THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. 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*.

SUPPLEMENTAL RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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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.*

ARGUMENT IN RESPONSE TO THE STATE'S RESPONSE TO ADDITIONAL SUSTAINING GROUNDS

I. RELEVANT PROCEDURAL HISTORY

This Court denied the State's Motion to Strike Additional Sustaining Grounds and ordered both parties to submit supplemental arguments on whether this Court should grant certiorari to review the Court of Appeals' decision, authored by Judge Few, that Freiburger was denied his Sixth Amendment right to the effective assistance of counsel. Order (Dec. 16, 2015). The State submitted its supplemental Petition for Writ of Certiorari and Feiburger submits the following as supplemental reasons that certiorari should be denied.

II. THIS COURT CAN ADDRESS FREIBURGER'S ADDITIONAL SUSTAINING GROUNDS

The Court can, and should, consider Freiburger's additional sustaining grounds in deciding whether to grant certiorari to review the judgment below regardless of the State's argument that they are defaulted because they were not raised in a petition for rehearing in the Court of Appeals.[1] As this Court's rules make clear, "[a] writ of certiorari is not a matter of right, but of sound judicial

[1] This Court has made initial indications that the additional sustaining grounds are not defaulted by denying the State's Motion to Strike Additional Sustaining Grounds. Order (Dec. 16, 2015).

discretion, and will be granted only where there are special and important reasons" to do so. Rule 242(b), SCACR. In this case, the additional sustaining grounds reveal additional flaws in Freiburger's conviction relevant to this Court's decision whether to invest additional judicial resources to review the decision below granting Freiburger a new trial.[2]

Furthermore, the State's contention that the additional sustaining grounds should not be considered is idiosyncratic given the fact that if Freiburger were appealing a grant of relief directly from the post-conviction relief ("PCR") court, he would be entitled to submit additional sustaining grounds in support of his argument that this Court should deny certiorari. *See* Rule 243(g), SCACR. Only because this Court is determining whether to grant certiorari to review a decision from the Court of Appeals is there an issue whether undersigned counsel's failure to file a petition for rehearing in that court render the claims not ripe for consideration. This is especially true given that consideration of Freiburger's other arguments is in line with the purpose of the rule on additional sustaining grounds, which is to avoid requiring a prevailing party to appeal adverse grounds despite the fact that he obtained the relief sought in the lower court. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 358 S.C. 406, 419-20, 526 S.E.2d 716, 723 (2000) ("It would be inefficient and pointless to require a respondent to return to the judge and ask for a ruling on other arguments to preserve them for appellate review. It also could violate the principal that a court usually should

[2] Similarly, even if this Court concludes that Freiburger's additional sustaining grounds are technically defaulted, the Court can consider them as a reason for upholding the lower court's ruling. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."). Although the State asserts Rule 220(c), allowing this Court to affirm "any ruling" on "any ground," is limited to appeals directly from the trial court, *see* Supplemental Petition for Writ of Certiorari 8, the rule contains no such limitation nor do the cases cited by the State explicitly limit this rule's application to review of a trial court decision. *See Law v. South Carolina Dep't of Corr.*, 368 S.C. 424, 440, n.3, 629 S.E.2d 642, 651, n.3 (2006); *Upchurch v. New York Times Co.*, 314 S.C. 531, 538, 431 S.E.2d 558, 562 (1993).

refrain from deciding unnecessary questions."); *Pinckney v. Orkin Exterminating Co.*, 268 S.C. 430, 432, 234 S.E.2d 654, 655 (1977) (The purpose of [the additional sustaining grounds rule] is to relieve a respondent who . . . has obtained a judgment giving him all the relief he sought, from the necessity of appealing from adverse rulings that did not affect the result of the lower court's decision." (internal quotation marks omitted)). This is especially so given the fact that Freiburger does not seek to expand the relief granted by the Court of Appeals; he merely offers additional reasons supporting the result in the lower court.[3]

III. TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO ADEQUATELY CHALLENGE THE STATE'S BALLISTICS EVIDENCE BY USING PARNELL'S REPORT

The State asserts that Freiburger was not prejudiced by trial counsel's failure to use the Parnell report because counsel did in fact use it when cross examining Parnell. Supplemental Petition for Writ of Certiorari 10. However, the record clearly demonstrates that trial counsel never confronted Parnell with his report,[4] *see* App. 629-49, and thus allowed Parnell to testify

[3] It is also important to note that each of Frieburger's additional sustaining grounds were raised and fully briefed in the circuit court and the Court of Appeals. App. 2114-15 (Motion to Alter or Amend PCR court order denying relief); App. 2266, 2269-73 (Brief of Petitioner in the Court of Appeals). Unlike cases in which the grounds were not raised below, Freiburger's claims are not a surprise to the State which has fully engaged with these claims in both of the lower courts. *See Alexander v. Houston*, 403 S.C. 615, 620 n.4, 744 S.E.2d 517, 520 n.4 (2013) ("While a respondent may raise on appeal any additional sustaining grounds appearing in the record, even where those reasons have not been ruled on by the lower court, we are reticent to invoke an alternative sustaining ground where the ground is not raised in the appellate brief. Invoking an additional sustaining ground under such circumstances would generally be unfair to an unaware appellant.").

[4] The Appendix pages the State cites in support of its contention that counsel did cross examine Parnell on his report show only that counsel asked Parnell about the results of his testing generally. Supplemental Petition for Writ of Certiorari 10 (citing App. 630-31, 632, 646-49). At no point during counsel's cross of Parnell did counsel ask Parnell to review his report or confront Parnell with the actual language contained within his report.

without contradiction that his (and other SLED examiners') inconclusive finding was only different from Cayton's ballistics "match" testimony in a matter of degree. App. 644.

Parnell's report, on the contrary, reveals that his opinion was that the bullet recovered from the victim's body "could have been fired from [the Dreher weapon], [the Freiburger weapon], *or by any other similarly rifled firearm* of the same caliber."[5] App. 1467-68 (emphasis added); App. 1696-97. Parnell's actual conclusion that any other .32 caliber firearm could have been the murder weapon is clearly contrary to, and in fundamental disagreement with, Cayton's testimony that Freiburger's .32 revolver "to the exclusion of every other" firearm was the murder weapon. App. 725.

Counsel, therefore, performed deficiently in failing to impeach Parnell with his own report.[6] *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Freiburger was prejudiced by this failure because if counsel had introduced the report, it would have demonstrated that the findings of at least five SLED examiners directly contradicted and disagreed with Cayton's conclusive finding. Given the fact that Cayton's conclusion linking the Freiburger weapon to the crime was the only evidence tying Freiburger to the murder, counsel's failure to demonstrate that SLED's qualified and highly trained firearms examiners disagreed with Cayton's faulty "match" conclusion was highly prejudicial. Had the jury known the true nature of Parnell's findings, it likely would have rejected Cayton's claims and there is a reasonable probability that the outcome of the proceeding would have been different.

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[5] Parnell expressly refused to disavow his report at the post-conviction relief hearing. *See* App. 1696-97.

[6] The State asserts that Freiburger cannot be prejudiced because trial counsel attempted, but failed to introduce Parnell's report. However, regardless of the admissibility of the actual report, counsel could have used the report as a prior statement of the witness, Rule 613(a), SCRE, to demonstrate that Parnell's testimony that he did not disagree with Cayton was undeniably false.

IV. THE STATE'S FAILURE TO DISCLOSE EVIDENCE REGARDING CAYTON'S FALSE TESTIMONY VIOLATED THE REQUIREMENTS OF *BRADY V. MARYLAND*, 373 U.S. 83 (1963).

The State minimizes the importance of the *Denny* transcript, asserting that it does not demonstrate that Cayton was fired from the Kansas Bureau of Investigations ("KBI"), and even if he was, it was only for trivial violations. Supplemental Petition for Writ of Certiorari 14-15. In *Denny*, Cayton was asked on cross, "Actually, you were fired for failing to follow KBI protocols and policies and they actually handed you a termination letter, didn't they?" App. 1952. Cayton responded unequivocally, "I think that's obvious." App. 1952. The grounds set forth in the termination letter were that Cayton failed to "follow policies, procedures, and protocols of the KBI Laboratory section." App. 1953-54. Failure to follow laboratory policies, procedures, and protocols is hardly trivial and, contrary to the State's assertion, pertains directly both to Cayton's conclusions in this case and his competence in general. At the KBI, Cayton conducted firearms examinations; the same task for which he was hired by Richland County in Freiburger's case. Being fired from a job doing the very thing he was asked to do in this case is invariably relevant to the jury's determination of Cayton's competence. Even if (somehow) it were not, the *Denny* transcript also reveals as false Cayton's trial testimony that he "retired" from the KBI. In truth he was "fired." This evidence goes to his credibility and is undoubtedly material given the importance of Cayton's testimony at Freiburger's trial.

The State further argues that the prosecution had no obligation to turn over information about Cayton being fired because Cayton was not a state actor. Supplemental Petition for Writ of Certiorari 16. In *Kyles v. Whitley*, 514 U.S. 419, 437 (1995), the Supreme Court outlined the duty of the prosecution to "learn of any favorable evidence known to the others acting on the government's behalf in the case." Cayton was clearly acting on the State's behalf in this case, imposing a duty on the State to learn of favorable evidence known to Cayton, including

impeachment evidence. *See id.*; *Giglio v. United States*, 405 U.S. 150 (1972). Cayton was retained by the prosecution as a forensic examiner to review evidence in SLED's possession and to present his findings at trial on behalf of the State. There is no difference between Cayton's position as part of the prosecution team and any SLED examiner who reviews evidence on behalf of the State. *See Avila v. Quarterman*, 560 F.3d 299, 308 (5th Cir. 2009) (holding an expert witness for the state falls under the state's *Brady* responsibilities when the expert is "an arm of the prosecution"); *United States v. Stewart*, 323 F. Supp. 2d 606, 618 (S.D.N.Y. 2004) (same); *see also United States v. Rasha*, 445 F.3d 298, 304 (6th Cir. 2006) (imputing knowledge of a state law enforcement officer to a federal prosecutor); *United States v. Antone*, 603 F.2d 566, 570 (5th Cir. 1979) (same). Here, Cayton performed his examination and provided testimony in the same capacity as a SLED examiner would have if a SLED examiner chose to make a conclusive finding in this case. The State was, therefore, required to learn of favorable evidence to Freiburger and to turn it over under *Brady*, *Kyles*, and *Giglio*. Any other conclusion would allow the State to skirt its *Brady* obligations simply by hiring outside examiners.

Finally, the State asserts that evidence Cayton was fired "is simply not powerful impeachment evidence" because trial counsel already impeached Cayton with evidence of an error made in a similar case seventeen years prior. Supplemental Petition for Writ of Certiorari 16. Freiburger does not deny that evidence Cayton made a mistake in a similar case is powerful impeachment evidence, but that does not discount the materiality of additional impeachment evidence which would have revealed Cayton deliberately lied to the jury about his work history and qualifications. Given that Cayton knew he had been fired, deliberately concealed that information from the jury, and the State made no effort to provide counsel with the information

necessary to impeach Cayton, Freiburger's conviction based on Cayton's testimony was fundamentally unfair.

CONCLUSION

Taking all of the relevant circumstances into consideration, there is no "special and important" reason for this Court to grant discretionary review to disturb the considered decision of the Court of Appeals. Certiorari should be denied.

Respectfully submitted,

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February 18, 2016.

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of Respondent's Supplemental Response in Opposition to Petitioner for Writ of Certiorari was mailed today by first class United States mail, postage prepaid, this 18th day of February, 2016, upon the following:

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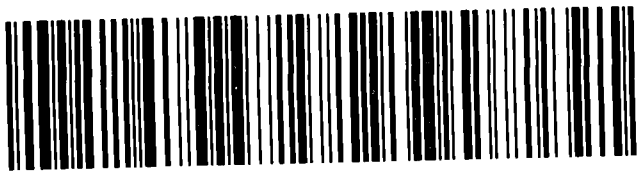

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