STATE OF SOUTH CAROLINA
In the Supreme Court

On Writ of Certiorari to the Court of Appeals
Appeal from Richland County
The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 5295 (S.C. Ct. App. filed Feb. 11, 2015)
Appellate Case No. 2010-177147

EDWARD FREIBURGER,

Respondent,

vs.

THE STATE OF SOUTH CAROLINA,

Petitioner.

PETITION FOR WRIT OF CERTIORARI

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The Court of Appeals erred in reversing the post-conviction relief court and remanding Freiburger's case to the court of general sessions for a new trial based on its finding that trial counsel was ineffective for failing to introduce a 1961 letter written by the then director of SLED, J.P. Strom, to the then director of the FBI, J. Edgar Hoover, where the pertinent portion of the letter is inadmissible and there is no reasonable probability that the result of Freiburger's trial would have been different had counsel utilized the letter.

STATEMENT OF THE CASE

Procedural History

Edward Freiburger was indicted during the June 2001 term of the Richland County Grand Jury for murder (2001-GS-40-2955). Freiburger was represented by John D. Delgado, Esquire, and Kathrine H. Hudgins, Esquire. On July 25, 2002, Freiburger proceeded to a jury trial before the Honorable Henry F. Floyd, where the jury convicted him as indicted. On August 1, 2002, Judge Floyd sentenced Freiburger to life imprisonment under 1961 law.

A notice of appeal was filed and an appeal was perfected by appellate counsel John S. Nichols, Esquire. Following briefing and oral argument, the South Carolina Supreme Court affirmed Freiburger's conviction and sentence by published opinion filed September 26, 2005. State v. Freiburger, 366 S.C. 125, 137, 620 S.E.2d 737, 743 (2005). Following the denial of his petition for rehearing, Freiburger petitioned for certiorari to the United States Supreme Court, and the State filed a brief in opposition. On May 22, 2006, the United States Supreme Court denied the petition.

Thereafter, Freiburger filed a timely application for post-conviction relief on July 5, 2006. The State made its Return on February 9, 2007, requesting an evidentiary hearing be held. Freiburger filed several amendments to his application for post-conviction relief: the first on November 13, 2008; the second on July 15, 2009; the third

on August 3, 2009; and the fourth on August 17, 2009. Freiburger also filed a "Pretrial Brief" on August 4, 2009. Evidentiary hearings into the application and subsequent amendments were convened on August 13, 2009, and October 8, 2009, at the Richland County Courthouse before the Honorable G. Thomas Cooper, Jr. Freiburger was present at the hearings alongside counsel, John H. Blume, III. The State was represented by Assistant Attorney General Brian T. Petrano of the South Carolina Attorney General's Office. Freiburger did not testify at the evidentiary hearings; however, he did present testimony from Delgado, Hudgins, and Nichols. Additionally, Freiburger presented testimony from Dr. Steven J. Laken and Dr. Adina Schwartz. The State presented testimony from South Carolina Law Enforcement Division (herein after "SLED") Agent Ira B. Parnell, Jr.

The post-conviction relief court denied and dismissed all of Freiburger's allegations by written order filed February 9, 2010. On February 25, 2010, Freiburger served a Motion to Alter or Amend the Judgment. The State served its return to this motion on March 8, 2010. The court held a hearing on Freiburger's motion on July 8, 2010. On October 8, 2010, the court issued an order denying Freiburger's motion.

Freiburger served a notice of appeal on November 4, 2010. Freiburger served his Petition for Writ of Certiorari and Appendix on February 24, 2011. Thereafter, the State filed an initial Motion to Hold Time Limits for the Return to Petition for Writ of Certiorari in Abeyance while the Petitioner Removes/Supplements the Appendix with the Required Documents per Rule 243(f), SCACR on March 28, 2011. In response, Freiburger filed a Motion to Correct the Appendix and file a Supplemental Appendix on April 11, 2011. By order dated April 15, 2011, this Court granted the motions and instructed Freiburger to remove the improper documents from the Appendix and

supplement it with the omitted documents. Thereafter, Freiburger filed a Supplemental Appendix, Second Supplemental Appendix, and Third Supplemental Appendix. On September 9, 2011, the State filed a Second Motion to Hold Time Limits for the Return to Petition for Writ of Certiorari in Abeyance while the Petitioner Removes/Supplements the Appendix with the Required Documents per Rule 243(f), SCACR. Freiburger filed his return on September 14, 2011. This Court denied the State's motion on October 20, 2011. The State filed its Return to the Petition for Writ of Certiorari on October 31, 2011. On November 17, 2011, Freiburger filed a reply.

Thereafter, this Court transferred this case to the South Carolina Court of Appeals pursuant to Rule 243(l), SCACR. On August 2, 2013, the Court of Appeals granted certiorari. Freiburger filed his Brief of Petitioner on October 31, 2013. The State filed its Brief of Respondent on March 5, 2014. Freiburger filed his reply on March 17, 2014. The Court of Appeals heard argument of this case on October 16, 2014. On February 11, 2015, the Court of Appeals reversed the post-conviction relief court and remanded the matter to general sessions for a new trial in a two-to-one decision. Freiburger v. State, Op. No. 5295 (S.C. Ct. App. filed February 11, 2015) (Shearouse Adv. Sh. No. 6 at 53). Writing on behalf of the majority, Chief Judge Few found that trial counsel was ineffective for failing to introduce a letter written in 1961 by then director of SLED, J.P. Strom, to then director of the FBI, J. Edgar Hoover; the majority dismissed all of Freiburger's remaining allegations. Writing separately, Judge Thomas concurred with the dismissal of the remaining allegations but disagreed with the majority's ruling as to the use of the letter.

The State filed its Petition for Rehearing on February 26, 2015. Freiburger filed his "Response in Opposition" on March 12, 2015. On August 21, 2015, the Court of Appeals denied the State's petition. This Petition for a Writ of Certiorari follows.

Factual History

Edward Freiburger, then a young Army private in training at Fort Jackson, callously murdered John Orner, shooting him at close range in the back of the head sometime between the evening hours of February 28, 1961, and the early morning hours of March 1, 1961. More than forty years after the killing, Freiburger was convicted of the crime.

John Orner was a retired Army master sergeant and a veteran of both World War I and World War II. (App. 223). He drove a taxicab, frequenting a taxi stand outside the main gate of Fort Jackson on Jackson Boulevard, catering to soldiers from the post. (App. 223-24).

Orner's stepson reported Orner missing on the morning of March 1, 1961, when Orner failed to return home after work the night before. (App. 225-26, 295). Later that day, Columbia Police Officer Frank Revetta discovered Orner's abandoned and bloody cab near the DeSoto Hotel at the intersection of Lady and Assembly streets in downtown Columbia. (App. 244-45, 297). Orner's identification papers were on the front seat. (App. 297). On March 3, 1961, SLED Agent L.B. Harmon discovered the lifeless body of Orner on the side of Highway 601 in lower Richland County. (App. 368, 370).

An autopsy was performed on Orner's body. The pathologist removed three bullet fragments from Orner's brain and determined that those bullet fragments killed him. (App. 376, 386). Orner's wound was consistent with being shot in the back of the head by a passenger in his cab sitting in the back seat. (App. 440).

SLED forensic examiners tested the bullet fragments. They determined that the three fragments were from a single .32-caliber bullet fired from a Harrington & Richardson revolver. (App. 390).

In 1961, the monthly salary for an Army private like Freiburger was sixty-eight dollars. (App. 488). Freiburger was habitually broke before the Army's payday, which was the last day of the month. (App. 488, 492). On February 17, 1961, Freiburger pawned an electric razor at Berry's Pawn and Army Store, which was located at the corner of Lady and Assembly Streets on the first floor of the building housing the DeSoto Hotel, for four dollars. (App. 473, 476-77). On February 25, 1961, Freiburger pawned a Philco transistor radio at Freed's Jewelry, on Washington Street, for eight dollars. (App. 513-14, 517-18). On February 28, 1961—payday—Freiburger redeemed the radio from Freed's for eight dollars plus interest. (App. 520).

The police determined that one Edward Freiburger had purchased a .32-caliber Harrington & Richardson revolver, serial number W9948, along with .32-caliber ammunition that same payday, February 28, 1961, from Capital Loan and Pawn for $50.42. (App. 315-16, 319-21). Further investigation revealed that on the night of March 2, 1961, a man using the name and Army service number of Edward Freiburger registered at the Gresham Hotel at the intersection of Main and Wheat Streets, near the railroad station, in Columbia, giving his home address as Fort Jackson. (App. 414, 422-24). Freiburger had stayed at the hotel previously. (App. 488).

Some time after the murder, Freiburger gave a fellow soldier in the barracks a live round of .32-caliber ammunition. (App. 463).

On March 29, 1961, at approximately 11:00 p.m., Tennessee Highway Patrolman Donald Meredith spotted Freiburger hitchhiking along state Highway 25 near Newport,

Tennessee. (App. 561-62). Hitchhiking was a misdemeanor under Tennessee law. (App. 562). Trooper Meredith stopped, questioned Freiburger, and patted him down. (App. 563). During the pat down, Trooper Meredith discovered a loaded .32-caliber Harrington & Richardson revolver, serial number W9948. (App. 564, 567, 572). Trooper Meredith arrested Freiburger for carrying the pistol and confiscated it. (App. 564).

Freiburger, who was actually absent without leave from the Army when Trooper Meredith arrested him, was eventually turned over to military authorities. He was subsequently convicted of being absent without leave and sentenced to confinement in the United States Disciplinary Barracks at Fort Leavenworth, Kansas. He was dishonorably discharged from the Army. (App. 1004-05).

The next month, Richland County Sheriff S.S. Sligh contacted Trooper Meredith and asked whether he had the pistol. (App. 565). Trooper Meredith turned the weapon over to Sheriff Sligh. (App. 567).

Once in custody of the Richland County Sheriff's Department, the weapon was sent to SLED for ballistics testing. SLED Lieutenant Millard Cate, who at that time was head of the SLED ballistics laboratory, and Agent Carl Stokes tested the pistol to determine if it had fired the bullet that killed John Orner. Cate carved his initials in the handle of the pistol for identification. (App. 393). The tests yielded inconclusive results as the SLED agents could not determine that the bullet was fired from Freiburger's pistol, but also could not excluded the possibility it was fired from that weapon. (App. 396). Another Harrington & Richardson revolver, taken from the home of Columbia resident Alonzo Dreher, was also tested and similarly yielded inconclusive results. (App. 393, 1474-75).

Following the inconclusive results as to both the Freiburger and Dreher weapons, then SLED director J.P. Strom wrote a letter to then FBI director J. Edgar Hoover seeking assistance.[1] (App. 1474-75). In this informal letter, Strom described Orner's murder, the Freiburger and Dreher weapons, and the ballistics testing already completed by both SLED and an Army Firearms Examiner—both of which yielded inconclusive results as to each gun. (App. 1474-75). Strom requested that the FBI examine the two guns and bullet fragments recovered from Orner, or in the alternative, provide guidance as to the best course of action to pursue. (App. 1474-75). The letter stated that neither SLED nor the Army issued a formal report and further stated that Cate withheld any formal report due to the condition of the bullet fragments. (App. 1474-75). The FBI never tested either weapon.

Forty years later, the Richland County Sheriff's Department reopened the Orner murder case. (App. 662-63). The Harrington & Richardson revolvers and the bullet fragments were still "in pristine condition" at the SLED forensics facility. (App. 614). Lieutenant Ira Parnell retested the weapon. Although one of the fragments removed from John Orner's brain "bore a striking similarity" to bullets test fired from Freiburger pistol, Lieutenant Parnell could not opine that the bullet that killed Orner was in fact fired from that weapon. (App. 620-22). Parnell concluded that the test, although "very nearly a

[1] At oral argument before the Court of Appeals, the State noted the "transcription" of the Hoover letter prepared by the paralegal of Freiburger's counsel was improperly placed into the Appendix as a post-conviction relief hearing exhibit by Freiburger despite it never having been admitted into evidence and after the State explicitly objected to its introduction at the evidentiary hearing. (App. 1728). The State submits that the improper inclusion of this "transcription" has improperly tainted not only the Court of Appeals' interpretation of the letter, but also the lower court and any witnesses who viewed it below. Additionally, the State notes that although the Hoover letter was attached as an exhibit to Freiburger's Pretrial Brief, the letter was never admitted into evidence at the post-conviction relief hearing. (App. 1516 - Applicant's Exhibit No. 11 marked for identification only). A number of documents that were never admitted into evidence before the lower court were attached as exhibits to Respondent's Pretrial Brief and therefore are included in the Appendix. (App. 1361-1505). However, the State continues to maintain that these documents, notably the Hoover letter, are not substantive evidence that was before the post-conviction relief court.

positive," was still inconclusive. (App. 644). He similarly was unable to conclusively exclude the Dreher weapon. (App. 627-29).

The Richland County Sheriff's Department then retained an independent ballistics expert, John Cayton. The sheriff's department sent Cayton the bullet fragments and the Harrington & Richardson pistols. (App. 719, 788). Cayton discovered that there were bone fragments, blood, and tissue on one of the bullet fragments. He soaked the bullet fragment and with the use of a Sonic cleaner, he removed the tissue with mild detergent and flushing. (App. 721-22, 725-26). In so doing, Cayton revealed more rifling marks on the bullet fragment, enabling him to examine it more closely. (App 721, 725-26).

With more visible fragments, Cayton was able to perform a conclusive examination and analysis. He opined that the bullet that ended John Orner's life was fired from the .32-caliber Harrington & Richardson revolver, serial number W9948, that Edward Freiburger purchased on February 28, 1961, and that Trooper Meredith confiscated from him on March 29, 1961. (App. 725-27). He was also able to definitively exclude the Dreher weapon from having fired the fatal bullet. (App. 725).

In October of 2000, Richland County Sheriff's Department Investigators Brian Metz and Carl Craig traveled to Indiana to interview Freiburger. Freiburger agreed to the interview and voluntarily traveled to the Whitley County Sheriff's Department to meet with Metz and Craig. (App. 766-67, 782). Freiburger claimed to have no memory of being in the Army or spending time in Columbia. (App. 768, 782-83). Freiburger claimed to have no memory of being interviewed by Sheriff Sligh in 1961 in connection with the Orner murder. (App. 768, 783-84). Freiburger claimed to have no memory of being at Fort Jackson; Fort McPherson, Georgia; or Fort Leavenworth, Kansas. (App. 678, 785).

When confronted with a picture of himself in uniform and of documentary records of his stay at Fort Leavenworth, Freiburger's memory of his military service returned. (App. 678, 783, 785). Freiburger had no trouble remembering his life history before and after his Army service. (App. 676, 786). Investigator Metz noted a distinct change in Freiburger's demeanor when Metz told Freiburger that he was there to discuss the 1961 murder of John Orner: Freiburger face flushed, he began to sweat, and he had problems speaking. (App. 790-91).

Freiburger was later arrested and indicted for the murder of John Orner. Following a week of testimony, the jury convicted Freiburger of Orner's murder.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact and conclusions of law receive great deference during appellate review. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The proper standard of review of a post-conviction relief decision is whether "***any*** evidence of probative value" exists to sustain the lower court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (emphasis added). The reviewing court should affirm if there is any evidence to support the post-conviction relief court's findings. Moore v. State, 399 S.C. 641, 646, 732 S.E.2d 871, 873 (2012). The reviewing court should reverse the post-conviction relief court only if there is no probative evidence to support the lower court's ruling or if it is controlled by an error of law. Suber v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007) (citing Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004)).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813

(1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she 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 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007), *cert. denied*, 552 U.S. 944 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Strickland, 466 U.S. at 689. The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689. Accordingly, courts must be wary of second-guessing counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Courts use 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, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 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. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

ARGUMENT

The Court of Appeals erred in reversing the post-conviction relief court and remanding Freiburger's case to the court of general sessions for a new trial based on its finding that trial counsel was ineffective for failing to introduce a 1961 letter written by the then director of SLED, J.P. Strom, to the then director of the FBI, J. Edgar Hoover, where the pertinent portion of the letter is inadmissible and there is no reasonable probability that the result of Freiburger's trial would have been different had counsel utilized the letter.

The Court of Appeals reversed the post-conviction relief court's denial of relief to Freiburger and remanded the matter to the court of general sessions for a new trial in a sharply-divided decision. Freiburger v. State, Op. No. 5295 (S.C. Ct. App. filed February 11, 2015) (Shearouse Adv. Sh. No. 6 at 53). In reaching that result, a majority of the Court of Appeals concluded that the post-conviction relief court erred in denying relief as to Freiburger's claim that trial counsel was ineffective for failing to introduce a letter written in 1961 by then SLED Chief J.P. Strom to then FBI Director J. Edgar Hoover (hereinafter the "Hoover letter"). In reaching this decision, the Court of Appeals relied upon the State's purported concession that the Hoover letter would have been admissible

at trial.[2] The majority found that trial counsel was deficient for failing to introduce the letter, citing to numerous ways the letter would have been helpful to Freiburger's case:

> First, the letter stated Lt. Cate was "of the opinion" the Dreher gun was the murder weapon, which would have been the only evidence that directly contradicted Cayton's positive identification of the Freiburger gun. Lt. Cate's "opinion" stands out because the State successfully presented the other experts' "inconclusive" ballistics results as not being inconsistent with Cayton's opinion, but different only by a matter of degree. . . . Second, Lt. Cate's opinion regarding the Dreher gun would have discredited Lt. Parnell's testimony that "[he] saw no similarity between" the bullet fragments and test bullets fired through the Dreher gun. . . . Third, the letter could have been used to undermine the inconclusive results reached by the other SLED examiners as to the Dreher gun because the letter indicates the results of Lt. Cate's ballistics tests were not inconclusive. Fourth, Lt. Cate's opinion as to the Freiburger gun matched the inconclusive results reached by other SLED examiners. . . . Finally, the letter contradicted the testimony of another expert for the State, Carl Stokes, who worked for SLED from 1954 until 1981.

Id. The majority further concluded that Freiburger was prejudiced by this omission, finding "there is a reasonable probability the jury would have had a reasonable doubt as to whether he was guilty of murder if trial counsel had introduced the letter at trial." Id. In support of this finding, the majority noted the highly deferential manner in which the State portrayed Lt. Cate throughout Respondent's trial and "the evidence against Freiburger was purely circumstantial, and—other than ballistics—weak." Id. The majority found that trial counsel's failure to utilize the Hoover letter at trial prejudiced Freiburger in three ways:

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[2] While the actual letter would have been admissible at trial under either the ancient documents exception, Rule 803(16), SCRE, or the records of regularly conducted activity exception, Rule 803(6), SCRE, the State did ***not*** concede that the hearsay within hearsay, or the double hearsay, within the letter would have been admissible at Petitioner's trial. That critical issue and distinction is addressed at length later in this petition. Furthermore, the State continues to maintain that the letter was never admitted during either evidentiary hearing and therefore was not substantive evidence before the post-conviction relief court.

> First, it would have negatively impacted the certainty of Cayton's opinion that the Freiburger gun was the murder weapon. . . . Second, introduction of the letter would have disrupted the apparent unanimity of the State's experts. Cayton's positive identification of the Freiburger gun gained strength from the corroborative effect of Stokes' and Lt. Parnell's trial testimony, and Lt. Parnell's statement that the other SLED experts—none of whom testified at trial—agreed with him. Specifically, Stokes and Lt. Parnell testified they were able to exclude the Dreher gun, but reached inconclusive results regarding the Freiburger gun. . . . Finally, the letter was important for impeachment purposes, as it contradicted Stokes' testimony regarding the results of the ballistics tests he and Lt. Cate performed in 1961.

Id. The majority concluded "the admission of the Hoover letter would have deeply undermined the State's case" and undermined confidence in the outcome of the trial. Id.

In contrast, the dissent found that "trial counsel was not ineffective for failing to introduce the letter and that this failure was not prejudicial to Freiburger." Id. (Thomas, J., dissenting). In her opinion, Judge Thomas wrote:

> The PCR court found Freiburger failed to satisfy his burden to demonstrate with any credible probative evidence that use of the Hoover letter would have made the outcome of the trial any different. To support this finding, the court noted that at the PCR hearing, firearms expert Lt. Parnell was cross-examined regarding the letter and the results of the cross-examination were not useful to Freiburger. The court further found Parnell's testimony would probably have been detrimental to Freiburger had the cross-examination been conducted during his trial. I agree with the PCR court's assessment of Parnell's testimony and would hold this is evidence that would support the PCR court's finding that use of the Hoover letter at trial would most likely not have benefited Freiburger.

Id. (Thomas, J., dissenting). In support of this finding, Judge Thomas held:

> [T]he letter, when considered in its entirety, presented only a differing but still tentative conclusion that another weapon was involved. At best, then, the Hoover letter would only emphasize the difficulty law enforcement had in determining in 1961 who owned the .32 caliber

> Harrington and Richardson revolver that killed the victim, an uncertainty that should have been readily apparent in view of the other evidence presented at trial and the fact that many years passed before anyone was charged in the case. To the extent the letter presented a different opinion about the murder weapon, it also suggested that the individual to whom the opinion was attributed had valid concerns about the reliability of his identification and the condition of the physical evidence upon which this identification was based.

Id. (Thomas, J., dissenting). Judge Thomas further held that the post-conviction relief court did not rule as to whether the Hoover letter would have been beneficial for impeachment of Stokes and therefore the issue was not preserved for appellate review. Id. (Thomas, J., dissenting).

The majority of the Court of Appeals erred in reversing the post-conviction relief court and remanding Respondent's case to the court of general sessions for a new trial for several reasons. As an initial matter, the majority misapprehended the admissibility of the contents of the Hoover letter—particularly the opinions attributed to Lt. Cate—which would have been inadmissible as double hearsay pursuant to Rule 805, SCRE. Second, the majority incorrectly heightened the value of the Hoover letter. Third, the majority misinterpreted the testimony of Agent Parnell. Fourth, the majority overlooked the significant technological advancements between the murder and trial which enabled law enforcement to better view and analyze the bullet fragments. Fifth, the majority incorrectly characterized the State's evidence apart from ballistic evidence as "weak." Finally, the majority improperly determined that the Hoover letter would have been beneficial for the impeachment of Stokes, an issue that was not preserved for appellate review. Accordingly, the post-conviction relief court correctly determined that trial counsel was not ineffective as to the Hoover letter, just as the dissent correctly concluded.

This petition for a writ of certiorari should be granted and ultimately, the post-conviction relief court's findings should be affirmed.

Admissibility of Lt. Cate's Opinion within the Hoover Letter

The Court of Appeals misapprehended the State's concession as to the admissibility of the Hoover letter. In its opinion, this Court of Appeals stated that the State conceded that the Hoover letter would have been admissible at trial. However, the State did not concede that the hearsay within hearsay, or the double hearsay, within the letter would have been admissible at Freiburger's trial. In particular, the State did not concede that the opinions attributed to Lt. Cate within the letter, which amount to hearsay within hearsay, would have been admissible at Freiburger's trial. These portions of the letter are inadmissible, regardless of whether the Hoover letter itself was admitted under the ancient documents or business records exceptions to the hearsay rule.

Pursuant to Rule 805, SCRE, "[h]earsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." Rule 805, SCRE. See State v. Hendricks, 408 S.C. 525, 531, 759 S.E.2d 434, 437 (Ct. App. 2014), *reh'g denied* (June 30, 2014) ("Hearsay within hearsay is admissible if each level of hearsay satisfies an exception to the hearsay rule."); State v. Burroughs, 328 S.C. 489, 498, 492 S.E.2d 408, 412 (Ct. App. 1997) (finding hearsay within hearsay is only admissible if each level of hearsay qualifies as an exception to the hearsay rule); Wilson v. Childs, 315 S.C. 431, 439, 434 S.E.2d 286, 291 (Ct. App. 1993) ("[H]earsay within hearsay, or 'double hearsay' is excluded unless each part of the combined statement falls within an exception to the hearsay rule."); see also Ruffin v. City of Boston, 146 F. App'x 501, 506 (1st Cir. 2005) (finding, in § 1983 case against police officers for use of excessive force, that

plaintiff's statements to EMT that were incorporated in EMT's report constituted "double hearsay" but were admissible because they could be identified as statements of a party-opponent); United States v. Filippi, 172 F.3d 864 (4th Cir. 1999) (finding the district court did not abuse its discretion in requiring the redaction of statements contained within a letter that was admitted as an exception to hearsay rules, as the statements within were double hearsay and did not meet any exceptions); Phoenix Mut. Life Ins. Co. v. Adams, 30 F.3d 554, 567 (4th Cir. 1994) (finding hearsay within hearsay found in a letter did not fall within a recognized exception to the hearsay rule, and therefore, should have been excluded).

Freiburger has offered no exception to the hearsay rule under which the opinions of Lt. Cate within the Hoover letter would be admissible pursuant to Rule 805, SCRE. Furthermore, no such exception exists that would render these portions of the letter admissible at trial, regardless of whether the letter itself was introduced as an ancient document or as a business record.

If the Hoover letter had been offered into evidence under the ancient documents exception to the hearsay rule pursuant to Rule 803(16), SCRE, the opinions of Lt. Cate within the letter would have been inadmissible as double hearsay. Admissibility exceptions for ancient documents apply only to the document itself; if the document itself contains more than one level of hearsay, an appropriate exception must be found for each level of hearsay to be admissible. United States v. Hajda, 135 F.3d 439, 444 (7th Cir. 1998). Courts that confronted the issue of whether hearsay statements within ancient documents are admissible pursuant to the ancient documents exception have concluded that the hearsay within hearsay problem persists and that excluding parts of such documents because of double hearsay is an appropriate application of Rule 805. Ruth v.

A.O. Smith Corp., 615 F. Supp. 2d 648, 651 (N.D. Ohio 2005) (citing Columbia First Bank, FSB v. United States, 58 Fed. Cl. 333 (Fed. Ct. Cl. 2003); United States v. Demjanjuk, 2002 WL 544622 at *23 (N.D. Ohio Feb. 21, 2002), *aff'd,* 367 F.3d 623 (6th Cir. 2004)); see also United States v. Stelmokas, 1995 WL 464264 at *6 (E.D. Pa. Aug. 2, 1995) ("[T]he Court interprets Rule 803(16) as an exception to the hearsay rule only for statements where the declarant is the author of the ancient document. This ruling best gives effect to the combined purposes of Rules 803(16) and 805."), *aff'd,* 100 F.3d 302 (3d Cir. 1996). As there is no appropriate exception to the hearsay rule for the double hearsay regarding Lt. Cate, these portions of the Hoover letter are inadmissible and would have to be redacted from the otherwise admissible letter.

Additionally, if the Hoover letter had been offered into evidence as a record of regularly conducted activity pursuant to Rule 803(6), SCRE, the opinions of Lt. Cate would still be inadmissible. Pursuant to Rule 803(6), SCRE,

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness; *provided, however, that subjective opinions and judgments found in business records are not admissible.* The term "business" as used in this subsection includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

SCRE 803 (emphasis added). Based on the plain language of the rule, subjective opinions within the business records are not admissible. See Duncan v. Ford Motor Co., 385 S.C. 119, 137, 682 S.E.2d 877, 886 (Ct. App. 2009) (citing Rule 803(6), SCRE, and holding:

"A report kept in the course of regularly conducted business activity is admissible unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. However, subjective opinions and judgments found in business records are not admissible."). Here, the opinions of Lt. Cate within the Hoover letter are subjective and, thus, are not admissible. Similarly, these opinions are hearsay on their own and do not satisfy any recognized exception to the hearsay rule as discussed previously.

In sum, the portions of the letter pertaining to Lt. Cate's opinion are inadmissible hearsay. These portions would have required redaction prior to admission if the letter was admitted into evidence or shown to the jury. As these portions of the Hoover letter are the basis for Freiburger's argument, no deficiency or prejudice can be established. The post-conviction relief court properly acknowledged the inadmissibility of the opinions of Lt. Cate within the Hoover letter in its Order of Dismissal, citing to the testimony from trial counsel that "he may not have used [the Hoover letter] because Lt. Cate had passed away [and] he was not sure how he could get the Hoover letter into evidence." (App. 2096-97). This is supported by trial counsel's testimony at the evidentiary hearing. (App. 1805). As these pertinent portions of the Hoover letter were inadmissible hearsay, counsel cannot be deficient for failing to use the letter at trial. Furthermore, as the relevant portions of the letter that support Freiburger's argument are inadmissible hearsay, Freiburger cannot establish any resulting prejudice from counsel's failure to use the Hoover letter at trial.

In light of the inadmissibility of the relevant portions of the Hoover letter, the Court of Appeals erred in its reversal of the post-conviction relief court. Therefore, the State asks that this Court grant this petition and ultimately affirm the lower court's denial of post-conviction relief.

Misapprehension of Hoover Letter

Additionally, the Court of Appeals misconstrued the Hoover letter and incorrectly placed more weight on the letter than was actually warranted if the letter was viewed in the proper context. In its opinion, the majority of the Court of Appeals found that the Hoover letter "would have deeply undermined the foundation of the State's case" and "that the letter was the only evidence establishing the Dreher gun as the murder weapon." The majority went on to find that the Hoover letter directly contradicted Cayton's identification of the Freiburger gun, was not inconclusive, and contradicted the testimony of Stokes. The majority of the Court of Appeals erroneously interpreted the letter as a formal opinion of Lt. Cate and wrongly gave it heightened meaning, resulting in an unwarranted finding that trial counsel's use of the letter would have "deeply undermined the foundation of the State's case."

Contrary to the majority's conclusions, the Hoover letter does not amount to any formal opinion. In the letter, Chief Strom reports that Lt. Cate is ***unable to make any determination*** as to which gun, if either, was used to kill Orner and seeks outside assistance from the FBI. The letter goes on to state that at least two other firearms examiners also reviewed all evidence and both were unable to include, or exclude, either gun as the murder weapon. Ultimately, the letter confirms the uncertainty and inconclusiveness in the findings from SLED in 1961 regarding both guns. However, it does ***not*** contradict the inconclusive findings as the majority of the Court of Appeals held. Simply put, the letter is a request for more assistance ***based on*** the inconclusiveness of the preliminary results that had been reached by Lt. Cate—not a formal opinion establishing the Dreher gun as the murder weapon. In fact, had Lt. Cate been as certain as

or as conclusive as the majority of the Court of Appeals appears to believe the letter suggests, there simply would have been no need for the letter, which is a request for assistance in reaching a conclusive result, to exist. Therefore, the Hoover letter is merely cumulative to the abundance of testimony already in the record as to SLED's inconclusive findings in 1961 as to which firearm killed Orner and would not have disrupted the unanimity of other SLED examiners as the majority of the Court of Appeals erroneously found. Additionally, the letter would not have negatively impacted the certainty of Cayton's testimony as the majority of this Court concluded.

The dissent correctly acknowledged the majority's misinterpretation of the Hoover letter. The dissent determined that "the letter, when considered in its entirety, presented only a differing but still tentative conclusion that another weapon was involved." The dissent then elaborated that, "At best, then, the Hoover letter would only emphasize the difficulty law enforcement had in determining in 1961 who owned the .32 caliber Harrington and Richardson revolver that killed the victim, an uncertainty that should have been readily apparent in view of the other evidence present at trial and the fact that many years passed before anyone was charged in the case."

Based on its erroneous interpretation of the Hoover letter, the majority of the Court of Appeals erred in its reversal of the post-conviction relief court. Therefore, the State asks that this Court grant this petition and ultimately affirm the lower court's denial of post-conviction relief.

Misapprehension of Agent Parnell's Testimony

Furthermore, the majority of the Court of Appeals misinterpreted the testimony of SLED Agent Ira Parnell. In its opinion, the majority stated that Parnell testified that "he saw no similarity" between the bullet fragments and the Dreher gun. This misconstrues

the testimony of Parnell and the record before this Court. Parnell's testimony was not that he saw no similarities between the bullet fragments and the Dreher gun, but rather that he saw no "***remarkable individual characteristic agreement***" between the Dreher gun and the fragments. (App. 627-28). However, Parnell found remarkable individual characteristic agreement between the Freiburger gun and the fragments. (App. 627-28). Parnell elaborated that he was unable to exclude or include either firearm as the murder weapon due to insufficient markings on the fragments rendering them unsuitable for identification. (App. 627-28). This is consistent with his testimony at the evidentiary hearing, where he testified that similar ***class*** characteristics existed between the Dreher gun and the fragments, but no similar ***individual*** characteristics. (App. pp. 1687-88). This is also consistent with Parnell's SLED ballistics report[3] where Parnell states that "[g]eneral rifling characteristic similarities were noted" for both the Freiburger and Dreher guns. (App. 1467-78). The majority of the Court of Appeals misconstrued the testimony of Parnell and then erroneously used it to support its position that trial counsel was ineffective.

In light of this misapprehension of Parnell's testimony, the Court of Appeals erred in its reversal of the post-conviction relief court. Therefore, the State asks that this Court grant this petition and ultimately affirm the lower court's denial of post-conviction relief.

Overlook of Technological Advances between 1961 and Trial

Moreover, the majority of the Court of Appeals overlooked the significant technological advances in ballistics and firearm examination that have been made in the more than forty years between the Hoover letter and Freiburger's trial. In its decision, the majority emphasized the value of this 1961 letter for impeachment and to undermine the

[3] Again, this report was attached to Freiburger's pre-trial brief and therefore is included in the Appendix as an attachment to the brief, but this report was not admitted into evidence during the evidentiary hearings.

State's case at trial. However, the majority overlooked the significant technological advances in firearms examination and ballistics between 1961 and Freiburger's trial in 2002, which led to improperly heightened value being appropriated to the Hoover letter and an erroneous finding of prejudice.

At trial, the State presented evidence of technological advancements since 1961 that allowed for identification of the Freiburger gun as the murder weapon. Most notable would be the advancements that allowed for additional organic material to be removed from the bullet fragments allowing for better analysis. Cayton testified:

> Well, on the bullets there were some bone fragments and some tissue and blood on the bullets, and so to prepare them for examination, I soaked them. I took some of the tissue off of the bullets, collected them. By doing this, it actually revealed more rifling marks that were underneath the tissue, and so after cleaning them, then they were more usable for examination. I saved the tissue that I collected in a vial and returned it with the evidence.

(App. 721). Cayton then described how he soaked the bullets and used a Sonic cleaner that allowed him to flush loose tissue off the fragments, enabling a better comparison of the fragments to each weapon's test bullets. (App. 725-26). Parnell confirmed this, testifying at trial that Cayton was able to remove organic material from the bullets with advanced cleaning methods and equipment, allowing him to make a positive identification. (App. 644). Parnell also testified to this at the evidentiary hearing. (App. 1694). The Hoover letter is of little value to Freiburger, either for impeachment or otherwise, based on these significant advancements since the letter was written that allowed for a more thorough examination than was possible in 1961. Furthermore, it is highly unlikely that this letter from 1961 would have impacted Freiburger's trial to the level of giving the jury reasonable doubt in light of the forty years between this letter and the identification of the Freiburger gun as the murder weapon.

In light of the majority's overlooking of technological advances between 1961 and Freiburger's trial, the majority of the Court of Appeals erred in its reversal of the post-conviction relief court. Therefore, the State asks that this Court grant this petition and ultimately affirm the lower court's denial of post-conviction relief.

Misapprehension of the Evidence Presented

Additionally, the majority of the Court of Appeals misapprehended the evidence presented at trial in erroneously categorizing the State's case as "purely circumstantial" and "weak." In its opinion, the majority cited to this Court's opinion affirming Freiburger's conviction summarizing the evidence presented as follows:

> The evidence adduced at trial which tended to implicate Freiburger was as follows: 1) he was a soldier stationed at Fort Jackson on February 28, 1961, 2) he had a habit of pawning his personal property at downtown Columbia pawn shops, 3) he purchased a .32 caliber H & R revolver, serial number W9948, and bullets from the Capital Loan and Pawn shop on February 28, 1961, 4) the victim was shot on February 28, 1961 with a .32 caliber H & R revolver, 5) two days after the victim's cab was found, Freiburger stayed at a downtown motel in close proximity to where Victim's bloody cab was found, 6) Freiburger was arrested in Tennessee on March 29, 1961 carrying a .32 caliber H & R revolver, 7) a ballistics test conducted in 2001 indicated that the H & R revolver confiscated from Freiburger in 1961 was the same weapon which fired the shot killing the victim, and 8) Freiburger was evasive when talking to Richland County police investigators in Indiana in September 2000, claiming he did not recall having been in the army, or having been stationed at Fort Jackson.

State v. Freiburger, 366 S.C. 125, 137, 620 S.E.2d 737, 743 (2005). In its opinion, the majority of the Court of Appeals characterizes this evidence as purely circumstantial and weak. However, when reviewing this same record on direct appeal, this Court found that "although circumstantial," the evidence presented was "sufficient" and able to withstand a directed verdict motion. Id. Furthermore, the jury heard the same evidence and clearly

did not find the evidence to be "weak," as it convicted Freiburger of murder in less than two and a half hours of deliberation. The majority misapprehended the State's evidence presented at trial and erroneously characterized it as "weak," thereby speciously affecting its determination that confidence in the jury verdict was undermined by counsel's failure to use the Hoover letter.

In light of this, the majority of the Court of Appeals erred in its reversal of the post-conviction relief court. Therefore, the State asks that this Court grant this petition and ultimately affirm the lower court's denial of post-conviction relief.

Overlooking that the Issue of the Letter's Impact as to Stokes was Not Preserved

Finally, the majority of the Court of Appeals overlooked that Freiburger did not raise—nor did the lower court rule upon—whether the Hoover letter would have been beneficial for the impeachment of Carl Stokes. As the dissent properly notes in its opinion, Freiburger did not raise this issue below and the post-conviction relief court did not rule upon it. Therefore, it was not properly preserved for appellate review. See Burgess v State, 402 S.C. 92, 95, 738 S.E.2d 264, 265 (Ct. App. 2013) (holding there must be sufficient findings of fact and conclusion of law to preserve an issue for appellate review in a PCR action). The majority of the Court of Appeals erred when it wrongly determined that trial counsel was ineffective for failing to use the letter to impeach Stokes.

In light of this, the majority of the Court of Appeals erred in its reversal of the post-conviction relief court. Therefore, the State asks that this Court grant this petition and ultimately affirm the lower court's denial of post-conviction relief.

CONCLUSION

For all the foregoing reasons, the State requests that this Court grant this petition for a writ of certiorari and reverse the Court of Appeals. In requesting this relief, counsel for the State certifies a petition for rehearing was made and ruled upon by the Court of Appeals.

Respectfully submitted,

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September 18, 2015

STATE OF SOUTH CAROLINA
In the Supreme Court

On Writ of Certiorari to the Court of Appeals
Appeal from Richland County
The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 5295 (S.C.Ct. App. filed Feb. 11, 2015)
Appellate Case No. 2010-177147

EDWARD FREIBURGER,

Respondent,

vs.

THE STATE OF SOUTH CAROLINA,

Petitioner.

PROOF OF SERVICE

I, Megan Harrigan Jameson, certify that I have served the within Petition for Writ of Certiorari and Appendix on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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Lindsey S. Vann, Esquire
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I further certify that all parties required by Rule to be served have been served.
This 18th day of September, 2015.

Megan Harrigan Jameson

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