

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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

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OCT 23 2013

S.C. Supreme Court

JOSEPH WALKER,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2012-211267

BRIEF OF RESPONDENT

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ISSUES PRESENTED

I. Was Counsel deficient in failing to present alibi testimony from Robina Reed, and did the Court of Appeals correctly find Petitioner was not prejudiced by the alleged deficiency where Reed's testimony at the post-conviction relief evidentiary hearing did not conclusively establish an alibi.

II. Did evidence support the lower court's findings with regard to the issues of (a) counsel's failure to request a continuance to receive written results of forensic testing, (b) counsel's failure to inquire about a time discrepancy in a nurse's statement, and (c) counsel's failure to investigate the victim's alcohol use? Did the PCR court further err in employing the doctrine of "cumulative error" where (a) the doctrine has not been espoused in South Carolina and (b) the evidence would not support such conclusion even if the doctrine was to be applied?

STATEMENT OF THE CASE

Petitioner was true bill indicted during the August 26, 2002, term of the Aiken County Grand Jury for Criminal Sexual Conduct (“CSC”) – First Degree, Kidnapping, and Possession of a Weapon During a Violent Crime.¹ (App. p. 7, line 4 – p. 8, line 8; pp. 310-311; 313-314.) He was represented by Kelley P. Brown, Esquire (“Counsel”). Petitioner proceeded to a jury trial on July 22 - 23, 2003, before the Honorable James R. Barber, III. The jury found Petitioner guilty of CSC – First Degree and Kidnapping. He was sentenced to twenty-four years imprisonment on each charge, with the sentences to be served concurrently. (App. p. 310; 313.) Petitioner was acquitted of Possession of a Weapon during a Violent Crime. (App. p. 263, lines 6-13.)

A timely Notice of Appeal was filed on Petitioner’s behalf, and an appeal was perfected. The South Carolina Court of Appeals affirmed Petitioner’s conviction and sentence. State v. Walker, Op. No. 2004-UP-618 (S.C. Ct. App. filed December 9, 2004). The Remittitur was sent on January 11, 2005. (App. pp. 318-328.)

Petitioner subsequently filed an application for post-conviction relief on January 7, 2005, alleging he was held in custody unlawfully due to ineffective assistance of trial counsel. (App. pp. 329-335.) An evidentiary hearing was convened at the Bamberg County Courthouse on March 9, 2007, before the Honorable Doyet A. Early, III. (App. pp. 341-437.) Petitioner was present and was represented by Joan E. Smith, Esquire, and Timothy S. Mirshak, Esquire. Respondent was represented by Lance S. Boozer of the

¹ The trial transcript also reflects that Petitioner was indicted for Burglary – First Degree and Kidnapping in Orangeburg County as a result of this series of events. (App. p. 267, line 7 – p. 268, line 13.) The incident began in Orangeburg County and progressed to Aiken County. There is nothing in the record reflecting the disposition of the Orangeburg charges.

South Carolina Attorney General's Office. Also present and testifying were Counsel; Petitioner's former girlfriend, Robina Reed; and prosecuting Assistant Solicitor Brenda Brisbin. By Order dated May 24, 2007, Judge Early granted Petitioner's application for post-conviction relief, finding that Counsel was ineffective as she was deficient for failing to interview Reed as an alibi witness, which prejudiced Petitioner, as well as deficient for various other reasons which in cumulative effect prejudiced Petitioner. (App. pp. 438-449.)

The State filed a notice of intent to appeal, and on January 4, 2008, filed a Petition for Writ of Certiorari. Petitioner filed a Return to the Petition for Writ of Certiorari on September 2, 2008. On November 20, 2009, the Court of Appeals granted the State's Petition for Writ of Certiorari. The State filed the Brief of Petitioner on February 18, 2010, and Petitioner filed a Brief of Respondent on June 30, 2010. The South Carolina Court of Appeals heard oral arguments on this matter on October 5, 2011. On February 22, 2012, the Court of Appeals reversed the post-conviction relief court's grant of relief. Walker v. State, 397 S.C. 226, 723 S.E.2d 610 (Ct. App. 2012). Petitioner filed a petition for rehearing, which was denied on March 15, 2012. Petitioner submitted a Petition for Writ of Certiorari, and this Court directed briefing thereafter.

SUMMARY OF FACTS ADDUCED AT TRIAL

On the afternoon of March 2, 2002, 59-year-old Margaret Ann Sanders (“Sanders”), a former nursing assistant who had retired after thirty (30) years of work, stopped at a B.P. gas station on her way home from a trip to Dollar General.² (App. p. 45, lines 10-24; p. 93, lines 6-21; p. 120, line 4.) She purchased a cup of ice, but she experienced car trouble when trying to leave the store. (App. p. 45, lines 21-24.) Sanders solicited assistance from a customer at one of the pumps, a man wearing what looked like a mechanic’s uniform. (App. p. 46, lines 1-5; p. 50, lines 22-25.) The man offered to purchase a wire for \$9 and complete the repair for her. (App. p. 46, lines 9-20.) Sanders recalled that it was daylight when he was fixing her car, and she had a good look at the man. (App. p. 60, lines 5-20.) After repairing the vehicle, the man told Sanders that she would have to pay him \$30. (App. p. 46, lines 19-21.) Because she did not have the money, she offered to let him follow her home so that she could retrieve the money. (App. p. 46, lines 19-23.)

Sanders went into her home, leaving the man outside and without invitation in. (App. p. 47, lines 4-5.) She retrieved money from her bedroom and turned around to see him standing in the room. (App. p. 46, line 24 – p. 47, line 12.) Sanders testified that the man blindfolded her and placed her in his vehicle, a small, black truck with a manual transmission, red interior, and an unpleasant odor. (App. p. 47, line 14 – p. 48, line 14; p. 67, lines 17– 24; p. 156, line 10 – p. 157, line 2.)

² The times on the store video were off. However, Sanders was at the dollar store at 3:28 p.m., so it was estimated that Sanders came to the BP station at 3:33 pm. (App. p. 288, lines 5-25.) The B.P. clerk testified that they would compare the register tape to the videotape to determine an accurate date and time. Sanders stated that she left for Dollar General in the mid-afternoon, and later stated she probably got to the BP station between 3:00 pm and 5:00 pm. (App. p. 76, lines 4 – 20.)

Sanders recalled that she was taken, still blindfolded, into a house, and the blindfold was removed in the bedroom. (App. p. 49, line 22 – p. 50, line 8.) She claimed the man was armed with a small pistol. (App. p. 49, line 22 – p. 50, line 8.) The room had an unpleasant smell. Sanders reported that there were blankets hanging from windows and doorways in the bedroom and that a heater was on in the room. (App. p. 69, lines 9 – 16; p. 70, lines 11-23; p. 155, lines 21-25.) Sanders recalled that there was a small bathroom off of the bedroom and a double bed. (App. p. 69, lines 20-25; p. 156, lines 5-7.) Sanders also described a chair and ashtray in the room. (App. p. 70, lines 11-12; p. 156, lines 4-5.)

In the bedroom, the man removed her jogging outfit, raped her numerous times, and forced her to perform oral sex on him. (App. p. 50, lines 15-21; p. 51, line 1 – p. 52, line 17.) She pleaded to be released, and he eventually blindfolded her and drove her back to her home. (App. p. 53, lines 5 – 25.) Upon returning to Sanders' yard, the man removed the blindfold and shoved her out of the truck, threatening to kill her if she told anyone what had happened. (App. p. 54, lines 1-9.) Sanders stated that she got home around 5:00 am. (App. p. 53, line 9-11.)

Sanders washed herself and changed her underclothes. (App. p. 55, lines 3-6; p. 86, lines 2-4.) Sanders became scared because she was bleeding and in pain and went to her cousin's house. (App. p. 54, lines 16-24.) Sanders proceeded to the Orangeburg Hospital and was sent to Charleston so that a rape kit could be collected. (App. p. 56, lines 3-20.)

When she reported to police, Sanders provided a description of the perpetrator, his truck, and his house.³ (App. p. 57, line 22 – p. 58, line 13; p. 70, line 24 – p. 71, line 6; p. 153, lines 17-22.) Sanders was later shown a video from the B.P. station, and stated that she was about “90% sure” that one of the individuals she saw was her attacker. (App. p. 59, line 15 - p. 60, line 3; p. 152, line 15 – p. 153, line 6; p. 153, lines 17-25.) However, Sanders did not know his name. The clerk at the B.P. station, Diane Warren (“Warren”), recognized Petitioner by name without hesitation from the surveillance video taken at the store on March 2. (App. p. 145, line 1 – p. 146, line 6; p. 153, lines 9-14.) Warren also provided a description of Petitioner’s vehicle, a black pickup truck. (App. p. 146, lines 7-23.)

Based on the identification in the videotape by Sanders and Warren, a photo lineup was created. (App. p. 154, lines 1-8.) Sanders then selected Petitioner’s photo from the lineup, again stating she was “about 90% sure that that was him.” (App. p. 61, line 22 – p. 62, line 17; p. 154, line 9 – p. 155, line 3.) Both the video and the lineup were presented to the jury. In addition to her identification of Petitioner in the video and photo lineup, Sanders was able to identify Petitioner in the courtroom with absolute certainty, even noting, “he doesn’t have facial hair like he did [at the time of the attack].” (App. p. 75, lines 4-24; p. 100, lines 9-18.)

When investigators went to Petitioner’s home more than 20 days after the assault, they found a small, black Ford Ranger pickup. (App. p. 179, lines 9-25; p. 181, lines 2-6;

³ Sanders’ March 4 statement to police, as testified to by Officer Bamberg, was consistent with her trial testimony with regard to descriptions of the vehicle and the house. Officers Bamberg and Graybeal also reported that Sanders had consistently reported the time of the assault though she did not know the exact location because she had been blindfolded. (See for example App. p 177, line 14 – p. 178, line 7.)

p. 186, lines 7-13.) The pickup had a manual transmission and a strong, unpleasant odor, just as Sanders described. (App. p. 180, lines 3-15.) Petitioner's room matched exactly the description given by Sanders after the attack; details like where the heater was in the room were exactly as Sanders described in her initial accounts of the assault. (App. p. 71, line 23 – p. 75, line 3; p. 181, line 23 – p. 184, line 21; p. 206, lines 24-25.) Sanders recognized a pair of black shoes found in the room as those worn by her attacker. (App. p. 71, line 23 – p. 72, line 5; p. 74, lines 10-14; p. 184, lines 1-7.) The investigator's attempts to obtain fingerprints from the house and truck were unsuccessful. (App. p. 185, line 4 – p. 186, line 6; p. 194, line 25 – p. 196, line 10.) No DNA was collected at the house. (App. p. 186, line 18 – p. 187, line 13; p. 196, line 11 – p. 201, line 25.) No weapon was found. (App. p. 202, line 1 – p. 203, line 24.)

Sanders' cousin, Margie Kaminer ("Kaminer"), provided corroborative testimony as to time and place as allowed by Rule 801(d)(1)(D), SCRE. Kaminer reported that Sanders had arrived at her home the morning after the assault, March 3, around 10:30 or 11:00 am. (App. p. 135, lines 2012.) Sanders told Kaminer that the assault had happened the night before, March 2-3. (App. p. 135, lines 13 – 25.) Sanders was upset, and Kaminer called other family members who took Sanders to the hospital. (App. p. 136, line 10 – p. 137, line 13.)

Dr. Elizabeth Gibbs ("Dr. Gibbs") testified to the results of Sanders' sexual assault forensic healthcare assessment and an evidence collection kit performed March 3, 2002. (App. p. 105, lines 16-17.) Sanders was found to have redness and petechiae in the roof of her mouth consistent with the oral sexual assault she had described. (App. p. 107,

lines 16-18; p. 108, line 4 – p. 109, line 11.) The exam also revealed multiple injuries to Sanders’ genital area, including lacerations, bruising, and a fresh traumatic interruption of the hymen. (App. p. 112, line 2 – p. 117, line 17.) Dr. Gibbs opined that the injuries were diagnostic of blunt-force-penetrative trauma and were consistent with the assault Sanders described. (App. p. 118, lines 8-11.) Dr. Gibbs also testified that a “wet prep” was performed, wherein vaginal fluids were looked at under a microscope for semen or bodily fluids, but none were found. (App. p. 122, lines 19-22; p. 124, lines 9-15; p. 130, line 7 – p. 132, line 16.)

STANDARD OF REVIEW

In reviewing a post-conviction relief court's decision, an appellate court will reverse the post-conviction relief court "only where there is either no probative evidence in the record to support the decision or the decision was controlled by an error of law." Edwards v. State, 392 S.C. 449, 455, 710 S.E.2d 60, 64 (2011) (citing Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010)).

In a post-conviction relief action, the applicant 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 applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, Id.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland; Id. The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's

performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

ARGUMENT

- I. **The evidence does not support a finding that Counsel was ineffective for failing to interview a potential alibi witness, Robina Reed. Moreover, Petitioner failed to show prejudice where Reed's testimony at the post-conviction relief evidentiary hearing did not conclusively establish that Petitioner was at her house during the time of the incident and therefore was not an alibi.**

Petitioner asserts that the Court of Appeals erred in holding that the post-conviction relief court's finding that Counsel was ineffective was controlled by an error of law and that Reed's testimony did not qualify as an alibi, and therefore, Petitioner could not establish prejudice as required under the second prong of Strickland. This argument is without merit.

While the PCR court and Court of Appeals found Counsel deficient in failing to investigate and present the defense of alibi, the State submits that Petitioner failed to demonstrate deficient performance by Counsel with regard to the investigation of potential alibi witness Robina Reed ("Reed"). The PCR court's finding that Counsel made no effort to locate an alibi witness based upon information provided by her client is unsupported by the evidence. Counsel repeatedly testified that Petitioner never told her that he had an alibi. (App. p. 372, lines 19-21; p. 373, lines 1-3; p. 373, line 23 – p. 374, line 5; p. 378, lines 14-19.) Counsel stated that Petitioner never mentioned Reed to her. (App. p. 378, lines 18-19.) Petitioner confirmed this, admitting that he did not discuss alibi with Counsel. (App. p. 408, lines 19-25; p. 409, line 25 – p. 410, line 25.)

There was a videotaped interview with Petitioner.⁴ Counsel maintained that she watched the video and would have either played it for Petitioner or told him what it contained. (App. p. 350, lines 12-25.) In the interview, Petitioner stated that he was working all day on March 2. (Vid. 15:00.) Petitioner stated that he had been to the B.P. station due to an issue with fraudulent checks. (Vid., 16:00.) Petitioner averred that no one had asked for help with car trouble and added that he did not even work on his own vehicles. (Vid., 17:50 & 19:20.) Petitioner initially stated that he had been driving his car, not his black truck, at the B.P. station on March 2. (Vid., 18:30.) Petitioner said he had never owned a gun. (Vid., 21:20.) Petitioner stated several times that no woman other than his girlfriend had been to his house. (See for example Vid., 30:40.) After being told of the allegations, Petitioner offered more details of his stop at the B.P. station. Petitioner initially stated that after leaving the store he called his girlfriend, who was working at Hardee's, ran by her house for about five (5) minutes, and went home. (Vid., 33:45.) Petitioner stated that his girlfriend was not with him at any time. (Vid., 34:05.) Petitioner then elaborated on the story, stating that he went to his girlfriend's house and picked up one of the dogs. Petitioner again stated that no one was with him that night. (Vid., 35:20.) Petitioner explained that he took the dog by Hardee's to show his girlfriend and then went to his friend Greg Bloom's ("Greg") house in Neeses. Petitioner said that he stayed at Greg's house until 9:30 or 10:00 pm, possibly even later. Petitioner stated that another individual, "Road Dog," had seen him at Greg's house. (Vid., 39:00.) After being asked about the layout of his house, the interviewing officer inquired as to whether Petitioner

⁴ The video statement is a court's exhibit in this matter. Citations to the video in this brief will be indicated by "Vid." followed by the approximate time at which the statement begins, for example (Vid., 00:00.)

would be willing to take a polygraph. (Vid., 51:30.) Petitioner reiterated that Reed was the only woman who would have been at his house. At that point, for the first time Petitioner added that he had gone back to Reed's house after leaving Greg's and had stayed the night. (Vid., 52:55.) When Petitioner was asked for permission to take bed sheets to be tested for semen and DNA, Petitioner said that there had actually been two other women in the house. (Vid., 1:00:00.)

Counsel believed that her investigator pursued information on Reed. (App. p. 371, line 20 – p. 372, line 14; p. 374, lines 13-18.) Petitioner testified that he told the investigator about his alibi. Petitioner testified that he met with the investigator once, then testified they met “about twice.” (App. p. 408, lines 9-16; p. 409, lines 4-11.) Counsel's file contained a sheet of handwritten notes, including a note reading “Rovenia Manager Hardees.” (Supp. App., Plaintiff's Exhibit 4.) Counsel testified that the note was in her investigator's handwriting. (App. p. 373, lines 10-14.) Counsel stated that if she had been told of a potential alibi witness she would have vigorously explored such a possibility. (App. p. 374, lines 3-6; p. 378, lines 20-24.) Petitioner's evidence shows that some effort was made to locate “Rovenia Manager Hardees,” and Counsel's testimony was that her investigator did try to locate this individual.

Counsel recalled discussing the evidence against Petitioner, noting that Sanders had provided specific details of the interior of his home. The defense theory of the case was, in part, that there had been consensual intercourse between Sanders and Petitioner. This theme is intertwined into counsel's cross-examination of witnesses and argued in her closing argument. (See for example App. p. 122, lines 1-8; p. 236, line 1 – p. 244, line 2.)

Not only was this theory a viable one developed in communication with her client, it was a stronger theory than an alibi theory. An alibi explains neither Sanders' familiarity with Petitioner's truck and home nor her injuries. Moreover, in viewing the video, Counsel would recognize that even in Petitioner's recitation of events, Reed would at best offer an alibi for only a portion of the night, and as is discussed further below, this would be an incomplete alibi. Under the circumstances of the case Counsel's performance was reasonable. Her client, by his own testimony, did not inform her of an alibi defense. Nonetheless, her investigator pursued the lead on Reed, apparently without success. Without a viable alibi defense, Counsel pursued a more plausible defense theory.

In reviewing prejudice, the Court of Appeals correctly applied the framework for analyzing an alleged failure to investigate a purported alibi witness in a post-conviction relief case that this Court established in Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995) and properly discerned that Reed's testimony was not an alibi and Petitioner therefore could not establish prejudice.⁵

In Glover, this Court determined that in order to sufficiently establish an alibi defense, a witness's testimony must account for the defendant's precise location at the time of the crime to a degree that that it would have been physically unfeasible for the defendant to commit the crime. Id. at 498, 458 S.E.2d at 540 (citing State v. Robbins, 275 S.C. 373, 271 S.E.2d 319 (1980) for the proposition: "[S]ince an alibi derives its potency as a defense from the fact that it involves the physical impossibility of the accused's

⁵ As additional authority, the State notes State v. Diamond, 280 S.C. 296, 297, 312 S.E.2d 550 (1984) and Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989) (no prejudice where witness' testimony would not account for defendant's whereabouts during the time of the crimes and would be cumulative).

guilt, a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all”).

The case at hand is similar to Glover, as noted by the Court of Appeals:

“[In Glover], the PCR applicant ‘argued trial counsel was ineffective to failing to contact several witnesses who could have testified [the applicant] was in Florida when the crimes were committed.’ 318 S.C. at 497, 458 S.E.2d at 539. One witness initially said he ‘believed’ the applicant was in Florida, but then said he could not remember and ‘knew nothing.’ Id. The second witness testified the applicant was in Florida eleven hours before the crime was committed at a location only approximately six-and-a-half hours away. 318 S.C. at 497-98, 498 n. 1, 458 S.E.2d at 539-40, 540 n. 1. The testimony of either witness would have made it less likely the applicant committed the crime. Nevertheless, the supreme court found ‘no evidence to support the PCR judge’s finding of prejudice’ because ‘neither witness’ PCR testimony established an alibi defense.’ 318 S.C. at 498, 458 S.E.2d at 539-40.

Walker v. State, 397 S.C. 226, 237-38, 723 S.E.2d 610, 616 (2012); (Second Supp. App. pp. 9). Here, as in Glover, Reed could not conclusively state that Petitioner was with her during the time of the crime. At the evidentiary hearing, Reed testified that in March 2002, she had known Petitioner for approximately two years and that they had been in a sexual relationship for one year. (App. p. 388-397.) Reed testified that Petitioner had a key to her home (App. p. 393. line 24- p. 394, line 3) and had been staying with her on weekends for six months to a year. (App. p. 397, line 21- p. 398, line 2.) When questioned by the court, Reed testified that Petitioner had spent the first weekend of March 2002 at her home. (App. p. 403, lines 2-5.) However, on cross examination, Reed’s testimony changed as follows:

Q: 2002 is when y'all broke up?

A: Yea.

Q: You know the exact date?

A: No, sir.

Q: But you knew he was with you that night?

A: Huh?

Q: You knew he was with you on March 2?

A: Well, I know he was with me, but I can't say a particular date. No, I don't know what date y'all want.

Q: But you can't remember the date y'all broke up?

A: Right.

Q: Do you know what you were doing the night of March 1, 2002?

A: No, I can't go back that far.

Q: Well, that's just the day before when you said Mr. Walker was with you?

A: You said he was with me, but that's all I can say.

Q: So, you don't know what you were doing March 1, 2002?

A: We could have been together in 2002. I don't even know what day that was.

Q: But you don't know specifically?

A: Right, that's what I'm saying.

Q: But you know specifically right now what you were doing March 2, 2002?

A: No, I ain't said that.

Q: So, you don't know what you were doing March 2, 2002 that night?

The Court: Ma'am, do you know whether or not you were with this man over here Mr. Walker?

The Witness: I know we spent a lot of days together. I can't tell you no particular day.

Q: So you can't tell—

A: A particular day; right.

Q: You can't tell us you were with him March 2, 2002?

A: Right.

(App. p. 404, line 13- p. 405, line 22.) Viewing Reed's testimony as a whole, she cannot conclusively state that Petitioner was with her at her home during the late evening hours of Saturday, March 2, 2002 and the early morning hours of Sunday, March 3, 2002, when the crime occurred.⁶

The Court of Appeals interpreted Glover as establishing “a framework for analyzing an alleged failure to investigate an alibi witness.” 397 S.C. at 238, 723 S.E.2d at 616. Under this framework,

“[w]hen a PCR applicant alleges trial counsel failed to investigate or present an alibi witness, the PCR court must make two findings to determine if counsel's deficient performance constitutes prejudice under Strickland. First, the court must find as a matter of law whether the witness's testimony meets the legal definition of an alibi. Second, the court must assess the witness's credibility. In making the first finding, the court must consider the entire record to determine what the testimony would have been if it had been presented at trial. The PCR court must consider the testimony as a whole, take it as true and credible, and view it in the light most favorable to the PCR applicant.”

Id. Using this framework, the Court of Appeals correctly determined that Reed's testimony does not qualify as an alibi. Specifically, the Court of Appeals stated:

“Taken as a whole, however, her testimony does not account for [Petitioner]'s whereabouts on March 2, 2002,

⁶ Notably, in Walker's own recitation of events from his video statement Reed would not provide a complete alibi as he was not with her for much of the night.

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.”

Id. at 238-39, 723 S.E.2d at 616-617. As Reed’s testimony does not conclusively show that it would have been physically impossible for Petitioner to commit the crime, it is not an alibi and Petitioner has failed to carry his burden of establishing a reasonable probability that the result of the trial would have been different if Counsel had investigated Reed and introduced her testimony at trial. The post-conviction relief court based its grant of relief on an error of law – that Reed’s testimony established an alibi defense; the Court of Appeals properly reversed the post-conviction relief court to correct this error of law.

II. Petitioner failed to carry his burden of demonstrating deficient performance which prejudiced him such that the outcome of the trial would have been different with regard to the issues of (a) counsel’s failure to request a continuance to receive written results of forensic testing, (b) counsel’s failure to inquire about a time discrepancy in a nurse’s statement, and (c) counsel’s failure to investigate the victim’s alcohol use. The PCR court further erred in employing the doctrine of “cumulative error” where (a) the doctrine has not been espoused in South Carolina and (b) the evidence would not support such conclusion even if the doctrine was to be applied.

The post-conviction relief court found that Counsel’s performance was deficient in three other instances: (1) failure to ask for a continuance to await the written results of a DNA test, (2) failure to cross-examine the victim about her alcohol use, and (3) failure

to cross-examine the victim and call other witnesses about the victim's conflicting statements as to the time of the incident. (App. p. 438-48.) The post-conviction relief court concluded that Petitioner had not independently met the prejudice prong required under Strickland in any single instance, but when all three deficiencies were coupled with Counsel's failure to investigate Reed as an alibi witness, Petitioner had established a cumulative effect of prejudice. (App. p. 438-48.)

The Court of Appeals reversed the post-conviction court, finding "no evidence to support the PCR court's ruling that two of the instances were deficient performance" and that "the other instance, which was deficient performance, and the failure to investigate Reed as an alibi witness have no cumulative prejudicial effect." Walker, 397 S.C. at 239, 723 S.E.2d at 618. The court elaborated that "whether the cumulation of several errors, 'which by themselves are not prejudicial, would warrant relief is an unsettled question in South Carolina.'" Lorenzen v. State, 376 S.C. 521, 535 n. 3, 657 S.E.2d 771, 779 n. 3 (2008) (quoting Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318, 325 (2002)); however, it is unnecessary to answer this question because "[Petitioner] has failed to prove prejudice under any interpretation of the law." Id. at n.5.

Petitioner argues that the Court of Appeals erred in determining that Counsel was not deficient in two of the instances and for not finding a cumulative prejudicial effect. This argument is without merit, as there is no probative evidence in the record to support that Counsel was deficient in the first two instances, and Petitioner failed to establish prejudice with regards to any other alleged deficiencies.

- A. The Court of Appeals correctly determined that Counsel was not ineffective in failing to request a continuance in order to obtain**

written lab results showing no sperm or DNA was found on Sanders following the assault. Counsel knew the results of the test, and evidence that no such link was found was introduced at trial.

Petitioner asserts that the Court of Appeals erred by finding that there was no evidence in the record to support the post-conviction court's determination that Counsel was deficient for not seeking a continuance to await the written results of a South Carolina Law Enforcement Division ("SLED") DNA Analysis showing that no DNA evidence linked Petitioner to the crime. This argument is without merit, as there is no evidence of probative value in the record supporting the post-conviction relief court's finding that Counsel was deficient.

The post-conviction relief court found that absence of a request for a continuance to await the results of a SLED forensic report was part of a "cumulative prejudicial effect." (App. pp. 444-445; Supp. App., Pl.'s Ex. 1.) The court also found that Counsel "articulated no trial strategy for her failure to investigate the results of forensic testing being performed by [SLED]..." and that "Counsel gave no explanation as to why she did not know that the testing had not been completed." (App. p. 447.) The post-conviction relief court found that had Counsel had the report she could have stressed to the jury the absence of forensic testing; however, this alone did not establish prejudice. (App. p. 447.) After finding no prejudice, the post-conviction relief court states that this is, nonetheless, "further evidence of trial counsel's ineffectiveness." (App. p. 447.)

First, Petitioner must demonstrate that Counsel's performance was unreasonable under professional norms; an analysis of prejudice is unnecessary in the absence of deficient performance. Petitioner asserts that counsel should have requested a

continuance to await written results of SLED testing. However, the uncontroverted testimony at post-conviction relief hearing was that Counsel knew of the SLED findings before trial; the post-conviction relief court erred in finding otherwise. (App. p. 352, lines 2-7; p. 416, lines 18-22; p. 417, line 7 – p. 418, line 5.) Counsel was aware that the results from SLED indicated that there was no sperm or semen found on the victim and that the DNA present was exclusively the victim's own. Given that Counsel knew of this evidence and was able to elicit the evidence from various witnesses at trial, Counsel's failure to request a continuance so that the written report could be obtained was certainly reasonable.⁷

Though incorrectly finding that Counsel was deficient in this regard, the post-conviction court correctly found that Petitioner suffered no prejudice in this regard. Though the post-conviction relief court did not undertake any specific analysis of why there was no prejudice, the evidence clearly supports the conclusion. The written report shows that no semen, sperm, or DNA other than the victim's own was found on the victim. (Supp. App., Pl.'s Ex. 1.) The absence of forensic evidence linking Petitioner to the victim was repeatedly established through the testimony of other witnesses at trial. For example, on cross-examination of lead investigator Stuart Graybeal ("Graybeal"), Counsel elicited that Graybeal had not attempted to collect DNA from Petitioner to compare to the rape kit; in fact, Graybeal did not even know if the kit had been tested at all. (App. p. 190, line 14 – p. 194, line 10.) On cross-examination, Dr. Gibbs specifically stated that in her own testing no sperm were found in vaginal fluids collected from the

⁷ Moreover, the transcript indicates that the case had been called for trial at least once before, two months before the eventual trial date. (App. p. 171, lines 12-15.)

victim. (App. p. 122, lines 19-22; p. 124, lines 9-15; p. 130, line 7 – p. 132, line 16.) The victim reported consistently that she had washed and changed her undergarments before reporting what happened to her family members and medical personnel later that day. The written report with no findings would have only been cumulative to the trial testimony that no sperm, semen, or DNA evidence of value existed. See Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989) (no prejudice where testimony of witness would be cumulative to those presented at trial and did not establish an alibi defense). Therefore, Petitioner suffered no prejudice in this regard.

Based on the record, the Court of Appeals correctly found that the post-conviction relief court erred in its determination that Counsel was ineffective regarding her absence of a request for a continuance to await the results of a SLED forensic report. The record shows that Counsel was not deficient in this regard, and that Petitioner was not prejudiced by this alleged deficiency.

- B. Counsel’s failure to specifically inquire through investigation or cross-examination about whether or not the victim had been treated for alcoholism in order to attack her credibility was not deficient performance. Moreover, Counsel had already elicited from the victim that she had been drinking during and after the assault, making any evidence of a drinking habit cumulative because victim had already conceded her actions on the day in question.**

Petitioner asserts that the Court of Appeals erred in finding that there was no evidence in the record to support the post-conviction relief court’s determination that Counsel was ineffective for not inquiring through investigation or cross-examination as to whether the victim was an alcoholic in order to call her credibility into question. This

argument is without merit, as there is no evidence in the record supporting that Counsel was deficient in this regard.

The post-conviction relief court found that Counsel failed to investigate the victim's alcohol use and failed to articulate a trial strategy for this, and this failure "prevented the jury from considering [the victim's] credibility in her identification of [Petitioner] as her assailant." (App. pp. 445-446.) The post-conviction relief court found that standing alone, this failure to investigate the victim's use of alcohol did not establish prejudice. However, the post-conviction relief court found that Counsel's failure to investigate or inquire as to the victim's alcohol use is part of "a cumulative prejudicial effect." (App. pp. 444-445.)

Counsel's failure to investigate or inquire as to whether the victim had undergone treatment for alcoholism to cast doubt on her credibility is not unreasonable under reasonable professional norms. Counsel stated at the post-conviction relief hearing that she did not challenge Sanders with regard to alcohol treatment in cross-examination, but she cross-examined Sanders on other salient to the facts of the case, including but not limited to her alcohol use the particular night and morning of the incident (App. p 86, line 18 – p. 87, line 8; p. 94, lines 15-24), her claim that her assailant allowed her to smoke cigarettes (App. p. 95, lines 7-20), and her claim that Petitioner allowed her to pick up her purse as they were leaving (App. p. 97, line 11 – p. 98, line 6). Counsel stated that she believed she had been able to reveal issues with the victim's credibility through her cross-examination strategy. (See App. p. 386, lines 8-16.)

Moreover, such evidence of the victim's purported alcoholism may not be used to attack credibility. Drug addiction and drug convictions are generally not considered probative of truthfulness. Rule 608, SCRE; State v. Aleksey, 343 S.C. 20, 538 S.C. 248 (2000) (narcotics offenses generally not probative of truthfulness); State v. Harris, 189 N.C. App. 49, 657 S.E.2d 701 (N.C. App. 2008) (testimony regarding victim's drug addiction properly excluded because it was not probative of her character for truthfulness or untruthfulness; also finding no prejudice because victim admitted her drug use and addiction problems on cross-examination). Additionally, evidence that the victim is an alcoholic is not admissible to prove she was intoxicated at a particular time. See Rule 404(a), SCRE ("Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion."). While "[e]vidence of a pertinent trait of character of the victim of the crime offered by an accused" is admissible under Rule 404(a)(2), SCRE, in limited instances, the victim's alcoholism is not a pertinent trait of character in this case. See State v. Mizell, 332 S.C. 273, 278, 504 S.E.2d 338, 341 (Ct.App.1998) ("[T]he 'prevailing view is that only pertinent traits—those involved in the offense charged—are provable.'" (quoting John W. Strong, McCormick on Evidence § 191 (4th ed.1992))). Based on the all the foregoing, Counsel was not deficient for not investigating and eliciting testimony on cross-examination as to whether the victim was an alcoholic in order to attack credibility.

Without a finding of deficient performance, it is unnecessary to take on an analysis of prejudice. However, there is no evidence of prejudice to the Petitioner from Counsel's alleged deficiency. The post-conviction relief court specifically reviewed the

issue in terms of Petitioner's ability to use evidence of the victim's alcohol use to attack her credibility. As stated above, such evidence is not probative of truthfulness or untruthfulness. Even if such evidence could be considered probative of character for truthfulness or untruthfulness, Petitioner presented only a note that the victim intended to pursue "ETOH treatment" from the nurse's report about the sexual assault. (Supp. App., Pl.'s Ex. 2.) Petitioner presented no additional evidence of the victim's alcohol use or treatment before or after the attack. Therefore, Petitioner's speculation as to what additional investigation or questioning would have yielded does not establish prejudice. See Lorenzen v. State, 376 S.C. 521, 657 S.E.2d 771 (2008).

Moreover, Counsel did elicit testimony from the victim regarding her alcohol use on the night in question. Counsel elicited that Petitioner had given the victim a beer during the course of the night. (App. p. 94, lines 15-24.) Counsel also elicited from the victim that she had mixed herself "a big drink" of rum and Coke between the time she was dropped off around 5:00 am and the time she went to her cousin's house around 11:00 or 11:30 am. (App. p. 86, line 15 – p. 87, line 12; p. 98, lines 19-20.) Counsel elicited from the victim's cousin on cross-examination that the victim had been drinking. The victim's cousin reported that the victim had arrived at her house with a cup in hand and that Sanders had stated she had "mixed her[self] a drink to calm her nerves." (App. p. 138, lines 10-16.) Even if Counsel had been able to elicit additional testimony about the victim's alcohol use, such testimony would be cumulative to that already given. For these reasons, Petitioner failed to carry his burden of establishing both deficient performance

and prejudice in this regard. The Court of Appeals correctly found that the post-conviction relief court erred in finding Counsel deficient in regards to this allegation.

C. Counsel was not ineffective for not questioning the victim regarding discrepancies as to the time the incident occurred.

Petitioner argues that the Court of Appeals erred in determining that the post-conviction relief incorrectly found Counsel ineffective for not questioning the victim regarding discrepancies as to the time the incident occurred. This argument is without merit.

The post-conviction relief court found Counsel's failure to ask the victim about a report prepared by nurse Gretchen Overstolz ("Overstolz") was part of a "cumulative prejudicial effect." (App. pp. 444-445; Supp. App., Pl.'s Ex. 2 and 5.) The post-conviction relief court found that Counsel offered no strategic reason for failing to cross-examine the victim or call all officers who prepared the reports to inquire about the time discrepancies.⁸ The post-conviction relief court found that Counsel did not perform reasonably in this regard, as such examination could have cast doubt on the victim's identification of Petitioner as the perpetrator, specifically finding that Counsel had a duty to interview the police and nurses who prepared reports. The post-conviction relief court made no finding of prejudice except for its earlier note regarding "cumulative prejudicial effect."

There is no evidence of deficient performance in this regard. A defense attorney must conduct a reasonable investigation, a duty determined by the particular facts and evidence in a case. Petitioner asserts that Counsel erred when she did not question the

⁸ It is unclear from the order who the officers who prepared the initial reports were, what reports the order refers to, and Petitioner did not pursue this issue at PCR hearing.

victim as to Overstolz's note that she was at the gas station at 7:00 pm. (Supp. App., Pl.'s Ex. 2.) At trial, the victim insisted that it was daylight when Petitioner was fixing her car. (App. p. 60, lines 5-20.) While Counsel did not specifically question the victim on certain time discrepancies from her earlier statements, Counsel cross-examined the victim on the timeline of events. (App. p. 76-77; p. 79, line 24 – p. 80, line 14; p. 82, lines 18 –22.) On cross-examination at trial, the victim stated she had left for Dollar General in the afternoon; she estimated that the time was between 3:00 and 5:00 pm, but stated that she did not remember the exact times. (App. p. 76, lines 4-20.) She stated that it was dark by the time she was at Petitioner's house. (App. p. 77, lines 23-25.) She had difficulty recalling when she had given statements to police. (See, for example, App. p. 91, lines 2-25; p. 92, line 21 – p. 93, line 9.) She specifically stated that she did not keep up with time since she no longer worked. (App. p. 93, lines 6-9.) Counsel elicited from the victim multiple times that she did not remember certain details of the incident, such as time. Counsel performed cross-examination that was well within reasonable professional norms with regard to the victim and the officers who investigated the case. Counsel cannot be expected to ask every foreseeable question; such a requirement would be unreasonable. Further, Counsel had no reason to interview the nurse, Overstolz, who prepared the report; it was reasonable to assume that the report reflected what Overstolz would say. Time was not an essential element of the case, and Counsel identified several other inconsistencies through her cross-examination. Under these circumstances, the failure to ask a question (or failure to interview the nurse) about one time discrepancy is not unreasonable under professional norms.

Moreover, the outcome of the trial was not affected by this alleged deficiency of Counsel. One additional discrepancy regarding time where the witness said several times that her recollection of the time was not clear would not have had an effect on the outcome of the trial. Through her cross-examination, Counsel brought out other inconsistencies that cast doubt on the victim's credibility and the accuracy of her memory with regard not only to the timeline but also as to other more salient aspects of her story. Notably, Counsel inquired of the victim and the officers regarding her description of a gun which Petitioner allegedly threatened her with. The jury eventually acquitted Petitioner of the weapon charge. Further, in reviewing the remainder of the victim's statement, every other detail other than the time corroborates her trial testimony. (Supp. App., Pl.'s Ex. 2.) It would have been more damaging for defense counsel to have opened the door for the remainder of the statement to come in. See Rule 106, SCRE; Rule 801(d)(1)(B), SCRE. Counsel also inquired as to other inconsistencies between the victim's initial reports and her later statements. (See for example App. p. 163, line 22 – p. 164, line 6; p. 168, line 18 – p. 169, line 1.)

Additionally, the post-conviction relief court's order unduly focused on the victim's identification of Petitioner as the perpetrator and overlooks the other evidence in the case. Not only did the victim identify Petitioner, she provided a detailed description of the vehicle and home where she was held. Unique details, such as the positioning of the heater in the room, the location of the bathroom, the location of the ashtray, the linens hanging from the windows and doorways, the transmission and other features of the truck, and the foul stench in both the truck and home, were given in the victim's

description of the location. Each of these unique details were found in Petitioner's home and vehicle, and the victim identified photos of the home and vehicle. Her detailed description of the truck and home, which were corroborated by photos, added to her credibility. The victim's injuries also matched the unique description of the assault (e.g. the petechiae to the roof of her mouth indicative of the forcible oral sex she described). Further, as neither Overstolz nor the officers who prepared the initial reports testified at the post-conviction relief hearing, any benefit this additional investigation could have yielded is merely speculative.

D. In finding prejudice, the PCR court erred in applying a cumulative error standard. Cumulative error analysis is not recognized in South Carolina. Moreover, even if cumulative error analysis was an accepted standard, the evidence would not support a finding of ineffective assistance.

Based on the foregoing, the State submits that there is no evidence of probative value in the record to support the post-conviction relief court's finding that Counsel was deficient in regards to any of Petitioner's four allegations. Without multiple deficiencies, a cumulative error analysis is unnecessary. Fisher v. Angelone, 163 F.3d 835, 852 (4th Cir.1998) (it is not appropriate to consider the cumulative effect of attorney error when the individual claims of ineffective assistance do not violate the defendant's constitutional rights); Moore v. Reynolds, 153 F.3d 1086, 1113 (10th Cir.1998) (stating that cumulative error analysis applies where there are two or more actual errors; it does not apply to the cumulative effect of non-errors).

The Court of Appeals correctly discerned that counsel was not deficient in regards to two allegations. Even if, as the Court of Appeals found, there was deficient

performance in that Counsel failed to investigate and present testimony as an alibi and that Counsel failed to cross-examine witnesses as to the victim's discrepancies in her timeline of the instance, there is no evidence of prejudice to necessitate relief under Strickland.

Additionally, the Court of Appeals correctly determined "even if South Carolina did allow PCR based on the cumulative prejudicial effect of two or more instances of deficient performance, [Petitioner] would still have to demonstrate 'a' reasonable probability that, but for [the culmination of] counsel's unprofessional errors, the result of the proceeding would have been different.'" Walker, 397 S.C. at 243, 723 S.E.2d at 619 (citing Edwards v. State, 392 S.C.449, 459, 710 S.E.2d 60, 66 (2011)). As Petitioner has failed to meet his burden, the Court of Appeals reversal of the post-conviction relief court's grant of relief should be affirmed.

CONCLUSION

For the foregoing reasons, the trial court erred in granting Petitioner's application for post-conviction relief. Respondent requests that the Court of Appeals reversal of the trial court's order be affirmed or that reversal of the trial court's order be granted based on any arguments contained herein.

Respectfully submitted,

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October 23, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Aiken County
The Honorable Doyet A. Early, III, Circuit Court Judge
Case No. 2005-CP-02-39
Appellate Case No. 2012-211267

JOSEPH WALKER,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PROOF OF SERVICE

I, Caroline Kaiser, certify that I have served the within **Brief of Respondent** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins, Esquire
South Carolina Commission on Indigent Defense
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I further certify that all parties required by Rule to be served have been served.

This 23rd day of October, 2013.



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