

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Appeal from Lexington County
The Honorable J. Cordell Maddox, Circuit Court Judge
Appellate Case No. 2018-001149

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JAN 28 2019
S.C. SUPREME COURT

GENE TONY COOPER,

Petitioner,

vs.

THE STATE,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S STATEMENT OF ISSUES ON APPEAL

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?

COUNTER-STATEMENT OF ISSUES PRESENTED

- I. Must this Court deny certiorari because evidence of probative value supports the PCR judge's finding that Petitioner failed to prove either deficient performance or prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), where - in an effort to impeach the damaging prior sworn testimony of unavailable witness and co-defendant Red Farmer - counsel allowed jurors to hear evidence from Farmer's Texas sentencing proceeding and from the statement that he gave to Kimberly Turner on May 5, 2006?
- II. Must this Court deny certiorari because the record supports the PCR judge's decision that counsel was not ineffective in the manner in which he handled the admission of Petitioner's prior convictions for housebreaking and grand larceny, and for introducing evidence of Petitioner's sentence on those prior convictions?
- III. Must this Court deny certiorari because the record support's the PCR judge's finding that Petitioner was not prejudiced by counsel's failure to obtain an in limine instruction from the trial judge barring Southerland from testifying about Petitioner's prior armed robbery convictions?

STATEMENT OF THE CASE

Respondent incorporates by reference the lengthy “Procedural History” set forth in the May 18, 2018 Order of Dismissal by reference. *See App. 1710-15*. Respondent further notes that Petitioner timely served and filed his notice of appeal and that he filed a Petition for Writ of Certiorari on November 16, 2018.

STATEMENT OF FACTS

Respondent accepts the PCR judge’s discussion of the facts for purposes of this Return. *See App. 1715-27*.

STANDARD OF REVIEW

This Court must deny certiorari if any evidence of probative value supports the PCR judge’s findings, *Suber v. State*, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007); *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989), and it will only reverse the PCR judge’s decision when there is no probative evidence to support his findings or the decision is controlled by an error of law. *Pierce v. State*, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000). The Court should deny certiorari on each of Petitioner’s claims because he has not met this burden of proof.

ARGUMENTS

I. The Court must deny certiorari because evidence of probative value supports the PCR judge's finding that Petitioner failed to prove either deficient performance or prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), where - in an effort to impeach the damaging, prior sworn testimony of unavailable witness and co-defendant Red Farmer – counsel allowed jurors to hear evidence from Farmer's Texas sentencing proceeding and from the statement that he gave to Kimberly Turner on May 5, 2006.

One of the key issues at Petitioner Cooper's retrial and on appeal was whether the trial judge erred by finding that Phillip "Red" Farmer was an unavailable witness and by allowing the State to publish Farmer's prior sworn testimony to the jury. *See State v. Cooper*, 386 S.C. 210, 218-21, 687 S.E.2d 62, 67-69 (Ct. App. 2009) (*Cooper III*), *cert. dismissed as improvidently granted*, 400 S.C. 256, 734 S.E.2d 166 (2012), *cert. denied*, 569 U.S. 976 (2013). Although the trial judge overruled counsel's objection, he permitted counsel to present a great deal of additional impeaching evidence, which occurred after Farmer's 1991 testimony and counsel did so. *See App. 1004-1031; 1127-41*.¹ Petitioner now complains of the manner in which counsel sought to impeach Farmer's prior testimony.

Respondent submits that this Court must deny certiorari because evidence of probative value supports the PCR judge's finding that Petitioner failed to prove either deficient performance or prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), where - in an effort to impeach the damaging prior sworn testimony of unavailable witness and co-defendant Red Farmer – counsel allowed jurors to hear evidence from Farmer's Texas sentencing proceeding and a the statement that he gave to Kimberly Turner on May 5, 2006. *See App. 1738-*

¹ In addition to the challenged evidence, counsel published to the jury that several arrest warrants were issued in Aiken County but that Farmer was never prosecuted on those charges, and a bench warrant was issued when he failed to show. One warrant was destroyed but one was still pending at the time of trial. *App. 1004-05*. Counsel also published Farmer's two Texas convictions from 2001 for manufacturing methamphetamine and possession of methamphetamine, for which he received two life sentences. *App. 1005*.

45.

Mr. Bruck's assessment was that Farmer was an important prosecution witness because he was only witness to provide direct evidence of Petitioner's involvement in the conspiracy to rob the victim, and he was the person who put the conspiracy to rob the victim in motion. Yet, Mr. Bruck felt that there were problems with Farmer's credibility. *App. 1628-31; 1666-67; 1669.*

Mr. Bruck testified that the defense had prepared their case as if Farmer would testify in person at the 2006 trial. "[W]e'd investigated his life since 1989 and gathered a fair amount of ... documentary evidence, about his very colorful history since then, which ... we thought shed a great deal of adverse light on his credibility, including a different version of his own involvement in the crime that he gave during his own sentencing hearing in a Texas criminal trial where he ultimately received a life sentence for drug trafficking, and so ... he had told a different version of this crime under oath, and we had that." Also, counsel had circumstantial evidence that Farmer had been an informant for the Aiken County Sheriff's Department because he was allowed to stay out on bond for three years following his arrest, and he had fled the jurisdiction while out on bond for charges there. This all occurred after Farmer had received a very light sentence for his involvement in Kimberly Quinn's murder. *App. 1631; 1671.*

Mr. Bruck explained Farmer's perceived motive to lie as follows:

Well, he would have been culpable for the murder if -- if he had helped to set it up, no matter who actually committed it, and so his motive -- I mean, what I argued to the jury at the second trial was that ... he had an obvious motive to cooperate with the State in order to get leniency, and he got an extraordinarily lenient deal, but he also had a motive not to -- well, we argued that there was a second person that wasn't Tony Cooper with Southerland who committed this crime and that he had a motive to -- not to name that person because that person could flip back on him, and also he appeared to have a motive or a reason for a grudge against Tony Cooper having to do with a history of drug trafficking at CCI and that Cooper, after he had gotten out, had run afoul of this drug trafficking ring or whatever by refusing to lend them money or words to that effect.

App. 1637-38. See also App. 1412; 1420; 1423-40 (counsel's closing argument).

In response to questioning about why counsel published the Texas sentencing transcript even though Farmer still blamed Petitioner for the murder, mentioned that Petitioner was on parole after serving seventeen years in prison and had been in a maximum security prison (*see App. 1019-20*), Mr. Bruck explained that:

... [Farmer] is omitting his own culpability. Basically makes it sound like he had just overheard this whole transaction and that he had only plead guilty -- that he wasn't guilty of anything, that he'd only pled guilty because it had absolutely no effect. And, in fact, said something about just to satisfy me, they gave him a charge which made it sound as though this was sort of part of his cover or something. I mean, it was just a -- it 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 extraordinarily sweet deal in exchange for his testimony.

App. 1632-34. See also App. 1635.

Mr. Bruck conceded that the only benefit to Petitioner for the jury to hear these details about his past was that Farmer's account at the Texas sentencing impeached Farmer's 1991 trial testimony. This was what he argued to Petitioner's jury. *App. 1635*. Also, Mr. Bruck would have weighed the prejudice to Petitioner from jurors learning this adverse information against the necessity for offering further evidence to impeach Farmer's testimony before he presented this evidence to the jury. Mr. Bruck testified that he must have thought that the benefit to Petitioner's case by offering this evidence outweighed any prejudice because he offered the evidence, and that he "would imagine" that this was a matter he would have discussed with co-counsel. *App. 1671-72*.

Petitioner likewise questioned Mr. Bruck about the decision to present evidence of Ms. Turner's May 2006 interview of Farmer, since it showed that he still claimed that Petitioner had

murdered the victim. *See App. 1132-33*. Mr. Bruck testified that he had asked an attorney who was his acquaintance to interview Farmer. Ms. Turner was present for the interview. He conceded that the statement to which Ms. Turner testified was not “fundamentally different” from Farmer’s earlier statements. Mr. Bruck also conceded that, in *hindsight*, he thought that presenting Ms. Turner was a mistake because “I think we lost more than we gained by calling her.” He added, “There were things that we got from her that we wanted, but I think on balance it probably set us back.” *App. 1635-38; 1672-73*.

On cross-examination, he conceded that presenting Ms. Turner was “a mixed bag,” but unequivocally stated that he would not have presented her testimony if he had thought at that it was a mistake to do so at the time of Petitioner’s trial. After his memory was refreshed, Mr. Bruck recalled that Farmer had claimed in the statement to Ms. Turner that someone had helped him put a spin on his trial testimony and that this spin made Petitioner look bad. The obvious inference from that statement was that law enforcement or the prosecution had helped him. *App. 1672-73*. *See also App. 1152, lines 13-17*. Mr. Bruck could not recall whether or not he and co-counsel considered simply publishing the cross-examination of Farmer from 1991, but emphasized that “we found a lot of additional impeachment” and “thought that without that [Farmer’s] testimony would be unchallenged.” *App. 1638*.

In a PCR action, the petitioner bears the burden of proving the allegations in his application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the petitioner must make a twofold showing. First, he must demonstrate that his attorneys’ “representation fell below an objective standard of reasonableness.” *Strickland*, 466 U.S. at 687-88. “A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to

reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' ” *Id.* (Citation omitted).

Even if an inmate proves deficient performance, he must also prove that he was prejudiced by his attorneys' ineffectiveness. This requires proof “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694, 104 S.Ct. at 2068. It is insufficient to prove “that the errors had some conceivable effect on the outcome of the proceeding.” *Id.* at 693, 104 S.Ct. at 2067. Instead, “[c]ounsel's errors must be ‘so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.’” *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland*, 466 U.S. at 687).

Respondent submits that this record supports the PCR judge’s finding that Petitioner had not proven either deficient performance by counsel or prejudice to him under *Strickland*. *App.*

1741-45. As correctly observed by the PCR judge:

Defense counsel are allowed a considerable breadth of discretion in choosing their trial strategies.” *Fleming v. Kemp*, 748 F.2d 1435, 1451 (11th Cir. 1984). An attack on the effectiveness of counsel’s cross-examination of a witness is a matter generally entrusted to the professional discretion of counsel. *See Strickland*, 466 U.S. at 690 (where a defendant focuses on counsel's “strategic choices made after thorough investigation of law and facts,” such choices “are virtually unchallengeable”); *United States v. Nersesian*, 824 F.2d 1294, 1321 (2nd Cir. 1987) (“Decisions whether to engage in cross-examination and if so to what extent and in what manner, are ... strategic in nature” and will not support an

ineffective assistance claim”); *Yarrington v. Davies*, 779 F.Supp. 1304, 1308 (D. Kan. 1991), *aff’d*, 992 F.2d 1077 (10th Cir. 1993) (The extent of examination and cross-examination of witnesses is an area of trial tactics left to the discretion of counsel); *Sallie v. North Carolina*, 587 F.2d 636, 640 (4th Cir. 1978) (*Marzullo v. Maryland* standard was not intended to promote judicial second-guessing on questions of strategy as basic as handling of a witness). The Court finds that counsel’s decision to present the additional impeachment evidence from Farmer’s Texas sentencing proceeding and from the May 6, 2006, interview was objectively reasonable, even though it exposed the jury to prejudicial information about Petitioner that it might not have otherwise heard.

The Court finds that the prosecution’s theory of the case was such that information concerning [Petitioner]’s prior incarceration was inescapable, even if some of the details mentioned by Farmer were not. *See* Grounds (c) and (d), *infra*. Also, Farmer was an important prosecution witness and, as counsel noted at the 2006 retrial, the South Carolina Supreme Court had concluded on direct appeal that the trial judge erroneously restricted [Petitioner]’s cross-examination of Farmer regarding his drug smuggling activities, even though it found the error harmless. [*State v. Cooper*, 312 S.C. 90, 92, 439 S.E.2d 276, 277(1991) (*Cooper D*), *overruled on other grounds*, *Franklin v. Catoe*, 346 S.C. 563, 552 S.E.2d 718 (2001)].

App. 1741-42.

Also, the PCR judge correctly considered all of the impeaching evidence presented, rather than considering it piecemeal, and Petitioner has not challenged his finding that counsel’s pretrial investigation of Farmer was reasonable under *Strickland*. ***App. 1742.*** *See Strickland*, 466 U.S. at 691 (“counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments”).² Moreover, the

² Mr. Bruck testified that he was lead counsel in the case, and that he was assisted by Stuart Andrews, Esquire, and Assistant Lexington County Public Defender John Earl “Jack” Duncan, Esquire. Mr. Bruck detailed his prior experience in criminal trial and appellate practice, at length. ***App. 1661-64.*** Respondent notes that retrial differed from most typical cases because Mr. Bruck had represented Petitioner for roughly fifteen years by the time of the 2006 retrial, including the direct appeal, the original PCR proceedings, and the PCR appeal in *Cooper v. Moore*, 351 S.C.

defense's impeachment evidence portrayed Farmer (1) as a con artist and a liar, who consistently minimized his own culpability in the offenses with which he was charged;³ (2) as a drug trafficker who frequently cooperated with – or at least feigned cooperation with - law enforcement when he thought that it was to his benefit; and (3) as someone who consistently shifted blame to others when it was possible for him to do so, and lied about his past. Also, Farmer told Ms. Turner that someone had helped him put a spin on his prior testimony to make Petitioner look guilty but claimed that he would testify truthfully if called in 2006.

Based upon the additional impeachment evidence that was presented, counsel skillfully presented these reasons, the fact he had not been physically present for trial, and other reasons for the jury not to believe Farmer's 1991 testimony. *Tr. pp. 1157-74*. The fact another attorney may have handled the impeachment of Farmer differently does not show that counsel, who had extensive criminal trial and appellate experience,⁴ was deficient in the manner he chose to

207, 569 S.E2d 330 (2002) (*Cooper II*). Further, counsel had transcripts of both Petitioner's original trial and Southerland's trial, and counsel were aware of how the prosecution's witnesses had testified. *App. 1625-27; 1664-65*.

While Mr. Bruck did not recall how many times he had met with Petitioner, Petitioner was cooperative with counsel and Mr. Bruck felt that they had met frequently enough for him and co-counsel to represent Petitioner. Petitioner consistently denied involvement in Kim Quinn's murder. So, the defense at trial was that he was completely innocent. Therefore, counsel relied upon a "reasonable doubt" defense, and tried to expose the credibility problems with the prosecution's main witnesses. *See App. 1632; 1668-69*.

³ For instance, Farmer's Texas sentencing testimony minimized his involvement both in the murder and in the Texas drug charges for he was convicted and was to be sentenced. *See App. 1001-06*.

⁴ Among counsel's many jobs as an attorney, he was an Assistant Richland County Public Defender for over three years, eventually specializing in capital trials; he was the Richland County Public Defender for a year; he handled "the bulk of the South Carolina Office of Appellate Defense's death penalty appeals on a contract basis from 1980 through 1987 and was the Chief Attorney of that Office for three and one-half years; he has been the Federal Death

impeach this witness. *Strickland*, 466 U.S. at 689 (“[t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way”). Likewise, counsel’s hindsight assessment of the decision to present Ms. Turner does not show deficient performance. “In hindsight, there are a few, if any, cross-examinations that could not be improved upon. If that were the standard of constitutional effectiveness, few would be the counsel whose performance would pass muster.” *Willis v. United States*, 87 F.3d 1004, 1006 (8th Cir. 1996). See also *Strickland*, 466 U.S. at 689 (“A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time”). Despite Cooper’s post-trial complaints on counsel’s handling of Farmer, Respondent submits that counsel’s impeachment of Farmer unquestionably “provided the jury with a detailed picture of where [Farmer’s] loyalties lay.” *Willis*, 87 F.3d at 1006.

Furthermore, Petitioner failed to prove that he was prejudiced by counsel’s decision to present the additional impeachment evidence. Although Farmer consistently identified Petitioner as the person who murdered the victim, each of his subsequent statements about the conspiracy and murder was inconsistent with his 1991 testimony *in at least some of the details* provided, and *all of his statements minimized his role*. Thus, the statements impeached the credibility of his 1991 testimony. Nor could counsel cherry-pick portions of these statements. Once counsel made his reasonable decision to use either a portion of Farmer’s Texas sentencing testimony or the

Penalty Resource Counsel, since 1992; and he has taught a death penalty trial clinic at Washington and Lee Law School since 2004. He estimated that he had tried between fifteen and twenty capital trials and another ten noncapital trials. Also, he had tried other major felony cases while working in the Richland County Public Defender’s Office. *App. 1661-64*.

statement to which Ms. Turner testified, the State had the right to introduce the entire statement under Rule 106, SCRE. See also *State v. Patterson*, 367 S.C. 219, 227-28, 625 S.E.2d 239, 243 (Ct. App. 2006).

Also, a clear inference from Farmer's claim to Ms. Turner that someone helped him put a "spin" on his 1991 testimony is that he wanted her to believe that law enforcement had done this but if Petitioner called him as a witness, he would testify truthfully. Additionally, the trial judge instructed jurors that they could not consider any of Petitioner's prior legal proceedings in their deliberations (*App. 1487, line 2-13*) and that they only consider evidence of another crime or misconduct by a witness on the limited issue of credibility. *App. 1508, lines 13-25*. Because Petitioner testified at trial, these instructions prevented jurors from considering any past misconduct by him on the question of his guilt or innocence. See *United States v. Olano*, 507 U.S. 725, 740 (1993) ("[It is] the almost invariable assumption of the law that jurors follow their instructions") (citing *Richardson v. Marsh*, 481 U.S. 200, 206 (1987)). See also *Strickland*, 466 U.S. at 694 ("a court should presume ... that the judge or jury acted according to law"). Further, as more fully discussed in connection with Ground (c) (*App. 1745-53*), no limiting instruction was required for evidence of Petitioner's prior incarceration because this evidence was admissible as part of the *res gestae* of the charged crimes. See *State v. Johnson*, 306 S.C. 119, 127, 410 S.E.2d 547, 552 (1991) (where the evidence of prior murder formed part of the *res gestae* and was directly related to murder for which defendant was being tried, the failure to give a limiting instruction did not constitute reversible error); *State v. Nix*, 288 S.C. 492, 497-98, 343 S.E.2d 627, 630 (Ct.App.1986) (a limiting instruction is unnecessary when evidence of the other crime is admissible on the main issue or the evidence is admitted to show motive or intent and the prior bad acts may have been committed in furtherance of such motive or intent).

Additionally, while Farmer was an important witness, Southerland was the State's primary witness because Southerland provided jurors with graphic and detailed eyewitness testimony as to all of the offenses, including the conspiracy, kidnapping, armed robbery, and the murder of the victim. Also, much of Farmer's testimony was cumulative to Southerland's, although he provided more details concerning the conspiracy to rob Kim Quinn. And, many of the material points in Farmer's testimony were corroborated, either by Southerland's testimony or by the circumstantial evidence discussed at length in the PCR judge's "Statement of Facts." *App. 1715-27.*

Finally, there was overwhelming evidence of Petitioner's guilt, separate and apart from Farmer's testimony. The State's evidence showed that this was a premeditated armed robbery, which Petitioner quickly escalated to murder once he learned that he would receive less than \$200.00 for the crimes. He carried out the crimes and post-mortem efforts to conceal the victim's identity in a brutally macabre fashion and, once he had finished the murder and disposed of the victim's hands and feet, and his ax, he ate two hotdogs before washing either himself or his clothing. In order to have acquitted Petitioner, the jury would have had to accept that virtually every single prosecution fact witness either lied or was mistaken. *See Order, App. 1744-45.* Therefore, the record supports the PCR judge's conclusion that Petitioner failed to prove either deficient performance or prejudice.

II. This Court must deny certiorari because the record supports the PCR judge's decision that counsel was not ineffective in the manner in which he handled the admission of Petitioner's prior convictions for housebreaking and grand larceny, and for introducing evidence of Petitioner's sentence on those prior convictions.

Petitioner claims that counsel was ineffective for conceding that Petitioner could be impeached with his prior convictions for housebreaking and grand larceny when he should have

made the objection that they were overly prejudicial because they are similar to the facts underlying the charges for which he was on trial. He further asserts that counsel was ineffective in that counsel unreasonably introduced information regarding the Petitioner's sentence on those prior convictions including the fact that Petitioner had spent time in prison, which he asserts was unnecessarily prejudicial. Respondent submits that the PCR judge correctly found that Petitioner has not proven either deficient performance or prejudice from the manner in which counsel handled the admissibility of his prior convictions and sentence. *App. 1745-53.*

Mr. Bruck told jurors in his opening statement that:

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're 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, line 20 – 422, line 25.

Before Petitioner testified at trial, the trial judge addressed the admissibility of his prior convictions *in camera*. In response to the trial judge's statement that he thought that the parties had reached an agreement about which of his previous convictions could be used for

impeachment purposes, trial counsel argued that his entire record was too remote. The State then indicated that it intended to impeach Petitioner with his armed robbery convictions from February and March 1977, as well as his September 1977 convictions for housebreaking and larceny. Counsel maintained that these convictions were too remote under Rule 609(b), SCRE, because more than ten years had passed between the convictions and his testimony. *App. 1027-29.*

The State argued that counsel's opening statement had waived any objection. The State also argued that Petitioner was not released from custody on the prior convictions until 1988, and that "they're close in time to the date" of the October 1989 offenses for which he was being retried. *App. 1048-32.* Counsel argued that he had not waived an objection to introduction of the offenses and he asserted that the similarity of the armed robberies to the present charges made their use more prejudicial. Yet, he admitted that the same argument did not apply to the convictions for housebreaking and larceny. *App. 1050-51.*

The trial judge was concerned about the introduction of the armed robbery convictions and ruled that they were inadmissible. However, he found that the convictions for housebreaking and larceny were admissible. *App. 1051.* Counsel elicited evidence of these 1977 convictions on direct examination of Petitioner. *App. 1204, lines 13-20.* The State did not mention the convictions on its cross-examination of Petitioner (*App. 1270-81*), and neither prosecutor referenced them in closing argument. *App. 1365-72; 1464-1504.*

Mr. Bruck testified at the PCR hearing that he had conceded Petitioner's previous incarceration with Southland in opening statement because he knew that Southland 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.” Also, in light of the State’s theory of how the crimes originated, it was impossible to keep out evidence of the prior incarceration *App. 1674*.

Mr. Bruck further testified that he believed “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*. Also, his decision to introduce the housebreaking and grand larceny convictions on direct examination of his client was consistent with this reasoning. *App. 1676-77*. He admitted that he had never thought about whether the State’s case could have been tried so that the jury only aware that Petitioner and Southerland were associates who knew each other and who both knew individuals in prison. However, he observed that he was unsure that the trial judge would have required the prosecution to edit its case to fit such a scenario. *App. 1643-44*. See *Old Chief v. United States*, 519 U.S. 172, 186-87 (1997) (affirming as “unquestionably true as a general matter” the “familiar, standard rule that the prosecution is entitled to prove its case by evidence of its own choice” excepting prior conviction proof or status); *Estelle v. McGuire*, 502 U.S. 62, 70-71 (1991) (the prosecution’s burden to prove every element of the crime is not relieved by a defendant’s tactical decision not to contest an essential element of the offense).

Mr. Bruck testified that he had argued that the prior convictions for armed robbery were inadmissible because were too similar to the charges for which Petitioner was being tried and were therefore prejudicial. See Rule 609(a), SCRE; *Green v. State*, 338 S.C. 428, 433–34, 527 S.E.2d 98, 101 (2000) (stating the five factors that a trial judge should consider before allowing impeachment with similar prior conviction(s)). He did not did not make the same argument with respect to the housebreaking and larceny convictions. Although he testified on direct

examination that he believed the State's evidence would have supported a charge of burglary, he candidly admitted on cross-examination that Petitioner had not been arrested or indicted for burglary. So, that charge was not before the jury. And, even with decades of appellate experience, he was unable to name any South Carolina appellate decision that would have supported an objection that prior convictions should be excluded because the convictions are similar to facts presented by the prosecution that might support an indictment for a similar offense but where there is no indictment for the offense. *App. 1638-44; 1675-76.*⁵

Respondent submits that Petitioner has failed to prove that counsel's performance was deficient. First, the PCR judge correctly found that "counsel reasonably understood that evidence of Petitioner's prior incarceration [was admissible] under Rule 404(b), SCRE, to establish identity and other exceptions." *App. 1748*. See Rule 404(b), SCRE. Likewise, this evidence was admissible because it formed part of the *res gestae* of the crimes for which he was on trial because it "furnishe[d] part of the context of the crime" and was necessary to a "full presentation" of the case. See *State v. Wiles*, 383 S.C. 151, 158-59, 679 S.E.2d 172, 176 (2009); *State v. Adams*, 322 S.C. 114, 122, 470 S.E.2d 366, 370-71 (1996). See also *State v. Owens*, 346 S.C. 637, 552 S.E.2d 745 (2001); *United States v. Masters*, 622 F.2d 83, 86 (4th Cir. 1980); *United States v. Kimball*, 73 F.3d 269, 272 (10th Cir. 1995) (evidence of defendant's recent release from prison, including evidence that his inmate number was found on coffee pot in motel room along with tablet containing imprint of robbery demand note and that his clothing worn at time of his release from prison was identical to clothing of robber, was admissible as part of *res gestae* in bank robbery prosecution); *United States v. Champion*, 813 F.2d 1154, 172-73 (11th Cir. 1987). *App. 1748-49*.

⁵ See counsel's argument in support of this claim. *App. 1696-97*.

Because the evidence of Petitioner's earlier incarceration was admissible, counsel's decision to address it in opening in an effort to put this evidence "in proper context" was reasonable under *Strickland*. See *Wheeler v. Simpson*, 852 F.3d 509, 515 (6th Cir.), *reh'g denied* (Apr. 12, 2017), *cert. denied*, 138 S.Ct. 357 (2017) (state court's rejection of claim that trial counsel was ineffective for introducing testimony that he had received furloughs during his previous incarceration was not contrary to or an unreasonable application of Supreme Court precedent, where introduction of this evidence was a strategic attempt to show that petitioner had previously been such a model prisoner that he received two furloughs); *Campbell v. Bradshaw*, 674 F.3d 578, 588 (6th Cir. 2012) (trial counsel was not ineffective for introducing petitioner's entire incarceration record during the penalty phase of trial because it was "part of a strategic effort to be candid with the jury about Campbell's past in an effort to gain credibility and, ultimately, obtain a life sentence for Campbell"); *State v. Groves*, 2014-Ohio-4337, ¶ 14, 2014 WL 4823883, *4 (Oh. Ct.App. 2014) ("It is clear from our review of the record that trial counsel made an apparent strategic decision in eliciting such testimony from Ms. Warren. This court must presume counsel's conduct falls within the wide range of reasonable professional assistance and is the product of sound trial strategy"). Counsel's chosen strategy lessened the impact of this evidence that obviously would be introduced in the State's case-in-chief because he was able to place Petitioner's relationship in proper 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. 1749-50*.

Counsel's decision to elicit the housebreaking and larceny convictions on direct examination was equally reasonable under *Strickland*, since he knew that the trial judge had ruled that Petitioner could be impeached with these convictions. Again, counsel presented

Petitioner as someone who was not going to hide anything from his jury, and this gave both counsel and Petitioner more credibility with the jury. *App. 1750*. E.g., *Ohler v. United States*, 529 U.S. 753, 757-58 (2000) (recognizing that “[a] defendant has a ... choice to make if she decides to testify, notwithstanding a prior conviction. The defendant must choose whether to introduce the conviction on direct examination and remove the sting or to take her chances with the prosecutor's possible elicitation of the conviction on cross-examination”); *Taylor v. State*, 258 S.C. 369, 377, 188 S.E.2d 850, 854 (1972) (finding that “[t]he voluntary elicitation of the information that appellant had a record was obviously intended to soften the impact of what was certain to follow. The specification [of ineffective assistance of counsel] is hypocritical”); *Rodriguez v. State*, 129 S.W.3d 551, 558–59 (Tex.App. 2003, pet. ref'd).

Nor was counsel deficient for failing to argue that the housebreaking and larceny convictions should have been excluded because they are similar to the crime of burglary, a crime for which Petitioner was never arrested or indicted. The PCR judge properly rejected Petitioner’s claim that counsel should have argued these convictions were inadmissible because the facts here could have possibly supported a burglary indictment. *App. 1750-51*. There was simply no appellate court authority from South Carolina that would have supported such an argument at the time of Petitioner’s 2006 trial, and there is still none at present. As discussed, in evaluating ineffective assistance of counsel claims, there must be a contemporary assessment of counsel’s performance: *i.e.*, counsel's acts are to be judged as of the time counsel was required to act. *Strickland*, 466 U.S. at 690.⁶ As a result, counsel is not ineffective in failing to anticipate a

⁶ The Court has consistently applied the rule of contemporary assessment of counsel's conduct. E.g., *Maryland v. Kulbicki*, 136 S.Ct. 2, 3 (2015); *Rompilla v. Beard*, 545 U.S. 374, 381 (2005); *Wiggins v. Smith*, 539 U.S. 510, 523 (2003); *Bell v. Cone*, 535 U.S. 685, 698 (2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993); *Burger v. Kemp*, 483 U.S. 776, 789 (1987); *Darden v.*

change in the law that may or may not occur. *See Gilmore v. State*, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) (“We have never required an attorney to be clairvoyant or anticipate changes in the law [that] were not in existence at the time of trial”) (citing *Thornes v. State*, 310 S.C. 306, 426 S.E.2d 764 (1993)); *Cartrette v. State*, 323 S.C. 15, 448 S.E.2d 553 (1994); *United States v. McNamara*, 74 F.3d 514, 515-17 (4th Cir. 1996) (counsel cannot be considered ineffective for failing to anticipate changes in law). Also, counsel’s failure anticipating how a state appellate court will rule on a novel question of law was not ineffective. *E.g.*, *Richardson v. Branker*, 668 F.3d 128, 141-43 (4th Cir. 2012).

Moreover, Petitioner did not prove that he was prejudiced by counsel’s performance. *See App. 1751-53*. In addition to the above-stated reasons, Respondent notes that this evidence was going to be presented by the prosecution if counsel had not done so. Also, the trial judge instructed jurors that they could not consider any of Petitioner’s prior legal proceedings in their deliberations (*App. 1487, line 2-13*) and that they only consider evidence of another crime or misconduct by a witness on the limited issue of credibility. *App. 1242, lines 13-25*.⁷ Again, jurors are presumed to “follow their instructions,” *Olano*, 507 U.S. at 740 (1993); *Richardson*, 481 U.S. at 206; *see also Strickland*, 466 U.S. at 694 (“a court should presume ... that the judge

Wainwright, 477 U.S. 168, 185 (1986); *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986).

South Carolina courts have also consistently applied this standard. *E.g.*, *Patterson v. State*, 359 S.C. 115, 118, 597 S.E.2d 150, 151 (2004) (“An attorney is not required to anticipate potential changes in the law, which are not in existence at the time of the conviction”); *Gilmore v. State*, 314 S.C. 453, 445 S.E.2d 454 (1994) (attorney is not required to be clairvoyant or anticipate changes in the law which were not in existence at time of trial), *overruled on other grds.*, *Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999); *Thornes v. State*, 310 S.C. 306, 426 S.E.2d 764 (1993) (counsel not ineffective for encouraging defendant to plead guilty although counsel never interviewed the victim because he had her written statement against defendant), *Robinson v. State*, 308 S.C. 74, 417 S.E.2d 88 (1992).

⁷ These instructions were given as a result of counsel’s request. *See App. 1174-76*.

or jury acted according to law”). These instructions prevented jurors from considering his previous incarceration or his prior convictions on the question of his guilt or innocence, even though no limiting instruction was necessary with respect to evidence of Petitioner’s prior incarceration because it was properly admitted as part of the *res gestae* of the charged offenses. See *Johnson*, 306 S.C. at 127, 410 S.E.2d at 552; *Nix*, 288 S.C. at 497-98, 343 S.E.2d at 630. Further, Petitioner has not presented the Court with any appellate court authority from South Carolina that would have supported such an argument at the time of Petitioner’s 2006 trial. Finally, there cannot be any conceivable prejudice resulting to Petitioner because any conceivable prejudice from counsel’s argument and introduction of the prior convictions by trial counsel pales in comparison to the State’s evidence of the grisly murder and other crimes in this case. See Statement of Facts, *supra*. See *Strickland*, 466 U.S. at 696. Therefore, Petitioner is not entitled to relief on this claim, either.

III. This Court must deny certiorari because the record support’s the PCR judge’s finding that Petitioner was not prejudiced by counsel’s failure to obtain an *in limine* instruction from the trial judge barring Southerland from testifying about Petitioner’s prior armed robbery convictions.

Petitioner’s remaining claim is his Ground (d), in which he asserts that counsel was ineffective in failing to obtain an *in limine* instruction from the trial judge that Southerland should not be allowed to provide testimony referring to Petitioner prior armed robbery convictions. See *App. 1697-98* (Petitioner’s argument below). However, Respondent submits that this Court must deny certiorari, since the record support’s the PCR judge’s finding that he was not prejudiced by counsel’s failure to obtain an *in limine* instruction. See *App. 1753-57*.

The trial transcript reflects that Southerland was often evasive and argumentative on Mr. Bruck’s cross-examination of him. *E.g., App. 727-51; 753-816*. At one point when Mr. Bruck

was questioning him about his prior armed robbery convictions, the following exchange occurred:

Q So if the records show that you were convicted and got an 18 year sentence, the records must be wrong?

A I caught, let's see, 15 -- 15, 18 and 18, Dorchester, Berkeley and Clarendon County, 15, 18, and 18. That's all the --

Q All armed robberies?

A Yes, sir.

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 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 ahead.

App. 775, lines 13-25.

Mr. Bruck testified that he was aware that Petitioner and Southerland were co-defendants in the armed robberies for which Petitioner had been previously convicted, and that he had anticipated Southerland would be a difficult witness before Southerland testified. In his answer to counsel's question, Southerland "blurted out unresponsively" that Petitioner was his co-defendant in the armed robberies. Mr. Bruck did not think of making a motion *in limine* to prohibit Southerland from mentioning Petitioner's convictions or requesting a curative instruction because he did not foresee that Southerland would "volunteer that information unresponsively to a question" even though "I probably should have foreseen that." *App. 1640-*

41; 1677-78.

However, Mr. Bruck agreed that Southerland was constantly evasive on cross-examination and had repeatedly attempted to interject Petitioner's involvement in the murder, as opposed to answering the questions being asked of him by Mr. Bruck. Also, Mr. Bruck later used this evasiveness in closing argument as one of the reason jurors should find that Southerland was not credible. *App. 1678*.

In *Strickland*, the Court explained, "The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland*, 466 U.S. at 697. Accordingly, it was unnecessary for the PCR judge to address whether counsel's performance was deficient as Petitioner claimed, since it is clear that there was absolutely no resulting prejudice.⁸ The contested remarks by Southerland were unresponsive to the question posed and it is clear the trial judge found that his response was not proper. Also, the trial judge instructed that jurors could not consider any of Petitioner's prior legal proceedings in their deliberations (*App. 1487, line 2-13*) and that they only consider evidence of another crime or misconduct by a witness on the limited issue of credibility (*App. 1508, lines 13-25*) precluded jurors from considering his remark on the question of Petitioner's guilt or innocence. *Olano*, 507 U.S. at 740; *see also Strickland*, 466 U.S. at 694.

Further, counsel thoroughly cross-examined Southerland concerning the details of the crimes to which he had testified on direct examination; his activities in the days immediately

⁸ The PCR judge did not "find that counsel's performance was deficient, only that the clear absence of any possible prejudice makes it unnecessary to address that prong." *See App. 1755 n. 24*.

before and after the murder; his claim that he had only used the phone at the Cooper residence once; his claim that he had never spoken to Red Farmer; the various different statements that he had made about the murder;⁹ the fact his picture is in the photographic lineup introduced as State's Ex. 2; his claim that he had given a statement accepting full responsibility for the murder because Petitioner had communicated a threat to him through three death row inmates, who had since been executed and could not be cross-examined; his claim that Petitioner had told him what to say in that statement; that when his attorneys got a restraining order prohibiting Mr. Bruck from having further contact with him, he wrote Judge Keesley, stated he did not agree with his attorneys, and attempted to have Judge Keesley deny his attorneys' request; that he had given a similar statement to *The State* newspaper and repeated a similar story to "[a]nybody and everybody;" that he had given similar statements to death row inmate Norman Starnes and to two women who were church volunteers at the prison, Ms. Betts Davis and Ms. Naida Knotts; that he had continued to claim full responsibility for the crimes until 2006; that he had spent over thirty years in prison; his remaining criminal history in addition to the armed robbery convictions; that the State had dropped the death penalty in exchange for his testimony against Petitioner; and, counsel even cross-examined him about his claim that he had cried after the murder, the fact no one witnessed this and that the only other time he acknowledged crying was when his mother died.

Additionally, counsel introduced the two statements that Southerland had given to

⁹ For instance, he admittedly lied to SLED when questioned about the crime on October 10, 1989, when he told officers he was at the apartment complex on the afternoon before the murder but did not know anything about the murder. *App. 729-32; 491*. Also, he gave two statements to Mr. Bruck following his 1992 death sentence and he did not want his own attorney to know that he had done so. He took full responsibility for the murder in these statements and exonerated Petitioner. *App. 742-52; 755-64*.

counsel as Defendant's Exs. 1 and 2 and he published these to the jury. Counsel also presented Starnes, Ms. Bessie "Betts" Davis, and Ms. Knotts as witnesses. They testified about the admissions that Southerland had made to each of them and that there was no apparent tension between Southerland and Petitioner. *App. 1038-47* (Starnes); *App. 1068-77* (Ms. Davis); *App. 1081-90* (Ms. Knotts). Counsel later used this impeaching information in his closing argument to assail Southerland's credibility. *See App. 1387-99; 1405-22*. Included in counsel's attack on Southerland's credibility were the following comments about his evasiveness on cross-examination:

And unlike Mr. Farmer, who you have yet to lay eyes on, Mr. Sutherland at least shuffled in here with that expression that none of you will probably ever forget and you got to see how he dodged and weaved and played games with me. He was willing to answer the State's questions, but when it came for cross-examination, forget it.

App. 1388, lines 11-17.

In light of the trial judge's limiting instructions, counsel's thorough impeachment of Southerland's credibility and the overwhelming evidence of guilt, the PCR judge correctly found that there was no prejudice from counsel's failure to either request an *in limine* instruction before Southerland testified or a curative instruction after he made the unresponsive comment that Petitioner was his co-defendant in the armed robberies. Therefore, certiorari must be denied denied.


CONCLUSION

Respondent submits that certiorari should be denied for the foregoing reasons.

Respectfully submitted,

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By: 
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ATTORNEYS FOR RESPONDENT

January 28, 2019

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Lexington County
The Honorable J. Cordell Maddox, Circuit Court Judge
Appellate Case No. 2018-001149

RECEIVED
JAN 28 2019
S.C. SUPREME COURT

GENE TONY COOPER,

Petitioner,

vs.

THE STATE,


Respondent.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the Return to Petition for Writ of Certiorari on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to: Lara M. Caudy, Esquire, Office of Appellate Defense, P.O. Box 11589, Columbia, South Carolina 29211.

I further certify that all parties required by Rule to be served have been served.

This 28th day of January, 2019.


ANGELA BENNETT
Administrative Coordinator

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727



RECEIVED
JAN 28 2019
S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

January 28, 2019

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme court
P.O. Box 11330
Columbia, South Carolina 29211

Re: Gene Tony Cooper v. The State
Appellate Case No: 2018-001149

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the *Return to Petition for Writ of Certiorari* along with proof of service in the above-referenced case.

Sincerely,

William Edgar Salter, III
Senior Assistant Attorney General
S.C. Bar No: 4806

WES/ab
Enclosures

cc: Lara M. Caudy, Esquire
Victim Advocacy Division