

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Aiken County
Doyet A. Early, III, Circuit Court Judge

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S.C. Supreme Court

JOSEPH WALKER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-211267

BRIEF OF PETITIONER

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ISSUES PRESENTED

1. Did the PCR judge correctly grant relief by finding trial counsel ineffective in failing to interview and call as an alibi witness, Robina Reed, when Ms. Reed's name and address appear in evidence provided to trial counsel from the State, prior to trial respondent gave trial counsel's investigator Ms. Reed's name and place of employment and the investigator's note was in trial counsel's file and Ms. Reed's credible testimony at the PCR hearing establishes an alibi?

2. Did the PCR judge correctly grant relief by finding that the cumulative effect of trial counsel's errors in failing to move for a continuance to obtain a forensic report revealing that no semen was identified from the sexual assault evidence kit collected from the complainant, failing to investigate the complainant's alcohol use, failing to cross examine the complainant in regard to discrepancies as to the time of the alleged incident and failing to interview the alibi witness, Ms. Reed, resulted in prejudice to respondent?

STATEMENT

In August 2002, the Aiken County Grand Jury indicted Walker for criminal sexual conduct first degree, possession of a firearm or knife during the commission of a violent crime and kidnapping. On July 22, 2003, Walker proceeded to jury trial before the Honorable James R. Barber, III. The jury returned a verdict of not guilty of possession of a firearm or knife during the commission of a violent crime and guilty of criminal sexual conduct first degree and kidnapping. Judge Barber sentenced Walker to 24 years concurrent for each charge. An appeal was perfected on Walker's behalf and the South Carolina Court of Appeals affirmed the conviction and sentence. State v. Walker, Op. No. 2004-UP-618 (S.C.Ct.App. filed December 9, 2004).

On January 7, 2005, Walker filed an application for post conviction relief. On March 9, 2007, an evidentiary hearing was held before the Honorable Doyet A. Early, III. Walker, Robina Reed, trial counsel Kelly Perkins Brown and Assistant Solicitor Brenda Brisbin testified at the PCR hearing. In a written order signed May 24, 2007, Judge Early granted post conviction relief, finding that counsel was ineffective in failing to interview Robina Reed as an alibi witness and Walker was prejudiced by counsel's deficient performance. Additionally, Judge Early found that Walker established prejudice through the cumulative effect of trial counsel's errors in failing to obtain a forensic report revealing that no semen was identified from the sexual assault evidence kit collected from the complainant, failing to investigate the complainant's alcohol use, failing to cross examine the complainant in regard to discrepancies as to the time of the alleged incident, and failing to interview the alibi witness, Ms. Reed.

The State filed a notice of intent to appeal. On January 4, 2008, the State filed a petition for writ of certiorari. Respondent filed a return to the State's petition for writ of certiorari on September 2, 2008. In an order dated November 20, 2009, the South Carolina Court of Appeals granted the

State's petition for writ of certiorari. The State filed the brief of petitioner on February 18, 2010. Walker filed the brief of respondent on June 30, 2010. The case was argued before the South Carolina Court of Appeals on October 5, 2011. On February 22, 2012, the Court of Appeals reversed the grant of relief by the PCR judge. Walker v. State, 397 S.C. 226, 723 S.E.2d 610 (Ct.App. 2012). The petition for rehearing was filed and then denied on March 15, 2012.

On June 15, 2012, Walker filed a petition for writ of certiorari with this Court. On March 5, 2013, this Court granted the petition for writ of certiorari. This brief of petitioner follows.

ARGUMENTS

1. The PCR judge correctly granted relief by finding trial counsel ineffective in failing to interview and call as an alibi witness, Robina Reed, when Ms. Reed's name and address appear in evidence provided to trial counsel from the State, prior to trial respondent gave trial counsel's investigator Ms. Reed's name and place of employment and the investigator's note was in trial counsel's file and Ms. Reed's credible testimony at the PCR hearing establishes an alibi?

Margaret Sanders, the prosecuting witness, testified that on March 2, 2002, her car broke down at the BP gas station in Denmark, South Carolina. Ms. Sanders testified that a black man repaired her car, replacing a wire, and she told him to follow her to her house so that she could pay him. (App. p. 45, lines 10 – p. 46, lines 1-25). According to Ms. Sanders, the man followed her into her home, grabbed her, blindfolded her and put her in his truck. Ms. Sanders testified that when he finally stopped driving, he took her into a house and sexually assaulted her. (App. p. 49, lines 14- p. 50, 51, 52). According to Ms. Sanders, the man took her back to her house early the next morning. (app. p. 53, lines 9 – 20).

Lieutenant Rhonda Bamberg of the Orangeburg County Sheriff's Office testified that after interviewing Ms. Sanders, she obtained a video surveillance tape for March 2, 2002, from the BP station in Denmark. (App. p. 151, lines 3-7). Lieutenant Bamberg showed the tape to Ms. Sanders and Ms. Sanders picked out a black male on the tape who "was most likely the person that had sexually assaulted her." (App. p. 152, lines 15 – p. 153, lines 1-2). According to Lieutenant Bamberg, the clerk from the BP identified the man selected from the video as respondent, Joseph Walker. Based on the information from Ms. Sanders and the clerk, Ms. Sanders was shown a photo line-up and, predictably, picked Walker as her assailant. (App. p. 154, lines 1-19).

During the PCR hearing, Walker testified that he told Detective Redd that he was at his girlfriend Robina's house during the time of the sexual assault. (App. p. 411, line 25 – p. 412, 413,

lines 1-21). Detective Redd was not called as a witness at trial. Walker testified that prior to trial Bennie, an investigator working for trial counsel, asked him if he had any witnesses and Walker told him where Robina worked. (App. p. 408, lines 9-13). Robina was not called as a witness at trial.

Trial counsel admitted that she never spoke with Robina Reed. (App. p. 371, line 25 – p. 372, lines 1-16). Trial counsel claimed that Walker did not tell her about the alibi witness, Robina Reed. (App. p. 372, lines 19 – p. 373, lines 1-25). Walker testified that he asked trial counsel and trial counsel’s investigator to talk with Robina Reed. (App. p. 413, lines 14-15; p. 408, lines 9-13). Trial counsel admitted that there was a note in her file referencing Robina, a manager at Hardees. (App. p. 371, lines 22 – 24). When asked by the PCR judge what Ms. Reed’s name was doing in her file, trial counsel testified that Mr. Walker had given the name to her investigator, Bennie Williams and the note was written by the investigator, corroborating Walker’s testimony at the PCR hearing. (App. p. 373, lines 9-14). Trial counsel admitted that she did not know if the investigator took any steps to locate the witness, Robina Reed. (App. p. 373, lines 15-19). Trial counsel admitted that she did not discuss with her investigator the significance of the name, Robina, written on a note contained in trial counsel’s file. The note was admitted in evidence at the PCR hearing as plaintiff’s exhibit No. 4. (Supplemental App. p. 6). Additionally, a receipt provided to trial counsel from the State prior to trial lists Robina Reed’s name and address. (App. p. 371, lines 5 – 12). The receipt was admitted in evidence at the PCR hearing as plaintiff’s exhibit No. 3. (Supplemental App. p. 5).

Robina Reed testified at the PCR hearing that in March of 2002, she and Walker were lovers. (App. p. 393, lines 16-20). While Ms. Reed could not remember the specific date, she testified that she and Walker spent every weekend together for six months to a year before Walker “disappeared” in late March. (App. p. 397, lines 21 – p. 398, lines 1-2). Ms. Sanders’ incident

took place on Saturday, March 2, 2002. (App. p. 360, lines 2-7). Ms. Reed testified that her relationship with Walker ended in late March of 2002, and she was unaware of Walker's arrest on March 22, 2002. (App. p. 404, lines 5-9; p. 395, lines 3-21; p. 399, lines 20-21). Ms. Reed testified that she believed that Walker "got tired of my mouth" and took off. (App. p. 395, lines 10-14).

Ms. Reed testified that she had worked at Hardees since 1988, and worked as the manager of Hardees in March 2002. (App. p. 388, lines 22 – p. 389, lines 1-24). She testified that Walker would spend the night at her house during that time. (App. p. 393, lines 21-22). Ms. Reed testified that in March of 2002, her car was broken and Walker would come to the Hardees and wait on her to take her home. (App. p. 394, lines 4-12). The PCR judge asked Ms. Reed, "And you're telling me that you spent - - Mr. Reed (sic) was staying with you that first weekend in March of 2002?" Ms. Reed responded, "Yes." (App. p. 403, lines 2-5). Upon further questioning, Ms. Reed testified, "I know we spent a lot of days together. I can't tell you no particular day." (App. p. 405, lines 17-18). She was able to testify, however, that prior to the last time she saw Walker, they spent every weekend together at either her house or his. (App. p. 406, lines 4-8). PCR counsel asked Ms. Reed, "Prior to the last time that saw Mr. Walker did y'all spend every weekend together?" (App. p. 406, lines 4-5). Ms. Reed responded, "Yea, we spend every weekend together." (App. p. 406, line 6).

The PCR judge correctly found trial counsel ineffective in failing to interview and call as an alibi witness, Robina Reed, when Ms. Reed's name and address appear in evidence provided to trial counsel from the State, prior to trial respondent gave trial counsel's investigator Ms. Reed's name and place of employment and the investigator's note was in trial counsel's file. As the PCR judge noted in the order granting relief, "Trial counsel was aware or should have been aware, of the existence of the alleged alibi witness, Robina Reed." (App. p. 442).

The PCR judge applied the proper standard in granting post conviction relief. In the order the judge wrote, “**THE COURT THEREFORE FINDS AND CONCLUDES** that the Applicant has met his burden to establish both that his Trial Counsel was ineffective, and that prejudice resulted. Strickland, supra; Rule 71.1(e), SCRCP.” (App. p. 444). The order granting post conviction relief applies the correct law and correctly cites Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The State’s contention that the PCR judge applied an incorrect standard is without merit. In the order granting PCR, the judge wrote, “Trial counsel offered no explanation as to her failure, or the failure of her investigators, to attempt to locate Reed [the alibi witness].” (App. p. 444). Respondent established that trial counsel was deficient in failing to locate the alibi witness and the PCR judge simply noted that trial counsel offered no strategic reason for failing to contact the alibi witness.

The State’s assertion that trial counsel was not deficient because, according to trial counsel, respondent never provided her with the alibi information is not supported by the record. The record supports the finding that respondent provided trial counsel’s investigator with the alibi witness’s name and place of employment. Trial counsel knew or should have known of the existence of the alibi witness through her investigator as well as discovery provided to her by the State. The record supports that counsel was deficient in failing to contact the alibi witness and that respondent was prejudiced by counsel’s deficient performance

Ms. Reed’s testimony at the PCR hearing establishes an alibi. While, five years later at the PCR hearing, Ms. Reed could not remember the specific date of March 2, 2002, her testimony indicated that during that time frame she and Walker spent the weekends together, making it impossible for Walker to have been with Ms. Sanders from Saturday night, March 2, 2002, until five in the morning the following day as testified by Sanders. This case is easily distinguished from

Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995), where the failure to call witnesses did not result in prejudice because the witness' testimony placed the defendant in Florida between 8:00 and 8:30 AM and the crime took place at 8:30 PM in Williamsburg County. In Glover the fact that the defendant was in Florida at 8:00 AM did not preclude him from being in Williamsburg County at 8:30 PM. Unlike the facts in Glover, Ms. Reed's testimony establishes an alibi.

Trial counsel was ineffective in failing to interview and call Ms. Reed as an alibi witness. Walker was prejudiced. In order to establish prejudice there must be "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, 386 S.E.2d 624, 625 (1989). The State's case against Walker was based entirely on the testimony of the one complaining witness, Ms. Sanders. There was no forensic evidence linking Walker to an assault of Ms. Sanders and no witnesses who could corroborate Ms. Sanders' testimony. Ms. Sanders' identification of Walker was made only after she had viewed a video tape of Walker entering the BP station. There is a reasonable probability that Ms. Reed's testimony would have made the difference in obtaining an acquittal. See Martinez v. State, 304 S.C. 39, 403 S.E.2d 113 (1991).

In the order of dismissal the PCR judge wrote, "The Court finds that this failure [trial counsel's failure to locate and call Reed as an alibi witness] severely prejudiced the Applicant's right to a fair trial. While it is the role of the jury to gauge the credibility of the witnesses at trial, the Court finds that the testimony of Reed at the PCR hearing was credible. The jury would have weighed the credibility of the testimony of the witnesses, and it is reasonable to assume that the outcome of the deliberations may have been different had this witness testified in light of the facts of this case." Walker was prejudiced by trial counsel's deficient performance.

PCR findings must be upheld where supported by any evidence of probative value in the record. Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007). The PCR judge's findings that trial counsel was deficient in failing to interview and call Robina Reed as an alibi witness and that respondent was prejudiced by the deficient performance are supported by not just any evidence but plenty of evidence in the record. The finding of the PCR judge must be upheld.

The Court of Appeals found that trial counsel's failure to investigate Reed as an alibi witness was deficient performance. The Court wrote, "We agree with the court's conclusion that trial counsel's performance was deficient because we find 'counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'"(Citing Edwards, 392 S.C. at 456, 710 S.E.2d at 64 ; quoting Strickland, 466 U.S. at 687). Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct.App. 2012). The Court of Appeals found, however, relying on Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995), that Reed's testimony does not qualify as an alibi and therefore Walker was unable to demonstrate prejudice. The Court of Appeals wrote:

Reed's testimony makes it less likely Walker is guilty. Taken as a whole, however, her testimony does not account for Walker's whereabouts on March 2, 2002, such that it was physically impossible that he committed the crimes. Although Reed began by saying Walker spent the weekend with her, she eventually said she could not specifically remember whether Walker spent the night with her on March 2. Even her specific testimony that Walker "was staying with [her] that . . . weekend" does not foreclose the possibility that he arrived at her house on Saturday morning after committing the crimes on **Friday** night. Therefore, like the testimony of the two witnesses in Glover, Reed's testimony does not establish an alibi because it leaves open the possibility that Walker is guilty. (emphasis added).

Walker, 397 S.C. at 238, 723 S.E.2d at 616. The Court of Appeals erred.

First, there is no question that the complaining witness testified that the incident took place on Saturday, March 2, 2002, not on Friday the day before. Second, Reed testified at the PCR hearing that Walker had been spending weekends and Saturday nights with her every weekend for six months to a year. PCR counsel questioned Reed:

Q. Now, at the first of March – The first weekend of March of 2002 were you and Mr. Walker still involved in a sexual relationship?

A. Of course.

Q. And we're now five years later; is that correct?

A. Yea.

Q. Okay. At the time before he disappeared had Mr. Walker been spending [sic] with night with you on the weekends and on Saturday night?

A. Yes, he has.

Q. Okay. Had that been going on every weekend for six months to a year?

A. Yea.

(App. p. 397, lines 15 – p. 398, lines 1-2).

The PCR judge asked Ms. Reed, “And you’re telling me that you spent - - Mr. Reed (SIC) was staying with you that first weekend in March of 2002?” Ms. Reed responded, “Yes.” (App. p. 403, lines 2-5). Upon further questioning, Ms. Reed testified, “I know we spent a lot of days together. I can’t tell you no particular day.” (App. p. 405, lines 17-18). She was able to testify, however, that prior to the last time she saw Walker, they spent every weekend together at either her house or his. (App. p. 406, lines 4-8). PCR counsel asked Ms. Reed, “Prior to the last time that saw Mr. Walker did y’all spend every weekend together?” (App. p. 406, lines 4-5). Ms. Reed responded, “Yea, we spend every weekend together.” (App. p. 406, line 6).

While on cross examination, Reed admitted that she could not remember specifically being with Walker on March 2, 2002, the jury should have heard her testimony that she and Walker's usual practice during the time frame including March 2, 2002, was to spend the night together. The jury could then make a determination as to the credibility of the alibi testimony and the judge would instruct the jury about assessing the credibility of the alibi testimony.

This Court's reliance on Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995), is misplaced. In Glover the witness testified that the defendant was in Florida eleven hours before the crime was committed at a location approximately six and a half hours away. The South Carolina Supreme Court found that the testimony of the witness did not establish an alibi because the defendant could have left Florida and traveled to the location within six and half hours and committed the crime. In the present case, if the jury believes the alibi witness, Robina Reed, as the PCR judge did, that she was with Walker on Saturday night March 2, 2002, it would have been impossible for Walker to have committed the crimes.

Reed's testimony establishes an alibi and a jury, not an appellate court, should determine what weight to give the alibi testimony. It is important to note that the PCR judge found Reed's testimony credible. In the order of dismissal the PCR judge wrote, "The Court finds that this failure [trial counsel's failure to locate and call Reed as an alibi witness] severely prejudiced the Applicant's right to a fair trial. While it is the role of the jury to gauge the credibility of the witnesses at trial, the Court finds that the testimony of Reed at the PCR hearing was credible. The jury would have weighed the credibility of the testimony of the witnesses, and it is reasonable to assume that the outcome of the deliberations may have been different had this witness testified in light of the facts of this case." Walker was prejudiced by trial counsel's deficient performance. The PCR judge's order granting relief and ordering a new trial is supported by the record and is not

controlled by an error of law. Under the any evidence standard the Court of Appeals erred in reversing the finding of the PCR judge.

Reed's testimony at the PCR hearing that Walker was at her house on March 2, 2002, is corroborated by the recorded statement Walker gave the police when he was arrested on March 22, 2002. Walker testified that he told Detective Redd that he was at his girlfriend Robina's house during the time of the sexual assault. (App. p. 411, line 25 – p. 412, 413, lines 1-21). As the Court of Appeals correctly notes in finding counsel ineffective for failing to investigate Reed as an alibi witness, "Counsel admitted she watched the DVD of Walker's interview. Therefore, she was aware of Walker's claim that he was with Reed on the night of the crime." Walker v. State, 397 S.C. 226, 723 S.E.2d 610, 615 (Ct.App. 2012). If Reed had testified at trial and Walker requested a charge on alibi, the trial judge would have erred in not instructing the jury on the law of alibi. "The failure to give an alibi charge, where the defendant claims to be at another place, is reversible error. State v. Robbins, 275 S.C. 373, 271 S.E.2d 319 (1980). The Court of Appeals erred in finding that Reed's testimony did not meet the legal definition of alibi.

The Court of Appeals' determination that Reed's testimony did not establish an alibi is in conflict with the reasonable probability standard established by Strickland. In order to establish prejudice there must be "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Reed testified that she and Walker spent the night together on Saturday, March 2, 2002. The State's case against Walker was based entirely on the testimony of the one complaining witness, Ms. Sanders. There were questions about this witness's credibility. As discussed below, this Court found counsel ineffective for failing to adequately cross examine the witness about

conflicting evidence as to the time the incident is alleged to have happened. There was no forensic evidence linking Walker to an assault of Ms. Sanders and no witnesses who could corroborate Ms. Sanders' testimony. Ms. Sanders' identification of Walker was made only after she had viewed a video tape of Walker entering the BP station. There is a reasonable probability that Ms. Reed's testimony would have made the difference in obtaining an acquittal. See Martinez v. State, 304 S.C. 39, 403 S.E.2d 113 (1991). The Court of Appeals erred in refusing to find that Walker was prejudiced by trial counsel's deficient performance.

2. The PCR judge correctly granted relief by finding that the cumulative effect of trial counsel's errors in failing to move for a continuance to obtain a forensic report revealing that no semen was identified from the sexual assault evidence kit collected from the complainant, failing to investigate the complainant's alcohol use, failing to cross examine the complainant in regard to discrepancies as to the time of the alleged incident and failing to interview the alibi witness, Ms. Reed, resulted in prejudice to respondent.

While Walker is entitled to a new trial based on counsel's failure to investigate the alibi witness, the PCR judge found three additional instances of ineffective assistance of counsel. The PCR judge found counsel ineffective in failing to move for a continuance to await completion of forensic testing that revealed that no semen was identified from the sexual assault evidence kit collected from the complainant, failing to investigate the complainant's alcohol use, as well as failing to cross examine the complainant in regard to discrepancies as to the time of the alleged incident. The PCR judge wrote, "THE COURT FURTHER FINDS AND CONCLUDES that the Applicant has independently established a second ground for prejudice with the cumulative effect of Trial Counsel's error in her failure to investigate Sanders' alcohol use, her failure to move to continue the hearing to await the written results of the forensic testing, her failure to cross-examine the witness as to the discrepancy of the conflicting times of the incident, and her failure to investigate or interview Reed, the combination of which prejudiced the Applicant." (App. p. 444).

The PCR judge applied the proper standard in granting post conviction relief. The State's contention that the PCR judge applied an incorrect standard is without merit. The PCR judge citing Green v. State, 351 S.C. 184, 569 S.E.2d 318 (2002) wrote, "These failures cumulatively prejudiced the Applicant and adversely affected his right to a fair trial under the fact of this case." (App. p. 445). In Green the South Carolina Supreme Court wrote, "Whether the cumulation of several errors, which by themselves are not prejudicial, would warrant relief is an unsettled question in South Carolina. Compare State v. Peterson, 287 S.C. 244, 335 S.E.2d 800 (1985) (accumulation

of errors warranted reversal, but Court also found each individual error caused prejudice), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), with State v. Freeman, 319 S.C. 110, 459 S.E.2d 867 (Ct.App.1995) (finding multiple errors, which were not prejudicial separately, could be prejudicial to deny an individual a right to a fair trial when they were viewed together).” 351 S.C. at 197, 569 S.E.2d at 324. The PCR judge correctly found that, in this case, the multiple errors by trial counsel denied respondent the right to a fair trial.

In Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318; 325 (2002), the Court wrote, “While it is unsettled law whether individual errors, which may not be independently prejudicial, may be prejudicial when taken as a whole, we recognize the threshold to asking the cumulative prejudicial question is to first find multiple errors.” In Green the Court found that multiple errors did not exist to support cumulative prejudice. In contrast, trial counsel in the present case committed multiple errors in failing to move for a continuance to await completion of a written forensic report revealing that no semen or spermatozoa was identified from the sexual assault evidence kit collected from Ms. Sanders, failing to investigate and cross examine Ms. Sanders about her alcohol use, failing to cross examine Ms. Sanders in regard to serious discrepancies as to the time of the alleged incident. While Walker demonstrates actual prejudice from counsel’s failure to interview and call the alibi witness, Walker also demonstrates prejudice based on the cumulative effect of counsel’s other multiple errors, as correctly found by the PCR judge.

Based on Ms. Sanders’ report of a sexual assault, several items were submitted to the South Carolina Law Enforcement Division [SLED] for serology and DNA analysis. At the time of Walker’s trial, however, SLED had not completed the written report in regard to the forensic

testing. Consequently, at the time of trial, counsel did not have a written copy of the results of forensic testing performed by SLED. The SLED report is dated August 27, 2003, and was admitted in evidence at the PCR hearing as plaintiff's exhibit No. 1. (Supp. App. pp. 1-2). Walker's trial was held earlier on July 22 and 23, 2003. Testing of smears, swabs and panties collected in the sexual assault evidence collection kit from Ms. Sanders on March 3, 2002, (Ms. Sanders alleged that the incident started on March 2, 2002, and continued into the early morning hours of March 3, 2002), revealed no spermatozoa and no semen. (Supp. App. pp. 1-2). Ms. Sanders testified that the assailant penetrated her more than three times. (App. p. 51, lines 14 – p. 52, lines 1 – 3). The nurse's notes indicate that the assailant did not wear a condom. (Supp. App. p. 4).

The State's contention that respondent was not prejudiced by trial counsel's failure to await completion of the written report because trial counsel was told by the solicitor, prior to trial, that no semen was found is without merit. Trial counsel admitted at the PCR hearing that it would have been important for the jury to have known about the results of the SLED forensic testing. (App. p. 367, lines 9-11). While there was limited testimony about the lack of DNA evidence, the written SLED report revealing no spermatozoa and no semen further calls into question the credibility of the complainant, a critical issue in the case. The complainant's testimony was the only evidence against respondent.

In an interview with Ms. Sanders following the incident, a nurse noted the following, "She [Ms. Sanders] has been planning on attending ETOH treatment this week and is still planning to begin this week." ((App. p. 369, lines 1-8; Supp.App. p. 4). The interview was admitted as evidence at the PCR hearing as plaintiff's exhibit No. 2. Trial counsel admitted that she did not cross examine Ms. Sanders in reference to the alcohol treatment referenced in the note. (App. p. 386, lines 10-19). Additionally, trial counsel admitted that when Ms. Sanders initially reported

the incident to law enforcement, the officers noted that she smelled of alcohol. (App. p. 353, lines 21 – 24). Trial counsel admitted it would have been important to cross examine Ms. Sanders about her smelling of alcohol at the time of reporting the incident to police. (App .p. 354, lines 1-8). Trial counsel further admitted that she failed to call the nurse or the officers to testify about the alcohol treatment and the complaining witness smelling of alcohol. (App. p. 354, lines 9-14). In the order of dismissal the PCR judge wrote, “Trial counsel merely made reference that alcohol had been consumed by Sanders during and after the incident as part of a confirmation of events Sanders claimed had transpired. The only evidence linking the Applicant to Sanders was Sander’s identification of the Applicant. Trial counsel’s failure to investigate the impact of alcohol use prevented the jury from considering Sanders’ credibility in her identification of the Applicant as her assailant.” (App. pp 445-446).

Counsel admitted failing to cross examine Ms. Sanders in regard to discrepancies about the time of day she alleged the incident began. (App. p. 356, lines 18 – p. 357, lines 1-25). Ms. Sanders initially told the police she stopped at the BP station at 8:00 PM. (App .p. 357, lines 2-4). Ms. Sanders told the nurse that she was at a gas station at 7:00 PM. (Supp. App . p. 4). The video surveillance from the BP station, however, reflects that Ms. Sanders entered the store at 2:20 PM. (App. p. 357, lines 19-25). Trial counsel admitted it would have been important to explore this significant discrepancy in the time. (App. p. 357, lines 7-9).

The PCR judge correctly found that the cumulative effective of trial counsel’s errors independently established prejudice and deprived Walker of the right to a fair trial. Trial counsel’s multiple errors of failing to move for a continuance to await completion of a written forensic report revealing that no semen or spermatozoa was identified from the sexual assault evidence kit collected from Ms. Sanders, failing to investigate and cross examine Ms. Sanders about her alcohol use,

failing to cross examine Ms. Sanders in regard to serious discrepancies as to the time of the alleged incident and failing to interview the alibi witness, Ms. Reed, constitute ineffective assistance of counsel requiring a new trial. The PCR judge's finding that Walker was prejudiced by the cumulative effect of multiple errors committed by trial counsel is supported by the record. The finding of the PCR judge must be affirmed.

The Court of Appeals correctly found that counsel was deficient in failing to cross examine the complainant in regard to discrepancies as to the time of the alleged incident. The Court wrote, "We find two instances of trial counsel's deficient performance – her failure to investigate Reed as a potential alibi witness and her failure to cross-examine the victim or call witnesses to testify about conflicting evidence as to the time of the incident." Walker, 397 S.C. at 243, 723 S.E.2d at 619. The Court of Appeals, however, found that Walker failed to prove prejudice. "These instances of deficient performance are unrelated to each other and neither one makes the other more prejudicial. Therefore, even if we could evaluate them together, there is no cumulative prejudicial effect that would warrant relief under Strickland." Walker, 397 S.C. at 243, 723 S.E.2d at 619. The Court of Appeals erred.

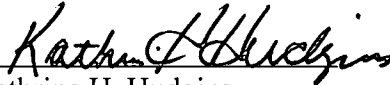
First, as discussed above, counsel's failure to investigate and call Robina Reed as an alibi witness constitutes prejudicial deficient performance requiring a new trial, as found by the PCR judge. Second, the testimony of the alibi witness and cross examination of the complainant in regard to discrepancies as to the time of the alleged incident are related, as both go to the credibility of the complaining witness. Third, the PCR judge correctly found that counsel was additionally deficient in failing to move for a continuance to await completion of forensic testing that revealed that no semen was identified from the sexual assault evidence kit collected from the complainant and failing to investigate the complainant's alcohol use. The Court of Appeals erred in refusing to

find that Walker was prejudiced by the cumulative effect of trial counsel's failure to investigate Sanders' alcohol use, her failure to move to continue the hearing to await the written results of the forensic testing, and her failure to cross-examine the witness as to the discrepancy of the conflicting times of the incident.

CONCLUSION

Based on the above arguments, the decision by the Court of Appeals should be reversed and the case remanded for a new trial based on the PCR judge's finding of prejudicial deficient performance by trial counsel.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER.

This 28th day of June, 2013

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County

Doyet A. Early, III, Circuit Court Judge

JOSEPH WALKER,

PETITIONER,

V.

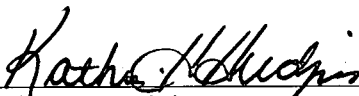
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-211267

CERTIFICATE OF SERVICE

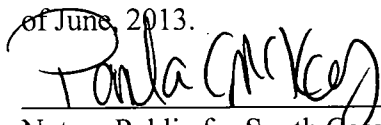
I certify that a true copy of the brief of petitioner, in this case has been served on Megan Harrigan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and also served upon Mr. Joseph Walker # 162475 Broad River Correctional Institution 4460 Broad River Road Columbia, SC 29210. this 28th day of June, 2013.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 28th day
of June, 2013.



(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.