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SC SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Clarendon County  
R. Knox McMahon, Circuit Court Judge

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DONNEIL WOODS,

Petitioner,

vs.

THE STATE,

Respondent.

APPELLATE CASE NO. 2015-000131

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**RETURN TO PETITION  
FOR WRIT OF CERTIORARI**

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## **STATEMENT OF ISSUE ON APPEAL**

Probative evidence supports the PCR court's ruling that Counsel was not ineffective for deciding to not utilize medical records during cross-examination of Victim or admit the records into evidence where counsel provided reasonable trial strategy for declining to use the medical records and where counsel asked Victim 180 questions on cross-examination. Additionally, the record supports a finding that Petitioner was not prejudiced by the alleged deficiency.

## STATEMENT OF THE CASE

The Clarendon County Grand Jury indicted Petitioner Woods for kidnapping, criminal sexual conduct in the first degree (CSC), and strong armed robbery. Woods was represented by Deborah K. Butcher, Esquire. The jury found Woods guilty on all three charges following trial on October 14-16, 2008, before the Honorable Clifton Newman. Judge Newman sentenced Woods to concurrent sentences of thirty years imprisonment for both the CSC and kidnapping convictions, and fifteen years imprisonment for the robbery charge.

Woods appealed and was represented by Robert M. Pachack, Esquire. The appeal was dismissed pursuant to Anders v. California, 386 U.S. 738 (1967). Woods filed an application for post-conviction relief (PCR). A hearing was held before the Honorable R. Knox McMahon on September 30, 2013. Applicant was represented by Blair Jennings, Esquire, and Ray E. Chandler, Esquire. Judge McMahon denied relief by written order dated December 11, 2013. Woods' counsel submitted a subsequent motion to reconsider that was denied on May 5, 2014.

Woods petitioned this Court for a writ of certiorari. This return follows.

## STATEMENT OF FACTS

Victim often visited a college friend, Tywan Blackwell, in Manning. Victim and Blackwell also often visited a friend of Blackwell's, Troy Nelson, in Alcolu. On June 23, 2006, she drove from her mother's house in St. George to Nelson's house to retrieve a phone charger she left behind. Nelson was there, as was Petitioner Woods. Victim met Woods at Nelson's on a prior occasion. Woods asked Victim for a ride to the store before she went home. Victim drove Woods to the store, which was less than five minutes from Nelson's house. Victim waited in the car while Woods went in and bought beer. App. pp. 25-30.

Victim drove back towards Nelson's house. Victim testified as they approached the house, "I was about to turn the wheel, he grabbed my arm, and he grabbed the wheel, and said, he forced me to drive. And he said, 'if you don't drive, I am going to kill you.'" App. p. 30, line 24 – p. 31, line 3. Victim was afraid and she was crying. She explained she drove because she did not want to die. She drove to the end of a paved road and Woods forced her to turn on a dirt road. She estimated she drove a mile on the dirt road before Woods told her to stop. App. pp. 30-32.

Woods took Victim's car keys, her cell phone, and her purse. He removed the battery from her cell phone and the money from her wallet. App. p. 32, p. 35. He pulled her out of the car from the passenger side door and told her to undress when they were standing outside the car. She took off her shirt, then she ran. Woods ran after her and she fell when he caught up to her. Woods dragged her by the hair back to the car. When they got back to the car, Woods told her to take off her pants. He drug her into the woods and told her to perform oral sex on him. Woods then raped her. App. pp. 32-34. Victim testified Woods ejaculated on her arm and stomach. Woods made her stand

up and put on her pants. Victim could not find her shirt or her underwear. Woods forcefully walked her back to the car. App. pp. 34-36.

They got in the car, Woods drove. He started to back up and got stuck. App. pp. 36-37. Victim testified, "He tried, you know, to move the car, but it wouldn't move." App. p. 37, lines 10-11. Woods ordered her to push the car while he stepped on the gas. App. p. 37.

At one point after the car became unstuck, another car came down the road and Woods stopped. He told her if she screamed or yelled he would kill her. Victim tried to yell and escape, but Woods choked her. App. p. 40.

Woods drove Victim further down the road and turned on a pathway leading into an open field. He raped her again in the backseat of the car. It was dark by this time. App. p. 38. Victim testified Woods used force to rape her. She testified he threatened to kill her if she tried to escape. Victim tried to kick Woods and escape, but Woods was stronger than her and she could not get away. App. p. 39. Woods ejaculated on her stomach again. App. p. 40.

Woods made Victim go back to the passenger side and he drove back. Victim testified as follows: "And as we drove, he said, 'I am sorry.' And will you forgive me. 'Here is my number' and all this. He was saying all kind of crazy things to me. Of course I was still crying." App. p. 41, lines 1-5. Woods asked Victim for her number and she complied. She explained why, "Because I didn't know if he had a cell phone of his own. And I felt if I gave him the wrong phone number that he might would kill me or try something greater." App. p. 41, lines 8-11.

Woods offered to take her to his father's so she could wash up. She pleaded for him to take her home instead. She was still pleading for her life. Then Woods got out of the car and ran. Victim

drove to the end of the paved road and put the battery back in the phone. She called Nelson and Blackwell. App. pp. 41-42. She began throwing up at TA where she met Nelson. Nelson took her to the hospital. App. p. 43.

Richard Todd Avant was an investigator with the Clarendon County Sheriff's Office at the time of the incident. Avant interviewed Victim at the hospital and she reported what happened. She was upset and crying, she was not able to speak about the incident easily. App. pp. 92-93. Investigator Avant left the hospital with a Deputy and went to the area Victim described. The road was a long dirt road with many cuts and paths, but they managed to find a spot where it looked like a car had been stuck. App. pp. 96-97. Investigator Avant testified "We parked . . . out on the road. We began walking down the road down into the woods. . . . And we discovered her wallet down there on the edge of the road." App. p. 97, lines 1-11. The wallet contained Victim's social security card. App. p. 105.

Tywan Blackwell testified she met with Victim at night on June 23<sup>rd</sup> and Victim was shaking and crying. She told Blackwell she was raped. Blackwell confirmed he was at Nelson's house earlier and Woods was there at the time when he left Nelson's. App. pp. 136-37.

Teresa Blackwell is Blackwell's mother and Woods' first cousin. She went to the hospital to see Victim and found Victim there trembling, shaking, and crying. App. pp. 145-47.

Marsha Nelson was the ER nurse that saw Victim. She testified Victim was depressed and crying. App. p. 160. She testified she did not remember if she saw any semen. She testified Victim had red visible marks on her neck. She testified Victim also had abrasions and scrapes on her leg. **Nurse Nelson testified the marks on the neck were consistent with Victim being choked by**

someone. App. p. 158.

The defense did not put up a case. The trial court advised Woods of his right to testify or not testify and then asked Woods if he wanted to testify. Woods replied: "Let me check the time. It's 11 o'clock. I want to get this done, so I am not going to be testifying. I just want to get this done." App. p. 211, line 24 – p. 212, line 2.

## ARGUMENT

**Probative evidence supports the PCR court's ruling that Counsel was not ineffective for deciding to not utilize medical records during cross-examination of Victim or admit the records into evidence where counsel provided reasonable trial strategy for declining to use the medical records and where counsel asked Victim 180 questions on cross-examination. Additionally, the record supports a finding that Petitioner was not prejudiced by the alleged deficiency.**

Woods alleges counsel was ineffective for declining to use medical records to cross-examine Victim.<sup>1</sup> Counsel testified she felt the records tended to corroborate Victim's claims and declined to use them. Counsel asked Victim 180 questions on cross-examination. Probative evidence supports a finding Counsel was not ineffective.<sup>2</sup>

In order to prove counsel was ineffective, a PCR applicant must show counsel's performance was deficient and the applicant was prejudiced by the deficient performance. Strickland v. Washington, 466 U.S. 668, 687 (1984). Counsel's performance will be deemed deficient if it falls "outside the wide range of professionally competent assistance." Id. The applicant is prejudiced by the deficient performance if "there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Id. at 695.

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<sup>1</sup> In the statement of issues, Woods makes conclusory assertions about unspecified violations of the state constitution. No such claim was raised below and a violation of the State constitution would be a direct appeal issue not cognizable in PCR. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975).

<sup>2</sup> Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989) (The PCR court's findings will be affirmed on appeal when supported by probative evidence).

“A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” Id. at 689. “Judicial scrutiny of counsel’s performance must be highly deferential.” Id., at 689. In order to prove a claim of ineffectiveness, “the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” Id. “[T]he existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant’s cause.” Id. at 689.

Counsel’s articulation of valid trial strategy defeats a claim of ineffective assistance of counsel. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546; 419 S.E.2d 778 (1992). “Courts must be wary of second guessing counsel’s trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel.” Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). Strickland requires extreme deference to counsel’s strategic judgments that are adequately investigated; as Strickland explains: “[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. . . .” Strickland, 466 U.S. at 690-91.

“Courts generally entrust cross-examination techniques, like other matters of trial strategy to the professional discretion of counsel.” Henderson v. Norris, 118 F.3d 1283, 1287 (8th Cir. 1997). “The cross-examination of a witness is a delicate task; what works for one lawyer may not be successful for another.” Id. The Eighth Circuit observed “there are few, if any, cross-examinations

that could not be improved upon.” *Id.* (citation and quotation marks omitted).

The Ninth Circuit held, “We give ‘great deference’ to ‘counsel’s decisions at trial such as refraining from cross-examining a particular witness.” *Brown v. Uttecht*, 530 F.3d 1031, 1036 (9th Cir. 2008) (quoting *Dows v. Wood*, 211 F.3d 480, 487 (9th Cir. 2000)). In *Uttecht*, the Ninth Circuit affirmed the determination that counsel was not ineffective for declining to cross-examination of an expert witness based on the awareness “that a cross-examination of [expert] ‘might well have backfired.’” *Uttecht*, at 1036-37 (quoting *Yarborough v. Gentry*, 540 U.S. 1, 7 (2003)); see generally *Skeen v. State*, 325 S.C. 210, 481 S.E.2d 129 (1997) (finding one could only speculate whether counsel could have done a better cross-examination of a doctor, therefore, applicant did not meet his burden of proving prejudice).

Counsel testified she reviewed the medical records prior to trial and recalled she did not want to put the records into evidence because “it had things in here about redness and scratches and her statement that she had made about the rape and how upset and everything she was.” App. p. 319, lines 14-18. Counsel took a realistic approach to the significance of perceived inconsistencies between the statement and the Victim’s trial testimony: “I think they run similarly. You’re talking about a rape victim who’s upset, scared, talking to a nurse and the nurse taking notes. And here you’re talking about testimony sometime later from the rape victim. I think both of these run very similarly. They’re not going to be word for word.” App. p. 327, line 23 – p. 328, line 3.

Counsel considered how cross-examination might have gone if she attempted to impeach victim with the statement: “But when I look at this, I don’t think I could call – tell her she is not being truthful here when you’ve got somebody else writing it down. She could’ve very well told the

nurse that, and she could've corrected it if I had asked her that and put this in." Tr. p. 329, lines 3-7.

Counsel explained further, "I mean, I just don't think these are 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." Tr. p. 329, lines 9-13. Counsel noted that Victim was convincing on the stand and jurors she spoke with afterwards confirmed this. Tr. p. 329, lines 17-19.<sup>3</sup>

Counsel explained, "... I certainly would not have wanted to bring these medical records in and let it just validate her testimony even farther." Tr. p. 329, lines 22-25. Counsel also felt the injuries described in the medical records were substantial enough to show Victim went through some trauma and opined it validated her story.<sup>4</sup> She further noted it was not beneficial to argue with a rape victim about how much she was scratched or beaten up in front of the jury. Tr. p. 335, lines 4-18.<sup>5</sup>

Counsel felt the statement Victim provided Nurse Nelson was devastating: "The scratches, her demeanor, how upset she was, and her statement I thought was pretty darn consistent with the statement she gave law enforcement and what she stated on the stand." App. p. 345, lines 14-23.

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<sup>3</sup> Respondent disagrees with Woods' summary that "trial counsel did not believe the inconsistencies provided valid cross-examination . . ." Instead, the testimony reflects trial counsel determined that the consistencies between testimony and the statement meant the potential damage from the statement outweighed the minimal benefits.

<sup>4</sup> Contrary to the contention Woods makes in his petition, counsel did not agree the injuries reported in the medical records were inconsistent with Victim's testimony. She testified that the description "validated her story," and she thought the records showed Victim went through some trauma. She did not believe it was beneficial to argue with Victim about how much she was scratched. This is reasonable, not "incredulous" as Woods claims. It is reasonable trial strategy. App. p. 335, lines 6-18.

<sup>5</sup> Nurse Nelson testified at trial and at the PCR hearing that Victim said Woods tried to choke her and Nelson observed she had red visible marks on her neck. She also had abrasions or scrapes on her left leg. App. p. 155, lines 19-24, p. 376, lines 21-25.

Counsel testified she still would not have wanted the medical records admitted into evidence. App. p. 351, lines 12-17.

Counsel noted that in both the trial testimony and statement Victim related she agreed to drop Woods at the Exxon, Woods grabbed her arm and hair and made her drive where he directed, that she was told to strip, that she tried to run away, that they got stuck, that a car came down the dirt road, that she was choked (and the nurse testified at trial that she had red marks on her neck consistent with being choked), and that she was raped twice. App. pp. 349-350.

The PCR court analyzed the similarities and differences between the statement and trial testimony as follows:

This Court finds that counsel has expressed reasonable trial strategy as to all of these allegations. Victim's statement to Nurse Nelson mostly corroborates victim's trial testimony. At trial, as in the statement, victim indicated that she was stopping at a friend's house to pick up something (at trial she clarified a phone charger, Tr. p. 26). Applicant then asked victim to take him to the store and she did. Applicant went into the store and then on the way back to the friend's house, Applicant grabbed victim and made her drive down a dirt road. Tr. pp. 28-30; p. 32, lines 4-5. Both the statement and the testimony indicates Applicant raped victim twice. The first time Applicant told victim to strip. Both the statement and testimony mention that the car became stuck on the dirt road, although the statement suggests Applicant may have pushed the car, while testimony indicated Applicant made victim push the car while Applicant drove to get it unstuck. Tr. pp. 35-36. The second rape occurred after Applicant drove further down the road and pulled the car over on either a driveway or path. Tr. p. 37. The statement corroborated victim's testimony that Applicant choked her. Tr. p. 38. 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. This Court does not believe that this proves victim was lying, as Applicant urges this

Court to believe.<sup>6</sup> This Court also does not believe this inconsistency undoes the efficacy of trial counsel's stated strategy.

App. p. 497.

Counsel noted her investigator talked to several different witnesses, and none of them were able to contradict Victim's statements or support Woods. Tr. p. 350, line 25 – p. 351, line 3. Counsel explained her trial strategy was to show that law enforcement did a poor job on the case, made a lot of mistakes, and failed to fully investigate. Tr. p. 330, line 25 – p. 331, line 4.

Counsel expertly executed this strategy, culminating in a masterful closing argument, chastising law enforcement for failing to take various steps in the investigation. See p. 225, lines 12-15 ("It's not that they didn't bring you any evidence. What's more appalling is they didn't even try to get you evidence.")). Concerning the medical records, counsel argued the following:

One of the big things that I felt like was missing from this case is the medical records. Where were the medical records? They certainly could have been obtained. Was there anything in there that they did not want you to see? What is so scary, Ladies and Gentlemen, I do mean scary, the State is asking you to convict a man of very serious crimes. A horrible crime. And they refuse to even investigate the crime.

App. p. 227, lines 2-11. Obviously, counsel's strategy during closing would be undermined if she attempted to offer the medical records into evidence or even if she utilized them in cross-

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<sup>6</sup> Woods alleges the PCR court used the wrong standard based on the observation that the inconsistency fails to show Victim was lying. However, the PCR court was merely responding to PCR counsel's assertion during closing argument that Victim "comes in **and lies** on the freaking stand" (App. p. 398, lines 10-12) and "**I care that the medical evidence made this woman a liar.**" App. p. 399, lines 4-13. PCR counsel then lied to the PCR court, "You know what Ms. Butcher does in her brilliant cross-examination? She asked her twelve questions." App. p. 399, lines 18-20. In fact, trial counsel asked Victim 180 questions. App. pp. 55-82. Unlike Victim, PCR counsel was not hysterical and crying with bruises on his neck when he argued his closing at the PCR hearing.

examination. Additionally, the medical records could have become admissible under the rule of completion – counsel would have lost the opportunity to insinuate the prosecution was hiding something. See Rule 106, SCRE.

Woods relies on this Court's brief opinion in Thomas v. State, 308 S.C. 123, 417 S.E.2d 531 (1992) to assert counsel is **always** ineffective for failing to impeach a witness with an inconsistent statement. Obviously that is not the law. In Thomas, counsel was found ineffective for failing to call medical personnel as witnesses who would have testified that when treated, victim said she did not know her attacker, contrary to her testimony that she recognized the attacker as Thomas, her neighbor. Id. Thomas fails to indicate whether counsel provided strategic reasons for failing to call the witnesses or any strategy at all. In the instant case, counsel adamantly stated her trial strategy. Further, the inconsistencies alleged in this case do not rise to the level of inconsistency on the critical fact of the victim's ability to identify the attacker in Thomas.

Woods also relies on Driscoll v. Delo, 71 F.3d 701, 710-11 (8th Cir. 1995). In that case, Driscoll's counsel failed to impeach an inmate witness with statements to officers that omitted he saw Driscoll stab the victim and that Driscoll admitted stabbing the victim. Driscoll's counsel admitted the failure to impeach was not based on trial strategy. So Driscoll serves as little guidance as the impeachment value of the statements in Driscoll was far more obvious and again, Driscoll's counsel did not state a trial strategy, unlike the instant case.

Next, Woods cites Berryman v. Morton, 100 F3d 1089, 1097 (3d Cir. 1996). In Berryman, counsel failed to impeach the state's sole witness with inconsistent testimony from prior trials concerning the height of the three co-defendants which the Court of Appeals considered critical on

the issue of identity. Obviously, in this case, identity was not an issue. Further, in Berryman, the district court found Berryman's trial counsel's testimony to lack credibility and the Court of Appeals was merely affirming the findings of the fact finder (this is **an inconsistency** between the actual opinion and Woods's recitation of the case in his petition). In the instant case, the fact finder found Counsel's stated trial strategy to be reasonable. See Gavin v. State, 473 So.2d 952, 955 (Miss. 1985) ("Even if we wanted to be fact finders, our capacity for such is limited in that we have only a cold, printed record to review. The trial judge who hears the witnesses live, observes their demeanor and in general smells the smoke of the battle is by his very position far better equipped to make findings of fact which will have the reliability that we need and desire.").

The inapplicability of Peebles v. State, 958 S.W.2d 533, 536-37 (Ark. 1998) is patent. The child abuse victim recanted in a pretrial hearing, denying Peebles did anything to him. Peebles' counsel failed to impeach the child with the prior recantation. In the instant case, obviously Victim never recanted that the rape occurred. Woods also relies on Black v. State, 151 S.W.3d 49 (Mo. 2004) in which the state did not contend counsel's omission was trial strategy and agreed the lower court's order claiming the impeachment evidence would be merely cumulative was incorrect. In the instant case, Woods' claim is without merit because counsel's decision was based on reasonable trial strategy.

Strickland does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation, instead Strickland requires the PCR applicant to prove "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, at 697. Therefore, the function of the PCR court is to determine if

“in light of all the circumstances, the identified acts or omissions were outside **the wide range** of professionally competent assistance” required of a criminal defense attorney. Strickland, at 690 (emphasis added).

In the instant case, counsel’s performance was not deficient for failing to follow some rigid playbook where attorneys should attempt impeachment for any perceived inconsistencies. Counsel recognized, based on counsel’s experience, that impeachment likely would not be fruitful. This constitutes effective assistance of counsel and the determination was amply supported by evidence.

### CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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The Honorable R. Knox McMahon, Circuit Court Judge  
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DONNEIL WOODS, #272800

Petitioner,

STATE OF SOUTH CAROLINA

Respondent.

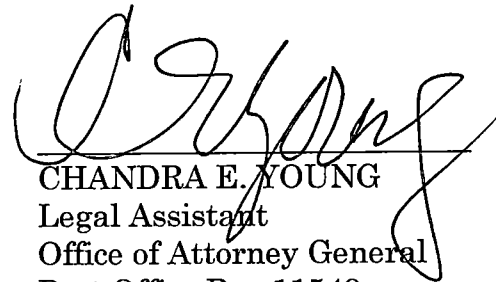
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**PROOF OF SERVICE**  
\_\_\_\_\_

I, CHANDRA E. YOUNG, certify that I have served the Return to Petition for Writ of Certiorari on opposing counsel by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, Esquire  
Post Office Box 11589  
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I further certify that all parties required by Rule to be served have been served.

This 13<sup>th</sup> day of July 2016.



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