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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Lexington County

Honorable J. Cordell Maddox, Circuit Court Judge

GENE TONY COOPER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2018-001149

BRIEF OF PETITIONER

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ISSUE PRESENTED

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

STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

On November 16, 2018, Petitioner filed a petition for writ of certiorari with the Supreme Court. The state filed a return to the petition for writ of certiorari on January 28, 2019. By order dated February 11, 2019, the Supreme Court transferred this appeal to the Court of Appeals pursuant to Rule 243(l), SCACR. On February 18, 2021, this Court granted the petition for writ of certiorari as to Question 3 and ordered further briefing pursuant to Rule 243(j), SCACR.

This brief of petitioner follows.

STATEMENT OF FACTS

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

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

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

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

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

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

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

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

In his statement, Southerland admitted, "I thought about how she killed her young'un to get money for drugs. She deserved it. I shot her in the back. . . . I popped another one. I hit her in the back of the neck. . . . I stood back and pumped two more rounds in her head."[2] App. 760-761; App.

[2] The decedent's boyfriend, Eugene Carter, was in prison. It was apparently widely believed in the Department of Corrections that she had set fire to her house for insurance money. Her son was apparently killed in the fire. The judge at Petitioner's retrial allowed the jury to hear this

1582-1583. He added, "Why I chopped her hands and feet off I'll never know. I tried to chop off her head." App. 761; App. 1583.

Southerland elaborated, "The deal was that if anything came down over this they, Red [Farmer] and [Gerald] LeGrand, were going to blame Tony [Petitioner]. They were mad at Tony because he wouldn't lend them anymore money. When I was arrested I made a statement putting this on Tony because that's what everyone had planned to do. The statement that I made to the police was not true. I knew where everything was because I had thrown them there myself. Not because Tony had told me anything." App. 761-762; App. 1583.

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

Despite this signed and notarized statement, his prior confession under oath in court, and the fact that he consistently maintained for over a decade that Petitioner was innocent and that he murdered the decedent on his own, Southerland testified at Petitioner's retrial in May 2006, when it was then possible that he could be sentenced to only thirty years, that all of this was a lie, that

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same allegation—but not for the truth of the matter asserted—since it was relevant to explain this belief about the decedent and a possible motive for her murder. App. 1150, l. 16 – 1151, l. 15.

Petitioner killed the decedent, and that he, Southerland, was merely present. See App. 698, l. 4 – 717, l. 16. Southerland claimed Petitioner and three other death row inmates, who had all been executed by the time of Petitioner's retrial, had pressured him into confessing that he was the only one involved. App. 724, ll. 3-22; App. 734, l. 7 – 738, l. 21.

Norman Starnes scoffed at Southerland's claim that he was scared of Petitioner and therefore told everyone that he killed the decedent, and that Petitioner was not present. Starnes recalled "they [Petitioner and Southerland] interacted just like most of us did." Starnes remembered that Petitioner at times bought items for other death row inmates including Southerland when Southerland was without any funds. App. 1062, l. 19 – 1064, l. 15. Starnes said Southerland was not coerced into saying anything by Petitioner. App. 1064, l. 16 – 1065, l. 3.

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

Farmer's story was that he conspired with Petitioner to rob the decedent. Farmer claimed he told Petitioner on Wednesday, October 5, 1989 that Eugene Carter, who was the decedent's boyfriend and who was in prison with Farmer, told him the decedent would be receiving an insurance check for twenty eight hundred dollars. Farmer claimed he told Petitioner "that it would

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

be good opportunity to rob her." App. 967, l. 9 – 969, l. 14. Farmer said he was to get five hundred dollars of the insurance money for his part in the robbery. App. 970, ll. 4-10.

Farmer testified that Petitioner called him at CCI on a state phone he had access to because of his work in the library as part of a literacy program. He said he received the call around 10:00 a.m. on Friday, October 6, 1989. App. 971, l. 8 – 972, l. 15. Farmer explained that because the phones were monitored "[w]e talk in riddles." App. 972, ll. 8-19. He claimed at the prior trial that Petitioner told him "[t]hat my intelligence was wrong that she did not have the 2800 [dollars], that he completed the construction job that he was working on and that he had burned excess material and was pleased with the job and didn't see any complications." App. 972, l. 20 – 973, l. 2. Farmer said he took this to mean that the decedent did not have the money, that Petitioner killed her, and burned her body. App. 973, ll. 3-14.

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

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

STANDARD OF REVIEW

The standard of review in post-conviction relief (PCR) cases depends on the specific issue before the Court. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). The Court defers to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Id. (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)). The Court reviews questions of law de novo, with no deference to trial courts. Id. at 180-181, 810 S.E.2d at 839-840 (citing Sellner, 416 S.C. at 610, 787 S.E.2d at 527).

ARGUMENT

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

Relevant Facts

Before Petitioner testified at trial, the trial judge addressed the admissibility of Petitioner's prior convictions *in camera*. The solicitor wished to impeach Petitioner with his 1977 convictions for housebreaking, grand larceny, and armed robbery. App. 1047, ll. 3-14. Trial counsel argued these convictions were too remote as more than ten years had passed since the convictions occurred. Consequently, he asserted all of the convictions were inadmissible pursuant to Rule 609, SCRE. App. 1047, ll. 15-24. The solicitor maintained the convictions were admissible because they were close in time to when the murder for which Petitioner was being retried occurred and, as to the armed robbery and larceny convictions, they were crimes of dishonesty. The solicitor further maintained that trial counsel had waived any objection to the admissibility of the convictions because he discussed them during his opening statement.[4] App. 1048, l. 1 – 1050, l. 2.

Trial counsel argued he had not waived any objection to the identities of the crimes and their dates. App. 1050, ll. 6-18. He added that the similarity of the crime of armed robbery to the armed robbery for which Petitioner was being tried increased the prejudicial effect of admitting the conviction. However, for whatever reason, trial counsel conceded the same argument did not apply

[4] In his opening statement, trial counsel told the jury, "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 [Petitioner]. And they both went to prison together. And they both got out in 1988." App. 421, l. 20 – 422, l. 25.

to the housebreaking and grand larceny convictions because Petitioner was not on trial for those offenses despite the fact that the underlying facts of the case dealt with an alleged housebreaking and larceny. App. 1051, ll. 12-20.

The trial judge ultimately ruled Petitioner's housebreaking and grand larceny convictions were admissible but excluded the armed robbery conviction because it was too similar to the offense for which Petitioner was being tried. App. 1051, ll. 21-24. Later during Petitioner's trial testimony, trial counsel elicited evidence about Petitioner's housebreaking and grand larceny convictions during direct examination as well as Petitioner's fifteen year sentence for those convictions. App. 1204, ll. 13-20.

During Petitioner's PCR hearing in 2017, trial counsel admitted he anticipated Robert "Bo" Southerland would be a difficult witness. He was also aware that Petitioner and Southerland were codefendants in 1977 and were both convicted of multiple counts of armed robbery, housebreaking, and larceny. App. 1638, l. 25 – 1640, l. 19. Despite this, counsel did not consider requesting the trial judge to instruct Southerland not to discuss Petitioner's prior record.[5] Counsel admitted he had no strategic reason for failing to do so, he simply "didn't think of it." App. 1640, l. 20 – 1641, l. 7.

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

> Q: And then on November 22nd, 1976, you were convicted of armed robbery and received an 18 year sentence, correct?
>
> A: Which county?

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

Q: That would be - - well, that's not Clarendon County and it's not Richland County?

A: It was Fairfield County.

Q: So that would be Fairfield County?

A: Yes, sir.

Q: And you were also convicted of armed robbery on January 17th, 1977 in Clarendon County?

A: Yes, sir.

Q: You got a 15 year sentence for that?

A: In that first one, Fairfield County, I was acquitted.

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 you about your record, if you don't mind.

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

Mr. Bell [The Solicitor]: Your Honor, he's allowed to explain his answer.

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

App. 774, l. 15 – 775, l. 25 (emphasis added).

During the PCR hearing, Bruck said he did not foresee that Southerland would "volunteer that information unresponsively to a question," but "[k]nowing Bo Southerland as I then did, I

probably should have foreseen that" and requested a proper instruction from the trial court *in limine*. App. 1677, l. 15 – 1678, l. 1.

PCR Court's Ruling

Finding Petitioner failed to prove prejudice, the PCR judge did not address the deficient performance prong of Strickland.[6] App. 1753. The judge emphasized that the remarks made by Southerland as to Petitioner's prior armed robbery convictions were unresponsive to the question posed and that the trial judge found the response improper. App. 1755. The PCR judge concluded that "the trial judge['s] instructions that jurors could not consider any of [Petitioner's] prior legal proceedings in their deliberations and that they only consider evidence of another crime or misconduct by a witness on the limited issue of credibility precluded jurors from considering this remark on the question of [Petitioner's] guilt or innocence." App. 1755 (citing App. 1508, ll. 13-25). The judge further relied upon trial counsel's thorough cross-examination of Southerland, in which he impeached Southerland's credibility, and counsel's closing argument where he attacked Southerland's credibility and discussed his evasiveness on cross-examination, as evidence of lack of prejudice. App. 1755-1756.

Discussion

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

[6] Strickland v. Washington, 466 U.S. 668 (1984)

this instruction since evidence of Petitioner's prior armed robbery convictions was inadmissible and unfairly prejudicial. Moreover, Petitioner was obviously prejudiced by counsel's deficient performance because he testified at trial and his credibility was crucial to his defense.

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

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

In Green v. State, 338 S.C. 428, 434, 527 S.E.2d 98, 101 (2000), our Supreme Court held the PCR judge properly found Green's trial counsel was ineffective for failing to object to the admission of his prior convictions. Green was convicted of distribution of crack cocaine "as a

result of an undercover sting operation conducted by the South Carolina Law Enforcement Division (SLED)." Id. at 430-431, 527 S.E.2d at 99. SLED agents parked a van outside a bar in Conway, where Green was standing in a group of men. Id. at 431, 527 S.E.2d at 99. "An agent called [Green] over and asked for a twenty, meaning a twenty dollar rock of crack cocaine." Id. (internal quotation marks omitted). Green returned to the group of men. The agents testified at trial that Green returned with the drugs and accepted a marked twenty dollar bill. Id. Green testified he never went back to the van, rather, another man in the group sold the agents the cocaine. Id. Green was arrested. Id. at 431, 527 S.E.2d at 100. When the officers arrived to arrest Green, the other men standing with Green ran. Id. Green testified that he did not run because "he didn't do anything." Id. The marked twenty dollar bill was never recovered. Id.

During cross-examination, the state impeached Green with his 1990 conviction for possession of crack cocaine and his 1991 conviction for possession of cocaine. Id. The trial judge gave the jury limiting instructions. Id. Green's trial counsel failed to object to the admission of Green's prior drug convictions. Id.

Citing to Rule 609(a)(1), SCRE, our Supreme Court asserted that trial courts must weigh the probative value of prior convictions against their prejudicial effect to the accused, and outlined the factors that should be considered: (1) the impeachment value of the prior crime; (2) the point in time of the convictions 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 432-433, 527 S.E.2d at 100-101 (citing State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000)). The Court emphasized that "federal courts have held that prior convictions for the same or similar crimes are highly prejudicial and should be admitted sparingly." Id. at 433, 527 S.E.2d at 100-101.

The Court ultimately held there was evidence to support the PCR judge's ruling that Green was prejudiced by his counsel's failure to argue the prejudicial effect of Green's prior convictions outweighed their probative value. Id. at 434, 527 S.E.2d at 101. The Court concluded that Green's "credibility was critical, as the jury had to choose between his version of events and that of the SLED agents." Id.

In this case, trial counsel was ineffective for failing to request an instruction from the trial judge that Bo Southerland could not discuss Petitioner's prior convictions for armed robbery since the evidence was inadmissible because the convictions were too similar to the offense for which Petitioner was being tried and therefore unfairly prejudicial under Rule 609(a)(1). Significantly, the trial judge ruled Petitioner's prior armed robbery convictions were inadmissible, noting he was "troubled" by the similarity between the prior convictions and the offense for which Petitioner was being tried (armed robbery). See App. 1051, ll. 12-24.

Significantly, trial counsel admitted at the PCR hearing that he should have anticipated Southerland would testify concerning Petitioner's prior armed robbery convictions given that he knew Southerland would be a difficult witness and Petitioner and Southerland were codefendants. See App. 1639, l. 13 – 1641, l. 7 and App. 1677, l. 15 – 1678, l. 1. Consequently, because Petitioner's prior armed robbery convictions were inadmissible and trial counsel knew Southerland would likely testify about the convictions, counsel was ineffective for failing to request the trial judge instruct Southerland not to mention the convictions during his testimony.

Petitioner was prejudiced by counsel's deficient performance because Petitioner testified in his own defense at trial and presented an alibi. His credibility was therefore crucial to his defense. While discussing the admissibility of Petitioner's prior armed robbery convictions during his retrial, even the judge recognized that "this case is all about credibility." See App. 1051, l. 11. Importantly,

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

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

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

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court reverse his convictions and sentence and remand for a new trial.

Respectfully submitted,

s/ Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of March, 2021.

RECEIVED
Mar 22 2021
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable J. Cordell Maddox, Circuit Court Judge

GENE TONY COOPER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency" dated March 20, 2020, the undersigned hereby certifies a true copy of the Brief of Petitioner in the above referenced case has been served upon William Edgar Salter, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and a copy of the Brief of Petitioner has been served on Gene Tony Cooper, #084279, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 22nd day of March, 2021.

s/ Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER