STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Berkeley County

Michael G. Nettles, Circuit Court Judge

WILTON Q. GREENE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000339

BRIEF OF PETITIONER

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2.

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

3.

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

STATEMENT

During the April term of 2013, a Berkeley County Grand Jury indicted Petitioner for armed robbery and kidnapping. App. 475 – 476; App. 478 – 479. Petitioner was tried before the Honorable J.C. Nicholson, Jr., and a jury, from May 20 – 23, 2013. App. 1; App. 263. Chad Shelton and David Schwacke represented Petitioner. Adrian Dejeu and Bryan Alfaro represented the State. App. 2.

Petitioner was convicted as indicted and he was sentenced to serve concurrent terms of imprisonment for twenty years for armed robbery and twenty years for kidnapping. App. 255, l. 2-9; App. 274, ll. 16-2; App. 477; App. 480. Petitioner timely appealed his convictions and sentences, but they were affirmed by this Court in an unpublished opinion, *State v. Greene*, Op. No. 2015-UP-086 (S.C. Ct. App. filed February 25, 2015). App. 328 – 329.

On August 19, 2015, Petitioner filed an application for post-conviction relief (PCR). App. 331 – 353. On May 13, 2016, the State made its return. App. 354 – 358. On December 4, 2017, a hearing was held on the matter before the Honorable Michael G. Nettles. Petitioner was represented by Rodney Davis. The State was represented by Julie Coleman. App. 359. The PCR court heard testimony from Petitioner and from trial counsel Chad Shelton. App. 360. On January 23, 2018, the PCR court issued an order of dismissal. App. 457 – 473. On October 14, 2020, this Court granted the petition for a writ of certiorari.

This brief of petitioner follows.

STANDARD OF REVIEW

"Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836, 839–40 (2018) (citing *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); *Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). "We review questions of law de novo, with no deference to trial courts." *Id*. (citing *Sellner*, 416 S.C. at 610, 787 S.E.2d at 527; *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)).

STATEMENT OF FACTS

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

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

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

Petitioner testified Zhang wanted to buy sixty dollars' worth of cocaine, but did not have enough money, so Petitioner agreed to hold Zhang's wallet as collateral until he paid. App. 180, ll. 9-19. The wallet did not contain any cash but contained Zhang's green card. App. 83, ll. 21-24; App. 180, ll. 17-18; App. 380, ll. 2-3. Petitioner said he and Zhang had engaged in a similar transaction previously, with Zhang's green card held as collateral. App. 180, ll. 16-19.

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

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

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

Officer Anthony Judy of the Monck's Corner Police Department was on patrol when a car came at him "head on" through the median. App. 133, l. 22 – 133, l. 15. Officer Judy said he "locked up the brakes" and jumped out of his car in case he was being ambushed. App. 134, ll. 15-23. The officer said the driver "had a very wild look in his face," and "bailed out yelling he

robbed me, he robbed me." App. 134, l. 23 – 135, l. 1. Officer Judy said the passenger then got out of the car and started running toward the Huddle House. App. 135, ll. 1-4.

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

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

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

[1] Petitioner said he told counsel prior to trial that his charges were the result of a drug deal gone bad, and that he had Zhang's wallet for collateral. App. 379, l. 23 – 380, l. 4. Trial counsel agreed that Petitioner said the incident arose out of a drug deal. App. 405, ll. 14-15. However, trial counsel said that when he had Petitioner transported from jail to relay a plea offer and urged Petitioner to take the plea bargain, Petitioner said he did commit the armed robbery. App. 402, ll. 8-11; App. 411, ll. 13-16; App. 405, l. 22 – 406, l. 6. Trial counsel said that because Petitioner's version of the facts changed, he had Petitioner testify in narrative fashion at trial. App. 405, ll. 5-15; App. 418, ll. 15-22.

Petitioner had a prior conviction from 2011, which the parties referred to as "strong arm robbery."[2] App. 164, ll. 13-23; App. 165, ll. 5-10; App. 268, l. 23 – 269, l. 24. The State did not argue the conviction was admissible. Instead, the court asked trial counsel: "So that would be an impeachable offense is that correct?" App. 164, ll. 24-25. Trial counsel replied: "Yes, Your Honor." App. 165, l. 1. Without any further discussion, the court then advised Petitioner that the State could ask him about the prior conviction if he testified. App. 165, ll. 17-19.

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

Prior to the jury charge, the parties had an "informal charge conference" at the bench that was not reported. App. 203, ll. 6-11. The court did not give the jury a limiting charge or otherwise explain in its charge that Petitioner's prior conviction should not be considered as evidence he committed the crime in the instant case. App. 236, l. 10 – 247, l. 24. Before submitting the case to the jury, the court asked the parties if they had any exceptions to the charge as given and trial counsel said that he did not. App. 248, ll. 1-6.

The jury deliberated for a total of five and a half hours. App. 249, ll. 9-10; App. 254, ll. 13-14. During that time, it sent a note to the court asking, "Is there a possibility of a lesser

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

included charge?" App. 454. After receiving an answer in the negative, the jury sent another note asking, "Can we have Mr. Zhang and [Petitioner's] testimony read back to us or a copy?" App. 455. The testimony of Petitioner and of Zhang was then replayed for the jury. App. 249, ll. 19-21. Then the jury sent another note that said, "We would like to see the police report of the incident and transcript."[3] App. 456.

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

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

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3 Police officers recorded their interview of Zhang, possibly due to confusion caused by the language barrier, and a transcript made of the interview and it was mentioned at trial—it appears this was the transcript the jury referenced in its note. App. 93, ll. 3-6; App. 95, ll. 3-9. The court replied to the jury that neither the transcript nor the police report was in evidence and therefore neither could be provided. App. 456.

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

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

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

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

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

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

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

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

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

The order of dismissal continued: "Trial counsel credibly testified he saw no reason to object to the admission of the prior conviction at the time of trial. Although he was unsure at the evidentiary hearing why he did not make the argument, he did not believe at the time of trial that an objection was necessary." App. 467. The PCR court's order of dismissal further stated: "Trial Counsel's failure to object to request a curative instruction was not deficient." App. 467. "More importantly, even if Trial Counsel were deficient in failing to object or request the balancing test [of Rule 609(a)(1) and *State v. Colf*[7]], Applicant can show no prejudice that would entitle him to a new trial," because the "evidence against Applicant was overwhelming." App. 467 – 468.

The order of dismissal continued that, "Although the trial judge . . . did not explicitly place this balancing test on the record at trial, Applicant has not met his burden of showing that the trial judge failed to conduct the balancing test." App. 467. "It is possible that the trial judge

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

conducted the balancing test but did not specifically explain each factor of the test for the record." App. 467.

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

ARGUMENT

1.

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

Counsel provided ineffective assistance when he failed to object to the prior conviction's admissibility, since the conviction should have been excluded under Rule 609 and *State v. Colf*, 337 S.C. 622, 525 S.E.2d 246 (2000).

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

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

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

In *State v. Colf*, 337 S.C. at 628, 525 S.E.2d at 249, the South Carolina Supreme Court found the following factors relevant to admission of a prior crime for impeachment purposes under Rule 609: (1) the impeachment value of the prior crime; (2) the point in time of the

conviction and the witness's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. *Id*. at 627, 525 S.E.2d at 248. "[U]nder Rule 609(a)(1), if the witness is the accused and has a prior conviction of a crime punishable by death or imprisonment for more than one year, the trial court must balance the *Colf* factors and determine whether the probative value of the conviction outweighs its prejudicial effect to the accused." *State v. Robinson*, 426 S.C. 579, 595, 828 S.E.2d 203, 211 (2019).

The prosecution has the burden of proof under Rule 609(a)(1), SCRE to show a conviction meets the five-factor balancing test espoused in *Colf*. *State v. Brayboy*, 401 S.C. 207, 213, 736 S.E.2d 679, 682 (Ct. App. 2012). As initial matter, the State did not move that Petitioner's prior conviction be admitted for impeachment. Trial counsel simply did not argue against admission when the judge brought up the matter *sua sponte*. Counsel was deficient in failing to hold the prosecution to its burden of proof with regard to the admissibility of Petitioner's prior conviction for impeachment purposes.

Moreover, an application of the *Colf* factors weighs against admitting Petitioner's prior conviction. The first *Colf* factor—the impeachment value of the prior crime—weighs in favor of exclusion because robbery is generally not probative of truthfulness. *State v. Bryant*, 369 S.C. 511, 517, 633 S.E.2d 152, 155 (2006); *State v. Broadnax*, 414 S.C. 468, 476, 779 S.E.2d 789, 793 (2015). The impeachment value of crimes that are "not particularly probative of the specific trait of truthfulness" is limited. *State v. Black*, 400 S.C. at 23, 732 S.E.2d at 887. While robbery involves stealing, it does not involve deceit, fraud, cheating, or otherwise show a propensity to lie. No argument was advanced by the State that Petitioner's prior conviction had impeachment value, and no facts or circumstances about the prior conviction were provided.

The second *Colf* factor—the point in time of the conviction and the witness's subsequent history—does not weigh heavily in favor of either admission or exclusion. This factor considers the "temporal proximity" of prior convictions to current charges and whether that proximity reveals a "pattern of behavior" which evokes questions of credibility. *State v. Robinson*, 426 S.C. at 600, 828 S.E.2d at 214. On the one hand, the prior conviction was in 2011 and the trial was in 2013, so the temporal proximity was recent, which weighs in favor of admission. On the other hand, one prior conviction is not sufficient to create a pattern of behavior; a fact weighing in favor of exclusion.

The third *Colf* factor—similarity between the prior conviction and the charged offense—weighs heavily in favor of exclusion. The third *Colf* factor looks to the nature and details of the past crime compared with the crime for which an accused stands trial. *Colf*, 337 S.C. at 627, 525 S.E.2d at 248. Where the past convictions are similar to the case at trial, this factor weighs in favor of exclusion: "evidence of similar offenses inevitably suggests to the jury the defendant's propensity to commit the crime with which he is charged." *Id*. at 628, 525 S.E.2d at 249.

Petitioner's prior conviction was for strong arm robbery, an offense very similar to one of his charged offenses—armed robbery. Therefore, the nature of the conviction weighed against admission because when a prior offense is similar to the charged offense, the "danger of unfair prejudice to the defendant from impeachment by that prior offense weighs against its admission." *State v. Bryant*, 369 S.C. at 517-18, 633 S.E.2d at 156; *see also State v. Broadnax*, 414 S.C. at 478, 779 S.E.2d at 794 ("the prejudicial effect of admitting prior convictions for the exact same offense is often very high").

The fourth *Colf* factor—the importance of the defendant's testimony—also weighs in favor of exclusion, because it was important that the jury hear Petitioner's testimony, as his defense of misunderstanding was reliant on his testimony. *See United States v. Lipscomb*, 702 F.2d 1049, 1062 (D.C. Cir. 1983) (evidence that a witness is a convicted criminal can seriously prejudice the defense, especially when the witness is the defendant himself); *Luck v. United States*, 348 F.2d 763, 768 (D.C. Cir. 1965) (trial judge may think truth would be helped more by letting the jury hear the defendant's story than by the defendant's foregoing that opportunity because of the fear of prejudice founded upon a prior conviction).

Finally, the fifth *Colf* factor—the centrality of the credibility issue—also weighs in favor of exclusion. "[W]hen credibility is central to a case, the introduction of prior convictions for impeachment purposes becomes even more legitimate." *State v. Robinson*, 426 S.C. at 606, 828 S.E.2d at 217. However, "in the absence of a prior conviction for a crime of dishonesty, when a defendant's credibility is key it is the prejudice from the conviction that is heightened, not its probative value." *State v. Dunlap*, 346 S.C. 312, 328, 550 S.E.2d 889, 898 (Ct. App. 2001) (Shuler, J., concurring), *aff'd as modified,* 353 S.C. 539, 579 S.E.2d 318 (2003). Here, Petitioner's credibility was critical, because the jury had to choose between his version of events and the alleged victim's. However, because there was nothing in the record to indicate the prior conviction was one involving dishonesty, it was prejudice—not probative value—that was heightened. Thus, this fifth factor too weighs against admission.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). 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. *Id.* at 687. As discussed above, counsel should not have agreed to admit Petitioner's prior conviction—he should have objected pursuant to Rule 609(a)(1), since the conviction would not have passed *Colf* balancing. Counsel's performance here was constitutionally deficient.

The PCR court erred in finding trial counsel provided effective representation where counsel did not argue to keep Petitioner's prior conviction for strong arm robbery out in his trial for armed robbery. Counsel's failure to object was not strategic. The State did not argue to impeach Petitioner with his prior conviction, and the trial court did not perform a Rule 609(a)(1) analysis as to its admissibility.

As seen, the PCR court recognized that the trial court did not articulate the basis for its conclusion the conviction was admissible, yet found, "It is possible that the trial judge conducted the balancing test but did not specifically explain each factor of the test for the record." App. 467. This was error. The record does not show the court engaged in a meaningful *Colf* analysis. *See State v. Elmore*, 368 S.C. at 238–39, 628 S.E.2d at 275 (current state of the law does not mandate trial court make on-the-record specific finding **as long as record reveals trial judge did engage in a meaningful balancing** of probative value and prejudicial effect before admitting a prior conviction under 609(a)(1)); *State v. Scriven*, 339 S.C. at 342, 529 S.E.2d at 75–76 (urging trial court to "articulate its ruling and the basis for [the conviction's admission], thereby clearly and easily informing the appellate courts that a meaningful balancing of the probative value and the prejudicial effect has taken place as required by Rule 609(a)(1)"); *State v. Howard*, 384 S.C. 212, 220, 682 S.E.2d 42, 46 (Ct. App. 2009) (finding trial court committed

reversible error by not conducting an on-the-record balancing test weighing the probative value of defendant's prior convictions against their prejudicial effect).

There is no indication in this record that the judge did engage in meaningful balancing under Rule 609(a)(1) and *Colf*. In fact, it appears the court only considered Rule 609(b), which deals with a ten-year time limit regarding convictions for impeachment. App. 164, l. 13 – 165, l. 20. Therefore, the record does not show the judge engaged in a meaningful balancing of probative value and prejudicial effect before admitting the prior conviction under 609(a)(1), a requirement noted by this Court in *Elmore, supra*.

"To show prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability the result of the trial would have been different." *Patrick v. State*, 349 S.C. 203, 207, 562 S.E.2d 609, 611 (2002). "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). "Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect." *Strickland*, 466 U.S. at 695-96. Here, counsel's error did not have an isolated effect. Rather, it was an effect which altered the evidentiary picture. Counsel brought up the conviction without doing anything to take the sting out of it—it was the last thing the jury heard on direct examination, with no testimony to explain or mitigate the prior, similar conviction.

Counsel's error was severe enough to undermine confidence in the result of the trial—Petitioner was prejudiced. Where convictions "are either similar or identical to the charged offenses . . . the likelihood of a high degree of prejudice to the accused is inescapable." *State v. Scriven*, 339 S.C. 333, 343, 529 S.E.2d 71, 76 (Ct. App. 2000). "We take this opportunity to

remind and caution the bench and bar of the inherent prejudice that flows from the use of similar prior convictions for impeachment purposes under Rule 609(a)(1), SCRE." *State v. Elmore*, 368 S.C. at 238, 628 S.E.2d at 275. "[E]vidence of similar offenses inevitably suggests to the jury the defendant's propensity to commit the crime with which he is charged." *Colf*, 337 S.C. at 628, 525 S.E.2d at 249.

"As part of the prejudice analysis, the PCR court and the reviewing court must . . . consider the strength of the State's case apart from the inadmissible evidence to which trial counsel deficiently failed to object." *Thompson v. State*, 423 S.C. 235, 246, 814 S.E.2d 487, 492–93 (2018). As will be discussed further in Issue 3, *infra*, the jury deliberated for over five hours and received an *Allen* charge.[8] App. 249, ll. 9-10; App. 254, ll. 13-14; App. 350, l. 11 – 254, l. 5. Trial counsel characterized the case as a "swearing match" between Petitioner and Zhang, the alleged victim. App. 417, ll. 5-8. Under these circumstances, Petitioner has established that but for counsel's errors, there is a reasonable probability the result of the trial would have been different. *Patrick*, 349 S.C. at 207, 562 S.E.2d at 611; *Thompson*, 423 S.C. at 246, 814 S.E.2d at 492-93.

Had counsel objected and asked the court to apply Rule 609, the *Colf* factors weighed against admitting the conviction. Counsel's performance was deficient, and Petitioner was prejudiced. Rule 609(a)(1), SCRE; *Colf*, 337 S.C. at 627, 525 S.E.2d at 248; *Strickland*, 466 U.S. 668.

[8] *Allen v. United States*, 164 U.S. 492 (1896).

2.

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

Counsel's performance was deficient where he failed to request a limiting instruction on the purpose for which Petitioner's prior conviction could properly be considered. Because counsel did not request a limiting instruction, the jury was free to improperly consider Petitioner's prior strong arm robbery conviction as propensity evidence during deliberations.

"When evidence of other crimes is admitted for a specific purpose, the trial judge should instruct the jury to limit its consideration of this evidence to the particular purpose for which it is offered." *State v. Hamilton*, 327 S.C. 440, 447, 86 S.E.2d 512, 516 (Ct. App. 1997); *State v. Johnson*, 306 S.C. 119, 126, 410 S.E.2d 547, 552 (1991). "The reasoning behind this rule is to protect against a jury convicting a defendant just because he has committed other crimes and not because it has been proven that he is guilty of the crime for which he is accused." *Johnson*, 306 S.C. at 126, 410 S.E.2d at 552.

"[W]here the evidence of other crimes is admissible only to impeach an accused when he testifies, the court, particularly on request, should instruct the jury that such evidence shall be considered by the jury only on the question of the credibility of the accused, and not to show his guilt." *State v. Smalls*, 260 S.C. 44, 47, 194 S.E.2d 188, 189 (1973). The failure to give a limiting charge that evidence of a defendant's prior conviction is admissible only for impeachment purposes is reversible error. *State v. Bryant*, 307 S.C. 458, 460-61, 415 S.E.2d 806, 808 (1992);

State v. Staley, 294 S.C. 451, 452, 365 S.E.2d 729, 729 (1988). "Under our system of justice, a conviction must be based upon evidence of the offense for which the accused is on trial rather than prior criminal or immoral acts." *State v. Gore*, 283 S.C. 118, 120, 322 S.E.2d 12, 13 (1984).

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

Here, had counsel requested a jury instruction to the effect that Petitioner's prior conviction could only be considered for impeachment, and not as propensity evidence, the trial court would have been bound to issue such an instruction. *State v. Smalls*, 260 S.C. at 47-48, 194 S.E.2d at 189-90; *State v. Bryant*, 307 S.C. at 460-61, 415 S.E.2d at 808; *State v. Staley*, 294 S.C. at 452, 365 S.E.2d at 729.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). 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. *Id.* at 687.

As discussed in Issue 1, *supra*, counsel should not have agreed to admit Petitioner's prior conviction—he should have objected pursuant to Rule 609(a)(1), since the conviction should not have passed *Colf* balancing. Regardless, however, once the conviction was admitted, counsel should have requested a limiting instruction. Counsel's failure to do so here was constitutionally deficient representation and the PCR court erred in finding counsel's performance was effective.

"To show prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability the result of the trial would have been different." *Patrick v. State*, 349 S.C. 203, 207, 562 S.E.2d 609, 611 (2002). "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).

The PCR court recognized the prior conviction's "potential prejudice as a similar offense with little probative value," but erroneously determined Petitioner was not prejudiced. "[E]vidence of similar offenses inevitably suggests to the jury the defendant's propensity to commit the crime with which he is charged." *Colf*, 337 S.C. at 628, 525 S.E.2d at 249. Petitioner was prejudiced because absent a limiting instruction the jury was left to consider his prior conviction for any purpose, including a forbidden purpose—the likelihood that Petitioner committed the crime because he had a demonstrated criminal propensity, in a case that trial counsel characterized as a "swearing match." App. 417, ll. 5-8.

"As part of the prejudice analysis, the PCR court and the reviewing court must . . . consider the strength of the State's case apart from the inadmissible evidence to which trial counsel deficiently failed to object." *Thompson v. State*, 423 S.C. at 246, 814 S.E.2d at 492–93 (2018). As will be discussed further in Issue 3, *infra*, the jury deliberated for over five hours and received a charge pursuant to *Allen v. United States*, 164 U.S. 492 (1896). App. 249, ll. 9-10;

App. 254, ll. 13-14; App. 350, l. 11 – 254, l. 5. On these facts, Petitioner has established that but for counsel's error, there is a reasonable probability the result of the trial would have been different. *Patrick*, 349 S.C. at 207, 562 S.E.2d at 611; *Thompson*, 423 S.C. at 246, 814 S.E.2d at 492-93.

3.

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

The PCR court's reliance on overwhelming evidence in its prejudice analysis was error here.

"The second prong of the *Strickland* test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989) (internal quotations omitted, quoting *Strickland v. Washington*, 466 U.S. at 688). The South Carolina Supreme Court further explained the correct application of *Strickland*'s prejudice prong in *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). "In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial." *Id*. at 188, 810 S.E.2d at 843 (citing *Strickland*, 466 U.S. at 695-96). "In addition, the PCR court should consider the strength of the State's case in light of all evidence presented to the jury." *Id.*

Here, Petitioner's testimony that the incident was a misunderstanding instead of a robbery was tainted by counsel's errors in conceding the prior conviction's admissibility and in failing to request a limiting instruction. The specific impact of the errors here was to undercut Petitioner's defense with the taint of improper propensity evidence.

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

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

In keeping with the above cases, the South Carolina Supreme Court explained that for evidence to be so overwhelming that it categorically precludes a finding of prejudice, "the evidence must include **something conclusive**, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong . . ." that there is no reasonable possibility counsel's error contributed in any way to the conviction. *Smalls*, 422 S.C. at 191, 810 S.E.2d at 845 (emphasis added).

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

A fair reading of this record does not support the PCR judge's determination that overwhelming evidence precluded Petitioner from showing prejudice. There was no "conclusive evidence" that would support the application of overwhelming evidence as a bar to relief, as that term was explained in *Smalls*, *supra*. Multiple eyewitnesses did not see a robbery. Petitioner did not confess. Although physical evidence was present in form of the knife and wallet, the case still came down to a "swearing match," because the physical evidence could be explained either by the alleged victim's version of events or by Petitioner's.

The jury deliberated for a total of five and a half hours. App. 249, ll. 9-10; App. 254, ll. 13-14. The jury peppered the court with questions and requests: whether it could convict Petitioner of a lesser offense; whether it could re-hear the testimony of Petitioner and the alleged victim; whether it could view a police report and transcript of the alleged victim's statement to police. The jury sent a note saying it was deadlocked, received an *Allen* charge,[9] and still continued to deliberate for another hour. App. 249, l. 23 – App. 254, l. 18.

Balancing the errors of trial counsel—allowing and eliciting Petitioner's prior conviction for strong arm robbery and failing to request a limiting instruction as to its proper purpose—against the strength of the State's case, the errors significantly undermine confidence in the outcome of the trial, and leave a reasonable probability that, but for counsel's deficiencies, the result of the trial would have been different. *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. Petitioner respectfully submits that the PCR court erred in using "overwhelming evidence of guilt" as a categorical bar to post-conviction relief where the State did not present conclusive proof of guilt. *Smalls*, 422 S.C. at 191, 810 S.E.2d at 845; *Franklin*, 346 S.C. at 574, 552 S.E.2d at 724-25.

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

CONCLUSION

Based on the foregoing arguments, this Court should reverse the decision of the PCR court and grant Petitioner a new trial.

s/ *Joanna K. Delany*
Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of December, 2020.