

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County

Honorable J. Cordell Maddox, Circuit Court Judge

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S.C. SUPREME COURT

GENE TONY COOPER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001149

PETITION FOR WRIT OF CERTIORARI

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INDEX

INDEX i

ISSUES PRESENTED.....1

STATEMENT OF THE CASE.....2

ARGUMENTS

1.

The post-conviction relief (PCR) judge erred by finding trial counsel was not ineffective when he introduced so called impeachment evidence against Phillip “Red” Farmer which merely reaffirmed Farmer’s claim that Petitioner called him the morning after the murder and confessed to killing the decedent and burning her body since Petitioner was obviously prejudiced where the only other direct evidence against Petitioner was the testimony of Robert “Bo” Southerland who had little to no credibility.....9

2.

The post-conviction relief (PCR) judge erred by finding trial counsel was not ineffective when he told the jury during his opening statement about Petitioner’s prior record and the fact that he went to prison with Robert “Bo” Southerland, and when he later failed to object to the introduction of Petitioner’s prior convictions for housebreaking and grand larceny as unfairly prejudicial since they are similar to the underlying crime for which Petitioner was being tried, and where Petitioner was prejudiced since he testified at trial and his credibility was crucial to his defense.17

3.

The post-conviction relief (PCR) judge erred by finding trial counsel was not ineffective when he failed to request and obtain an instruction from the trial court that star witness Robert “Bo” Southerland could not testify concerning Petitioner’s prior armed robbery convictions, since such evidence was inadmissible and unfairly prejudicial, and where Petitioner was prejudiced since he testified at trial and his credibility was crucial to his defense.25

CONCLUSION.....29

ISSUES PRESENTED

1.

Did the post-conviction relief (PCR) judge err by finding trial counsel was not ineffective when he introduced so called impeachment evidence against Phillip “Red” Farmer which merely reaffirmed Farmer’s claim that Petitioner called him the morning after the murder and confessed to killing the decedent and burning her body since Petitioner was obviously prejudiced where the only other direct evidence against Petitioner was the testimony of Robert “Bo” Southerland who had little to no credibility?

2.

Did the post-conviction relief (PCR) judge err by finding trial counsel was not ineffective when he told the jury during his opening statement about Petitioner’s prior record and the fact that he went to prison with Robert “Bo” Southerland, and when he later failed to object to the introduction of Petitioner’s prior convictions for housebreaking and grand larceny as unfairly prejudicial since they are similar to the underlying crime for which Petitioner was being tried, and where Petitioner was prejudiced since he testified at trial and his credibility was crucial to his defense?

3.

Did the post-conviction relief (PCR) judge err by finding trial counsel was not ineffective when he failed to request and obtain an instruction from the trial court that star witness Robert “Bo” Southerland could not testify concerning Petitioner’s prior armed robbery convictions, since such evidence was inadmissible and unfairly prejudicial, and where Petitioner was prejudiced since he testified at trial and his credibility was crucial to his defense?

STATEMENT OF THE CASE

Robert “Bo” Southerland told anyone who would listen following his own 1992 conviction for the murder, kidnapping, and armed robbery of the decedent, and subsequent death sentence, that he, Southerland, killed the decedent, and that Petitioner, Tony Cooper, was not present.¹ Death row inmate Norman Starnes testified Bo Southerland admitted to him that “Tony didn’t have anything to do with it and Tony was not present when it happened.” App. 1062, l. 19 – 1063, l. 15.

Bessie Davis started a prison ministry after she retired as a school teacher. App. 1069, l. 8 – 1070, l. 5. She and fellow ministry volunteer Naida Knotts often met with Bo Southerland and other death row inmates. App. 1070, ll. 6-23. Davis recalled, “I never asked [Bo Southerland], but he shared with me that he did the crime alone, that Tony did not have anything to do with it.” App. 1074, l. 22 – 1076, l. 5.

Knotts remembered that Southerland told her “he [Southerland] had committed the crime.” App. 1084, ll. 4-22. Although Knotts did not bring up the subject of the murder with Southerland, it piqued her interest. At one point Knotts recalled: “I said, well what about Tony? What did he do? And he [Southerland] said, Well, Tony wasn’t even there. He didn’t have anything to do with it.” App. 1084, l. 9 – 1086, l. 4.

Southerland also admitted under oath during a hearing in 1996 that he murdered the decedent and that no one else was involved. He asserted, “I mean I killed the girl. I did it by myself. I mean, there was no help. There was no witnesses, but, I mean, you know, I’d just like to say that I did kill her by myself. There was nobody else involved but me and Kimberly Quinn [the decedent].” App. 792, l. 5 – 796, l. 5.

¹ Southerland’s convictions and death sentence were affirmed in State v. Southerland, 316 S.C. 377, 447 S.E.2d 862 (1994). However, his death sentence was later reversed in Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999).

A Lexington County Grand Jury indicted Petitioner on January 8, 1990 for murder, armed robbery, kidnapping, forgery, and conspiracy to commit armed robbery. App. 1783-1787. His case was called to trial on February 11, 1991. Petitioner was convicted as indicted and ultimately sentenced to death on February 22, 1991.

The Supreme Court in State v. Cooper, 312 S.C. 90, 439 S.E.2d 276 (1994) reversed Petitioner's conviction for murder and his death sentence and remanded for a new trial since there was no on the record waiver of Petitioner's right to personally address the jury during the guilt phase of his capital trial. Petitioner's remaining convictions were affirmed. Id.

On September 4, 1995, Petitioner filed an application for post-conviction relief as to his remaining convictions. The PCR court reversed Petitioner's non-capital convictions finding his trial counsel's failure to inform Petitioner of his statutory right to make a closing statement to the jury constituted ineffective assistance of counsel. On August 12, 2002, this Court upheld the PCR court's grant of relief and remanded for a new trial. Cooper v. Moore, 351 S.C 207, 569 S.E.2d 330 (2002).

After Petitioner's numerous demands for a speedy trial were denied, his case was finally called to trial on May 22, 2006 before the Honorable Daniel F. Pieper, and a jury. App. 345. Assistant Solicitors B. Harrison Bell and Theodore Lupton represented the state. App. 345. David Bruck, John Duncan, and Stuart Andrews represented Petitioner. App. 345.

In April 2006, as the state was preparing to retry Petitioner, Bo Southerland now claimed Petitioner was the killer and he, Southerland, was just along for the ride. In exchange for Southerland's testimony against Petitioner, the state no longer sought the death penalty against him and Southerland had a chance, for the first time since he was indicted, to receive a thirty year sentence upon resentencing. App. 817, l. 13 – 825, l. 9; App. 952, ll. 5-20.

During Petitioner’s retrial, Southerland was impeached with his prior written and notarized statement dated April 11, 1992 admitting his guilt, and exculpating Petitioner. App. 755-764; See App. 1581-1584. In this statement, which was read aloud to the jury, Southerland’s confession was consistent with what he had told everyone for over a decade—that Petitioner was not with him at the time he knocked the decedent unconscious inside her house and then took her to the pond where he killed her, chopped off her hands and feet with an ax, and burned her body. App. 755-764; App. 1581-1584.

Southerland said Phillip “Red” Farmer told him the decedent was getting a check and that she wanted to buy half a pound of marijuana. App. 756; App. 1581. The price of the marijuana was eight hundred dollars. App. 757; App. 1581. Farmer told Southerland the decedent had been “F’ing up a lot of people’s dope. A lot of people didn’t feel too good about her. She’d been stepping in people’s cocaine . . . That means she’d been cutting the cocaine. Red said, You could kill her.” App. 757-758; App. 1581.

In his statement, Southerland admitted, “I thought about how she killed her young’un to get money for drugs. She deserved it. I shot her in the back. . . . I popped another one. I hit her in the back of the neck. . . . I stood back and pumped two more rounds in her head.”² App. 760-761; App. 1582-1583. He added, “Why I chopped her hands and feet off I’ll never know. I tried to chop off her head.” App. 761; App. 1583.

Southerland elaborated, “The deal was that if anything came down over this they, Red [Farmer] and [Gerald] LeGrand, were going to blame Tony [Petitioner]. They were mad at Tony

² The decedent’s boyfriend, Eugene Carter, was in prison. It was apparently widely believed in the Department of Corrections that she had set fire to her house for insurance money. Her son was apparently killed in the fire. The judge at Petitioner’s retrial allowed the jury to hear this same allegation—but not for the truth of the matter asserted—since it was relevant to explain this belief about the decedent and a possible motive for her murder. App. 1150, l. 16 – 1151, l. 15.

because he wouldn't lend them anymore money. When I was arrested I made a statement putting this on Tony because that's what everyone had planned to do. The statement that I made to the police was not true. I knew where everything was because I had thrown them there myself. Not because Tony had told me anything." App. 761-762; App. 1583.

Southerland admitted in this statement that he cashed the decedent's welfare check at a bank in Cayce. He also found eight hundred dollars in cash (the price of the marijuana) in her purse. He said, "All together, I got about \$1200 worth of money, Valium, and Xanax. I ate the pills myself." App. 762-763; App. 1583-1584. Southerland later continued, "Tony Cooper didn't have anything to do with this. I have made this statement because this is the truth. No one contacted me or asked me to make it. Tony Cooper has not pressured or forced me to make this statement and neither has anyone else. After I decided to make this statement, I sent word to Tony Cooper's lawyer, David Bruck, that I wanted to talk to him. . . . David Bruck told me that I needed to discuss the statement with my own lawyers, because this could hurt my case." App. 763; App. 1584.

Despite this signed and notarized statement, his prior confession under oath in court, and the fact that he consistently maintained for over a decade that Petitioner was innocent and that he murdered the decedent on his own, Southerland testified at Petitioner's retrial in May 2006, when it was then possible that he could be sentenced to only thirty years, that all of this was a lie, that Petitioner killed the decedent, and that he, Southerland, was merely present. See App. 698, l. 4 – 717, l. 16. Southerland claimed Petitioner and three other death row inmates, who had all been executed by the time of Petitioner's retrial, had pressured him into confessing that he was the only one involved. App. 724, ll. 3-22; App. 734, l. 7 – 738, l. 21.

Norman Starnes scoffed at Southerland's claim that he was scared of Petitioner and therefore told everyone that he killed the decedent, and that Petitioner was not present. Starnes recalled "they [Petitioner and Southerland] interacted just like most of us did." Starnes remembered

that Petitioner at times bought items for other death row inmates including Southerland when Southerland was without any funds. App. 1062, l. 19 – 1064, l. 15. Starnes said Southerland was not coerced into saying anything by Petitioner. App. 1064, l. 16 – 1065, l. 3.

Red Farmer was incarcerated at Central Correctional Institution (CCI) in Columbia in October 1989. App. 954, l. 21 – 955, l. 6. Farmer later pled guilty to criminal conspiracy for his part in the decedent's death. He faced a sentence of five years imprisonment at the time of Petitioner's first trial. App. 955, ll. 7-23. While the state failed to secure Farmer's presence at Petitioner's retrial in May 2006, his testimony from Petitioner's first trial was read to the jury.³ App. 953, l. 18 – 954, l. 10; See App. 954, l. 11 – 981, l. 11 and App. 987, l. 17 – 990, l. 24 .

Farmer's story was that he conspired with Petitioner to rob the decedent. Farmer claimed he told Petitioner on Wednesday, October 5, 1989 that Eugene Carter, who was the decedent's boyfriend and who was in prison with Farmer, told him the decedent would be receiving an insurance check for twenty eight hundred dollars. Farmer claimed he told Petitioner "that it would be good opportunity to rob her." App. 967, l. 9 – 969, l. 14. Farmer said he was to get five hundred dollars of the insurance money for his part in the robbery. App. 970, ll. 4-10.

Farmer testified that Petitioner called him at CCI on a state phone he had access to because of his work in the library as part of a literacy program. He said he received the call around 10:00 a.m. on Friday, October 6, 1989. App. 971, l. 8 – 972, l. 15. Farmer explained that because the phones were monitored "[w]e talk in riddles." App. 972, ll. 8-19. He claimed at the prior trial that Petitioner told him "[t]hat my intelligence was wrong that she did not have the 2800 [dollars], that

³ Farmer was incarcerated in Texas during Petitioner's retrial in May 2006. He had been convicted of manufacturing methamphetamine and possession of more than four hundred grams of methamphetamine. He was sentenced to life in prison. App. 1005, ll. 7-21. The state failed to timely submit paperwork to Texas to arrange for his transportation to South Carolina for the retrial. Consequently, the trial judge ruled Farmer was an unavailable witness and permitted the state to read his prior testimony into the record over Petitioner's objection.

he completed the construction job that he was working on and that he had burned excess material and was pleased with the job and didn't see any complications." App. 972, l. 20 – 973, l. 2. Farmer said he took this to mean that the decedent did not have the money, that Petitioner killed her, and burned her body. App. 973, ll. 3-14.

Farmer later admitted to a clinical psychology student, Kimberly Turner, who interviewed him in a Texas prison the month of Petitioner's retrial, that he did not tell the truth during Petitioner's first trial and that he wanted to tell the truth "this time." App. 1154, ll. 2-6. Farmer told Turner that he "put a spin" on the facts during Petitioner first trial at the urging of the prosecution to make Petitioner "look bad" and "worse than he was." App. 1152, l. 13 – 1153, l. 14.

Farmer now maintained in May 2006 that he only heard from Petitioner after the murder, and that he was "completely surprised" by the telephone call. App. 1151, l. 16 – 1152, l. 5. However, he still claimed Petitioner was talking to him in "code" and that he confessed to the murder. App. 1149, l. 16 – 1150, l. 15.

On June 1, 2006, the jury found Petitioner guilty as indicted. App. 1545, l. 15 – 1546, l. 7. He was sentenced to life without parole for murder, twenty five years for armed robbery, and five years for conspiracy. Judge Pieper did not impose a sentence for kidnapping pursuant to S.C. Code Ann. § 16-3-910 since Petitioner was sentenced to life for murder. App. 1559, ll. 13-20.

The Court of Appeals affirmed Petitioner convictions and sentence. State v. Cooper, 386 S.C. 210, 687 S.E.2d 62 (Ct. App. 2009). On January 12, 2011, this Court granted a petition for writ of certiorari to review Petitioner's claim that he was denied his right to a speedy trial. However, the Court later dismissed the writ as improvidently granted by order filed November 7, 2012. State v. Cooper, 400 S.C. 256, 734 S.E.2d 166 (2012).

Petitioner then filed a petition for writ of certiorari in the United States Supreme Court. The United States Supreme Court denied certiorari on May 13, 2013. Cooper v. South Carolina, 569 U.S. 976 (2013).

On June 5, 2013, Petitioner filed an application for post-conviction relief (PCR). App. 1595-1603. The state filed a return to this application dated December 9, 2013. App. 1604-1610. Petitioner filed an amended application on November 17, 2017 and a second amended application on November 29, 2017. App. 1611-1619. An evidentiary hearing was convened on December 11, 2017 before the Honorable J. Cordell Maddox, Jr. App. 1620. Senior Assistant Attorney General William Edgar Salter represented the state, and Kristy Goldberg represented Petitioner. App. 1620. By order filed May 18, 2018, Judge Maddox denied Petitioner relief. App. 1710-1782.

Because Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated, and Petitioner was prejudiced by trial counsel's deficient performance, this petition for writ of certiorari follows.

ARGUMENT

1.

The post-conviction relief (PCR) judge erred by finding trial counsel was not ineffective when he introduced so called impeachment evidence against Phillip “Red” Farmer which merely reaffirmed Farmer’s claim that Petitioner called him the morning after the murder and confessed to killing the decedent and burning her body since Petitioner was obviously prejudiced where the only other direct evidence against Petitioner was the testimony of Robert “Bo” Southerland who had little to no credibility.

After Phillip “Red” Farmer’s testimony from Petitioner’s 1991 trial was read aloud to the jury, trial counsel introduced portions of Farmer’s testimony from his Texas sentencing hearing on August 17, 2001 after a jury convicted him of manufacturing methamphetamine and possession of more than four hundred grams of methamphetamine as impeachment evidence. Specifically, counsel read an excerpt from the testimony in which Farmer discussed this case. The following exchange occurred during Farmer’s direct examination by his attorney:

Answer: **This guy got out on parole *after being locked up 17 years* who happened to be my cell mate and robbed and killed this girl and told me about it.** Well, SLED, which happens to stand for South Carolina Law Enforcement Division, charged me with the same crime they charged him for because I knew about it and I didn’t tell on him.

Question: Did he tell you in a phone conversation or what?

Answer: Yes, sir. Just so happened his niece, which was my age and he’s a little older than me, was coming to visit me. And I called and talked to her one evening and **he got on the phone and told me about it.** Well, she overheard it. And excuse my French, but when the shit hit the fan, I was standing in front of it.

Question: So they prosecuted him and you, too?

Answer: Yes, sir. They locked me up for conspiracy to commit murder, conspiracy to commit kidnapping, conspiracy to commit armed robbery. They said, well, you testify for us and we’ll just give you a conspiracy charge and it won’t even hurt you at all, because I still had a couple of years left in prison

before I could get out. Well, seeing how extensive my record is already, I felt it was in my best interest to tell them what I knew, so I did. **Well, that man got a life sentence and eventually got a death sentence.**

Question: And what did you get?

Answer: I got five years running concurrent with what I already had, which was basically nothing. They just gave - - they just give me a sentence to satisfy me is basically what happened.

App. 1019, l. 1 – 1020, l. 8 (emphasis added).

During Petitioner’s PCR hearing, David Bruck, Petitioner’s trial counsel, testified that he introduced this excerpt from Farmer’s sentencing hearing because in it Farmer omitted his own culpability and essentially made it “sound like he had just overheard this whole transaction . . . - - that he wasn’t guilty of anything, that he’d only pled guilty because it had absolutely no effect.” Bruck continued, “[I]t was a very distorted and dishonest account of his own prior testimony, which actually involved his being the prime mover in this crime and then having gotten an extraordinary sweet deal in exchange for his testimony.” App. 1634, 3-15. However, Bruck readily acknowledged that Farmer still alleged Petitioner confessed to the murder. App. 1634, ll. 16-21. He also recognized that Farmer inaccurately claimed Petitioner had previously served seventeen years in a maximum security prison and was on parole at the time of the robbery and murder. App. 1634, l. 22 – 1635, l. 8. Despite this, Bruck said he thought at the time that this testimony impeached Farmer’s credibility and he argued so to the jury. App. 1635, ll. 9-12.

In addition to introducing Farmer’s prejudicial testimony from his sentencing hearing in 2001, trial counsel also presented the testimony of Kimberly Turner, a clinical psychology student who interviewed Farmer in a Texas state prison in May 2006, three weeks before Petitioner’s retrial. Farmer told Turner that he did not tell the truth during Petitioner’s first trial and that he “put a spin” on the facts at the urging of the prosecution to make Petitioner “look bad” and “worse than he was.” App. 1152, l. 13 – 1153, l. 14. However, this favorable evidence was

significantly outweighed by Farmer's reaffirmance that Petitioner confessed to the murder during a telephone call on the morning of Friday, October 6, 1989. Trial counsel elicited the following testimony from Ms. Turner during her direct examination:

Q: And did he [Farmer] tell you what the first time he heard about the robbery or the murder of Ms. Quinn was?

A: Yes, sir. **It was the morning after it had happened. He stated that he got a phone call at the prison from Mr. Cooper [Petitioner].**

Q: And was that the only phone conversation that he related to you that he had had with Mr. Cooper in this entire matter?

A: Yes, sir.

Q: All right. Did he tell you that he had previously phoned Mr. Cooper himself?

A: He did not.

Q: And did he tell you what . . . Mr. Cooper had to say when he made this phone call after Ms. Quinn's murder?

A: **He [Farmer] said that Mr. Cooper was speaking in some type of code language, that he had said something about the construction job was done. And Mr. Farmer had taken that to mean that Ms. Quinn had been killed.**

App. 1149, l. 16 – 1150, l. 12 (emphasis added).

Highlighting the obvious flaw in this so called impeachment evidence, the solicitor had Turner repeat that Farmer's story, *now that he was telling the truth*, was that Petitioner called him and confessed to the robbery and murder of the decedent:

Q: So he [Farmer] said he's telling the truth now?

A: I'm not sure.

Q: Well, you said that he claimed that he had spun his story last time?

A: He did use that word spin.

Q: But he wasn't going to do it again?

A: That's what he said.

Q: So his story now [is] that he got a phone call from the defendant, Gene Tony Cooper, wherein Mr. Cooper confessed to the robbery and murder of the victim, Kimberly Quinn, he said that was the truth; is that true?

A: He didn't say that was the truth, that's just what he told us.

Q: But that's still his story now when he was telling the truth?

A: Yes, sir, that was his story as of three weeks ago.

...

Q: He [Farmer] minimized his own role in this crime?

A: Yes, sir.

Q: But he freely, unequivocally, said that the defendant confessed to this murder?

A: In code.

Q: But Mr. Farmer was not unequivocal in saying that that coded confession was given?

A: Yes, sir.

Q: And that it was given by the defendant, Gene Tony Cooper?

A: That's correct.

Q: And that was in May of 2006?

A: Yes, sir.

Q: While he was serving a life sentence in the State of Texas.

A: Two life sentences I believe.

App. 1154, l. 19 – 1159, l. 8 (emphasis added).

During Petitioner's PCR hearing, Bruck acknowledged Farmer told Turner "a story which was broadly consistent with his trial testimony" wherein he implicated Petitioner and claimed Petitioner confessed to the murder. App. 1635, l. 20 – 1636, l. 5. Given this consistency, Bruck

admitted he should not have presented Turner as a witness and thought the defense “lost more than we gained by calling her.” App. 1636, ll. 11-16. Bruck explained, “There were things that we got from her that we wanted, but I think on balance it probably set us back. We would have done better not to call her.” App. 1637, ll. 2-6. From her testimony, the jurors learned that a mere three weeks before Petitioner’s retrial, Farmer still claimed Petitioner confessed to the murder and had never wavered regarding Petitioner’s guilt.

PCR Court’s Ruling

The PCR judge found trial “counsel’s decision to present the additional impeachment evidence from Farmer’s Texas sentencing proceeding and from the May 6, 2006 interview [with Kimberly Turner] was objectively reasonable, even though it exposed the jury to prejudicial information about [Petitioner] that it might not have otherwise heard.” App. 1742. The judge maintained that “in accessing the reasonableness of counsel’s decision of how to best impeach Farmer’s testimony, all of the impeaching evidence must be considered collectively, rather than parsed.” App. 1742. The judge concluded, “When so viewed, it is clear that counsel’s performance was reasonable.” App. 1742.

In support of this conclusion, the judge found the “defense’s impeachment evidence portrayed Farmer as a con artist and a liar who consistently minimized his own culpability in the offense with which he was charged, was a drug trafficker who frequently cooperated with—or at least feigned cooperation with—law enforcement when he thought that it was to his benefit, consistently shifted blame to others when it was possible for him to do so, and lied about his past.” App. 1742. The judge also emphasized Farmer’s statement to Kimberly Turner that the prosecution had encouraged him to put a spin on his prior testimony to make Petitioner look guilty. App. 1742.

Moreover, the PCR judge found Petitioner failed to prove he was prejudiced by trial counsel’s decision to present this additional impeachment evidence. App. 1743. The judge

concluded that although Farmer consistently identified Petitioner as the person who murdered the decedent, the details of Farmer's subsequent statements about the conspiracy and murder were inconsistent with his 1991 trial testimony. Consequently, these statements impeached the credibility of Farmer's 1991 testimony. App. 1743.

The PCR judge also determined that the information concerning Petitioner's prior incarceration, which Farmer testified about at his sentencing hearing in Texas, did not prejudice Petitioner since the trial judge instructed the jurors that they could not consider any of Petitioner's prior legal proceedings in their deliberations and that they could only consider evidence of another crime or misconduct by a witness on the limited issue of credibility. App. 1743-1744. Lastly, as far as prejudice, the PCR judge found there was overwhelming evidence of guilt, separate and apart from Farmer's testimony. App. 1744-1745.

Discussion

The PCR judge erred by finding trial counsel was not ineffective when he introduced testimony from Farmer's August 2001 sentencing hearing in Texas in which Farmer continued to claim Petitioner confessed to the armed robbery and murder of the decedent and discussed (incorrectly) Petitioner's prior seventeen year incarceration at a maximum security prison as well as his parole status. Counsel was also ineffective for calling Kimberly Turner as a witness concerning her interview of Farmer a mere three weeks before the retrial in which Farmer reaffirmed, fifteen years after his initial testimony, that Petitioner called him the morning after the crime and confessed to robbing and killing the decedent. No reasonably competent criminal defense attorney would have introduced this so called impeachment evidence. Counsel's deficient performance was extremely prejudicial to Petitioner, given that the only other direct evidence against Petitioner was the testimony of Bo Southerland, and the evidence as a whole

was far from overwhelming. Moreover, given that Petitioner testified at trial, his credibility was crucial to the defense. There is simply no probative evidence to support the PCR court's ruling.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

The United States Supreme Court has established a two pronged test to evaluate allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and the deficient performance prejudiced Petitioner. Strickland, 466 U.S. at 687. Under the second prong, Petitioner must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

Trial counsel was ineffective when he introduced Farmer's testimony from his August 2001 sentencing hearing in Texas in which he continued to claim Petitioner confessed to the armed robbery and murder of the decedent. This so called impeachment evidence merely informed the jury that Farmer had never wavered in this claim that Petitioner called him the morning after the morning and confessed, be it in code, to killing the decedent and burning her

body. The fact that Farmer continued to minimize his own guilt was irrelevant to Petitioner's own guilt or innocence and did little to impeach Farmer. Not only did this evidence reaffirm Farmer's allegation of Petitioner's confession (now that he was telling the truth), Farmer also discussed Petitioner's prior incarceration at a maximum security prison as well as his parole status. This in and of itself was highly prejudicial to Petitioner as will be discussed *infra* since Petitioner testified at trial and therefore his credibility was essential to his defense.

Trial counsel was also ineffective for calling Kimberly Turner as a witness concerning her interview of Farmer *a mere three weeks* before the retrial in which Farmer reaffirmed yet again, fifteen years after his initial testimony, that Petitioner called him the morning after the crime and confessed to robbing and killing the decedent. No reasonably competent criminal defense attorney would have introduced this so called impeachment evidence. Trial counsel admitted at the evidentiary hearing that Turner's testimony did more harm than good and that he should not have called her as a witness.

Counsel's deficient performance was extremely prejudicial to Petitioner given that the only other direct evidence besides Farmer's testimony was the testimony of Bo Southerland, whose credibility had been thoroughly impeached. The remainder of the circumstantial evidence was anything but substantial. See Cooper v. Moore, 351 S.C 207, 569 S.E.2d 330 (2002). Moreover, Farmer's mention of Petitioner's prior incarceration and parole status was very damaging to his credibility, which was essential to his defense given that he testified at trial and established an alibi.

Given counsel's deficient performance and the resulting prejudice, Petitioner respectfully requests this Court reverse the ruling of the PCR judge and remand for a new trial.

The post-conviction relief (PCR) judge erred by finding trial counsel was not ineffective when he told the jury during his opening statement about Petitioner's prior record and the fact that he went to prison with Robert "Bo" Southerland, and when he later failed to object to the introduction of Petitioner's prior convictions for housebreaking and grand larceny as unfairly prejudicial since they are similar to the underlying crime for which Petitioner was being tried, and where Petitioner was prejudiced since he testified at trial and his credibility was crucial to his defense.

During his opening statement to the jury, trial counsel asserted:

One of the things lawyers often object to is anything that shows about the prior record of their client, they don't want the jury to know about that. Well, y'all need to know everything and we are not going to object to the warrants and the things in Tony Cooper's background that are relevant to your job. So we are not going to object.

And we want you to know and **we'll tell you right now that when Bo Southerland was a career criminal in his early 30's, he committed a long series of crimes and he had along with him a 17-year-old kid named Tony Cooper. And they both went to prison together. And they both got out in 1988.** And thereafter, Tony married and had an instant family of four children, his wife's children, working as a contractor doing roofing and different types of jobs like that trying to get a new start in life.

But he had his buddy, Bo Southerland. He allowed Bo Southerland to have his car, which was a Cougar, I think, a 1979 I believe. There will be pictures of it in evidence. And so Bo Southerland was driving the car that was registered to Tony Cooper. And they were together a lot. **They had known each other in prison** and they still knew each other and they did some work together.

And that is where this involvement of Tony Cooper really begins because on the day before Kimberly Quinn was abducted in the middle of the night, someone saw the Cougar with Bo Southerland in it.

App. 421, l. 20 – 422, l. 25 (emphasis added).

Before Petitioner testified at trial, the trial judge addressed the admissibility of Petitioner's prior convictions *in camera*. The solicitor wished to impeach Petitioner with his 1977 convictions

for housebreaking, grand larceny, and armed robbery. App. 1047, ll. 3-14. Trial counsel argued these convictions were too remote as more than ten years had passed since the convictions occurred. Consequently, he asserted all of the convictions were inadmissible pursuant to Rule 609, SCRE. App. 1047, ll. 15-24. The solicitor maintained the convictions were admissible because they were close in time to when the murder for which Petitioner was being retried occurred and, as to the armed robbery and larceny convictions, they were crimes of dishonesty. The solicitor further maintained that trial counsel had waived any objection to the admissibility of the convictions because he discussed them during his opening statement. App. 1048, l. 1 – 1050, l. 2.

Trial counsel argued he had not waived any objection to the identities of the crimes and their dates. App. 1050, ll. 6-18. He added that the similarity of the crime of armed robbery to the armed robbery for which Petitioner was being tried increased the prejudicial effect of admitting the conviction. However, for whatever reason, trial counsel conceded the same argument did not apply to the housebreaking and grand larceny convictions because Petitioner was not on trial for those offenses despite the fact that the underlying facts of the case dealt with an alleged housebreaking and larceny. App. 1051, ll. 12-20.

The trial judge ultimately ruled the housebreaking and grand larceny convictions were admissible, but excluded the armed robbery conviction because it was too similar to the offense for which Petitioner was being tried. App. 1051, ll. 21-24.

During Petitioner's trial testimony, counsel elicited evidence about the housebreaking and larceny convictions during direct examination as well as Petitioner's fifteen year sentence for those convictions. App. 1204, ll. 13-20.

During the PCR hearing, Bruck testified that he told the jury about Petitioner's prior incarceration with Bo Southerland because he knew Southerland would testify and "it was so preposterous to me that Bo Southerland had been intimidated into clearing Tony Cooper while they

were both on death row given the actual relationship between them and that Southerland was an older and more experienced criminal and . . . a very tough guy and so I wanted the jury to have the background for that.” App. 1674, ll. 3-16.

At the time, Bruck did not think he would be able to keep out the information about Petitioner’s prior record and incarceration, which is why he introduced the evidence during his opening statement. App. 1674, ll. 17-21. He explained, “If you think something’s coming in anyway, you might as well be the first to tell the jury about it and . . . put it in the proper context if you can, so I assume that’s what I was trying to do.” App. 1675, ll. 11-18. However, Bruck admitted at the hearing that he was not sure he was correct in thinking the evidence regarding Petitioner’s prior incarceration was admissible. App. 1674, ll. 17-25. He never considered at the time whether the state’s case could have been tried so that the jury was only aware that Petitioner and Southerland were associates who merely knew each other and who both knew individuals in prison. While he did not consider it at the time, he nonetheless admitted “it could have been done.” App. 1643, l. 21 – 1644, l. 4.

As far as Petitioner’s convictions for housebreaking and grand larceny, Bruck admitted he did not object to the admission of these convictions on grounds that the offenses were too similar to the underlying facts for which Petitioner was being tried. While he made this argument as to Petitioner’s conviction for armed robbery, and the trial judge excluded the armed robbery conviction accordingly, Bruck did not extend this argument to the housebreaking and larceny convictions because Petitioner was not specifically charged with burglary or larceny. App. 1675, l. 22 – 1676, l. 22. However, Bruck acknowledged that the decedent’s child, who was an adult at the time of the retrial, testified that on the night her mother disappeared the decedent unsuccessfully tried to stop two men from entering their home. He also recognized there was evidence items were stolen from the decedent’s house. App. 1641, l. 8 – 1642, l. 4. Consequently, the state could have

prosecuted Petitioner for burglary and larceny. App. 1642, ll. 5-15. Bruck could provide no explanation as to why he did not make this additional argument at trial to exclude these prior convictions. App. 1642, l. 19 – 1643, l. 2.

PCR Court's Ruling

The PCR judge found evidence of Petitioner's prior incarceration was admissible under Rule 404(b), SCRE to establish identity and as "part of the *res gestae* of the crimes for which he was on trial because it 'furnished part of the context of the crime' and was necessary for a 'full presentation' of the case." App. 1748 (internal citations omitted). Because the judge found the evidence of Petitioner's prior incarceration was admissible, the judge concluded trial counsel's "decision to address it in opening in an effort to put this evidence 'in proper context' was reasonable under Strickland." App. 1749. He further stated, "By following this strategy, counsel lessened the impact of this evidence that would be introduced in the State's case-in-chief because he was able to place [Petitioner's] relationship [with Bo Southerland] in prior context from the defense's perspective and to present [Petitioner] as someone who was not going to hide anything from his jury. This gave counsel and [Petitioner] more credibility with the jury. App. 1749-1750.

Similarly, the PCR judge found trial counsel's decision to elicit the housebreaking and larceny convictions on direct examination was reasonable under Strickland since counsel knew the trial judge had ruled Petitioner could be impeached with these convictions. App. 1750. Moreover, the judge ruled trial counsel was not ineffective for failing to argue that Petitioner's housebreaking and larceny convictions should have been excluded because they are similar to the underlying facts of the case where Petitioner was never arrested or indicted for these offenses. App. 1750.

The PCR judge also found Petitioner failed to prove any prejudice by counsel's performance because the evidence of Petitioner's prior incarceration and his convictions for housebreaking and larceny would have been presented by the prosecution if trial counsel had not done so, and by

introducing this evidence himself during his opening statement and Petitioner's direct examination, counsel was able "to put these matters in what he reasonably viewed as a proper context." App. 1751. Additionally, the judge emphasized the trial court's instructions to the jury that it could not consider any of Petitioner's prior legal proceedings in its deliberations and that it could only consider evidence of another crime or misconduct by a witness on the limited issue of credibility. App. 1751-1752. Lastly, the PCR judge concluded there was overwhelming evidence of guilt. App. 1752-1753.

Discussion

Trial counsel was ineffective when he told the jury during his opening statement about the existence of Petitioner's prior record and the fact that he went to prison with Bo Southerland since this evidence was not admissible pursuant to Rule 404(b), SCRE and did not constitute part of the *res gestae* of the case. Counsel was also ineffective for failing to object to the introduction of Petitioner's prior convictions for housebreaking and grand larceny as unfairly prejudicial since they are similar to the underlying crimes for which Petitioner was being tried. There is a reasonable probability that if counsel had made this objection the trial judge would have excluded these convictions since the judge was openly concerned about the similarity of Petitioner's armed robbery conviction to armed robbery offense to which Petitioner was being tried. Petitioner was prejudiced by counsel's deficient performance because he testified at trial establishing an alibi defense and his credibility was therefore crucial. Moreover, there was not overwhelming evidence of guilt.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to the effective assistance of counsel. Strickland, 466 U.S. 668 (1984). In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be

relied on as having produced a just result.” Id. at 686; Butler, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

The United States Supreme Court has established a two-pronged test to evaluate allegations of ineffective assistance of counsel. Petitioner must prove “that counsel’s performance was deficient” and fell below reasonable professional norms, and the deficient performance prejudiced Petitioner. Strickland, 466 U.S. at 687. Under the second prong, Petitioner must show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different.” Cherry, 300 S.C. at 117-118, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 688). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” Johnson, 325 S.C. at 186, 480 S.E.2d at 735 (citing Strickland, 466 U.S. at 668).

“South Carolina law precludes evidence of a defendant’s prior crimes or other bad acts to prove the defendant’s guilt for the crime charged except to establish (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan, or (5) the identity of the perpetrator.” State v. King, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999) (citing Rule 404(b), SCORE; State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996); State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923)). “The evidence of the prior bad acts must be clear and convincing to be admissible.” Id. (citing Adams, 322 S.C. 114, 470 S.E.2d 366). “The record must support a logical relevance between the prior bad act and the crime for which the defendant is accused.” Id. (citing Adams, 322 S.C. 114, 470 S.E.2d 366; State v. Smith, 309 S.C. 442, 424 S.E.2d 496 (1992); State v. Gilchrist, 329 S.C. 621, 496 S.E.2d 424 (Ct. App. 1998)). “Further, even though the evidence is clear and convincing and falls within a Lyle exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant.” Id. (citing Rule 403, SCORE; Adams, 322 S.C. 114, 470 S.E.2d 366).

“The *res gestae* theory recognizes evidence of other bad acts may be an integral part of the crime with which the defendant is charged, or may be needed to aid the fact finder in understanding the context in which the crime occurred.” *Id.* (citing *Adams*, 322 S.C. 114, 470 S.E.2d 366). This evidence of other crimes is admissible when such evidence furnishes part of the context of the crime or is necessary to a full presentation of the case. *Id.* at 512-513, 514 S.E.2d at 582-583 (citing *Adams*, 322 S.C. at 122, 470 S.E.2d at 370-371).

Here, there is no probative evidence to support the PCR judge’s ruling that Petitioner’s prior convictions and incarceration was admissible pursuant to Rule 404(b), SCRE to “establish identity and other exceptions.” Petitioner fails to see how his prior incarceration with Bo Southerland or the fact that they were codefendants in 1977 when both were charged with armed robbery, housebreaking, and larceny establishes Petitioner’s identity as the individual who robbed and murdered the decedent in this case. Instead, this is merely propensity evidence.

There is also no evidence to support the PCR judge’s finding that Petitioner’s prior incarceration and convictions constitute part of the *res gestae* of the case. As trial counsel admitted during the evidentiary hearing, the state could have easily tried its case against Petitioner without mention of his prior incarceration with Bo Southerland. The state could have merely shown Petitioner and Southerland were associates who knew each other and other individuals who were incarcerated. Therefore, evidence of Petitioner’s prior incarceration and convictions was not admissible and trial counsel was ineffective for introducing this evidence during his opening statement.

Counsel was also ineffective for failing to challenge Petitioner’s convictions for housebreaking and larceny as unfairly prejudicial because they were too similar to the underlying crimes for which Petitioner was being tried. *See Green v. State*, 338 S.C. 428, 434, 527 S.E.2d 98, 101 (2000). While Petitioner was not indicted for burglary or larceny, there was evidence presented

that supported both of these offenses. Consequently, if trial counsel had objected to the admission of these convictions on this ground, there is a reasonable probability the trial judge, who was concerned about the similarity to Petitioner's armed robbery conviction, would have excluded them.

Petitioner was prejudiced by counsel's deficient performance because Petitioner testified in his own defense at trial and presented an alibi. His credibility was therefore crucial to his defense. The trial judge instructed the jury that it could consider Petitioner's prior record, and that of any other witness, as evidence of credibility. Consequently, the judge's instruction could not have cured the prejudice to Petitioner caused by counsel's failure to object to the admission of his housebreaking and larceny convictions. See United States v. Beahm, 664 F.2d 414, 418-419 (4th Cir. 1981) (footnote omitted) ("Admission of evidence of a similar offense often does little to impeach the credibility of a testifying defendant while undoubtedly prejudicing him. The jury, despite limiting instructions, can hardly avoid drawing the inference that the past conviction suggests some probability that defendant committed the similar offense for which he is currently charged.").

Moreover, the evidence against Petitioner was far from overwhelming. The only direct evidence against Petitioner was the testimony of Red Farmer and Bo Southerland, both of whose credibility had been thoroughly impeached. The remainder of the circumstantial evidence was anything but substantial. See Cooper v. Moore, 351 S.C 207, 569 S.E.2d 330 (2002).

Given counsel's deficient performance and the resulting prejudice, Petitioner respectfully requests this Court reverse the ruling of the PCR judge and remand for a new trial.

The post-conviction relief (PCR) judge erred by finding trial counsel was not ineffective when he failed to request and obtain an instruction from the trial court that star witness Robert “Bo” Southerland could not testify concerning Petitioner’s prior armed robbery convictions, since such evidence was inadmissible and unfairly prejudicial, and where Petitioner was prejudiced since he testified at trial and his credibility was crucial to his defense.

Trial counsel admitted he anticipated Robert “Bo” Southerland would be a difficult witness. He was also aware that Petitioner and Southerland were codefendants in 1977 and were both convicted of multiple counts of armed robbery, housebreaking, and larceny. App. 1638, l. 25 – 1640, l. 19. Despite this, counsel did not consider requesting the trial court to instruct Southerland not to discuss Petitioner’s prior record.⁴ Counsel admitted he had no strategic reason for failing to do so, he simply “didn’t think of it.” App. 1640, l. 20 – 1641, l. 7.

During trial counsel’s cross-examination of Southerland, while counsel was questioning Southerland about his prior record, the following exchange took place:

Q: You were committed and convicted of three separate armed robberies in three separate counties?

A: Yes, sir. **Your client, Tony Cooper, was my codefendant.**

Q: Excuse me, I’m asking you about your record, if you don’t mind.

A: Yes, sir. Well, I’m explaining to you who my codefendant was.

Mr. Bell: Your Honor, he’s allowed to explain his answer.

The Court: No. He’s asking a question about his record. Go head.

⁴ Curiously, before Southerland testified, trial counsel requested the trial court to instruct Southerland not to discuss the fact that Petitioner was on death row and to instead refer to death row by its proper name such as the “Edisto Unit.” The trial judge instructed the witness accordingly. App. 696, l. 12 – 697, l. 22. However, counsel did not make a similar request as to Petitioner’s prior convictions.

App. 775, ll. 13-25 (emphasis added).

During the PCR hearing, Bruck said he did not foresee that Southerland would “volunteer that information unresponsively to a question,” but “[k]nowing Bo Southerland as I then did, I probably should have foreseen that” and requested a proper instruction from the trial court *in limine*. App. 1677, l. 15 – 1678, l. 1.

PCR Court’s Ruling

Finding Petitioner failed to prove prejudice, the PCR judge did not address the deficient performance prong of Strickland. App. 1753. The judge emphasized that the remarks made by Southerland as to Petitioner’s prior armed robbery convictions were unresponsive to the question posed and that the trial court found the response improper. App. 1755. The PCR judge concluded that “the trial judge instructions that jurors could not consider any of [Petitioner’s] prior legal proceedings in their deliberations and that they only consider evidence of another crime or misconduct by a witness on the limited issue of credibility precluded jurors from considering this remark on the question of [Petitioner’s] guilt or innocence. App. 1755. The judge further relied upon trial counsel’s thorough cross-examination of Southerland, in which he impeached Southerland’s credibility, and counsel’s closing argument where he attacked Southerland’s credibility and discussed his evasiveness on cross-examination, as evidence of lack of prejudice. App. 1755-1756.

Discussion

For whatever reason, trial counsel requested an *in limine* instruction from the trial judge that Bo Southerland could not discuss the fact that Petitioner was on death row, but failed to request a similar instruction as to Petitioner’s prior record. Counsel was aware that Southerland would be a difficult witness and, admittedly, should have anticipated that he would testify concerning Petitioner’s prior convictions, particularly given that Petitioner and Southerland were

codefendants. The PCR judge erred by finding counsel was not ineffective for failing to request this instruction since evidence of Petitioner's prior armed robbery convictions was inadmissible and unfairly prejudicial. Moreover, Petitioner was obviously prejudiced by counsel's deficient performance because he testified at trial and his credibility was crucial to his defense.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to the effective assistance of counsel. Strickland, 466 U.S. 668 (1984). In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686; Butler, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

The United States Supreme Court has established a two-pronged test to evaluate allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and the deficient performance prejudiced Petitioner. Strickland, 466 U.S. at 687. Under the second prong, Petitioner must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." Cherry, 300 S.C. at 117-118, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 688). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson, 325 S.C. at 186, 480 S.E.2d at 735 (citing Strickland, 466 U.S. at 668).

Here, counsel was ineffective for failing to request an instruction from the trial judge that Bo Southerland could not discuss Petitioner's prior convictions for armed robbery since the evidence was inadmissible because the convictions were too similar to the offense for which Petitioner was being tried and therefore unfairly prejudicial. See Green v. State, 338 S.C. 428, 434, 527 S.E.2d 98, 101 (2000). Moreover, trial counsel admitted at the evidentiary hearing that he should have

anticipated Southerland would testify concerning these convictions given that he was a difficult witness and Petitioner and Southerland were codefendants. See App. 1639, l. 13 – 1641, l. 7 and App. 1677, l. 15 – 1678, l. 1.

Petitioner was prejudiced by counsel's deficient performance because Petitioner testified in his own defense at trial and presented an alibi. His credibility was therefore crucial to his defense. The trial judge instructed the jury that it could consider Petitioner's prior record, and that of any witness, as evidence of credibility. Consequently, the judge's instruction could not have cured the prejudice to Petitioner caused by counsel's failure to request *in limine* instruction that Southerland could not discuss Petitioner's prior record. See United States v. Beahm, 664 F.2d 414, 418-419 (4th Cir. 1981) (footnote omitted) ("Admission of evidence of a similar offense often does little to impeach the credibility of a testifying defendant while undoubtedly prejudicing him. The jury, despite limiting instructions, can hardly avoid drawing the inference that the past conviction suggests some probability that defendant committed the similar offense for which he is currently charged.").

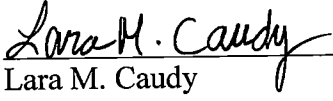
Moreover, the evidence against Petitioner was far from overwhelming. The only direct evidence against Petitioner was the testimony of Red Farmer and Bo Southerland, both of whose credibility had been thoroughly impeached. The remainder of the circumstantial evidence was anything but substantial. See Cooper v. Moore, 351 S.C 207, 569 S.E.2d 330 (2002).

Given counsel's deficient performance and the resulting prejudice, Petitioner respectfully requests this Court reverse the ruling of the PCR judge and remand for a new trial.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing on the issues presented.

Respectfully Submitted,


Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of November, 2018.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County
Honorable J. Cordell Maddox, Circuit Court Judge

GENE TONY COOPER,

PETITIONER

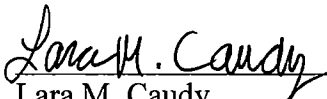
V.

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 have been served upon W. Edgar Salter, III, 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 upon Gene Tony Cooper, #084279, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 16th day of November, 2018.



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 16th day of November, 2018.



(L.S)
Notary Public for South Carolina
My Commission Expires: September 27, 2028.