THE STATE OF SOUTH CAROLINA
In the Supreme Court

ON CERTIORARI FROM THE COURT OF APPEALS
Appeal from Richland County
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Judge

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

EDWARD FREIBURGER ..... *Respondent*,

v.

STATE OF SOUTH CAROLINA ..... *Petitioner*.

Return
~~BRIEF IN OPPOSITION~~ TO CERTIORARI

JOHN H. BLUME
Cornell Law School
158 Myron Taylor Hall
Ithaca, NY 14853
(607) 255-1030

LINDSEY S. VANN
Death Penalty Resource & Defense Center
900 Elmwood Avenue, Suite 200
Columbia, SC 29201
(803) 765-1044

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

OTHER AUTHORITY

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in finding trial counsel ineffective in failing to utilize a letter in their possession, and written during the initial investigation of the crime, indicating a weapon other than the one recovered from the defendant was the murder weapon.

Additional Sustaining Grounds

2. Whether the Court of Appeals erred in upholding the PCR judge's finding that trial counsel was not ineffective in failing to utilize an expert report that contradicted that expert's testimony at trial.

3. Whether the Court of Appeals erred in upholding the PCR judge's finding that the State's failure to disclose false testimony by its key witness did not violate the Due Process requirements of *Brady v. Maryland*, 373 U.S. 83 (1963).

STATEMENT OF THE CASE

Respondent, Edward Freiburger, asserts that the Court of Appeals properly found that the Circuit Court erred in denying post-conviction relief and certiorari for this Court to review the Court of Appeals' decision is not warranted. As discussed more fully below, the record developed at trial and in the PCR proceedings—including the forty year old evidence upon which the prosecution's case depended and new information materially undermining and contradicting that evidence—is a virtual recipe for convicting an innocent man. The Court of Appeals properly found Freiburger's trial counsel were ineffective in failing to adequately challenge the State's evidence and remanded for a new trial.

On August 2, 2002, Freiburger was found guilty of the 1961 murder of Columbia cab driver, John Orner and sentenced to life in prison. This Court affirmed. *State v. Freiburger (Freiburger I)*, 366 S.C. 125, 620 S.E.2d 737 (2005). Freiburger timely filed an application for post-conviction relief ("PCR"). After conducting an evidentiary hearing, the PCR judge adopted the State's proposed order denying relief on February 8, 2010. On February 11, 2015, the Court of Appeals reversed the PCR court, finding that trial counsel were ineffective in failing to present

the jury with a 1961 letter that would have undermined the only direct evidence connecting Freiburger to the crime and thus would have been highly beneficial to Freiburger. The Court of Appeals denied the State's petition for rehearing on August 21, 2015. The State now seeks a writ of certiorari from this Court to review the decision of the Court of Appeals.

Factual Background

In 1961, Freiburger was an Army private stationed at Fort Jackson near Columbia, South Carolina. Like many of his fellow soldiers, Freiburger occasionally visited a pawnshop or stayed in a hotel in downtown Columbia when permitted to leave the base. February 28, 1961 was one of those occasions. App. 300-01, 316. That evening, cab driver John Orner failed to return home after being dispatched to the NCO club at Fort Jackson. App. 295-96. Orner's blood-stained cab was found the next day on Assembly Street, near the pawn shops and hotels frequented by soldiers.[1] App. 245, 265-71. Orner's body was discovered on March 3, 1961, by the side of the road in Lower Richland County. App. 58, 228. He had been shot in the head from behind, and three small bullet fragments recovered from his head were later determined to be consistent with having been fired from a .32 caliber Harrington and Richardson (H & R) weapon. App. 376, 386 390.

On March 29, 1961, Freiburger was stopped by Tennessee Highway Patrolman, Donald Meredith, for hitchhiking. App. 560-61. While patting Freiburger down before putting him in the patrol car, Meredith discovered and seized a .32 caliber H&R gun. App. 563-64. This gun was later given to Richland County authorities investigating Orner's murder. App. 565, 567. Richland

[1] That same day, John Morgan, a soldier in Freiburger's unit, went AWOL after returning to the barracks covered in blood. App. 1429-30. Morgan later admitted he had called a cab to pick him up at Fort Jackson on the evening of February 28th. App. 1659-60. For reasons which are unclear from the police files, Morgan was never pursued as a suspect.

County investigators tested the gun seized from Freiburger, as well as another .32 caliber H&R gun seized from the home of Aleena Dreher.[2] App. 393. Although the tests performed in 1961 were reported as inconclusive, a July 1961 letter from then-SLED Chief J.F. Strom to F.B.I. Director J. Edgar Hoover ("Hoover Letter") reported that Lt. Millard Cate, the developer and "father" of the SLED Firearms Identification Division, had identified the Dreher gun as the weapon used to kill Orner, but had withheld a formal report because of the condition of the bullet. App. 406-08, 584, 1472, 1474. Chief Strom went on to request F.B.I. assistance in examining the bullet. App. 1473, 1475. No further action was taken on the case.

Freiburger was discharged from the Army following a court-martial for an infraction unrelated to the Orner murder. After serving a short sentence at Fort Leavenworth, he returned home to Fort Wayne, Indiana in 1962, where he married, raised three children, spent a career as a manager at Sears, and led a completely law-abiding life.

Nearly forty years later, Richland County's newly-created "cold case" unit reopened the Orner murder investigation. The Freiburger gun and the Dreher gun were retested by Ira Parnell, supervisor of the SLED Firearms Identification laboratory. App. 614-17. Parnell found that while two of the three bullet fragments were too small to evaluate, the markings on the third bullet fragment were consistent with a .32-caliber H&R. App. 621-26. Parnell issued a report stating the bullet fragments recovered from Orner could have been fired by the Freiburger weapon, the Dreher weapon, or by another similarly rifled firearm of the same caliber. App. 1697-98. Including Cate and Parnell, at least seven SLED examiners tested the evidence and came to the same "inconclusive" results. App. 628-29, 649.

---

[2] Dreher admitted that a number of known thieves and robbers, including members of his own family, had access to the weapon in his home. App. 1472, 1474.

With no fewer than seven firearms examiners on record as unable to connect the bullet fragments to the Freiburger gun, Richland County authorities launched a national search for someone who would. They found their man in John Cayton, a forensic examiner who, unbeknownst to defense counsel at the time of Freiburger's trial, had been fired from the Kansas Bureau of Investigation (KBI) for incompetence and misconduct.[3] Notwithstanding the prior conclusions of SLED examiners and other trained professionals that the small number of striations on the bullet fragment made it impossible to connect the Freiburger gun to the shooting, Cayton claimed that those same striations positively matched markings from the Freiburger gun, to the exclusion of all other similar guns. App. 725. On the basis of this extraordinary claim, Freiburger was charged with Orner's murder in 2001. After being notified of the charge, Freiburger drove himself from Indiana to South Carolina, and turned himself in. App. 212.

At trial, the State built its case around Cayton's scientifically unsound ballistics testimony. In addition, the State bolstered Cayton's conclusions by calling two SLED ballistics examiners. Despite finding the bullets could have been fired from either weapon examined or any other similarly rifled weapon prior to trial—the opposite of a conclusive finding—Parnell testified at trial that his conclusion was different from Cayton's only in degree of certainty. App. 629. Carl Stokes, a SLED firearms examiner trained by Lt. Cate, also testified at trial that he and Lt. Cate excluded the Dreher weapon when conducting their bullet comparisons in 1961. App. 395. Other than the ballistics evidence presented by Catyon, the remainder of the case against Freiburger was

[3] Among other infractions, Cayton was found to have "failed to follow policies, procedures, and protocols of the KBI Laboratory section." App. 1952-53. He also persisted in operating a private lab from his residence, after being warned not to do so, without prior approval of his supervisor. App. 2037.

purely circumstantial. On direct appeal, this Court summarized the evidence presented by the State at trial:

> (1) [Freiburger] 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.

Freiburger I, 366 S.C. at 137, 620 S.E.2d at 743.

In closing, the solicitor asked the jury to find Freiburger guilty, explicitly arguing that no one had excluded the Freiburger weapon as the murder weapon. The solicitor stated: "Who excludes this gun? If it's excluded, find him not guilty. If one person put their hand on this Bible, swore to tell the truth and said, 'This is not the gun that murdered John Orner,' find him not guilty." App. 964-65. Responding to that call, and finding no evidence was presented that the Freiburger weapon was excluded, the jury convicted Freiburger, and he was subsequently sentenced to life in prison. This Court affirmed on direct appeal. *Freiburger I*, 366 S.C. 125, 620 S.E.2d 737.

Freiburger then filed a PCR application raising a number of grounds for relief. At the PCR hearing, Freiburger presented evidence that in 1961, while SLED was originally investigating the Orner murder, Chief Strom wrote "the Hoover Letter," stating "Lt. Cate is of the opinion that this [the Dreher] weapon killed the taxi driver, based on bullet comparisons, but has withheld a formal report because of the condition of the bullet." App. 1472, 1474. Despite the fact that this letter contradicted Parnell and Stokes' trial testimony, answered the solicitor's call for someone who

excluded the Freiburger weapon, and contradicted the seeming agreement of SLED analysts presented at trial, the jury never learned of the existence of this letter.

Freiburger's lead trial counsel, John Delgado, testified at the PCR hearing that although the Hoover Letter had been Bates stamped and appeared in his Index, he did not recall the letter at all. App. 1805. Delgado recognized that Cayton's testimony had been the linchpin of the prosecution's case, but he had no strategic reason not to utilize the Hoover Letter. App. 1792-93, 1804-05. Trial counsel, Katherine Hudgins, did not know why the Hoover Letter was not used at trial. App. 1661-62, 1663-68. Ira Parnell also testified at the PCR hearing; he acknowledged, and did not dispute, the Hoover Letter's assertion that Lt. Cate believed the Dreher gun (and not Freiburger's gun) was the murder weapon, although Lt. Cate had not written a formal report on the case. App. 1698-99.

Freiburger also presented evidence at the PCR hearing that Cayton testified falsely at trial about his background by telling the jury that he worked in Topeka, Kansas for a couple of months and retired. App. 706. At the PCR hearing, Freiburger presented the transcript from another case in which Cayton testified where Cayton was questioned about the circumstances surrounding his departure from the Kansas Bureau of Investigations ("KBI") in Topeka. App. 1665-67, 1952-54. Cayton admitted during that trial that he had actually been fired for failure to follow KBI protocols and procedures. App. 1952-54. At the PCR hearing, trial counsel testified that they were not made aware of the fact that Cayton had been fired and that it would have been critical to discrediting the State's star witness.[4] App. 1663-65, 1809-12.

[4] Freiburger also presented, as newly-discovered evidence, the testimony of Dr. Steve Laken, who reported that Freiburger had passed an f-MRI lie detection test showing he was truthful when he denied murdering Orner. App. 1530-69.

The PCR court denied relief on all grounds. The Court of Appeals properly reversed the PCR court, finding Freiburger's trial counsel were ineffective in failing to use the Hoover Letter at the time of trial. Based on the arguments below, certiorari is not appropriate in this case and the Court of Appeals' decision should stand.

ARGUMENT

The Court of Appeals' determination that Freiburger was denied the right to the effective assistance of counsel due to trial counsel's failure to introduce the 1961 Hoover Letter is amply supported by both the record evidence and relevant precedent. As the court correctly concluded, the letter would have significantly undermined the only direct evidence linking Freiburger to the crime, leaving the State unable to prove its case based on the remaining weak circumstantial evidence against Freiburger. *Freiburger v. State (Freiburger II)*, 413 S.C. 243, 251, 775 S.E.2d 391, 395 (Ct. App. 2015).

The crucial issue at Freiburger's trial was whether the weapon recovered from Freiburger fired the bullet taken from Orner's body. Without establishing that link, the State could not connect Freiburger to the crime. It is undisputed that trial counsel had in their possession a letter indicating that SLED examiner Millard Cate, a man described at trial as the dean and building block of the SLED ballistics evidence investigation in South Carolina, app. 399, concluded that another similar gun was the murder weapon. App. 1472, 1474.

"To establish a claim of ineffective assistance of counsel, a PCR applicant must establish both that counsel's representation fell below an objective standard of reasonableness and that but for counsel's errors, there is a reasonable probability that the result of the trial would have been different." *James v. State*, 372 S.C. 287, 290, 641 S.E.2d 899, 901 (2007) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Trial counsel has basic obligations to present favorable

evidence and to subject unfavorable evidence to a meaningful adversarial challenge. "Vigorous cross-examination [and] presentation of contrary evidence . . . are the traditional and appropriate means of attacking shaky but admissible evidence." *State v. Dinkins*, 319 S.C. 415, 418, 462 S.E.2d 59, 60 (1995) (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993)). Trial counsel can perform deficiently by failing to elicit favorable information during cross-examination and by failing to expose inconsistencies in an adverse witness's testimony. *See, e.g., Miller v. State*, 379 S.C. 108, 117, 665 S.E.2d 596, 600 (2008) (holding trial counsel was deficient in failing to elicit information supporting the defendant's theory of third-party guilt); *Roberts v. State*, 361 S.C. 1, 8, 602 S.E.2d 768, 771 (2004) (holding counsel performed unreasonably in failing to present evidence of jail cell configuration which would have shown an adverse witness's testimony impossible).

Here, both trial counsel testified that they had the Hoover Letter in their possession, that it would have been important evidence to present to the jury, and that they could think of no strategic reason for not using it. Trial Counsel Katherine Hudgins testified at the PCR hearing that she did not know why the letter was not used at trial. App. 1662. Lead trial counsel John Delgado stated he had no recollection of seeing the letter, which was provided to him in discovery, and that had it been used at trial, the letter would have been powerful evidence that another gun had been used. App. 1909. Mr. Delgado could not recall why he failed to use the letter and could imagine no strategic reason for not having done so. App. 1909. The Court of Appeals correctly found that no evidence supported the PCR judge's findings that trial counsel were not deficient in failing to use the Hoover Letter at trial. *Freiburger II*, 413 S.C. at 248-51, 775 S.E.2d at 393-95; *see also Miller*, 379 S.C. at 117, 665 S.E.2d at 600; *Roberts*, 361 S.C. at 8, 602 S.E.2d at 771; *Pauling v. State*, 331 S.C. 606, 610-11, 503 S.E.2d 468, 471 (1998) (finding counsel ineffective where counsel

failed to use impeachment evidence that the sexual assault, as alleged by the victim, did not occur); *Martinez v. State*, 304 S.C. 39, 41, 403 S.E.2d 113, 114 (1991) (finding counsel ineffective where counsel failed to present evidence that counsel admitted may have made the difference in obtaining an acquittal).

The Court of Appeals also properly found that counsel's failure to use the Hoover Letter prejudiced Freiburger. Other than ballistics evidence the "evidence against Freiburger was purely circumstantial, and . . . weak." *Freiburger II*, 413 S.C. at 251, 775 S.E.2d at 395. Lt. Cate was portrayed as "one of the building blocks" of the SLED firearms investigation division, giving additional weight to Cate's opinion. *Id.* at 252, 775 S.E.2d 396. Defense counsel's use of Cate's opinion found in the Hoover Letter would, therefore, have challenged the State's case in three effective ways: (1) "it would have negatively impacted the certainty of Catyon's opinion that the Freiburger gun was the murder weapon," (2) "introduction of the letter would have disrupted the apparent unanimity of the State's experts," and (3) "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.* at 253-54, 775 S.E.2d at 396-97

Because the Court of Appeals correctly found that Freiburger was denied his Sixth Amendment right to the effective assistance counsel, certiorari should be denied. Undersigned counsel will next address a number of collateral arguments made by the State, several for the first time after the Court of Appeals' decision.

I. THE HOOVER LETTER WAS ADMISSIBLE AT TRIAL

Contrary to the State's explicit concession at oral argument before the Court of Appeals, the State now asserts the Hoover Letter would not have been admissible at Freiburger's trial. Petition for Writ of Certiorari 15-18. During oral argument, the State was asked the question, "If

this letter had been offered, would it have been admissible?" Oral Argument at 35:48, *Freiburger II*, 413 S.C. 243, 775 S.E.2d 391. The State answered, without any qualifications, "Yes, I think it would have been admissible at trial." *Id.* at 35:50. The State's concession is clear from the recording of the oral argument: the Hoover 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, to the hearsay rules.

For the first time in the Petition for Rehearing in the Court of Appeals, the State argued the letter would have been inadmissible hearsay. *See* App. 2348. In its merits briefing in the Court of Appeals, the State did not address the admissibility of the letter, arguing instead that counsel's failure to use the letter was not deficient performance and did not prejudice Freiburger. App. 2294-96. In seeking rehearing and now before this Court, the State for the first time argues that Lt. Cate's opinion within the Hoover Letter was inadmissible because the opinion was hearsay within hearsay.[5] Petition for Writ of Certiorari 15.

---

[5] In the Petition for Writ of Certiorari, the State also asserts the "transcription" of the Hoover Letter was improperly placed in the Appendix before the Court of Appeals. Petition for Writ of Certiorari 7 n.1. On the contrary, the transcription was properly placed in the Appendix as an exhibit to Freiburger's PCR pre-hearing brief. Notably, the State has never asserted the transcription is inaccurate in any way. The State further asserts the Hoover Letter was never admitted into evidence at the PCR hearing and was improperly relied upon by the Court of Appeals. *Id.* However, the State has never contested that the Hoover Letter is what it purports to be, was provided to Freiburger's counsel prior to trial, and was in trial counsel's possession at the time of trial. Nor has it been contested that the letter states: "Lt. Cate is of the opinion that this [the Dreher] weapon killed the taxi driver, based on bullet comparisons, but has withheld a formal report because of the condition of the bullet." App. 1472, 1474, 1662-63; *see also* App. 1698-99, 1812-13. The letter was provided to the PCR court (and opposing counsel) prior to the PCR hearing as part of Freiburger pretrial brief, app. 1395-96, 1472-75, and was discussed extensively at the PCR hearing. Without objection from the State, Freiburger's counsel read the letter into the record (i.e., published its contents) when questioning both trial counsel. App. 1662-63, 1812-13. At no point did the State contest the contents of the letter or its authenticity. The contents of the Hoover Letter were also not disputed during cross-examination of Agent Parnell at the PCR hearing, which is the precise method in which Freiburger argued the letter could and should have been used at trial. App. 1698-99. The contents of the Hoover Letter were, therefore, properly before the Court of Appeals.

Even if the State's concession did not cover the entirety of the letter (which it did), the State's argument that the opinion of Lt. Cate would be inadmissible as hearsay within hearsay ignores the context in which Freiburger's trial took place.[6] The trial took place over forty years after the crime occurred and after the investigation was conducted. After forty years, many of the witnesses with knowledge of the crime or the investigation were deceased or did not remember relevant events and statements. As a result, the trial court, over defense counsel's objection, allowed the admission of a number of documents that would generally be inadmissible hearsay.[7] Specifically, the trial court allowed the admission of a police report, which was read to the jury by a witness who did not draft the report. App. 294-98. The police report contained a statement that the victim's stepson told investigators he called the victim's employer, State Cab Company, and the dispatcher told him the location and last call for the victim's cab. App. 296. This information

---

[6] The following arguments are not intended to concede that Lt. Cate's opinion would not be admissible under South Carolina's hearsay exceptions. The plain language of the ancient documents exception indicates that ancient documents, in their entirety, are admissible without consideration of layers of hearsay within the document. The rule provides that "[s]tatements in a document in existence twenty years or more the authenticity of which is established," are not excluded by the hearsay rule. Rule 803(16), SCRE. Lt. Cate's opinion is a statement undisputedly contained within a document in existence for more than twenty years, and is therefore admissible under the plain language of the ancient documents exception. The State has cited no case from South Carolina interpreting the exception to be subject to the hearsay within hearsay rule found in Rule 805, SCRE. Additionally, the business records exception has often been used to admit reports of expert analysis in criminal cases; i.e., blood alcohol test results in DUI cases where the State has proven chain of custody, *see, e.g.*, *State v. Smith*, 326 S.C. 39, 41, 482 S.E.2d 777, 778-79 (1997), and HIV testing results in criminal sexual conduct cases, *see, e.g.*, *Ex parte Dep't Health & Env. Control*, 350 S.C. 243, 249-50, 565 S.E.2d 293, 297 (2002). While Lt. Cate's opinion was not a final report, it was an opinion based on analysis of the evidence, similar to a blood alcohol or HIV test, and could have been admitted under the business records exception.

[7] It is important to note that Freiburger's case for excluding hearsay evidence was (at trial, and would be at a future trial) much stronger than the State's given that he has a constitutional right to confront the witnesses against him, which the State does not. U.S. Const. amend. VI; *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

was admissible at trial despite the fact that it was actually hearsay within hearsay within hearsay. Thus, the business records and ancient document exception to the hearsay rule operated at Freiburger's trial to admit entire documents over defense counsel's objection, regardless of whether multiple layers of hearsay were contained within the record.

The State's argument also ignores the fact that the trial record is replete with references to expert opinions made by experts who did not testify. Ira Parnell testified that Dan Defreese, Vello Paavel, David Collins, and Kenneth Whittler, all SLED ballistics examiners who did not testify at trial, also reviewed the ballistics evidence and came to inconclusive results. App. 638-40. Further, Stokes testified that he and Lt. Cate examined the evidence in this case and both came to inconclusive results regarding the Freiburger weapon and excluded the Dreher weapon despite the fact that Lt. Cate was deceased and did not testify. App. 394-95. In light of this testimony, it is incongruous to argue that written evidence of Lt. Cate's opinion would not be admissible because he could not be called to testify in person. Simply put, the rules the State relies upon are not the rules used by the trial court due to the unique nature of the trial in this case. In order to prove its case, the State did previously, and would at a retrial, be forced to rely on similarly relaxed rules regarding hearsay and the Hoover Letter, including Lt. Cate's opinion would be admissible at any future trial of Freiburger.

Further, it would be unfair and constitutionally impermissible to prohibit Freiburger from entering evidence regarding Lt. Cate's opinion under the hearsay rule. Freiburger would be deprived of his right to a fair trial if the State were allowed to present evidence of Lt. Cate's opinion, which is demonstrably untrue, and not allow Freiburger the ability to challenge that evidence simply because Lt. Cate died in the over forty years between the crime and the State's prosecution of Freiburger. In such a situation, "where constitutional rights directly affecting the

ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) (finding it would violate the defendant's right to a fair trial to prohibit the admission of reliable testimony that another person had confessed to committing the crime of which the defendant was accused and that the hearsay rule could not be applied to "defeat the ends of justice"). Here, the basic rationale of the hearsay rule is respected even when admitting Lt. Cate's opinion because the opinion within the Hoover Letter bears "persuasive assurance of trustworthiness." *Id.* No one has ever challenged the reliability of Chief Strom's representation of Lt. Cate's opinion within the letter, and indeed, there would have been no incentive for Chief Strom to misrepresent Lt. Cate's opinion to the FBI in asking for assistance in examining the ballistics evidence.

Finally, The State's argument ignores the fact that the letter was also admissible as impeachment evidence. As the Court of Appeals noted, the letter undermined (1) Agent Parnell's testimony that he saw no similarity between the Dreher gun and the test bullets fired, (2) Parnell's testimony that all of the SLED ballistics examiners (including Lt. Cate) reached inconclusive results, and, (3) statements by Carl Stokes that he and Lt. Cate were both able to exclude the Dreher gun as the murder weapon. *Freiburger II*, 413 S.C. at 248-49, 775 S.E.2d at 394. As impeachment evidence, Lt. Cate's opinion would not be hearsay because it would not have been admitted for the truth of the matter asserted. Instead, the opinion would be admitted for the purpose of demonstrating that there was not, in fact, a consensus among the SLED examiners who analyzed the ballistics evidence. The Hoover Letter could, therefore, have been effectively used by trial counsel to impeach both Parnell and Stokes, which would in turn have undermined the conclusive results reached by Cayton which were the basis for the State's prosecution of Freiburger.

In sum, the Court of Appeals correctly held that the Hoover Letter was not only admissible but powerful evidence that the jury should have been made aware of. The State's new argument, contradicting its concession at oral argument, to the contrary do not warrant certiorari in this case.

II. THE COURT OF APPEALS DID NOT MISAPPREHEND THE HOOVER LETTER

The State asserts the "Court of Appeal erroneously interpreted the letter as a formal opinion of Lt. Cate and wrongly gave it heightened meaning." Petition for Writ of Certiorari at 19. However, nothing in the appellate court's opinion indicates the court considered Lt. Cate's opinion within the Hoover Letter a final report. Instead, the Court of Appeals directly quoted from the letter, which stated "Lt. Cate is of the opinion that [the Dreher] weapon killed the taxi driver," *Freiburger II*, 413 S.C. at 248, 775 S.E.2d at 394, and correctly found that the letter undermined the State's ballistics evidence and testimony indicating that all of the SLED examiners to review the case came to inconclusive results. In addition, it directly contradicts Stokes' trial testimony that Stokes and Lt. Cate excluded the Dreher gun—to the contrary, Lt. Cate was of the opinion that the Dreher gun was the murder weapon.

III. THE COURT OF APPEALS DID NOT MISAPPREHEND AGENT PARNELL'S TESTIMONY

The State asserts that the Court of Appeals misapprehended Agent Parnell's trial testimony when it found the Hoover Letter undermined "Parnell's testimony that '[he] saw no similarity between the bullet fragments and the test bullets fired through the Dreher gun." *Id.* at 249, 775 S.E.2d at 394; Petition for Writ of Certiorari 20-21. The State, in actuality, misapprehends the testimony. The Court correctly stated that Agent Parnell "saw no similarity between" the bullet fragments and test bullets fired through the Dreher gun. *See* App. 628. The State asserts that Parnell stated "he saw no '*remarkable individual characteristic agreement*' between the Dreher gun and the fragments." Petition for Writ of Certiorari 21. Parnell, however, did not make such

an assertion. When asking about the Dreher weapon, the solicitor asked if Parnell saw "any remarkable individual characteristic agreement between" the bullet fragment and the test bullet fired by the Dreher weapon. App. 628. Parnell responded, "No, sir. I saw no similarity between those two items." App. 628. Despite the solicitor asking about "remarkable individual characteristic agreement," Parnell responded more broadly that he "saw *no* similarity between the two items." App. 628 (emphasis added).

Either way, however, it is a meaningless distinction; Parnell testified that he did not see enough similarity to conclude the Dreher weapon was the murder weapon. The Hoover Letter indicates Lt. Cate, the father of the SLED ballistics division, did see enough similarity to believe the Dreher gun was the murder weapon. Thus, the Hoover Letter undermines Parnell's testimony regardless of the interpretation of his testimony.

IV. THE COURT OF APPEALS APPROPRIATELY CONSIDERED BALLISTICS TECHNOLOGY

The State asserts that the court "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." Petition for Writ of Certiorari 21. This assertion is simply incorrect. As an initial matter, finding John Cayton, a forensic examiner who had been fired from the Kansas Bureau of Investigation for incompetence and misconduct, was the State's key to finding an expert to connect the Freiburger weapon to the forty year old crime, not advances in ballistics technology. Even forty years after the initial examination of the evidence in this case,

SLED examiners working in their nationally accredited crime lab (as opposed to a trailer in their backyard)[8] continued to come to inconclusive findings.[9] *See* App. 635, 732.

Additionally, evidence presented at Freiburger's post-conviction relief hearing demonstrated that the scientific basis for ballistics testing actually is now not as strong as it was forty years ago. At the hearing, Dr. Adina Schwartz testified regarding the inherent unreliability of modern firearms and tool mark identification.[10] She testified that unreliability is particularly likely in a case as old as Freiburger's because firearms are known to "foul" after decades without proper care. App. 1621. Dr. Schwartz also criticized Cayton's identification due to his lack of documentation—he only included small, hard to see sketches and conclusory notes—and his failure to obtain peer review of his identification. App. 1624-28. She concluded this created a "significant risk of misidentification in this case." App. 1629. The Court of Appeals, therefore, properly found that Lt. Cate's 1961 opinion that the Dreher weapon was the murder weapon would have served to discredit Cayton's decades-later identification of the Freiburger weapon as the murder weapon and certiorari is not warranted.

---

[8] Cayton's lab was in a trailer that sat on the same property as his home in Missouri. App. 732.

[9] The State's contention that Cayton's additional cleaning of the bullet fragments allowed him to reach a conclusive result falls flat in light of the fact that Parnell continued to adhere to his inconclusive opinion even after Cayton conducted his cleaning and analysis. *See* App. 644-45, 1697.

[10] Dr. Schwartz is a professor at the John Jay College of Criminal Justice. She has a Ph.D. in philosophy from Rockefeller University, a J.D. from Yale, and expertise in evidentiary law with concentration in expert testimony, scientific evidence, and primarily forensic information evidence. App. 1578-79.

V. THE COURT OF APPEALS DID NOT MISAPPREHEND THE EVIDENCE PRESENTED

The Court of Appeals accurately described the evidence against Freiburger as "purely circumstantial" and "weak." The State argues the Court of Appeals mischaracterized the evidence against Freiburger in light of this Court's finding on direct appeal that the circumstantial evidence against Freiburger was sufficient to withstand a directed verdict motion. Petition for Writ of Certiorari 23. Initially, as every trial judge knows, many weak circumstantial cases survive motions for directed verdicts since—in assessing such a motion—the evidence must be viewed in the light most favorable to the State. *See State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). Additionally, the State's argument ignores the fact that the Court of Appeals' characterization of the evidence as "purely circumstantial" and "weak" was based on a review of the evidence "other than ballistics." *Freiburger II*, 413 S.C. at 251, 775 S.E.2d at 251. Given that the court found that use of the Hoover Letter at trial would have discredited the ballistics evidence, the court properly considered the remaining evidence against Freiburger in order to determine whether counsel's failure to use the letter prejudiced Freiburger. *See Strickland*, 466 U.S. at 694 (holding that proving prejudice requires a demonstration "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different").

The Court of Appeals properly found that the evidence other than ballistics was weak as demonstrated by the fact that no charges were filed against Freiburger for over forty years and charges were not filed until authorities located Cayton who connected the Freiburger weapon to the murder. Without Cayton's ballistics testimony, there simply was no case against Freiburger. The Court of Appeals, therefore, properly found that if counsel had introduced the Hoover Letter, it would have undermined the ballistics evidence and the weakness of the remaining evidence

against Freiburger results in a reasonable probability the jury would have had reasonable doubt as to whether Freiburger was guilty of murder.

VI. THE COURT OF APPEALS PROPERLY CONSIDERED THE LETTER'S IMPACT IMPEACHING STOKES' TESTIMONY

The State argues the Court of Appeals should not have considered whether the Hoover Letter would have been beneficial for the impeachment of Stokes because Freiburger did not specifically raise the issue. Petition for Writ of Certiorari 24. In his appellate brief, however, Freiburger challenged the post-conviction relief court's finding that trial counsel was not ineffective in failing to use the Hoover Letter at trial both as direct evidence and impeachment evidence. *See* App. 2268. Freiburger also asserted that the lower court erred in its finding that Freiburger failed to prove deficient performance and prejudice, properly presenting both prongs of the ineffective assistance of counsel analysis to the Court of Appeals. *See* App. 2266, 2268. In Petitioner's Motion to Alter or Amend the Judgment, Freiburger similarly challenged the PCR court's finding that the failure to admit the Hoover Letter did not prejudice Freiburger in the PCR court. *See* App. 2113 ("The value of the letter in question to the defense case at trial is clear."); *see also* App. 2130 (Transcript of Hearing on Motion to Alter or Amend, stating "[T]estimony undermining [the ballistics evidence] credibility which raised the specter of a third party . . . as the perpetrator could easily and reasonably created a reasonable doubt in one or more jurors' minds.").[11]

[11] In *Burgess v. State*, 402 S.C. 92, 95, 738 S.E.2d 264, 265 (Ct. App. 2013), citied by the State, the Court of Appeals found an issue unpreserved for review because the State failed to file a Rule 59(e) motion asking the post-conviction relief court to make specific findings regarding the prejudice prong. Unlike *Burgess*, Freiburger did preserve the issue of prejudice, allowing the Court of Appeals to consider the letter's impact on the outcome of Freiburger's trial, including whether it could have impeached Stokes' testimony.

Furthermore, Freiburger has argued in the PCR Court and on appeal that the Hoover Letter could and should have been used to undermine evidence presented at trial that seven SLED examiners examined the weapons and reached inconclusive results. *See* App. 2113 (Motion to Alter or Amend arguing that the Hoover Letter would have undermined the impression given at trial that SLED examiners, including Lt. Cate, rendered an opinion that the results were inconclusive); App. 2268 (asserting that the Hoover Letter would have undermined the "prosecution's portrayal of the inconclusive results reached by seven examiners"). Stokes, Cate, and Parnell were three of the seven examiners whose opinions were presented at trial as inconclusive. Freiburger's arguments, made to the circuit court and the Court of Appeals, consistently asserted that the Hoover Letter would have undermined the testimony about the opinions of all seven SLED examiners. Thus, in addition to generally preserving the prejudice issue, Freiburger specifically preserved the issue of whether the letter could have impeached Stokes' testimony about his and Lt. Cate's opinions for review by the Court of Appeals. Accordingly, the Court of Appeals' consideration of the Hoover Letter's potential value for impeachment of Stokes was proper and certiorari is not warranted on this argument by the State.

ADDITIONAL SUSTAINING GROUNDS

I. THE PCR JUDGE ERRED IN FINDING TRIAL COUNSEL WERE NOT INEFFECTIVE FOR FAILING TO ADEQUATELY CHALLENGE THE STATE'S BALLISTICS EVIDENCE BY USING PARNELL'S REPORT

In addition to the Hoover Letter, trial counsel also had in their possession, but failed to use, Agent Parnell's report. Parnell testified at the PCR hearing, admitting that he drafted a report, which he was not asked about at Freiburger's trial, in which he opined that either of the known guns, as well as any other H & R .32 caliber weapon, could have been the murder weapon. App. 1697-98. Although Parnell's written report plainly contradicted Cayton's claim that the Freiburger

gun—to the exclusion of all other similar guns—fired the bullet that killed Orner, Parnell testified at trial that the only difference between his own conclusions and Cayton's was one of degree of certainty. App. 629. At the PCR hearing, however, he admitted that the contents of his report were true. Because trial counsel failed to utilize Parnell's report in addition to the Hoover Letter, however, the misimpression created by Cayton's and Parnell's trial testimony was not effectively challenged. Introduction of the Hoover Letter and Parnell's report would have transformed an ostensible consensus among firearms examiners, as the State maintained, into a conflict among experts with key SLED examiners on Freiburger's side. Had the jury been apprised of that conflict, it likely would have rejected Cayton's claims and the result of the trial would likely have been different. Trial counsel's failure to use the Parnell report at trial provides additional grounds for sustaining the Court of Appeals' decision.

II. THE PCR JUDGE ERRED IN FINDING THE STATE'S FAILURE TO DISCLOSE EVIDENCE REGARDING CAYTON'S FALSE TESTIMONY DID NOT VIOLATE THE REQUIREMENTS OF *BRADY V. MARYLAND*, 373 U.S. 83 (1963).

Again, and it cannot be overemphasized, that without Cayton there was no case against Freiburger. It was, therefore, imperative that the State honor its due process obligation to disclose any evidence impeaching Cayton's credibility. The State failed to do so, and the PCR judge erred in finding this failure did not violate the Due Process Clause.

Brady mandates that the State disclose to the accused any information which is both favorable to the accused, and material to guilt or punishment. *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987); *United States v. Bagley*, 473 U.S. 667, 669 (1985). This disclosure obligation applies to impeachment evidence as well as exculpatory evidence. *Giglio v. United States*, 405 U.S. 150 (1972); *State v. Bryant*, 307 S.C. 458, 461, 415 S.E.2d 806, 808 (1992). Whether or not the State has actual knowledge of impeachment evidence is irrelevant. *See Kyles v. Whitley*, 514

U.S. 419, 437 (1995) (stating that "the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case"); *see also Banks v. Dretke*, 540 U.S. 668, 703 (2004) (finding police and prosecutorial misconduct for failure to disclose information relating to an informant). "If a Brady violation is found to have occurred, PCR must be granted." *Riddle v. Ozmint*, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006).

At trial, Cayton testified that he worked in Topeka, Kansas for a couple of months as a firearms examiner, and then retired for a couple of years. App. 706. At the PCR hearing, trial counsel Hudgins read into evidence a transcript of another case, *Kansas v. Matt Denny*, case No. 2005-CR-395, in which Cayton testified as a ballistics expert. In that case, Cayton was questioned regarding the precise circumstances of his departure from the Kansas Bureau of Investigations in 1999. The *Denny* transcript included the following:

> Q. Okay, you were actually fired from the KBI, weren't you?
>
> A. Well, we had a meeting and TL was there and they talked about all the problems they was having with my performance in work. And it was pretty clear that I was not wanted there. And I was asked if I would resign and I resigned.
>
> Q. Actually, you were fired for failing to follow KBI protocols and policies and they actually handed you a termination letter, didn't they?
>
> A. I think that's obvious.

App. 1665-66, 1952-54. Both trial counsel Hudgins and Delgado testified they had not been made aware of Cayton's firing from the KBI for failing to follow procedures, and that this information would have been critical to discrediting the sole evidence at trial connecting Freiburger's weapon to the murder. App. 1663-68, 1809-12.

No evidence in the record supports the PCR judge's findings in denying relief on this claim. Cayton's testimony that he "retired" from being an examiner in Kansas was patently untrue given

he was "terminated" from his job as an examiner in Kansas, a fact he explicitly admitted in the *Denny* case. App. 1666, 1952, 2022. Considering how central Cayton's testimony was to the case against Freiburger, evidence that he was fired from a state laboratory for incompetence in the very field in which he was presented as an expert to the Freiburger jury would have been extraordinarily powerful impeachment.

As a member of the prosecution team, Cayton's knowledge of the truth about his own professional past must be imputed to the prosecution, and was plainly subject to disclosure under *Brady*. *Kyles*, 514 U.S. at 437. Any failure of the prosecution to learn of this information must be held against the State, which had a duty to learn of any evidence favorable to Freiburger under *Kyles*, particularly because the evidence was in the knowledge and possession of a member of the prosecution's team. *See Kyles*, 514 U.S. at 437. The State's failure to produce this material evidence violated Freiburger's due process rights, and the PCR judge's finding to the contrary provides additional grounds for sustaining the Court of Appeals' decision.

CONCLUSION

For the reasons stated above, the Court of Appeals properly found Freiburger was deprived of his right to the effective assistance of counsel when his trial counsel failed to present the jury with significant evidence undermining the State's case—the Hoover Letter. This Court should, therefore, deny certiorari and allow the Court of Appeals' ruling to stand. Additionally, the PCR court erred in failing to grant relief on Freiburger's other ineffective assistance of counsel and *Brady* claims, providing additional reasons for upholding the Court of Appeals' decision.

Respectfully submitted,

JOHN H. BLUME
Cornell Law School
Myron Taylor Hall
Ithaca, New York 14853
(607) 255-1030

LINDSEY S. VANN
Death Penalty Resource & Defense Center
900 Elmwood Avenue, Suite 200
Columbia, SC 29201
(803) 765-1044

BY: _____
Counsel for Respondent

November 5, 2015.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

ON CERTIORARI FROM COURT OF APPEALS
Appeal from Richland County
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

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

EDWARD FREIBURGER. . . . . *Petitioner,*

v.

STATE OF SOUTH CAROLINA . . . . . *Respondent.*

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of Respondent's Brief in Opposition to Certiorari was mailed today by first class United States mail, postage prepaid, this 5th day of November, 2015, upon the following:

Megan Harrigan Jameson
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211

Jill B. Abernethy