

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Spartanburg County

Honorable Heath P. Taylor, Circuit Court Judge

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DOMINICK ANTONIO THOMPSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2024-002125

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PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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**ISSUE PRESENTED**

Did trial counsel's failure to make the proper argument that witnesses' credibility can be impeached with convictions under Rule 609, SCRE constitute ineffective assistance of counsel under the Sixth Amendment?

## STATEMENT

Petitioner was indicted in Spartanburg County for first-degree burglary, a weapons charge, armed robbery, first-degree assault and battery, and ABHAN. After his first trial resulted in a hung jury before the Honorable Lee Alford, he was tried again on June 10, 2019, before the Honorable J. Derham Cole and a jury. App. 1. Lauren Brown and Spencer Smith represented the State and Joshua Schultz represented petitioner. App. 1. The jury convicted petitioner and he was sentenced to life imprisonment under the recidivist statute. App. 436-38.

After the unsuccessful conclusion of his direct appeal, petitioner filed a timely PCR application on July 27, 2022. On May 20, 2024, the Honorable Heath P. Taylor held a hearing. App. 466. Susannah C. Ross represented petitioner and D. Russell Barlow, II, represented the State. App. 466. On December 16, 2024, Judge Taylor denied relief. App. 522. This petition follows.

## ARGUMENT

Trial counsel's failure to make the proper argument that witnesses' credibility can be impeached with convictions under Rule 609, SCRE constituted ineffective assistance of counsel under the Sixth Amendment.

Trial counsel waived the best argument he had for the impeachment of two critical witnesses (Summer Hall and Christine Richard) against petitioner. He conceded that the witnesses' convictions were not relevant to impeach their credibility which is contrary to the purpose of Rule 609, SCRE. App. 68-69. Petitioner can show prejudice because the State's first attempt to convict him resulted in a hung jury and, during that trial, the witnesses' convictions were used to impeach them, but not in the second trial before a different judge. App. 513-15.

Petitioner was charged with multiple crimes stemming from a robbery. Summer Hall was the State's first witness. On Thanksgiving Eve, November 23-24, 2016, Summer was staying in a hotel room in Spartanburg. App. 73. Also in the room were Summer's boyfriend Russell Donahue, her sister-in-law Christine Richard and Christine's boyfriend, Brandon Logan, and another man named Joseph. App. 74.

Christine was the State's second witness. Her cousin, Makayla Richard, sent her a message through Facebook wanting to buy marijuana. App. 103. Christine told Makayla she could find her some drugs, but Makayla would have to come to the hotel. App. 103. Makayla agreed and said she would send another message when she was on her way to the hotel. App. 104.

Makayla sent Christine a message when she arrived at the hotel. App. 104. Christine left the room and walked down the stairs to meet her. App. 104. She saw a black car pass and then

Makayla called and asked if they had just passed her. App. 104. Makayla said she would park and meet her at the steps. App. 104.

Makayla walked up and hugged Christine. App. 104. As they reached the top of the stairs, Christine saw “three black guys” running up the stairs. App. 104. The men attempted to pull hoods over their faces, but Christine claimed she could see all of their faces. App. 104. The men had a gun, took Christine’s necklace and phone, and told her if she did not take them into the hotel room, they would shoot her. App. 104-05.

Christine complied and Russell opened the door to the hotel room. App. 105. The men pushed Christine and Makayla inside. App. 105. Christine claimed she identified petitioner as the man with the gun. App. 105. Petitioner supposedly entered the room with the gun and pointed it at Summer while the other men began searching the room. App. 105.

Another man pistol whipped Brandon and then petitioner also pistol whipped him. App. 106. While petitioner was supposedly pistol whipping Brandon, the gun went off and the bullet hit Christine. App. 106-07. Everyone froze at the sound of the gunshot. App. 106. Then the assailants and Makayla fled. App. 106.

Summer did not know Makayla and had never met her. App. 76. She also claimed to be able to identify petitioner as the person who pointed a gun at her. App. 77. Summer said that on the night of the robbery, she did not know who any of the men were. App. 82. Christine also said that on the night of the robbery, she did not know any of the men. App. 109.

Christine testified that when she got to the hospital, she looked up Makayla’s Facebook account and eventually found petitioner’s profile. App. 110. Summer testified that she also used the same route through Facebook to identify petitioner by his online profile. App. 86. She could not identify the other two men. App. 86.

The night of the incident, Summer told the police that all she could see were the men's noses. App. 98-99. She admitted she never contacted the police with her Facebook identification of petitioner because she thought Christine had already relayed the information to the police. App. 96, 101.

The State charged Makayla with the same crimes as petitioner and those charges were still pending when she testified at petitioner's trial. App. 161. Makayla testified that she met petitioner about three weeks before the incident. App. 140. On the day of the robbery, petitioner came to her house with two men called "Swisher" and "Luke" who she had never met. App. 143. The conversation turned to acquiring marijuana and Makayla texted Christine. App. 143. Makayla said the plan was to take the drugs without paying for them. App. 144-45. Makayla minimized her role claiming she saw no weapons and that rushing into the hotel room was a surprise to her. App. 146-47.

Makayla admitted lying to the police several times. App. 170. She first told the police she was with a made-up friend on the other side of town. App. 157. On cross-examination, she agreed this story was "a bald-faced lie." App. 171. In the second statement she gave to the police, she admitted being at the hotel, but said she was with a friend named "Mall." App. 157. She did not tell the police petitioner was with her during this statement. App. 157-58. After getting arrested and seeing her mother arrested, Makayla gave the police petitioner's name. App. 158-59. Makayla admitted she hoped to "get a better deal" and avoid prison by testifying. App. 169.

Before testimony began, the solicitor informed the judge that he believed the defense intended to impeach Summer with a prior conviction for possession of methamphetamine. App. 65. The solicitor opposed the use of the conviction because it was prejudicial. App. 65. He said

the conviction had no probative value because it was a different drug from the marijuana involved in the incident and the defense wanted to use the conviction as “an attempt to sully her reputation.” App. 65-66.

Instead of arguing that the non-remote conviction was admissible to impeach Summer’s credibility, defense counsel made a convoluted argument that the prior drug conviction was probative of a drug deal happening in the hotel room. App. 66-69. Judge Cole asked defense counsel if he agreed that the meth conviction had “nothing to do with credibility or the likelihood of truth.” App. 68. Defense counsel agreed that the conviction did not fall under those exceptions. App. 68. Judge Cole pressed further, asking, “It doesn’t make her testimony more or less likely to be true because of that conviction. Is that what I am understanding you to agree with?” App. 69. Defense counsel replied, “That would be my understanding of the way the evidence rules are drafted.” App. 69. Judge Cole then ruled that the probative value of the conviction was outweighed by its prejudicial value and prohibited defense counsel from impeaching Summer with it. App. 69.

The discussion then proceeded immediately into the admissibility of Christine’s prior conviction for child neglect. App. 69-71. Defense counsel again failed to argue that the non-remote conviction was relevant to credibility in general and tried to tie the child neglect to drug use. App. 70-71. The judge refused to allow the conviction to be used for impeachment. App. 71. The court and the State agreed that Christine could be impeached with prior convictions for shoplifting. App. 71, 102.

At the PCR hearing, trial counsel said that during petitioner's first trial, which ended in a hung jury, impeachment of Hall and Richard was allowed.<sup>1</sup> App. 511-13. PCR counsel argued that the impeachment value of the convictions was important because Christine and Summer only identified petitioner through Facebook and that petitioner presented an alibi. App. 515. Petitioner also argued that when the priors were allowed in the first trial it resulted in a hung jury, but that petitioner was convicted when the impeachment was disallowed. App. 515. PCR counsel cited State v. Robinson, 426 S.C. 579, 828 S.E.2d 203 (2019) and further argued that trial counsel failed to argue the factors for impeachment and made no argument regarding Rule 609's distinction between witnesses and a criminal defendant. App. 519.

The PCR court denied relief on this ground. App. 538-41. Judge Taylor found no deficient performance because trial counsel "arduously and effectively argued for the admission of all priors." App. 540. The court also found that, "Trial counsel cannot be deficient when a well-reasoned argument is presented to the trial court, and the court rejects that argument." App. 540. The PCR court conclusorily found no prejudice because trial counsel was not deficient. App. 541.

The PCR court erred because trial counsel's argument was not well-reasoned, arduous, or effective and resulted from a fundamental misunderstanding of the way Rule 609 works. Trial counsel and Judge Cole operated under the mistaken belief that prior convictions needed to be crimes of dishonesty or specifically probative regarding the facts of the case being tried. Trial counsel mistakenly agreed with Judge Cole that prior convictions were not relevant to credibility.

All prior convictions have some probative value regarding credibility. See United States v. Lipscomb, 702 F.2d 1049, 1056-62 (D.C. Cir. 1983) (discussing Congress's recognition of

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<sup>1</sup> Confusingly, the PCR discussion concerned a prior burglary and a prior drug conviction, but the trial transcript only mentions a drug charge and the child neglect charge.

priors' relevance to credibility when drafting the federal Rule 609). Under South Carolina's version of Rule 609(a)(1), convictions of crimes that carry more than one year imprisonment and are within ten years "shall be admitted, subject to Rule 403." Rule 609(a)(1), SCRE. The second part of the rule includes the dishonesty component. Rule 609(a)(2), SCRE.

Trial counsel performed deficiently when he waived any argument that Summer and Christine's prior convictions had no probative value regarding credibility. In Robinson, the Court held that if only crimes involving dishonesty were allowable, then "carried to its logical extreme, no convictions would ever have impeachment value under Rule 609 unless they were crimes of dishonesty or false statement admitted under Rule 609(a)(2). Rule 609(a)(2) would inevitably swallow Rule 609(a)(1)." Robinson at 599-600, 828 S.E.2d at 213-14.

The convictions at issue in Robinson belonged to the accused and were for strong arm robbery and breaking and entering into cars. Id. The Court reasoned that even though neither were crimes of dishonesty, "that does not rule out the existence of impeachment value in each one of these prior offenses." Id. "It was within the trial court's discretion to conclude that because Robinson has prior convictions for such offenses, he legitimately might not be considered credible." Id.

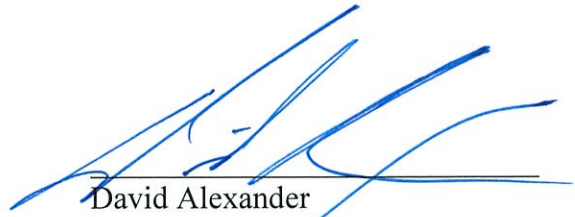
Trial counsel failed to make this argument explained by Robinson. In general, juries will perceive witnesses with any kind of prior criminal conviction to be less credible. That is the probative value envisioned by Rule 609(a)(1). Had trial counsel understood the evidentiary rule, he would not have made the convoluted argument that prior drug convictions were somehow relevant because the witnesses were facilitating a drug deal. He could have simply argued that these non-remote convictions were admissible regarding credibility. The State would have been left with the burden of showing the priors were inadmissible under Rule 403. Id. at 593, 828

S.E.2d at 210 (“The Rule 403 test places the burden upon the opponent of the evidence to establish inadmissibility pursuant to Rule 403.”).

Petitioner also proved prejudice. These witnesses were impeached in the first trial—a hung jury—but not in the second. Both made identifications of petitioner under shaky circumstances. They claimed to see petitioner on a Facebook page linked to Makayla. Summer also originally said she could only see the noses of the intruders. Makayla’s implication of petitioner came after lies to the police and pressure from facing decades of time in prison. Petitioner put up four witnesses from his family who testified he was present for their family Thanksgiving tradition which occurred every in the wee hours of Thanksgiving Eve. But for trial counsel’s failure to make the right argument and impeach these two crucial witnesses, petitioner likely would not have been convicted. This Court should grant certiorari and reverse.

**CONCLUSION**

For the foregoing reasons, this Court should grant the petition, reverse petitioner's convictions, and remand for a new trial.



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ATTORNEY FOR PETITIONER

This 30<sup>th</sup> day of May, 2025.