
LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of September, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Georgetown County

Honorable William H. Seals, Circuit Court Judge

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RONALD EDWARD GOODEN,

PETITIONER

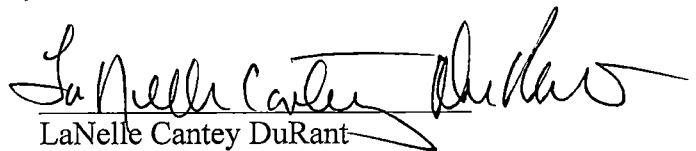
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STATE OF SOUTH CAROLINA,

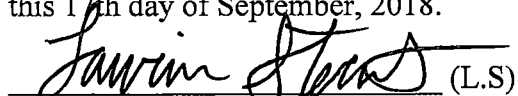
RESPONDENT

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CERTIFICATE OF SERVICE  
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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 Johnny Ellis James, Jr., 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 Ronald Edward Gooden, #191688, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 17th day of September, 2018.

  
LaNelle Cantey DuRant  
Appellate Defender

SUBSCRIBED AND SWORN TO before me    ATTORNEY FOR PETITIONER  
this 17th day of September, 2018.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: July 5, 2027.