ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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SC SUPREME COURT

Certiorari to Clarendon County

R. Knox McMahon, Circuit Court Judge

DONNEIL WOODS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000131

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did trial counsel provide ineffective assistance in derogation of Petitioner's rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and the state constitution by failing to cross-examine the prosecution's only eyewitness to the alleged offense with a prior inconsistent statement?

STATEMENT

On June 26, 2006, arrest warrants were issued for Petitioner on the charges of criminal sexual conduct in the first degree, strong arm robbery, and kidnapping. App. 404-406. The warrants were served on Petitioner a year later. App. 404-406. Petitioner applied for a public defender, and Deborah K. Butcher, hereinafter, trial counsel, was assigned to represent him on July 5, 2007. App. 407.

On August 21, 2008, a Clarendon County grand jury indicted Petitioner for criminal sexual conduct in the first degree, kidnapping, and strong arm robbery. App. 509-510. The state, represented by Amy B. Land, called the case to trial before the Honorable Clifton Newman and a jury on October 14-16, 2008. App. 1. Trial counsel represented Petitioner. App. 1. The jury found Petitioner guilty as charged. App. 247, line 19 – App. 248, line 1. Judge Newman sentenced Petitioner to thirty years' imprisonment for criminal sexual conduct, thirty years' imprisonment for kidnapping, and fifteen years' imprisonment for strong arm robbery. He ordered all sentences to be served concurrently. App. 264, line 21 – App. 265, line 1; App. 511-513.

On direct appeal, Robert M. Pachack represented Petitioner. App. 267. A brief pursuant to Anders v. California, 386 U.S. 738 (1967), was filed on Petitioner's behalf on July 27, 2009. App. 267-276. On October 31, 2011, the Court of Appeals dismissed the appeal. State v. Woods, 2011-UP-487 (S.C. Ct. App. filed Oct. 31, 2011); App. 277. Remittitur was sent on January 9, 2012. App. 278.

Subsequently, Petitioner, through counsel, filed an application for post-conviction relief (PCR). App. 279-286. The matter proceeded to an evidentiary hearing on September 30, 2013, before the Honorable R. Knox McMahon. App. 293. David Spencer represented the state. App. 293. Blair Jennings and Ray E. Chandler represented Petitioner. App. 293. By an order filed on December 11, 2013, Judge McMahon denied Petitioner relief from his convictions and sentences. App. 493-500. Petitioner, through counsel, filed a motion to alter or amend on December 23, 2013. App. 501-503. Petitioner filed a *pro se* motion to alter or amend on

February 24, 2014. App. 504-505. By an order filed on May 5, 2014, Judge McMahon denied the motions to alter or amend. App. 506-508.

Petitioner filed a notice of appeal. This petition for writ of certiorari follows.

ARGUMENT

Trial counsel provided ineffective assistance in derogation of Petitioner's rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and the state constitution by failing to cross-examine the prosecution's only eyewitness to the alleged offense with a prior inconsistent statement.

Relevant facts

Trial facts

In her opening statement, the prosecutor warned the jury that any of them who expected the case against Petitioner to be "a little like CSI or some of those shows that we love to watch on TV," would "be disappointed." App. 15, lines 12-16. According to the prosecutor, the main evidence in the case would come from Sheila Summers, the alleged victim. App. 15, lines 22-25. After explaining that Summers would describe how she was allegedly raped, the prosecutor asked the jurors to "imagine how it was for her to live it." App. 16, lines 18-22.[1] Additionally, the prosecutor told the jurors: "I submit to you Ms. Summers is here over two years later, while her life has been on hold because of this horrible tragedy, to tell you the truth." App. 17, lines 6-9.[2]

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[1] The solicitor violated the "Golden Rule" by asking the jurors to place themselves in the alleged victim's shoes when she asked the jurors to imagine how it was for Summers to live through the alleged rape. This type of argument is forbidden because it "tends to completely destroy all sense of impartiality of the jurors, and its effect is to arouse passion and prejudice." State v. Reese, 370 S.C. 31, 38, 633 S.E.2d 898, 901 (2006), rev'd on other grounds by State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009); see also VonDohlen v. State, 360 S.C. 598, 602 S.E.2d 738 (2004).

[2] The solicitor committed misconduct by vouching for the credibility of Summers during her opening statement by telling the jurors that Summers was present in court to tell the truth. "A prosecutor cannot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness' truthfulness." State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001). "Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity, or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony." Id.; see also State v. Kelly, 343 S.C. 350, 540 S.E.2d 851 (2001).

Summers told the jurors that in the summer of 2006, she would visit her friend, Tywan Blackwell, in Manning. App. 25, lines 12-19.[3] Often she would visit Tywan at the home of his cousin, Troy Nelson. App. 26, lines 10-19. On June 23, 2006, Summers went to Troy's home because she left her phone charger there the previous day. App. 27, lines 14-18. She arrived around 8:00 p.m. App. 27, lines 19-22. Summers claimed Petitioner, whom she knew only as "Button," was at Troy's home and asked her for a ride to the store. App. 28, lines 6-10; App. 29, lines 14-19; App. 46, lines 4-12.[4] Summers and Petitioner left for the store, which was less than five minutes away. App. 29, lines 24-25; App. 30, lines 6-7. Petitioner purchased a beer and returned to Summers' car. App. 30, lines 12-13. He asked for a ride back to Troy's. App. 30, lines 20-23.

Summers claimed that when they got close to Troy's home, Petitioner grabbed her arm and the wheel. App. 30, line 24 – App. 31, line 1. He forced her to drive by threatening to kill her. App. 31, lines 2-3. She drove to end of the paved road. App. 31, lines 6-7. He forced her to turn right onto a dirt road. App. 31, lines 21-24. After approximately one mile, Petitioner told her to stop. App. 32, lines 1-2. During this time, Petitioner was drinking the beer with his right hand, but holding on to her with his left hand. App. 32, lines 7-9. When he told her to shut off the car she did. App. 32, lines 11-13. She claimed Petitioner took her phone, removed the battery, and placed the phone between the seats. App. 32, lines 13-16. Additionally, Petitioner took her keys and her purse. App. 32, lines 13-16. She claimed Petitioner took money from her wallet, but she did not know what he did with the wallet after removing the money. App. 35, lines 12-24.

Summers claimed Petitioner dragged her by the arm from the driver's side to the passenger side and out of the car. App. 32, lines 21-23. Petitioner ordered her to undress, and she removed

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[3] Although Summers described her relationship with Twyan as only friends, Twyan testified that the two had once been boyfriend and girlfriend. Cf. App. 59, lines 6-8 with App. 133, lines 3-16.

[4] The lead investigator on the case, Todd Avant, testified that he got an anonymous call from a member of Petitioner's family, who was scared of Petitioner, and who identified Petitioner as "Button." App. 93, lines 14-19; App. 121, line 8 – App. 122, line 3 (testifying differently that it was a "family member or friend of hers" who identified Petitioner as Button). Days later, Avant showed Summers a photographic line-up in which she selected Petitioner's photograph as the person who committed the assault. App. 46, line 13 – App. 47, line 24.

her shirt. App. 32, line 25 – App. 33, line 1. Summers then ran, but Petitioner caught her and she fell. App. 33, lines 3-4. She claimed Petitioner dragged her by her hair back to the car. App. 33, lines 4-5. Summers removed her shoes and pants. App. 33, lines 7-9. Petitioner dragged her into the woods where Summers performed oral sex on him and then he raped her. App. 33, lines 12-13. She claimed Petitioner ejaculated on her arm and stomach. App. 34, line 23 – App. 35, line 4. She further claimed she did not clean herself in any way. App. 36, lines 12-14.

At Petitioner's request, Summers put on her pants and was forced to walk back to the car. App. 35, lines 6-11. Summers was unable to find her underwear or her shirt. App. 35, lines 8-9; App. 35, line 25 – App. 36, line 7.[5] The two got back into the car with Petitioner in the driver's seat. App. 36, lines 18-25. When Petitioner backed up, the car got stuck. App. 37, lines 1-3. According to Summers, Petitioner forced her to get out and push the car while he stepped on the gas. App. 37, lines 9-15. Another car approached them, and Summers tried to yell. App. 39, line 25 – App. 40, line 6. In response, Petitioner allegedly choked her with his arms around her neck. App. 40, lines 8-10.

When Summers' car was mobile again, the two went farther down a dirt road and parked near a pathway leading to an open field. App. 38, lines 4-16. Summers claimed Petitioner raped her again in the back seat. App. 38, lines 16-25. She claimed Petitioner removed her pants, forced her into the backseat, and had sexual intercourse with her. App. 39, lines 1-10. According to Summers, Petitioner ejaculated again on her stomach. App. 40, lines 16-22. Petitioner then drove back to the pathway and on to the dirt road. App. 40, line 23 – App. 41, line 1. During this time, Petitioner apologized and the two exchanged phone numbers. App. 41, lines 1-11. Petitioner offered to let her go to his father's home to wash, but Summers declined. App. 41, lines 22-25.[6]

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[5] Oddly, Summers testified that when she arrived at the hospital, she was wearing only her bra and panties. App. 83, lines 10-12. Thus, at some point, she found her panties, but lost her pants or simply had her pants and refused to put them on before entering the hospital.

[6] Summers did not shower before going to the hospital. App. 69, lines 7-9.

Petitioner got out of the car and left. App. 42, line 1. Summers drove to Troy's home, but no one was there. App. 42, lines 5-8. Summers also put the battery back into her phone and called Twyan, and then Reggie Nelson. App. 42, lines 9-17. Per Reggie's instructions, she met him at the TA, a truck stop. App. 42, lines 17-24.[7] Reggie took her to the hospital, but he did not stay with her. App. 43, lines 16-23. Twyan's mother, Teresa Blackwell, met Summers at the hospital and stayed with her. App. 44, lines 1-6; App. 44, lines 21-25. When Summers was released from the hospital, she drove her car home. App. 45, lines 1-10.

On cross-examination, Summers claimed she had scratches on her chest, back, arms, and feet. App. 64, line 1 – App. 65, line 13. She also claimed she was covered in dirt. App. 66, line 15 – App. 67, line 2.[8]

Marsha Nelson, a nurse, performed the rape kit and a physician conducted the pelvic exam. App. 152, lines 5-8; App. 157, lines 18-20. Nurse Nelson examined Summers using a wood's lamp (black light), which would reveal semen on items. App. 153, line 16 – App. 154, line 1. She was unable to recall if she saw any semen using the special lighting. App. 154, lines 2-5. However, Nurse Nelson explained that she collected swabs from areas indicated by the wood's lamp, if any, and areas where semen may be found based on Summers' description of the event. App. 154, lines 6-9. Nurse Nelson's notes revealed she saw a red mark on Summers' neck and an abrasion on her left leg. App. 156, lines 16-24. Nurse Nelson read from her notes that Summers "acted very depressed," "was crying," "was very disheveled," and was not wearing a shirt. App. 160, lines 16-23.

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[7] Twyan testified that he met Summers at Manning Lane Apartments, and she claimed she had been raped. App. 136, line 25 – App. 137, line 6. He further testified that Summers was not driving her car at the time, but that one of his cousins was driving the car. App. 139, line 17 – App. 140, line 7. Summers never mentioned meeting Twyan at the apartments.

[8] Avant told the jury that Summers reported to police that she had been raped by Button. App. 92, lines 9-25. Although Avant's testimony clearly exceeded the time and place exception making certain statements not hearsay, trial counsel did not object to Avant's testimony. See Rule 801(d)(1)(D).

Although the SLED DNA analyst was present for the trial and called as a witness twice by the state, the analyst was unable to testify regarding the results of her analysis on the rape kit in light of trial counsel's objection to the chain of custody. App. 172, lines10-24; App. 176, line 4 – App. 179, line 25; App. 193, lines 15-19; App. 203, lines 8-9.[9]

After the police spoke to Summers, two officers, including the lead investigator Todd Avant, went to the area where Summers described the alleged assaults occurred. App. 96, lines 10-15. Officers found a spot where it appeared a car had been stuck, but found no footprints around the area. App. 97, lines 1-5; App. 109, lines 5-13. The two walked the road, which led go to a hunting club, and found a wallet belonging to Summers. App. 97, lines 7-11; App. 104, line 16 – App. 105, line 16. The police permitted Summers to leave in the car and conducted no investigation involving the car because the lead investigator "was under the impression everything happened outside the vehicle." App. 112, line 21 – App. 113, line 1; App. 115, lines 20-25; App. 124, line 21 – App. 125, line 5. Thus, the only physical evidence presented to the jury consisted of photographs of (1) the general area found by the police, (2) the spot where a tire got stuck, and (3) Summers' wallet.

During her closing argument, the prosecutor told the jury "nobody that came in this courtroom and took that stand had any reason to tell you anything except the absolute truth. No reason." App. 219, lines 17-21. She continued on this theme by telling the jurors that Summers had "no reason to come into this courtroom and tell you anything except the truth. No reason to wait these two years for her day in court. Come from her job and sit here, and relive this incident if it wasn't everything but the truth." App. 220, lines 9-14. Again, the solicitor vouched for Summers: "Ms. Summers came in this courtroom and told you the truth." App. 220, lines 21-22.[10]

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[9] The DNA analysis revealed no semen was found on any of the swabs. App. 449-451. The report was admitted as an exhibit during the PCR hearing, but this information was not conveyed to the jury. The medical examination also revealed no semen was present. App. 472; App. 482.

[10] Just as the solicitor improperly vouched for Summers during her opening statement, she improperly vouched for Summers during her closing argument. See Shuler, supra; Kelly, supra.

PCR hearing facts

Although trial counsel began representing Petitioner in July of 2007 and requested discovery that same month, Petitioner's case "fell through the cracks." App. 407-416; App. 424. Trial counsel claimed Petitioner told her he had retained private counsel so she stopped working on his case despite the fact that she was never relieved by a court. App. 305, line 13 – App. 306, line 14. After Petitioner sent a letter to this Court, which was provided to trial counsel, she contacted the solicitor explaining the case had fallen through the cracks. App. 424. Shortly thereafter, the solicitor obtained an indictment for Petitioner. App. 425-426. On September 12, 2008, trial counsel learned the state intended to call the case for trial in October 2008. App. 442. On October 2, 2008, trial counsel received discovery in the case. App. 444; App. 487-488. Around this same time, trial counsel requested and received funding for an investigator. App. 445-448; App. 490-492. On October 10, 2008, trial counsel filed a motion to compel the state to produce the medical records of Summers. App. 489. On October 14, 2008, trial counsel served a subpoena on the hospital for Summers' medical records. App. 453. Petitioner's trial started that same day. App. 1. Although trial counsel testified she received the records at least four days before trial, the subpoena clearly indicated it was not served until the day of trial, and four days before the trial was when trial counsel had filed her motion to compel the records. App. 318, lines 6-12; App. 318, lines 18-24; App. 453.[11]

Trial counsel agreed that the primary evidence against Petitioner was the testimony of Summers. App. 325, lines 7-10. She further agreed that Summers' testimony was "not exactly the same" as her statement to Nurse Nelson at the hospital on the night of the alleged assault. App. 326, lines 14-19. However, trial counsel did not agree that the narrative contained in the medical records indicated both sexual encounters took place inside the car, which would have contradicted Summers' trial testimony. App. 326, line 20 – App. 327, line 11. Instead, trial counsel read the

[11] Additionally, trial counsel admitted to "reviewing the medical records [] at the last minute." App. 352, lines 7-8.

medical records to mean one encounter occurred outside of the car, corroborating Summers' trial testimony. App. 327, lines 8-11; App. 328, lines 15-16; App. 331, lines 10-15.

According to trial counsel, Summers' trial testimony and her statement to Nurse Nelson ran "similarly." App. 327, lines 21-23. Trial counsel was unconcerned with inconsistencies because Summers was "a rape victim who's upset, scared, talking to a nurse and the nurse taking notes." App. 327, lines 23-25. Specifically, trial counsel did not want to challenge Summers' truthfulness because "somebody else" was "writing it down." App. 328, lines 1-7. Trial counsel did not find the testimony and statement "so different when you're given an upset girl at the hospital right after something happened and the nurse taking notes or writing down while she's talking and then her testimony on the stand." App. 329, lines 9-13. Incongruously, trial counsel did not believe the inconsistencies provided valid cross-examination because Summers "was a very convincing witness," which trial counsel had confirmed with her post-trial interviews of jurors. App. 329, lines 14-19; see also, 342, line 25 – App. 343, line 4 (claiming "she was a very good witness. She was very believable").

Trial counsel could not recall if she interviewed Nurse Nelson prior to trial, but she admitted she did not cross-examine Nurse Nelson concerning what Summers said. App. 331, line 21 – App. 332, line 5.[12] Further, trial counsel admitted the medical records and Nurse Nelson's observations indicated Summers had only a "redness and an abrasion on her front neck" and a scratch on her lower leg, which was inconsistent with Summers' testimony concerning scratches on her chest, arms, legs, back, and feet. App. 334, line 10 – App. 335, line 18. According to trial counsel, the notation of redness and a single scratch showed Summers "went through some trauma," and "validated her story." App. 335, lines 11-12. Frankly and incredulously, trial counsel did "not want to argue with a rape victim, about how much she had gotten scratched and beaten up, on the stand." App. 335, lines 16-18. Counsel stood by this position despite the fact that the hospital identified no

[12] Marsha Nelson, the nurse, testified that she was never contacted by anyone from Petitioner's defense prior to trial. App. 384, lines 3-19.

semen on Summers' body and SLED detected no semen on the swabs collected by Nurse Nelson. App. 337, lines 1-9.

Trial counsel claimed her strategy was to "bring out issues, save issues, and bring them out on closing." App. 342, lines 13-17. Further, trial counsel wanted the jury to understand "there was no evidence other than her testimony." App. 342, lines 21-22; App. 344, line 2.

Nurse Nelson explained that in conducting an examination of an alleged rape victim, she would have looked for "[a]ny scratches, bruises, cuts, anything" and made a note of those in the record. App. 368, lines 5-15. Using the medical records, Nurse Nelson explained the records indicated Summers had no scratches to her chest, abdomen, legs, or arms. App. 368, line 23 – App. 369, line 1; App. 471. The medical record indicated redness on the neck and a scratch on her foot. App. 369, lines 2-3; App. 370, lines 12-22; App. 471; App. 477.

Although Summers described the alleged rape to Nurse Nelson, she never mentioned being dragged through the woods by her hair. App. 371, lines 10-24. Additionally, Summers never told Nurse Nelson that she was sexually assaulted outside of the car. App. 372, lines 4-11; App. 372, line 12 – App. 373, line 15.

Order denying relief

The PCR judge noted that trial counsel "testified she had plenty of time to review the medical records and familiarize herself with them." App. 495. The judge explained that Petitioner claimed trial counsel failed to use a "written narrative account of the incident" contained within the medical records to impeach Summers' testimony in light of the inconsistencies between the statements made by Summers to the nurse at the hospital immediately after the alleged assault and her testimony at trial years later. App. 495. As noted by the PCR judge, trial counsel testified "she considered the narrative to mostly corroborate [Summers'] testimony and the inconsistencies were not material enough to justify admitting the record." App. 495-496. Additionally, the PCR judge noted that trial counsel "felt the medical records were more harmful than helpful because the nurse's narrative verified that [Summers] was upset and crying when she was examined," and that Summers "had scratches and redness that would serve to corroborate [her] version of events." App. 496.

Trial counsel appeared most moved by her belief that Summers' "testimony was compelling and credible." App. 496.

The PCR court's view of trial counsel's testimony was that "she focused her defense on challenge law enforcement's investigation of the case." App. 496. In her closing argument, trial counsel questioned the state's failure to produce medical records. App. 496.

The PCR judge found that trial counsel "expressed reasonable trial strategy as to all of these allegations." App. 497. Further, the PCR judge found Summer's "statement to Nurse Nelson mostly corroborates" her trial testimony. App. 497. The points of corroboration were that Summers was stopping at a friend's house to pick up something, that Petitioner asked her to take him to the store and she agreed, that when returning to the friend's house from the store, Petitioner grabbed her and made her drive down a dirt road, that she was raped twice, was told to strip, was raped the second time after driving farther down the road, and that Petitioner choked her. App. 497. The PCR judge recognized that Summers told the nurse that when the car became stuck on the dirt road, Petitioner pushed the car, but at trial, Summers testified that she was forced to push the car. App. 497. The PCR judge acknowledged that Petitioner contended Summers' statement to the nurse indicated she was raped twice in the car whereas her testimony was that she was raped once in the car and once in the woods. App. 497.[13] Although recognizing this inconsistency, the PCR court did "not believe that this prove[d Summers] was lying." App. 497. Further the Court did "not believe this inconsistency undoes the efficacy of trial counsel's stated strategy." App. 497.

[13] The order states: "Applicant complains that the statement varies from the testimony because Applicant testified she was raped the first time in the woods, while the statement seems to indicate the rape was outside the car." App. 497. This portion of the order appears to contain several typographical errors. Petitioner did not testify at the trial or PCR hearing; therefore, there could be no reference to his testimony. Additionally, it would have been Summers testifying regarding the alleged rape, not Petitioner. Finally, the rape occurring in the woods and "outside the car" would be the same, not inconsistent. What is clear from the record is that Petitioner claimed the Summers' statement to the nurse indicated both rapes occurred in the car whereas her testimony was that the first rape occurred outside the car, in the woods.

The PCR court found trial counsel's strategy was reasonable because "the variances in the statement fail[ed] to rise to the level as to accuse [Summers] of lying." App. 498. According to the PCR court, "some variance in a written statement and trial testimony" is not unusual. App. 498. The PCR judge agreed with trial counsel "that the statement tended to corroborate [Summers'] trial testimony." App. 498. The court found trial counsel's investigation fell within professional norms and she had adequate time to review the medical records. App. 498. The court did "not believe cross-examination or admission of the statement would alter the outcome of the trial." App. 498.[14]

Discussion

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984). To prove ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Id. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 687-688. "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Id. at 688. Concerning prejudice, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

When trial counsel fails to impeach a witness with prior inconsistent statements, deficient performance that prejudices a defendant results. See Thomas v. State, 308 S.C. 123, 417 S.E.2d

[14] In his motion to alter or amend, Petitioner argued that in Pauling v. State, 331, S.C. 606, 503 S.E.2d 468 (1998), this Court had held "that the failure of trial counsel to present the type of exculpatory evidence that was contained in Nurse Nelson's notes" was ineffective assistance of counsel, and not valid trial strategy. App. 502.

531 (1992). After Thomas was found guilty of first degree burglary and first degree criminal sexual conduct, he challenged his convictions in PCR alleging his counsel was ineffective by failing to impeach the alleged victim with statements she made to emergency medical personnel immediately after the attack that she did not know her assailant. Thomas, 308 S.C. at 124, 417 S.E.2d at 532. This Court found counsel's performance "deficient in failing to call the medical personnel who would have cast doubt on the sole witness' identification of the petitioner." Id. Based on the critical role of the witness – the only witness to the crime – this Court found counsel's deficient performance prejudiced Thomas. Id.

In Driscoll v. Delo, 71 F.3d 701, 710-11 (8th Cir. 1995), the Eighth Circuit reversed Driscoll's convictions based upon trial counsel's failure to impeach a key witness with a prior inconsistent statement. Driscoll was sentenced to death for stabbing a prison guard. Trial counsel failed to impeach an alleged eyewitness who claimed he saw Driscoll stab the guard and that Driscoll confessed to the murder. Driscoll's attorney knew the witness had told police that he only spoke to Driscoll after the stabbing and that Driscoll had not claimed responsibility. Id. at 709-12. The centrality of the witness's testimony was an important factor in the court's consideration in finding the failure to impeach prejudicial. The court found the failure "was a breach with so much potential to infect other evidence, that without, there is a reasonable probability that the jury would find reasonable doubt of Driscoll's guilt." Id.

In a federal habeas case, the Third Circuit Court of Appeals granted relief to Berryman where defense counsel failed to impeach the state's sole eyewitness with her prior inconsistent statements. Berryman v. Morton, 100 F.3d 1089, 1097 (3d Cir. 1996). "Berryman's conviction rested solely on the victim's uncorroborated out-of-court identification, and her in-court identification two years later." Id. Berryman was accused along with two others. Berryman was tried with one of his co-defendants, but the third man was tried separately. The first trials of all three ended in mistrials forcing re-trials. Thus, there were a total of four trials concerning the same set of facts and circumstances. Id. at 1092.

The descriptions of the three men given by the victim in the third man's second trial "differed radically from the actual height of each man, and differed from the identification testimony" she gave at the first trial of the third man. Id. at 1098. Despite these inconsistencies, Berryman's counsel never attempted to impeach her with her prior testimony. Id. Trial counsel explained his failure as "minor" because there were "a lot of major and substantial discrepancies in her story." Id. The Third Circuit concluded the explanation "simply does not wash" because the victim's identification was critical as it was the only evidence against Berryman. Id. at 1098-1099.

Concerning prejudice, the Third Circuit noted the jury never learned of the victim's previous descriptions of her assailants as vastly different from her testimony, meaning the jury was unable to properly evaluate the strength of her identification. The court noted the victim related the actions of her assailants according to their heights in respect to each other. However, she lacked the ability "to consistently describe the actions of Berryman who was nearly half a foot taller than one defendant, and nearly half a foot shorter than the other" and this was information the jury needed to weigh the accuracy of her identification. Based on the central role the identification played and how it was tied to height, the court concluded the prejudice was "obvious." Id. at 1102.

The Arkansas Supreme Court held Peebles' trial counsel was ineffective for failing to present the jury with inconsistent statements made by the alleged child-victim in a criminal sexual conduct case. Peebles v. State, 958 S.W.2d 533, 536-37 (Ark. 1998). The alleged child-victim had accused Peebles of committing sexual acts against him; however, during a pretrial hearing, the child-victim denied repeatedly that Peebles had done anything to him. Id. at 535. The court explained that "defense counsel made no attempt to offer [child victim]'s inconsistent statements into evidence though this information would have been invaluable to the jury." Id. at 536-537. The court concluded that "[b]ecause the jury was not informed that the three-year old boy, who was the critical witness against Peebles, had recanted his story at a pretrial hearing, we conclude that Peebles did not receive a fair trial." Id. at 536; see also Delarosa v. State, 24 So.3d

741, 741-42 (Fla. Ct. App. 2009)(remanding a case for a hearing where trial counsel failed to impeach a police officer with prior statement claiming he was attacked by three Mexicans when same officer testified at trial he was only attacked by defendant).

The Supreme Court of Missouri held trial counsel provided ineffective assistance by failing to impeach three witnesses with prior inconsistent statements in a capital murder case. Black v. State, 151 S.W.3d 49 (Mo. banc 2004). The case arose out of the stabbing death of a man in front of a night club. Four eyewitnesses testified that Black stabbed the victim while the victim was in a truck. Id. at 52. Black testified that the victim got out of the truck and tried to hit him with a beer bottle. Black stabbed the victim in self-defense. Id. at 53. Two other witnesses confirmed Black's testimony. Further, the forensic evidence supported Black's version of events. Id. Although defense counsel impeached one of the state's witnesses with a prior inconsistent statement – he initially told police that the victim got out of the truck before he saw blood. Id. However, defense counsel failed to impeach the other three state's witnesses with prior inconsistent statements, including one saying the victim hit Black with a beer bottle, another saying the victim and Black exchanged blows in the middle of the road, and the third one saying she saw the victim exit his truck prior to being stabbed. Id.

The court found Black suffered prejudice as a result of trial counsel's failures because the impeachment evidence "went to the key issue of deliberation." Id. at 57. "The record ... show[ed] that the jury was focused on that issue." The jury requested definition of the term "cool reflection" in the first-degree murder charge. Id. The court further noted that the evidence was not overwhelming as it consisted principally of testimony of state's witnesses who claimed Black reached into the truck to stab the victim. Id. at 58. "Had that testimony been impeached, little would have remained to support the finding of deliberation." Id. The court concluded:

> The unoffered evidence, admissible both for impeachment and as substantive evidence, went to a central, controverted issue on which the jury focused during deliberations. If believed by the jury, there is a reasonable probability that the outcome of the trial would have been different. Accordingly, this Court

> determines that counsel's ineffectiveness was so prejudicial as to undermine this Court's confidence in the outcome of the trial.

Id.

This Court's decision in Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998) sheds light on what Petitioner was required to show in order to establish *prejudice* under Strickland. Pauling challenged his convictions for first degree burglary and first degree criminal sexual conduct. Id. at 607, 503 S.E.2d at 469. One of his allegations was that trial counsel failed to prepare a triage nurse as a defense witness. Id. at 607-608, 503 S.E.2d at 469. At trial, counsel questioned a doctor about notes prepared by the triage nurse. Importantly, the notes indicated the alleged victim told the triage nurse that there was no actual penetration. However, trial counsel's attempt to question the doctor about the notes drew a hearsay objection, which was sustained. Id. at 608, 503 S.E.2d at 470. At his PCR hearing, Pauling introduced the triage nurse's notes indicating the alleged victim said the assailant did not penetrate her vagina. Id. at 609, 503 S.E.2d at 470.

This Court rejected the state's argument that Pauling was required to call the triage nurse to testify at his PCR hearing in order to show prejudice. According to this Court, Pauling's presentation of the nurse's notes was sufficient under Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). Id. at 610-611, 503 S.E.2d at 471. As explained by this Court, Pauling's introduction of the notes was evidence as to the nature of the nurse's testimony. Id. at 611, 503 S.E.2d at 471.

In Black, supra, the Missouri Supreme Court rejected the state's argument that Black "was required to have called each of the witnesses in question at his post-conviction motion hearing so that he could show what they would have stated had his counsel attempted to impeach them with their prior inconsistent statements." Id. at 57. The court held "a movant is not required to reenact how a hypothetical trial would have proceeded had particular evidence been utilized, but to show that counsel knew of the evidence and was ineffective in failing to use it, to movant's prejudice." Id. The court found counsel's failure prejudiced Black because it went to

the key issue of deliberation where the record showed the jury was focused on that issue based on its note requesting further information on "cool reflection." Id.

Per the medical records, Summers told Nurse Nelson the following concerning the alleged rape:

> She went to friends house (? friends Aunt) to pick up something she left. An acquaintance was there asked her to take him to Exxon Store on way home perp grabbed her arm and hair told her to keep driving. States she was on dirt road and car got stuck. Perp told her to get out of car, "and strip." Pt. got scared grabbed wallet and cell phone and ran away. Tried to call but perp reached her and pushed her down, grabbed wallet and cell phone. Perp told her he would kill her if she did not do what he asked. Took her back to car – another car came down dirt road, pt. tried to scream but perp pushed her down in car, put hands around her neck and once again told her he would kill her. He then ripped her undeware [*sic*] off had "foreplay then sex" he "raped" me. After that he got out of car – asked her to "pop the trunk" – perp didn't get anything out. He then tried to push car out of "rut" he drove down dirt road – was talking "crazy" using threats. He pulled into "drive way" and "raped" me again, in the back seat. He then drove car onto paved road – got out and told pt not to tell anyone or he would "kill" her.

App. 466; App. 467; App. 475. Further, the records indicated Summers told Nurse Nelson that the alleged sexual assault occurred after 9 p.m. on June 23, 2006. App. 374, lines 4-16; App. 468; App. 476; App. 478; App. 479.

Summers' trial testimony, which occurred over two years after the alleged assault, differed *significantly* from her statement to Nurse Nelson. Despite trial counsel's contention that Summers' statement to Nurse Nelson could be interpreted to mean one alleged assault occurred outside of the car, the written statement clearly indicated otherwise, and Nurse Nelson's testimony that her understanding was that both alleged assaults occurred inside the car. Thus, both the statement and Nurse Nelson's understanding of the statement could have been used to impeach Summers on a critical point – exactly *where* the alleged assaults occurred.

The statement could have been used to impeach Summers regarding another critical point – *when* the alleged assaults occurred. Summers told the jury that she arrived at Twyan's around 8 p.m. and drove Petitioner to the store, which was less than five minutes away. After Petitioner made one purchase, she was returning to Twyan's home when Petitioner allegedly forced her to drive down a dirt road where he allegedly raped her. However, she told the hospital staff, the

assault occurred after 9 p.m. Not only did Summers provide inconsistent statements regarding the specific time of the alleged assault, but she was inconsistent concerning the order of what transpired during the alleged assaults. Summers indicated to Nurse Nelson that she was sexually assaulted only after the car "got stuck." However, she told the jurors she was forced to perform oral sex and was "raped" prior to the car getting stuck. This was a significant difference concerning *when* the alleged assaults occurred.

Not only could the medical records be used to impeach Summers on the *where* and the *when* of the alleged assault, but the records could be used to impeach Summers on exactly *what* occurred during the supposed sexual assault. Summers' statement to Nurse Nelson is *completely devoid* of any indication that she was made to perform oral sex on Petitioner. However, that was the first alleged sexual assault she claimed occurred to the jury. She told the jurors that oral sexual and sexual intercourse happened in the woods and that she was unable to find her underwear afterwards. Regarding her underwear, she told Nurse Nelson that Petitioner ripped them off in the car prior to the first alleged sexual assault. Astoundingly, she told Nurse Nelson that Petitioner engaged in "foreplay" with her prior to the initial sexual assault, which was never mentioned to the jury.

One of the most significant differences between Summers' testimony and her statement to Nurse Nelson was *who* was driving the car when it got stuck and *who* pushed the car when it got stuck. At first blush, this seems like a minor inconsistency, but it is very significant when considered in context. Summers was insistent at trial that she was forced to push the car while Petitioner sat in the driver's seat. She was so fearful of Petitioner that she did not attempt to escape at this point despite being in a better position to get away. This testimony was important to support the state's position that Summers engaged in sexual intercourse with Petitioner unwillingly and only as a result of coercion. However, Summers told Nurse Nelson, just hours after the alleged assault, that the car got stuck while Summers was driving and that Petitioner was the one trying to free the car. Placing Petitioner at the trunk of the car trying to free it and allowing Summers to remain in a position of power in the driver's seat was significantly different from her testimony.

Summers told the medical staff that *she* grabbed her wallet and phone and then ran away. It was only when Petitioner caught up with her that *he* grabbed her wallet and phone. However, she told the jurors that while she and Petitioner were in the car together, Petitioner took her phone, removed the battery, and placed the phone between the seats. It was during this time that Petitioner allegedly took her purse and wallet as well. Along these same lines, Summers told the jurors that Petitioner dragged her out of the car and then ordered her to undress, but she told Nurse Nelson that Petitioner told her to get out of the car and undress, which was when she tried to run away. Not once did Summers mention anything to the jury about Petitioner opening her trunk; however, she told Nurse Nelson he got out of the car, walked to the trunk, told her to "pop the trunk," but did not remove anything. These were yet other significant differences between her testimony and her statement to Nurse Nelson.

Trial counsel's failure to use the medical records to impeach Summers was deficient performance prejudicial to Petitioner. See Rutland v. State, Op. No. 27614 (S.C. Sup. Ct. filed Mar. 30, 2016). Contrary to trial counsel's testimony that the medical records mostly corroborated Summers' testimony, the differences were stark and significant as explained. Informing the jury of those differences was necessary to challenge the only evidence against Petitioner – Summers' testimony.

Additionally, the PCR judge noted that trial counsel "felt the medical records were more harmful than helpful because the nurse's narrative verified that [Summers] was upset and crying when she was examined," and that Summers "had scratches and redness that would serve to corroborate [her] version of events." App. 496. Trial counsel appeared most moved by her belief that Summers' "testimony was compelling and credible." App. 496. Trial counsel's "strategic decision" not to use the records because she considered them harmful because the records supported Summers' testimony concerning her emotional state was unreasonable in light of the testimony. The jurors were well aware of Summers' emotional state from the testimony of Summers, Twyan, and Teresa. In fact, Nurse Nelson testified that the medical records indicated Summers was crying and upset. Thus, trial counsel's alleged concern at PCR that the medical records would corroborate

Summers' emotional state had in fact occurred and could not have been a reason not to use the records to impeach Summers regarding the circumstances of the alleged assaults. See Sanchez v. State, 351 S.C. 270, 569 S.E.2d 363 (2002); Gilchrist v. State, 350 S.C. 221, 565 S.E.2d 281 (2002); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992); Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993). Additionally, the jurors heard testimony concerning what the medical records contained concerning the injuries noted by Nurse Nelson. Thus, there could be no reasonable strategic reason for failing to use the medical records out of fear that the jury would learn the records indicated Summers had some injuries. See Sanchez, supra; Gilchrist, supra; Stokes, supra; Drayton v. Evatt, supra.

Further, the PCR judge applied the wrong standard to determine whether Petitioner had established trial counsel's prejudicial deficient performance. According to the PCR judge, Petitioner failed to show the medical records demonstrated Summers was "lying." The question was not whether the records showed Summers was lying; rather, the question was whether the records could be used to impeach Summers' testimony. The answer to that question is simple – yes. The next question was whether there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. The answer to that question is yes as well.

Petitioner suffered prejudice because Summers' testimony was the only evidence against him. Even trial counsel admitted that the state's only evidence was Summers' testimony and that her credibility was crucial. According to trial counsel, Summers was very credible. The solicitor knew the case hinged on Summers' credibility and vouched for her credibility in her opening and closing. See Rutland, supra. Thus, it was incumbent upon trial counsel to use every weapon in her arsenal to combat Summers' credibility. Her failure to use the medical records was inexcusable and she provided no *reasonable* strategic decision for her failure to do so.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented. In the event this Court grants the petition, but dispenses with briefing, Petitioner respectfully requests this Court reverse the decision of the PCR judge and grant him a new trial.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of April, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Clarendon County

R. Knox McMahon, Circuit Court Judge

DONNEIL WOODS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on David Spencer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Donneil Woods #272800, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 1st day of April, 2016.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 1st day
of April, 2016.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.