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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

GENE TONY COOPER,

Petitioner,

vs.

THE STATE,

Respondent.

BRIEF OF RESPONDENT

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PETITIONER'S STATEMENT OF ISSUES ON APPEAL

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 ISSUE PRESENTED

Must this Court either dismiss certiorari as improvidently granted or affirm the PCR judge's denial of Petitioner Cooper's issue presented because the record support's the PCR judge's finding that he was not prejudiced under *Strickland* by counsel's failure to obtain an in limine instruction from the trial judge barring Southerland from testifying about Cooper'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***. In addition to the PCR judge's findings, Respondent notes that Cooper timely served and filed his notice of appeal. He then filed a Petition for Writ of Certiorari on November 16, 2018. He presented the following issues for this Court's review:

> 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?
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> 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?
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> 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?

Respondent filed a Return to Petition for Writ of Certiorari on January 28, 2019. On February 18, 2021, this Court filed an Order denying certiorari on Cooper's Questions 1 and 2 but granting certiorari on his Question 3. Cooper filed the Brief of Petitioner on March 22, 2021.

STATEMENT OF FACTS

As the PCR judge correctly found in the Order of Dismissal:

> The evidence presented at trial, viewed in the light most favorable to the State, proved that the [Petitioner] Cooper kidnapped, robbed and murdered the victim (Kimberly Ann Quinn) as the result of a premeditated and sinister plot that originated with a state prison inmate and Cooper conspiring to rob Kim of an insurance settlement check from a car wreck. Cooper and Robert H. "Bo" Southerland carried out the crimes, with the aid and assistance of Brenda McLauren (Cooper's niece), even after they were aware that Kim did not have the insurance check. Cooper netted $ 149.00 for his maliciously brutal crimes. Although Southerland was the chief prosecution witness, much of his testimony was corroborated by other witnesses, including two who saw him and Cooper casing Kim's house on the day of the murder.[3]
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> > FN 3/ As will be seen, only one witness identified both men. The other witness identified only Southerland.

See ***App. 1715***.

Southerland testified that he had been convicted of murder, armed robbery, forgery and conspiracy to commit robbery in this case, and that Cooper was with him when these crimes were committed. Cooper went to Southerland's trailer and woke him up around 8:30 a.m. Thursday, October 5, 1989, and asked if Southerland would "help rob this gal, kill her." After Southerland agreed, Cooper said that Phillip "Red" Farmer had called and told him that the victim was getting an insurance check for $2800.00, and that "she wanted to buy half a pound of [marijuana]." Southerland did not know either Farmer or Kim Quinn. ***App. 681-82; 686***.

The co-defendant friends went down to where Cooper's niece, McLauren, was working "because he didn't know where [Kim] lived .... And when he walked in, she told him that Red wanted him to call ... him, so she gave him a phone number." After speaking with Farmer, Cooper went back into the store and McLauren wrote down the directions to where Kim lived. With Cooper driving his Mercury Cougar (State's Ex. 17), the men went to Platt Springs Rd. The

only house fitting the description that McLauren had given to the men was "right across from some apartments." Southerland warned Cooper that people would notice the car, so he pulled into the apartment complex, parked, and waited for several minutes. ***App. 686-88***.

Cooper then drove to a payphone and called the victim's house. When an answering machine picked up the call, Cooper got back into the car. He then drove them back and forth for several minutes before he again pulled into the parking lot of the apartment complex. Cooper got out and told Southerland to go to a pay phone and call Kim. Southerland did as he was instructed. When she answered the phone, Southerland acted as if he had the wrong number. After that call, he drove back to the apartments, picked up Cooper, and told Cooper that she had answered the phone. ***App. 688-90***.

Cooper got into the car and began driving up and down the road again. He then pulled back into the apartment complex and "sat there" briefly, before driving to a pay phone and calling Kim sometime before 3:00 p.m. Again, he got the answering machine. Following this call, Cooper drove to the apartment complex, backed the car into a space and they sat there. A blonde haired woman who lived across from where they were parked came outside and "was looking at the car." ***App. 690-91***.

When they left the apartments, Cooper drove to the store where McLauren worked. He instructed McLauren to go to Kim's house, and see whether she had the money and still wanted the marijuana. They followed McLauren to Kim's house in their car and stopped about a half block away. After they saw McLauren pull up to the house, they realized that this was not the house they had previously been watching. McLauren came out roughly fifteen minutes later, and they followed her to the West Columbia Post Office. Cooper "blew up" when McLauren told him that Kim didn't have the money, that she wouldn't be getting the check until that Tuesday,

and that the check she had was only for $240.00. Cooper accused McLauren and Farmer of lying to him. He then leaned into McLauren's car and spoke to her. Following this conversation, he said, "Damn the money, I'm going to kill the bitch." This occurred between 3:00 and 4:00 p.m. ***App. 691-94***.

Next, McLauren went home and Cooper drove Southerland back to the South Congaree trailer park where he was living.[1] Cooper told Southerland that he would come pick him up at :00 p.m., and that they would go to a bar on Platt Springs Rd., near Kim's house, and drink some beer. Southerland went to Donnie Shumpert's house around 6:30 or 7:00 p.m. and smoked marijuana.[2] He then waited for Cooper in a trailer belonging to Shumpert's nephew, located on the same property. When Cooper arrived, he was in his green truck. They then went to a "beer joint" off of Platt Springs Rd. and drank a few beers. ***App. 693-97***.

Once they finished their beers, they went to a store in "Triangle City," where Cooper used the telephone to call his wife at 9:00 p.m. As they passed Kim's house on their way to the store, a flatbed truck was sitting in the driveway. Farmer had told Cooper that Kim had a boyfriend. He and Southerland thought the truck belonged to the boyfriend. So, they returned to the bar and shot a game of pool. They later rode past Kim's house again and saw a man saying goodbye to her. As a result, they returned to the bar and stayed there for several minutes. ***App. 697-98***.

From there, they drove back passed Kim's house and the truck was gone. ***App. 697-98***. Next, Cooper stopped at a store and bought a six pack of Budweiser. From there, they went

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[1] Southerland knew a few people in the trailer park and he knew that Cooper's father lived on Greenwood Drive.

[2] Southerland had bought a half ounce of marijuana, so that Kim could smoke it and decide whether she wanted to buy a half pound of it.

Kim's house and pulled into her driveway. It was after 10:00 p.m. Cooper got out, walked up to the door and went inside with Kim when she answered the door. A few minutes later, Cooper came to the screen door and motioned for Sutherland to come in the house. Southerland grabbed the six pack and went into the house. Kim's daughter, Amanda, was sleeping in the front part of the house. ***App. 698-99***.

Cooper told Kim that he heard that she wanted to buy some marijuana and that Southerland had some for her to sample. Southerland "rolled a joint" and smoked it with her, and she said it was good. She told him that she had been on morphine and felt bad, but that this calmed her down. Kim refused Cooper's offer of a beer. Instead, she said that she wanted a Coke and something to eat. Cooper offered to drive her while Southerland would babysit. Sadly, Kim agreed and left with Cooper. ***App. 698-99***.

Southerland was finishing his third beer when Cooper came into the house, exclaiming "[W]e got to go, we got to go." When Southerland asked where Kim was, Cooper told him that she was at "the pond." Southerland knew that Cooper was referring to a pond off Beckman Drive, in South Congaree, which he and Cooper had visited a couple of times. Cooper told Southerland that he had parked the truck a short distance from Kim's house, and Southerland went and sat in it. Cooper walked up about ten minutes later, carrying a black plastic bag containing a leather jacket. As they headed to the pond, Southerland asked what Cooper was going to do. Cooper said that "he was going to kill her." ***App. 699-700***.

They eventually arrived at an abandoned house near the pond, and Cooper got out with a pump shotgun that came from a trailer he and Southerland had broken into a few weeks earlier.[3]

[3] Southerland had fired a round from this shotgun at Donnie Shumpert's house the previous night. ***App. 701***.

Kim was tied to the door inside the house. Her hands were handcuffed behind her, with a stick running through it, and she was "tied in" with strips from a curtain that had apparently been hanging in the house. Cooper untied her. As soon as Cooper took a gag out of her mouth, she asked Southerland for help. However, he did not do anything because Cooper was armed and Southerland could not help her. Kim told Southerland that Cooper had beaten her with a stick, and after Cooper pulled her pants down and shined his flashlight, Southerland could see where Cooper had beaten her bottom. ***App. 700-02***.

Cooper thereafter pulled her outside and told her that he was going to kill her. Even though she begged for him not to kill her, he shot her and she fell over on her left side. Realizing that she was still breathing, Cooper said, "She ain't dead" and he shot her three more times, until all of the shells were gone. Afraid that authorities might recognize that he had used handcuffs stolen from C.C.I., Cooper got his ax from the gun rack of his truck and chopped off both of Kim's hands. ***App. 702-03***.

For his part, Southerland chopped off her feet at Cooper's direction. Because her pants made this difficult, Cooper removed her pants and threw them in the pond. Cooper then dragged her body closer to the pond and put tree limbs on it. Again following Cooper's instruction, Southerland retrieved a chair from near the steps of the house and placed it on her. Cooper said "that's her seat in Hell." Cooper then got a gas can from his truck, poured gas on her and lit it. While her body was burning, Cooper took the rings from her severed hand and threw them in the pond. He gathered her hands, her feet, and the handcuffs. Southerland picked up the gun, the ax and the gas can. Once they had gathered these items, they left. ***App. 703-04***.

They next made a brief stop at the Congaree Creek Bridge on 302. Cooper had placed Kim's hands and feet in a plastic shopping bag and they threw them into the water along with the

ax. After these grizzly events, Cooper was hungry. So, he drove to the Crown Store, bought two hot dogs and ate them. Finally, they went to Cooper's trailer and washed the clothes that they had been wearing. Southerland took a shower and slept on the couch. They buried the murder weapon the next morning in some woods near Cooper's trailer. ***App. 705-06***.

Later that morning, they went to a bank in Cayce, where Cooper used Kim's state I.D. card and cashed the check he had stolen from her purse. Cooper drove them around for some time before going to a car wash, where he washed and vacuumed the truck. Southerland went to Cooper's trailer Saturday night and saw Cooper painting parts of the cab of the truck, a tool box, and the rear window black. ***App. 705; 707-08***.

While Southerland was driving down 302 into West Columbia on Sunday, he ran into Cooper near the residence of Cooper's father, where Cooper had picked up a camper that he kept there. Cooper told him that Kim's body must have been found because "you could see the cars going down the dirt road." Cooper told Southerland he could rent the camper for $50.00 a week, and Southerland followed Cooper back to Pelion. The camper had a T.V. and Cooper wanted to watch the news to see if there was any coverage about the murder. He also wanted to get a newspaper to see if it was in there as well. ***App. 708-09***.

The remaining evidence offered by the prosecution, including testimony from a number of witnesses without any involvement in the murder, corroborated many aspects of Southerland's testimony. This evidence proved that Kim and her six-year-old daughter, Amanda, lived in a West Columbia, South Carolina home in October 1989. She was unemployed and received a monthly AFDC check of $149.00. The check was mailed so that she received it by October 1st. At the time of her murder, Kim's boyfriend, Eugene Carter, was incarcerated at C.C.I. Carter was friends with Phillip "Red" Farmer, another inmate who was also friends with Cooper and

Cooper's niece, Brenda McLauren. ***App. 424-25; 433-36; 441-42; 639-40; 943-52***.

The trial judge ruled that Farmer was an unavailable witness and the State published his 1991 testimony on direct examination, over trial counsel's objection. ***App. 942-63***. Farmer testified that he was housed in Cell Block 3 (CB-3), from where he was able to make collect telephone calls. He also worked in C.C.I.'s educational department, located in the Stoney Building. This gave him access to additional State telephones. On Tuesday, October 3, 1989, Carter told Farmer that Kim was supposed to be receiving an insurance check for $2,800.00, in settlement of a claim against an automobile insurance carrier.[4] On October 4, Farmer received a visit from McLauren, Cooper's niece and co-defendant, who routinely visited him. During this visit, Farmer told her to have Cooper contact him. Farmer called Cooper at his home around 7:30 p.m. that night. ***App. 952-57***.[5]

Farmer informed Cooper that Kim was "receiving an insurance check for $2,800.00" and that "it would be a good opportunity to rob her." Cooper "said he didn't see any problem with it" and that "he didn't have any respect for the bitch." Farmer was supposed to receive $500.00 for setting up the robbery scheme. Cooper called Kim at her home after this conversation, which was around 9:30 p.m. ***App. 957-58***.

Mr. Dana Harley was working as the maintenance man at Lynn Gate Apartments on the morning of Thursday October 5, 1989. The apartments are across the street from Kim's

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[4] Farmer testified that he, Kim, Gerald Legrand and two other people were engaged in an ongoing conspiracy to smuggle drugs into C.C.I. ***App. 975-76***. Gerald Legrand's testimony corroborated this. ***App. 925-33; 936-38***.

[5] Blake Taylor, formerly Director of S.C.D.C.'s Internal Affairs and Audits, testified that there were no records of local calls from the educational unit. However, McLauren's visit was logged in S.C.D.C. records. ***App. 1014-25***.

residence. Mr. Harley identified Cooper and Southerland as occupants of a white Mercury Cougar that drove into the complex's parking lot around 9:30 a.m. They backed into a space from which they could easily watch Kim's house. Although they left after roughly fifteen minutes, they returned about forty-five minutes later. The passenger, Cooper, walked up to and sat on the steps of the apartment that Mr. Hartley was cleaning.[6] Again, Cooper was positioned so that he could watch Kim's house on Platt Springs Rd. The Cougar returned ten or fifteen minutes later, picked up Cooper, and left. ***App. 482-89; 492-94; 499-504***.

Mr. Harley saw Cooper and Southerland pull back into the parking lot sometime "around 3:00 [p.m.] or so." They again backed into the same space and sat for a few minutes before leaving. Mr. Hartley got the license tag number of the Cougar (State's Ex. 17) on this occasion. The car left roughly around 3:30 p.m., but returned around 4:00 p.m. This last time, however, the car did not stop in the lot. ***App. 490-95***.

The State also published the prior testimony of Mrs. Sharon Freeman Counts. She testified in 1991 that she was a resident of Lynn Gate and that she saw the car parked near her apartment between 2:30 and 3:30 p.m. on October 5, 1989. Two white males were in it, and she positively identified Southerland as the passenger. She thought this was suspicious, since "the parking lot is always empty at that time." Her description of the passenger fit Southerland, whom she testified that he had boldly stared at her. ***App. 497-506; 516-26***.

On Friday, October 6th, both Harley and Mrs. Freeman told police what they had seen on the 5th and they described the two men, Cooper and Southerland. Mrs. Freeman's description of

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[6] Hartley paid attention to the men because they were suspicious. Also, he kept the apartment he was cleaning dark when they were present. While he watched Cooper through a peephole on the second visit, but otherwise watched both men through the apartment window. ***App. 509-11***.

the two occupants was virtually identical to Harley's, and she selected Southerland as one of the men she had seen, from a photographic lineup. The only difference between her account and that given by Mr. Harley is that she stated Southerland was a passenger, whereas Mr. Harley remembered Cooper as the passenger. Mr. Harley selected both Cooper and Southerland out of a photographic lineup, and he later positively identified Cooper at trial. ***App. 526-45***.

At roughly the same time that Cooper and Southerland were arriving near Kim's residence on the afternoon of October 5th, Elizabeth Griffin - a good friend of Kim who drove Amanda and her own son to and from school - saw McLauren entering Kim's house as Ms. Griffin was leaving. Ms. Griffin last spoke to Kim around 11:00 p.m. on the 5th. Kim did not feel well, but was feeling better than she had earlier that evening. ***App. 440-46; 186***.

Kim's daughter, Amanda, testified that Kim was home, alone with her, when she went to sleep on Thursday night. Amanda had previously been in a fire and her mother was very protective of her. So, Amanda slept in the living room. She later awoke to the sound of someone knocking at the door. Kim answered the door and two men came into the house although Kim did not want them to enter. Amanda testified that "[i]t was mean loud" and too loud for then-six year old Amanda to go back to sleep. Also, she was threatened by one of the men: "I had rolled over and someone told me to roll back over or they [were] going to do to me what they were doing to my mother." ***App. 424-27***.

Amanda awoke early the following morning, and discovered that Kim was missing. This was unusual for Kim, and the police were called. Neither friends nor law enforcement could find Kim on Friday, October 6th, and her $149.00 AFDC check was missing. Although her purse was found on the ground outside the house, her State I.D. card and all of the money was missing. Her rings, which she wore each day, were also missing, and there were some Budweiser beer cans in

Kim's house. ***App. 424-32; 434-37; 446-51; 456***.

The parties stipulated that someone other than Kim cashed Kim's AFDC check (State's Ex. 14) at a drive-through window of the Knox Abbott Drive branch of South Carolina National Bank around 9:17 a.m. Friday, October 6th. The check was forged by someone who simulated Kim's signature and presented a South Carolina Department of Highways and Public Transportation identification card that had belonged to Kim. ***App. 639-42***.

Farmer had a conversation with Eugene Carter on Friday morning October 6th and learned that Kim was missing. He later went to the education department, where he received a telephone call from Cooper around 10:00 a.m. In a coded conversation, Cooper told Farmer his "intelligence was wrong; that [Kim] did not have the twenty-eight hundred; that he completed the construction job that he was working on; ... that he had burned the excess material[;] and [that he] was real pleased with the job and didn't see any complication." Farmer explained that this meant "the robbery had been completed, ... that [Cooper] had killed Kim Quinn, ... [and] that he had burned the body." App. 958-63.

In October 1989, Teresa Shumpert Dunn lived with her husband, Donnie Shumpert, in a mobile home on Glenwood Drive. Lee Chavis, Ms. Dunn's nephew, lived next door. Both witnesses knew Southerland and Cooper. Southerland would frequently stop by the Shumpert's residence and Cooper would come over to see him. ***App. 901-04; 914-23***. According to Chavis, Cooper and Southerland seemed to be "good friends." ***App. 917***. Cooper appeared to be the leader between the two men, and Ms. Dunn testified that Southerland was not as friendly when Cooper was present. ***App. 904-05***.

On the evening of Tuesday, October 3, 1989, Cooper and Southerland had returned an air compressor that they had borrowed from Mr. Shumpert. They were in Cooper's green pickup

truck. (State's Exhibit 30). Southerland got out of the truck, pointed a shotgun in the air and fired it. Mr. Shumpert told him to put the weapon up because the children were outside, and Southerland put the shotgun back in Cooper's truck. Cooper and Southerland later left in the truck. Cooper also owned a Mercury Cougar (State's Exhibit 17), but he allowed Southerland to drive it. A***pp. 905-07***.

On Thursday, October 5th, Southerland came over to Mr. Shumpert's shop, which was behind their residence. He asked what time it was and someone told him 10:30 p.m. He said that he had to go somewhere at 10:30. He walked out of the shop and Ms. Dunn did not see him again that night. The Cougar was parked in the yard after Southerland left, and it was still parked at the Shumpert residence when Chavis left for work at 7:00 a.m., on Friday, October 6. ***App. 907-09; 917-19***.

Early Friday afternoon, Forest Ranger Mike Hutchins, with the South Carolina Forestry Commission, was dispatched to a fire in some woods near Beckham Rd. The location was also near the residence of Cooper's father. The fire was contained in a relatively small area by the time Ranger Hutchins arrived and he did not further investigate, since there were no obvious signs of damage to an unoccupied building in the area. ***App. 457-66***.

Sadly, Kim's burned and mutilated body was discovered by two boys on Sunday, October 8th. The boys then led their father to it and he then notified law enforcement. **App. 467-81**. The macabre condition of the body was very consistent with Cooper's statements to Farmer. Her brains had literally been blown out of her skull by a shotgun blast; a large amount of brain matter was discovered some distance away from her body; her hands and feet had been severed; and a fire, started by gasoline, had badly burned her body and the debris that had been piled on top of it. Budweiser beer cans were found at the scene and her jeans were found in the nearby

pond. ***App. 549-57; 608-11; 614-35***. Divers from the Lexington County Sheriff's Department retrieved Kim's severed feet and her left hand from the Congaree Creek, near a bridge on Highway 302, in South Congaree. Also, Cooper's ax (State's Exhibit 22) was found near one of the feet. ***App. 560-71***.

Even though the ax had been in the creek for several days, there were three separate spots which tested positive for human blood. ***App. 649-50***. Law enforcement examined Cooper's truck and did not find any blood. However, the truck's cab had recently been painted black, including the floorboard, a tool box, the rear window and the area behind the seats. This made it difficult to accurately test for the presence of blood. Despite efforts to destroy evidence, samples of paint chips from the ax matched those taken from the cab. ***App. 651-54; 667-79***.

Marsha Burroughs Crane testified that she was married to Cooper in October 1989. They lived in Pelion, South Carolina at the time. She testified that Cooper kept all of their vehicles clean and that he would wash them several times a week. ***App. 893***. She last saw the ax that was introduced at trial when Southerland returned it on September 30th. ***App. 897***. Cooper's parents lived on Greenwood Dr. in West Columbia. Their house was near the pond where Kim was murdered, and Ms. Crane had been there with Cooper. ***App. 880-82***.

Ms. Crane also knows Southerland. Although she testified that he was a "business acquaintance" of Cooper, she admittedly did not know what else the two men did together. Southerland came to their trailer on Wednesday October 4, 1989, around 9:00 p.m. She worked on Thursday night. ***App. 897-99***. On the Sunday after Kim's murder, October 8th, 1989, she and Cooper went to his parents' home and picked up Cooper's camper. She corroborated Southerland's story that they saw him in "his" car on their way home. They pulled off of the road when he waived them down. After Cooper and Southerland exited their vehicles and had a

conversation, the Coopers went home. ***App. 882-84***.

Later Sunday evening, Cooper, Ms. Crane, and her two boys went to the home of Cooper's sister in Wagner, South Carolina. Southerland and McLauren were also there. At some point, Cooper had a private conversation with his sister, McLauren (his niece) and Southerland. Ms. Crane did not hear the substance of that conversation***. App. 884-85***.

Forensic pathologist Dr. Joel Sexton testified that he performed the autopsy on the victim. He identified the body through medical records. Dr. Sexton found three gunshot wounds. The wound to the head would have been immediately fatal and was listed as the cause of death. A wound to her back, near the shoulder blade, was fired before the head wound and caused extensive damage to about three-fourths of Kim's chest cavity. The remaining wound, to Kim's neck, would also have been fatal. Dr. Sexton opined that the post-mortem amputation of Kim's hands and feet were consistent with being caused by Cooper's ax. ***App. 578-96***. Dr. Sexton recovered buckshot, birdshot and wadding from the wounds. The buckshot was recovered from her neck, while the birdshot was found in the head wound. ***App. 588-89***.

STANDARD OF REVIEW

This Court's "standard of review in 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 "defer[s] to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." *Id.* The Court "review[s] questions of law de novo, with no deference to trial courts." *Id.* at 181, 810 S.E.2d at 839. The Court should deny certiorari on Cooper's claim of ineffective assistance of counsel because he has not met this burden of proof.

ARGUMENT

This Court must either dismiss certiorari as improvidently granted or affirm the PCR judge's denial of Cooper's issue presented because the record support's the PCR judge's finding that he was not prejudiced under *Strickland* by counsel's failure to obtain an *in limine* instruction from the trial judge barring Southerland from testifying about Cooper's prior armed robbery convictions.

Cooper 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 Cooper's prior armed robbery convictions. *See* ***App. 1697-98*** (Cooper's argument below). However, Respondent submits that this Court must either dismiss certiorari as improvidently granted or affirm the PCR judge's denial of Cooper's claim because the record support's the PCR judge's finding that he was not prejudiced by counsel's failure to obtain an *in limine* instruction and the PCR judge correctly applied the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984), in denying relief. *See* ***App. 1753-57***.

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 Supreme Court's decision in *Strickland* "provides the proper framework for assessing that claim." *Shinn v. Kayer*, 141 S.Ct. 517, 522 (2020). Under *Strickland*, Cooper is required to make a twofold showing. First, he must prove that his attorney's "representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88.[7]

[7] "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

Even if Cooper proves deficient performance, he must also prove that he was prejudiced by his attorney's 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. It is insufficient to prove "that the errors had some conceivable effect on the outcome of the proceeding." *Id*. at 693. Thus, merely identifying "some conceivable effect on the outcome of the proceeding" is insufficient. See *Harrington v. Richter,* 562 U.S. 86, 104 (2011) (quoting *Strickland,* 466 U.S. at 693) (internal quotation marks omitted).

Instead, "[c]ounsel's errors must be 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Richter*, 562 U.S. at 104 (quoting *Strickland*, 466 U.S. at 687). A reasonable probability means a " 'substantial,' not just 'conceivable,' likelihood of a different result." *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (quoting *Richter*, 562 U.S. at 112). *See also Maryland v. Kulbicki*, 577 U.S. 1, 2 (2015) ("Counsel is unconstitutionally ineffective if his performance is both deficient, meaning his errors are 'so serious' that he no longer functions as 'counsel,' and prejudicial, meaning his errors deprive the defendant of a fair trial") (quoting *Strickland*, 466 U.S. at 687). The *Strickland* standard is "highly demanding." *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986).

Initially, Respondent notes that 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***. This accords with the Supreme Court's explanation in *Strickland* that "[t]he 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,

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action 'might be considered sound trial strategy.' " *Id*. (Citation omitted).

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 Cooper claimed, since is clear that there was absolutely no resulting prejudice.

Nevertheless, the record supports the conclusion that there was no deficient performance. Cooper's lead counsel, David I. Bruck, Esquire, 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 (emphasis added)

In connection with Issue 2 in the certiorari petition, which this Court declined to review, Mr. Bruck testified at the PCR hearing that he had conceded Cooper'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 for the defense 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***. His decision to introduce the housebreaking and grand larceny convictions on direct examination of his client was also 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 Cooper and Southerland were associates who knew each other and who both knew individuals in prison. However, 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). Also, he was aware that Cooper wanted to testify and he agreed with his client's decision. "[W]hether it was necessary or not, I thought it was the right thing for him to do. …. I thought that the jury needed to hear Tony denying this as he had denied it for so many years. He hadn't testified at the first trial and that had not been a successful strategy and it just seemed like a better approach." ***App. 1683-86***.[8]

[8] Because the evidence of Cooper'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

Because counsel made a reasonable decision under *Strickland* to concede his client's incarceration in opening statement and reasonably handled the admissibility of Cooper's prior housebreaking and grand larceny convictions, Cooper cannot prove deficient performance on the present claim. The fact another attorney may have handled this issue differently does not show that counsel, who had extensive criminal trial and appellate experience,[9] was deficient in the manner he chose to handle it. *See 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"). Again, however, it is unnecessary to address the adequacy of counsel's performance because there clearly was no Sixth Amendment prejudice

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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 Cooper's relationship in proper context from the defense's perspective and to present Cooper as someone who was not going to hide anything from his jury. This gave counsel and Cooper "more credibility with the jury." ***App. 1749-50***.

[9] 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 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***.

and counsel's opening statement underscores the absence of prejudice on the present claim

Additionally and as the PCR judge correctly found, 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 at the PCR hearing that he was aware Cooper and Southerland were co-defendants in the armed robberies for which Cooper 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 Cooper was his co-defendant in the armed robberies. Mr. Bruck did not think of making a motion *in limine* to

prohibit Southerland from mentioning Cooper's convictions or requesting a curative instruction because he did not foresee that Southerland would "volunteer that information unresponsively to a question" even though he speculated, in hindsight, "I probably should have foreseen that." ***App. 1640-41; 1677-78***. *Contra Strickland*, 668 U.S. at 689 (explaining that a reviewing court must "reconstruct the circumstances of counsel's challenged conduct" and "evaluate the conduct from counsel's perspective at the time").[10] *See also Willis v. United States*, 87 F.3d 1004, 1006 (8th Cir. 1996) ("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").

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

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 jurors that they could not consider any of Cooper's prior legal proceedings in their deliberations (***App.***

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[10] The Supreme 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. 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).

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***. "[It is] the almost invariable assumption of the law that jurors follow their instructions" *United States v. Olano*, 507 U.S. 725, 740 (1993) (citing *Richardson v. Marsh*, 481 U.S. 200, 206 (1987)). Because Cooper testified at trial, these instructions prevented jurors from considering any past misconduct by him on the question of his guilt or innocence. *Id*. *See also Olano*, 507 U.S. at 740-741 (" ''[We] presum[e] that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them' ") (citing *Francis v. Franklin*, 471 U.S. 307, 324, n. 9 (1985)); *Weeks v. Angelone*, 528 U.S. 225, 234 (2000) ("[a] jury is presumed to follow its instructions") (citing *Richardson*, 481 U.S. at 211). Indeed, in assessing prejudice for purposes of an ineffective assistance of counsel claim, the Court in *Strickland* admonished that "a court should presume ... that the judge or jury acted according to law." 466 U.S. at 694.

Also, this Court has previously found that the trial judge in this case did not abuse his discretion in allowing the State to introduce Cooper's 1977 convictions for housebreaking and grand larceny under Rule 609, S.C. R. Evid., in part, because the trial judge "gave a limiting charge to the jury explaining Cooper's convictions could only be considered for impeachment purposes." *State v. Cooper*, 386 S.C. 210, 223, 687 S.E.2d 62, 69 (Ct. App. 2009), *cert*. *dismissed as improvidently granted*, 400 S.C. 256, 734 S.E.2d 166 (2012), *cert*. *denied*, 569 U.S. 976 (2013) (*Cooper III*). *Accord State v. Staley,* 294 S.C. 451, 365 S.E.2d 729 (1988) (trial judge's refusal of defendant's submitted charge limiting use of evidence of his prior convictions solely for impeachment purposes constituted reversible error; failure to charge was especially damaging given defendant was on trial for the same offense for which he had been previously

convicted); *State v. Bryant,* 307 S.C. 458, 415 S.E.2d 806 (1992) (trial judge's failure to give a charge limiting testimony of defendant's prior criminal record solely for impeachment purposes constituted reversible error and could not be considered harmless).

Cooper's reliance on *Green v. State*, 338 S.C. 428, 527 S.E.2d 98 (2000), and *United States v. Beahm*, 664 F.2d 414 (4th Cir. 1981), is misplaced because both cases involve the prosecution's impeachment of a testifying defendant with prior convictions. See *Green*, 338 S.C. at 434, 527 S.E.2d at 101;[11] *Beahm*, 664 F.2d at 418 (the district court erred by admitting an eleven year old sodomy conviction for impeachment purposes under Rule 609(b), Fed. R. Evid. because it was more than ten years old and "the district court not only failed to make any express finding that the probative value substantially outweighed the prejudicial effect of the evidence, but the record [was] silent both as to any specific facts supporting the probative value of the conviction for impeachment purposes, or showing how its probative value substantially outweighs its prejudicial effect").[12]

Green and *Beahm* are only relevant to a claim that the defendant was erroneously impeached with a prior conviction(s) under Rule 609, SCRE. Again, this Court denied certiorari to review denial of relief on Cooper's Issue 2, which raised this claim. The present claim does not involve the State's impeachment of Cooper with his prior convictions. Instead, this claim

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[11] The Court in *Green* found that "[l]imiting instructions alone do not make an erroneous admission of prior conviction evidence harmless." *Id*.

[12] In *dicta*, the Fourth Circuit added that "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." *Id*. at 418-19 (footnote omitted). The Court likewise found that admission of a nine year old conviction for impeachment purposes was reversible error. *Id*. at 419-20.

relates to counsel's failure to anticipate and try to prevent Southerland's evasive responses on cross-examination, which presented evidence of other bad acts by Cooper, by making a motion in limine. Accordingly, *Green* and *Beahm* are irrelevant to the issue of whether the PCR judge erred in denying relief on this claim.

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 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;[13] 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 Cooper 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 Cooper 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

[13] 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 Cooper. ***App. 742-52; 755-64***.

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 Cooper; 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 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 Cooper. ***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.

Of course, even assuming that counsel had made a motion *in limine*, there is nothing in the present record that suggests, much less creates a reasonable probability under *Strickland*, that the motion would have been granted. To the contrary, the PCR judge correctly found that "counsel reasonably understood that evidence of [Cooper'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***.

Finally, Respondent submits that there was overwhelming evidence of Cooper's guilt, notwithstanding his argument to the contrary. The State's evidence showed - primarily through the prior testimony of Farmer and Southerland's eyewitness testimony[14] - that this was a premeditated armed robbery, which Cooper 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

[14] In support of his contention that the proof of his guilt was not overwhelming, Cooper cites to *Cooper v. Moore*, 351 S.C. 207, 215-17, 569 S.E.2d 330, 334-35 (2002) (*Cooper II*). His reliance is misplaced. The primary evidence of Cooper's involvement in the conspiracy and murder in the original trial in *State v. Cooper*, 312 S.C. 90, 94, 439 S.E.2d 276, 278 (1994), *overruled*, *Franklin v. Catoe*, 346 S.C. 563, 552 S.E.2d 718 (2001) (*Cooper I*), was the circumstantial evidence from Farmer. Neither Southerland nor any other eyewitness testified at the original trial.

Unlike *Cooper I*, Southerland, who was present at the inception of the conspiracy with Farmer and an eyewitness to the murder, testified at his retrial in *Cooper III*, and his testimony was corroborated in most details by other witnesses.

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 Cooper the jury would have had to accept that virtually every single prosecution fact witness either lied or was mistaken. *See* Order, ***App. 1744-45***. In light of this overwhelming evidence of his guilt, Cooper has not and cannot show prejudice from counsel's performance. *See Strickland*, 466 U.S. at 696 ("… a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support"). *Cf. id*. at 700 (with respect to the death sentence imposed on Strickland, the Court held that "[g]iven the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed").

In light of the trial judge's limiting instructions, counsel's opening statement, 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 Cooper was his co-defendant in the armed robberies.

CONCLUSION

Respondent submits that the Court should either dismiss certiorari as improvidently granted or affirm the PCR judge's denial of Cooper's claim for the foregoing reasons.

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