

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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APPEAL FROM RICHLAND COUNTY
The Honorable G. Thomas Cooper, Jr., Circuit Court Judge
Certiorari to the Court of Appeals

SC SUPREME COURT

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

EDWARD FREIBURGER

RESPONDENT,

v.

STATE OF SOUTH CAROLINA

PETITIONER.

AMENDED APPENDIX
VOLUME V of V

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- 1 V-33. Does this show the wound in the upper right
2 chest and armpit?
- 3 A. Yes, it does.
- 4 Q. And what bruising do you mean?
- 5 A. Right here (indicating) there's some bruising, and
6 right over here (indicating) there's some bruising.
7 These could almost be described as a pinch, like a
8 blood blister. But this (indicating) is the area
9 where the clothing was kind of bunched up, and then
10 the bullet came down through that. When the bullet
11 hit the tissue, it caused this margin here
12 (indicating) at the top that has more pressure and
13 clothing. It causes a wider abrasion ring as the
14 bullet comes down through. You can have some
15 associated bruising from this maximum temporary
16 cavity that's caused when that bullet starts to
17 expand. And it, basically, slaps the underneath
18 side of his arm, causing that bruising right there
19 (indicating). That shows that this (indicating)
20 part of the arm was over this (indicating) way with
21 this (indicating) crease being closed.
- 22 Q. And have you observed this before in other cases
23 involving gunshots?
- 24 A. Yes.
- 25 Q. And is what we're seeing here -- the bruising here

- 1 indicative of a contact wound?
- 2 A. No.
- 3 Q. What is it indicative of?
- 4 A. Well, it's indicative of an angular shot from the
- 5 top. And we know from the autopsy report that the
- 6 projectile did go downward. But this shot -- this
- 7 (indicating) irregular shape is a combination of the
- 8 angle of the bullet going down as opposed to the one
- 9 that's in the upper chest where it was almost
- 10 symmetrical. Here (indicating), we have an
- 11 elliptical pattern showing more contact here
- 12 (indicating) and more pressure as the bullet
- 13 traveled down during the entry
- 14 Q. And, again, that abrasion is caused by what, sir?
- 15 A. It's caused by both a combination of the bullet
- 16 passage and pinching the clothes in between the
- 17 bullet and the flesh, causing that abrasion ring
- 18 Q. All right. Now, can you have an abrasion ring with
- 19 a shot fired from a distance?
- 20 A. Well, it depends upon if there's clothing. If
- 21 there's no clothing, then you would have an abrasion
- 22 ring from the bullet itself. Then if you have
- 23 clothing, then the clothing combines with the bullet
- 24 to contribute to that area around the wound that we
- 25 call an abrasion ring.

1 Q. All right. Does the abrasion ring you see on the
2 wounds in this case give you any indication of the
3 distance in which the bullets were fired?

4 A. No.

5 Q. And we have other photographs that you've selected
6 here, Mr. Cayton, that show these wound areas after
7 they've been cleaned up, correct?

8 A. Yes.

9 Q And do those show any evidence of tattooing or
10 stippling caused by gunshot residue?

11 A. No. Actually, stippling is normally seen as the
12 distance increases, but you do always have some
13 sooting, especially with the higher pressure.
14 You're going to have some associated tearing at the
15 point where the skin won't stretch any more. You
16 have what they call stellate tearing. So you'd have
17 some little tears around the bullet entry hole from
18 the gasses as they go in. So you can have a
19 combination of tearing as well as sooting, but I
20 didn't see either one of them

21 (THEREUPON, the court reporter throws
22 her hands up and, again, asks the
23 witness to speak up as he is barely
24 audible.)

25 Q. (BY MR. McCAUSLAND) Make sure you talk directly

- 1 into the microphone, please. Say that again. Did
2 you see any -- what was the word, "stellate"?
- 3 A. Yes. There's -- they're called "stellate" or little
4 tears. You know, when the tissue reaches its
5 maximum stretching, then it will tear. And when
6 that maximum cavity collapses and goes back, you
7 have the wound track, but you still have those
8 little tears from that muzzle blast and that gas
9 pressure.
- 10 Q And did you see that for either of these wounds?
- 11 A. No.
- 12 Q. Now, in addition to -- was there anything else that
13 you looked at? We've talked about what you did at
14 the scene; what you looked at, at the KBI
15 Laboratory; and looking at the autopsy report and
16 photographs, correct?
- 17 A. Yes.
- 18 Q. In addition, did you do anything else as a part of
19 your investigation?
- 20 A. Yes, I did.
- 21 Q What did you do?
- 22 A. I used a similar Ruger, 44 Magnum and conducted some
23 tests using PMC ammunition and some synthetic
24 fabric. I set up three shots. One was a contact;
25 one is at six inches; and one at five feet to see

1 the results -- the material and so forth as a result
2 of the shot. Also, I did an additional test putting
3 some fabric -- laying it -- draping it over the top
4 of the gun, shooting it, showing where the gasses
5 come out. Not only does the gas come out the muzzle
6 or the front of the gun, it comes out the cylinder
7 gap between the cylinder and the back of the barrel
8 where the cylinder rotates. You have a lot of gas
9 that comes out there And then at the back of the
10 cylinder where the primer -- the firing pin is,
11 there's gas leakage back there. So this white
12 material was used to show the large amount in the
13 areas that gunpowder residue can be deposited in the
14 areas that are associated close to the -- when a
15 contact shot was fired.

16 Q. All right. And when you did the test -- the contact
17 test straight on into the barrel, what was the
18 purpose -- specific purpose of that?

19 A. To see the effect and see the condition of the
20 fabric and the color, if there's residue deposit,
21 and the tearing that would happen.

22 Q. And what was the result of that test?

23 A. Well, it did show tearing and melting of the fabric
24 and deposit -- visible deposits of dark residue.

25 Q. All right. And then you did it again from what

1 distance?

2 A. I did it at contact, six inches, and then five feet.

3 Q. All right. And when you did the test from five --

4 from six inches, rather, what did you discover from

5 that test?

6 A. Well, there was a very large dense pattern of

7 unburned or partially burned gunpowder particles

8 embedded on the cloth, which would let me know that

9 not only was -- that there would be sooting and

10 deposits between contact and six inches, but there

11 would be some on past at greater distances. And so

12 I saw quite a large amount of partially and unburned

13 gunpowder around the hole.

14 Q. All right. Then what was the other distance that

15 you used?

16 A. Five feet.

17 Q. And what did you see at five feet?

18 A. Well, at five feet, there was a hole with no

19 associated tearing or anything from the gas pressure

20 and a few gunpowder particles. And these tests were

21 done with the target perpendicular, up and down,

22 shooting this (indicating) direction. And the

23 reason you extend the distance is to figure out at

24 what point gravity will take over and the gunpowder

25 will fall and not reach the target. In the case we

1 have here where you have a vertical - the shooter is
2 above - then the gravity just keeps going. And so
3 it doesn't matter about the distance. You'll still
4 have some gunpowder filter fall down on whatever is
5 below it.

6 Q. All right. Did you see in your tests from contact,
7 six inches, and five feet any type of a gunshot
8 residue pattern that was consistent with what you
9 saw on the jacket or shirt of Sheriff Samuels?

10 A. Well, the closest one would have been the distant
11 one, because there was very few particles. And I
12 know in handling shooting victims, sometimes
13 particles are dislodged and fall off. So you don't
14 always see what was there to start with. But I
15 didn't see any of the heavy pattern of the shooting
16 and smoke that I expected from contact. And I
17 didn't see any of the intermediate between that and
18 the six inches or even a little beyond that.

19 MR. McCAUSLAND: (Displays an exhibit on
20 the screen.)

21 Q. (BY MR. McCAUSLAND) All right. Let me show you
22 Photographs AG-20 and AG-21. Describe for us,
23 please, just what is Photograph AG-20.

24 A. This is a photograph of the cartridges and the Ruger
25 .44 Magnum New Model Super Blackhawk revolver that I

1 used. It had a seven-and-a-half-inch barrel. I
2 used this to conduct the tests.

3 Q. And have you also inspected the Ruger New Model
4 Blackhawk 44 Magnum revolver that was found at the
5 scene?

6 A. Yes.

7 Q. Are there any differences between those two guns in
8 terms of their dimension or function?

9 A: No They're the same design. Basically, they'd be
10 similar.

11 Q. So this photograph just shows the jury and the Court
12 what you used to do your test, correct?

13 A. Yes.

14 MR. McCAUSLAND: We offer AG-20, Your
15 Honor. (Handing exhibit to counsel.)

16 MR MAXWELL No objection.

17 THE COURT: AG-20 will be admitted

18 Q (BY MR. McCAUSLAND) Next I hand you AG-21, another
19 photograph. What is that, please, Mr. Cayton?

20 A. This is a photograph of the same revolver, after the
21 test firing where I draped the material over the gun
22 and fired it, showing the muzzle blast, the tearing
23 from the gas at the muzzle; and the associated
24 tearing, even, of the gas leaking out between the
25 cylinder and the barrel; and then the gas at the

1 back of the cylinder where the primer is. There's
2 three areas there that have indications of gunpowder
3 residue leakage under that pressure. And two of the
4 areas have enough pressure that they tore the cloth
5 from the gas pressure.

6 Q. And is the photograph of the revolver with this
7 cloth something that would assist the jury in
8 understanding the effect of this gunshot residue
9 from the cylinder gap?

10 A. Yes

11 MR. McCAUSLAND We would offer AG-21, Your
12 Honor. (Handing exhibit to counsel)

13 MR. MAXWELL: No objection

14 THE COURT. All right AG-21 will be
15 admitted.

16 MR. McCAUSLAND (Displays an exhibit on
17 the screen.)

18 Q. (BY MR. McCAUSLAND) Now I show you Exhibit AG-20,
19 Mr. Cayton, and is that the Ruger New Model Super
20 Blackhawk .44 Magnum caliber handgun with the seven
21 and half inch barrel that you used in your tests?

22 A. Yes, it is.

23 Q. And is the ammunition that's shown in the
24 photograph, the 44 Magnum PMC, ammunition you used
25 in your test?

- 1 A. Yes, it is.
- 2 Q. And are those hollow points?
- 3 A. Yes.
- 4 Q. All right.
- 5 MR McCausland: (Displays an exhibit on
6 the screen.)
- 7 Q (BY MR McCausland) I now show you Photograph
8 AG-21. Does this show this Super Blackhawk revolver
9 with this cloth that you draped over the gun in one
10 of your tests?
- 11 A. Yes, it is.
- 12 Q. All right. Would you explain for the jury where
13 this cylinder gap blast occurs and what we're
14 looking at, please
- 15 A Well, here's (indicating) the front of the cylinder.
16 There's a space that's between the back of the
17 barrel and the cylinder that allows the cylinder to
18 rotate. Back here (indicating) you have the tearing
19 - this cloth was laid over the top of the gun - and
20 you have the muzzle blast. This (indicating) is
21 tearing from the gun as it went off. This is
22 associated with the recoil at the top of the gun,
23 the site tearing. And this (indicating) is
24 associated with the gas, the tearing here
25 (indicating) Both sides -- this is from the top

1 strap that was laying over the top of the gun. And
2 then there's tearing on both sides from the gas that
3 leaks out of here (indicating). And this back here
4 (indicating) is from the cylinder gap at the back of
5 the cylinder where the primer is. So there's three
6 different places where gas burned and gunpowder
7 residue would leave soot and this (indicating) gray
8 residue. If somebody is -- was close to it, the
9 clothing or the hand or anything close, would have
10 this residue associated with it.

11 Q. All right. And can you actually see gunshot residue
12 on the cloth?

13 A. Yes. These (indicating) gray deposits are gunshot
14 residue from this. And there is some around the
15 edge, but a lot of this is blown out. But there is
16 a lot of soot. Most of that would have gone on
17 through the cloth. If it had been a distance shot
18 and just a bullet, then you would have only a hole.
19 You wouldn't have the associated tearing that you
20 have from the gas pressure tearing the cloth.

21 Q. And what tearing are you -- do you refer to?

22 A. I'm talking about the tearing from the gas pressure
23 here (indicating), blowing through it, and this gas
24 pressure here (indicating) from the cylinder gap.
25 In other words, if you put your hand alongside that

1 gap and you fired that gun, you would be hurt from
2 that gunpowder residue pressure and, probably, you
3 would have some gunpowder particles embedded in your
4 skin. So there's a lot of pressure there.

5 Q Okay. If you were holding the barrel of that gun
6 with your hand -- with the barrel in your palm and
7 the gun was discharged, what would you expect to
8 find?

9 A. Well, I would expect to find indications on the hand
10 that would show marks either from the gun -- the
11 physical gun shape, the site. Just from shooting it
12 - and I was holding it very carefully - I had a
13 blood blister from it. And I was holding it with
14 two hands when I was shooting it. So there's a lot
15 of pressure there. Even if you're trying to be
16 careful, there's a good chance you'll be hurt So
17 there's going to be a lot of sharp edges on that
18 front site right there (indicating). You'd have
19 parts of the cylinder extractor lever here
20 (indicating) -- extractor rod Different parts of
21 the gun have sharp edges. The sites there
22 (indicating) are sharp. The back of the hammer is
23 very sharp. And different parts of the gun have
24 sharp edges on it. When you have ahold of that --
25 when you're shooting it, you can be hurt

1 Q. All right. By the way, we didn't talk about this,
2 but this particular firearm, describe how it works
3 for the jury.

4 A. This is a single action, which means you have to
5 cock it before you can shoot it. In other words, a
6 double action, you could both cock and fire it by
7 just pulling the trigger through. The single
8 action, you have to manually, after you've loaded
9 it, pull the hammer back. Then you pull the
10 trigger, and that fires one round. And that -- this
11 gun has an internal safety feature. There's a
12 transfer bar that in the position, just relaxed as
13 it is now, there will be a -- a bar will come down
14 in the way and will not allow the hammer to hit the
15 firing pin. But when the trigger is pulled, it
16 allows that transfer bar to be in line with the
17 firing pin so that when the hammer hits it, it hits
18 the transfer bar and then that drives the firing pin
19 into the primer. So each time this is shot, you
20 have to manually cock it again and then pull the
21 trigger.

22 Q. All right. And, in addition, how do you load this
23 firearm?

24 A. On the other side there's a loading gate. You can
25 pull it down to the right, and it will expose an

1 open area behind the site of the cylinder. This gun
2 has a safety feature there that while that is in
3 that position, the cylinder can be rotated, but the
4 gun can't be manipulated as far as cocking it or
5 pulling the trigger. It's an internal safety So
6 you would drop the gate, and then you could rotate
7 the cylinder, loading one chamber at a time until it
8 was loaded. Then you would close the gate. Once
9 you close that loading gate, then it allows the
10 cylinder to stop at the bottom of the frame,
11 underneath the cylinder, to come up and engage these
12 cylinder notches. So at the point where you would
13 cock it, the cylinder rotates. And this lock comes
14 up the cylinder stop and locks in that groove,
15 aligning the chamber with the back of the barrel,
16 the bore of the revolver

17 Q. All right. But you have to cock it and fire it one
18 round at a time; is that right?

19 A. Yes.

20 Q. In the course of your investigation, did you also
21 examine photographs made at the autopsy of Sheriff
22 Samuels' right hand?

23 A. Yes, I did.

24 MR. McCAUSLAND: (Displays an exhibit on
25 the screen.)

1 Q. (BY MR. McCAUSLAND) I'll show you what we've marked
2 as V-39, Mr. Cayton. When you examined this
3 photograph, what were you looking for?

4 A. I was looking for some indication that he might have
5 had some injuries associated from the gun as the gun
6 was discharged.

7 Q. All right. And were you able to tell anything from
8 this photograph?

9 A. Well, there's -- you can see better after you look
10 at the other one, but there's several places where
11 he has some injuries on the palm side of his hand
12 and fingers.

13 Q. All right. Let's look at Exhibit V-58.

14 MR. McCAUSLAND (Displays said exhibit on
15 the screen.)

16 Q. (BY MR. McCAUSLAND) Do you see the injuries in the
17 exhibit -- in the photograph, Exhibit V-58?

18 A. Yes.

19 Q. What significance, if any, is there in these
20 injuries to you, sir?

21 MR. MAXWELL: Judge, I'm gonna object I
22 don't think he's got the qualifications to testify
23 to this. There's not been sufficient foundation

24 THE COURT: Overruled.

25 A. There's two that have skin flaps On the little

- 1 finger, from the palm side, the skin is torn here
2 (indicating) and peeled back that (indicating) way.
3 And on the inside of the index finger there's also a
4 similar tear that has -- it's a skin flap like
5 something snagged here (indicating) and pulled the
6 skin that (indicating) way. This (indicating) is a
7 cut from a sharp edge of something. This here
8 (indicating) is also a little bit of a skin flap
9 And so it looks like from these things that whatever
10 caused these, probably was caused by his hand or
11 something moving across that (indicating) direction.
12 And this here (indicating) looks like a separate
13 sharp edge that made that mark there.
- 14 Q. All right Are you able to see anything in this
15 photograph, Exhibit V-58, that you could attribute
16 to some part of a New Super Blackhawk .44 Magnum
17 revolver?
- 18 A No
- 19 Q. Did you examine the surfaces of the doorway and the
20 walls at the crime scene?
- 21 A. Yes, I did.
- 22 Q. Did you see anything there that could possibly be a
23 cause of these wounds?
- 24 A. Yes.
- 25 Q. What did you see?

- 1 A. Well, there's a lot of rough edges of the plaster
2 laths that were still there, and there are edges of
3 the doors that had been roughly cut out or torn out.
4 Also, there were little nails, little brads, that
5 hold the laths. Several heads of those were
6 sticking out. And there was just a lot of rough
7 edges in the doorway and that area.
- 8 Q All right. And are you able to tell the jury what
9 the exact precise cause was of the injuries to
10 Sheriff Samuels' hand?
- 11 A. No.
- 12 Q. Have you formed an opinion, Mr. Cayton, as to
13 whether the gunshot wounds suffered by Sheriff Matt
14 Samuels on January 19, 2005, were contact wounds?
15 Do you have an opinion?
- 16 A Yes.
- 17 Q What is your opinion as to the wound to the upper
18 left chest and collar area? Was that a contact
19 wound?
- 20 A. No.
- 21 Q. And do you have an opinion as to whether the -- the
22 wound in the upper right chest/armpit area, was that
23 a contact wound?
- 24 A No.
- 25 Q Is there any other -- are there any other findings

1 or bases for those opinions that we have not
2 discussed?

3 A Well, there's always unknowns, you know. I try to
4 look at it -- I don't know all the facts. No one
5 does. But we try to put it together the best we can
6 from what we have to work with. And I believe that
7 was done from the start. But I think -- I would
8 expect, even though the clothing was between the
9 skin and -- the skin -- the clothing would always
10 filter some of the residue. Most of the gunpowder
11 would be filtered into the clothing. But that
12 close, when you're talking about contact with this
13 gun, that would blow right through that fiber of
14 those materials, and you would see some associated
15 residue in the skin. And I think -- I've examined
16 cases before, and we try to work close with the
17 medical examiner to work out differences. But
18 there's been several cases where they've had to
19 change their autopsy report. So that happens
20 sometimes.

21 Q. All right. Have you formed an opinion concerning
22 the exact distance from the handgun to Sheriff
23 Samuels at the time these wounds were inflicted?

24 A. No.

25 Q. All right. And are you able to form an opinion as

1 to the exact distance?

2 A. No.

3 Q. Are you able to form an opinion as to an exact
4 trajectory for the bullets that fatally wounded
5 Sheriff Samuels?

6 A. Well, both the pattern -- to form an opinion about
7 the distance, you have to have a pattern to
8 duplicate. If you don't have a pattern, then you
9 just can't say The angles a body is -- a body is
10 moveable. You know, whether he was looking up, how
11 he was articulating (sic) in that stairwell, there's
12 several things that we don't know. But we know the
13 wound tract through the body So the position of
14 the shooter - the other evidence indicates from the
15 trajectory rods and the work that they did - shows
16 it's more or less a position at an angle. And those
17 you could associate with, maybe, someone looking
18 up -- the sheriff looking up, maybe have a
19 flashlight And different things could explain the
20 angles and the distance. If the shooter was above
21 him, you would expect to find some particles of
22 gunpowder. And you would always expect to find
23 traces of lead, because when you have a fired
24 bullet, that bullet lead is wiping through the
25 material. And you're going to see traces of lead

1 not only in clothing but also in the wound.

2 Q All right. Is that at any distance?

3 A. Yes.

4 Q. All right. And so were there traces of lead or
5 bullet wipe in the clothing here?

6 A. If you have that -- this type of bullet, you're
7 going to have lead impacting the material and the
8 tissue. And depending on the range, how much it
9 expands -- the further it is, the less expansion you
10 have. But up close -- at close range, you have most
11 of the energy still in the bullet. So you would
12 have a lot of trace lead, which probably shows up in
13 the X-ray

14 Q. All right. Have you formed an opinion whether the
15 gunshot wounds suffered by Sheriff Samuels were
16 consistent with one or more shots being fired from
17 the top of the stairs down into the stairwell?

18 A. They're consistent with the top of the stairs,
19 again, like the other rods indicated their relative
20 position. And I don't see anything that would
21 change that

22 Q. Those are all the questions I have, Mr. Cayton.

23 Thank you.

24 A. Thank you.

25 THE COURT Go ahead, Mr. Maxwell.

1 MR. MAXWELL: Thank you, Your Honor

2 CROSS EXAMINATION

3 BY MR. MAXWELL:

4 Q Let's talk -- let's talk a little bit, first, about
5 -- let me move this out of the way. (Moving the
6 manikin) The defendant, through Mr McCausland,
7 hired you in this case, right?

8 A. Yes.

9 Q. How much are you being paid?

10 A. Well, our lab charges \$185 an hour, and we work for
11 several states.

12 Q And how many hours have you put into this case so
13 far up until today?

14 A. Well, we've made two trips down I don't have the
15 total number of hours, but I'd say there's probably
16 maybe 24 or so I don't know

17 Q. So 3 or \$4,000 so far?

18 A. I haven't added it up, but it could be.

19 Q. Okay. Now, let's talk about -- a little bit
20 about -- we marked this letter from the KBI as
21 State's Exhibit 192 (sic).

22 MR. MAXWELL. And I think for the record,
23 the court reporter pointed out at the recess that it
24 should be 193, Judge.

25 THE COURT. All right.

1 Q. (BY MR. MAXWELL) It's in front of you, sir. That's
2 the letter that you were -- in which you were
3 terminated and gives the reasons that you were
4 terminated from the KBI on October 29, 1999,
5 correct?

6 A. Yes

7 MR. MAXWELL I move to admit State's 193.

8 MR. McCAUSLAND: Well, may we approach?

9 THE COURT. Yes.

10 (THEREUPON, the following bench
11 discussion was had outside the
12 hearing of the jury)

13 MR. McCAUSLAND: My objection to this
14 letter is that, first of all, he's admitted the
15 ending of their relationship. He's admitted -- it
16 says he was terminated This a lengthy letter that
17 goes through a litany of things that's, obviously,
18 typical of what I see in employment cases all the
19 time. And I just think it takes us off on a lot of
20 collateral issues that are a waste of time. They're
21 unduly prejudicial We could spend a lot of time
22 explaining it This isn't an employment case I
23 think he's already made his point So I would
24 object to the letter.

25 MR. MAXWELL: Your Honor, the letter shows

1 bias on the part of the witness. It shows a failure
2 to follow protocol. It shows animosity towards the
3 KBI, which all are relevant for impeachment. The
4 letter is admissible under 60-460(o). It's an
5 official record. I will represent to the Court it
6 was contained in the KBI official files, which is an
7 official record and, therefore, admissible under
8 that statute.

9 THE COURT: Let's get the jury out and talk
10 about it a little more.

11 (THEREUPON, the bench discussion
12 was concluded; WHEREUPON, the
13 following proceedings were had in
14 the hearing of the jury.)

15 THE COURT: Ladies and Gentlemen, let's
16 take a brief recess. I would call the lunch recess,
17 but we may be about finished with this witness, and
18 he may want to get back to where he's going. So if
19 you'd excuse us for about 10 minutes, then we'll try
20 to rap it up and then go to lunch. So we'll be in
21 recess. Thank you.

22 (THEREUPON, the jury was excused for a
23 recess; WHEREUPON, the following
24 proceedings were had outside the
25 presence of the jury.)

1 THE COURT: All right. The State has moved
2 to admit State's Exhibit 193. The defense has
3 objected to that letter being admitted. As I
4 understand it, Mr. Maxwell, you're seeking admission
5 under 60-460(o) as an official record?

6 MR. MAXWELL: Yes, Your Honor. I've got
7 T L. Price in the courtroom, Your Honor. He's the
8 manager of those files -- or that particular file, I
9 believe -- or, at least, the representative of the
10 KBI. It was obtained from the official record of
11 the file of employment of Mr. Cayton at the KBI.

12 THE COURT: So is it a business record, or
13 is it an official record? Which is it?

14 MR. MAXWELL: It's both, Judge. It's a
15 business record they keep in the ordinary course of
16 business, as well as an official record. In the
17 State of Kansas any record that is kept as part of
18 the State's official file is an official record.
19 This would be in part of his official record of
20 employment in the KBI files at Topeka. And they are
21 a state institution

22 THE COURT: I understand that. So any
23 document maintained by the KBI is an official
24 record, whether it's a memo or a -- (interrupted)

25 MR. MAXWELL: If it's maintained in their

1 official -- or in the official record -- or the
2 file, yes, Your Honor, as long as it's not
3 privileged in some manner.

4 THE COURT: I'm just used to official
5 records being marriage licenses and things of that
6 nature and not just every single memo and document
7 that's contained within the Government's filing
8 cabinets.

9 MR. MAXWELL: Well, people routinely ask
10 the State for release of public information through
11 the official records kept by the KBI That's why
12 these files are kept And people ask for this
13 information all the time under the statutes of the
14 State of Kansas, which requires us to keep them as
15 official records I mean, we're required to keep
16 them

17 THE COURT: So this kind of letter would be
18 subject to release to anyone who requested it?

19 MR. MAXWELL To somebody who would request
20 it within the meaning of the statute, Judge, I mean
21 as far as public release of it or the information of
22 it. But it's certainly admissible as impeachment of
23 this witness.

24 MR. McCAUSLAND: Let me make sure the Court
25 understands what my position is

1 THE COURT: Okay.

2 MR. McCAUSLAND: I don't -- Mr. Cayton -- I
3 received a copy of this letter Friday afternoon.
4 Mr Cayton was out of town over the weekend. We met
5 this morning I showed it to him. He recalls that
6 he probably saw this when -- (interrupted)

7 THE COURT: You received a copy of this
8 letter when?

9 MR. McCAUSLAND: Friday, I think.

10 THE COURT: Were you unaware of it prior to
11 then?

12 MR. McCAUSLAND: Yes. So I showed it to
13 Mr. Cayton, and he said that he recalled that he may
14 have been shown this letter. He also recalled
15 signing a letter of resignation. I'm sure they
16 could lay a foundation as to its authenticity. So I
17 don't want to get -- we don't need to waste time on
18 that issue. But I think it's unfair for them to
19 produce part of his personnel file at this late hour
20 and try to use it as impeachment. They have not --
21 as far as I know, haven't brought us his entire
22 personnel file. We don't know what else is in
23 there. We don't know if there's a letter of
24 resignation in there, as he recalls

25 Furthermore, this takes us into collateral

1 issues about a whole -- I mean, if you read the
2 letter, it goes on for several pages. I do a lot of
3 employment law practice. This is the kind of letter
4 that I would draft for a client who wanted to get
5 rid of an employee that would go through and set out
6 anything that we could come up with. And you end up
7 with -- and I try these cases, too, Judge. You end
8 up spending hours and hours of courtroom testimony
9 trying to get to the truth of a document like this.
10 I don't think that it should be admitted, because
11 this Court has the discretion to exclude even
12 relevant evidence if its probative value is
13 substantially outweighed by the risk that its
14 admission will unfairly and harmfully surprise a
15 party who has not had reasonable opportunity to
16 anticipate that such evidence would be offered. And
17 that's the situation we're in here. Mr. Cayton
18 doesn't have the benefit of the rest of his
19 personnel file to even be able to respond to all of
20 these allegations that are in that letter. I think
21 it's collateral and it's unfair. And that's my
22 objection.

23 MR. MAXWELL: Well, Your Honor, let me
24 respond to the unfairness -- (interrupted)

25 THE COURT: Just a minute. Just a minute.

1 How long has Mr. Cayton been known to the State as
2 an expert witness?

3 MR. MAXWELL: Well, he didn't disclose
4 Mr. Cayton's -- even that he was going to testify or
5 his report until the week before trial. We then got
6 this -- then started looking into Mr. Cayton. But
7 we didn't even get the information until the week
8 before

9 THE COURT: That's my question. It's a
10 simple question. When did you know that Mr. Cayton
11 would testify?

12 MR. MAXWELL: The week before this

13 THE COURT: Okay. A week ago.

14 MR. MAXWELL: Yeah, about a week ago. And
15 then, Judge, I gave -- I didn't have to give him
16 this letter. I don't have to give him impeachment
17 material like this. I gave it to him because I
18 didn't want to surprise him, because he had all
19 weekend to look at it, to talk to his witness. I
20 mean, just totally the opposite is true here as far
21 as surprise. I gave him the letter, I believe it
22 was, Thursday, not Friday. But I believe I gave him
23 the letter because I didn't want him surprised. I
24 wanted him to know what his witness' background was

25 THE COURT: Well, there doesn't seem to be

1 a question about the authenticity or the
2 foundational requirements for such a document.
3 Whether or not it falls within 60-460(o), I'm not
4 entirely confident of that. But I am certain of one
5 thing; that the State is entitled to impeach this
6 witness with anything that goes to his
7 qualifications, his work habits, his proficiency,
8 and things of that nature. I mean, he's been
9 allowed to testify as an expert witness. So in
10 terms of -- I'm looking at a copy of this letter
11 Certainly, there are a lot of points contained
12 within this letter that, in my view, would be proper
13 impeachment material. And the witness has testified
14 he was provided a copy of the letter. I don't think
15 there's any dispute about that. The witness is
16 still here. He can certainly explain whatever
17 portions of this that he chooses to explain. I'm
18 looking at it and reading it in its entirety now for
19 the first time

20 And you believe you need the document
21 itself in, rather than just cross-examine the
22 witness about certain aspects of it?

23 MR. MAXWELL I believe that the witness
24 has kind of equivocated on some of the reasons,
25 Judge So the State would offer the exhibit for the

1 jury to see for themselves there's a long laundry
2 list of things that he was not doing that he was
3 supposed to do that go directly to his
4 qualifications; not only that, it goes to bias
5 towards the KBI. He's the one who brought up,
6 during his direct examination, that the reason he
7 was fired was -- or the reason he left was because
8 Mr. Price was intimidated by him. And it directly
9 contradicts his testimony. So I think the letter is
10 admissible

11 THE COURT. Okay. Anything else, Mr
12 McCausland?

13 MR. McCAUSLAND: I don't have anything
14 further to add, Your Honor.

15 THE COURT All right I think I will
16 allow the admission of State's Exhibit 163, I
17 believe it is, and certainly while Mr Cayton is
18 here -- (interrupted)

19 THE REPORTER: It's 193.

20 THE COURT: Is it 193?

21 THE REPORTER: Yes

22 THE COURT: 193, I'm sorry. Certainly,
23 he'll be given every opportunity to explain whatever
24 portion of that he wishes to, if he has an
25 explanation. So I'm going to permit the State to

1 admit that document.

2 MR. MAXWELL: And as far as the defense's
3 other point, Judge, I don't know if I have the whole
4 personnel file, but he's certainly entitled to
5 review what I have. It's not much

6 THE COURT. Okay. Why don't you provide
7 that to him now, then.

8 MR. MAXWELL (Complies with the Court's
9 request)

10 THE COURT: I should have sent the jury
11 home for lunch, because even if we bring them back
12 right now, I can't imagine you guys only spending
13 five more minutes on this witness.

14 MR. MAXWELL: I'm only going to be about
15 three more questions, Judge, so 5, 10 minutes max.

16 MR. McCAUSLAND: There will be redirect,
17 obviously.

18 THE COURT. All right. Well, can somebody
19 bring the jury back in for us, please.

20 THE REPORTER: (Complies with the Court's
21 request.)

22 (THEREUPON, the jury entered the
23 courtroom; WHEREUPON, the following
24 proceedings were had in the
25 presence of the jury.)

1 THE COURT: All right. The jury is back.
2 The witness, Mr Cayton, is still on the stand, and
3 we're ready to continue. And I believe you had
4 moved for the admission of State's 193.

5 MR. MAXWELL: Yes, Your Honor.

6 THE COURT: All right That will be
7 admitted.

8 CROSS EXAMINATION

9 (Continued)

10 BY MR. MAXWELL.

11 Q. Mr. Cayton, Sheriff Samuels was shot twice, correct?

12 A. Yes.

13 Q. And those rounds killed him, true?

14 A I believe so

15 Q. Okay. And we've heard that -- here we go. This
16 jury has heard evidence -- would you turn to the
17 State's diagram here (indicating).

18 A. (Complies with counsel's request.)

19 Q We've heard evidence that in this location right
20 here (indicating) was a methamphetamine lab. Were
21 you aware of that?

22 A. I read that in the reports, yes.

23 Q Okay. And so what you're saying to the jury -- you
24 are, basically, disagreeing with Doctor Mitchell,
25 the coroner, the pathologist, the medical doctor

- 1 here, and the KBI forensic scientist, Mr. Wright?
- 2 A. Yes
- 3 Q. You're disagreeing with them?
- 4 A. Yes.
- 5 Q. Okay. But you're saying that the sheriff was shot
- 6 from this (indicating) location on the top of the
- 7 stairs, right?
- 8 A. Yes
- 9 Q. Okay. So that's -- (interrupted)
- 10 A. I said that I can't tell. I said that's consistent
- 11 with the other rods.
- 12 Q. So that would be significantly closer to this
- 13 methamphetamine lab, maybe four or five feet, would
- 14 that be fair, than it would be if the sheriff was
- 15 shot downstairs, true?
- 16 A. I believe the sheriff was downstairs and the shooter
- 17 could have been upstairs.
- 18 Q. I'm saying the shooter would have been significantly
- 19 closer to the methamphetamine lab that was ongoing -
- 20 in which the defendant and Scott Cheever were
- 21 upstairs at - than it would if the sheriff was --
- 22 the shooter was downstairs, right?
- 23 A. Well, I didn't see the lab and so forth, but if
- 24 you're saying it that way, I don't have any reason
- 25 to disagree with you.

1 Q. So it'd be three or four feet from the meth lab in
2 that case, wouldn't it?

3 A Yes.

4 MR. MAXWELL: That's all I have.

5 THE COURT: Any redirect, counsel?

6 Mr. McCAUSLAND: Just briefly.

7 (THEREUPON, the court reporter
8 marked for identification

9 Defendant's Exhibit CK.)

10 MR. McCAUSLAND: Your Honor, I've been
11 provided by the State with a copy of a memorandum
12 from Mr Cayton's personnel file dated November 1,
13 1999, referencing the termination/resignation of
14 John Cayton. We've marked it as Defendant's
15 Exhibit CK, and we would offer it into evidence
16 THE COURT: Any -- Mr. Maxwell, I can't see
17 you unless you stand up.

18 MR. MAXWELL: (Stands)

19 THE COURT: Thank you.

20 MR. MAXWELL: I can't hardly see you now,
21 Judge I don't have any -- I just gave it to him.
22 We don't have any objection.

23 THE COURT Okay. Defendant's Exhibit C,
24 is that what it is?

25 MR. McCAUSLAND It's CK.

1 THE COURT: CK will be admitted.

2 REDIRECT EXAMINATION

3 BY MR. McCAUSLAND:

4 Q Mr. Cayton, let's get the circumstances of your
5 employment for the KBI in perspective. How many
6 weeks did you work for the KBI Lab?

7 A. Over the years?

8 Q. No. I'm talking about when you were directly
9 employed there in 1999.

10 A. How many cases?

11 Q. How many weeks?

12 A. Well, it would be about six weeks

13 Q. And during that time period, what was it you were
14 asked to do as your employment for the KBI Lab?

15 A. I was in training to be a firearms examiner.

16 Q. Did you work any actual cases during that time?

17 (THEREUPON, the following four
18 answers were inaudible as the
19 witness refused to speak into the
20 microphone and only taken down by
21 the court reporter reading the
22 witness' lips.)

23 A. No (Inaudible)

24 Q. (BY MR. McCAUSLAND) Were you asked to review any
25 cases during that time?

1 A No (Inaudible)

2 Q. Was everything you did related to training?

3 A Yes (Inaudible)

4 Q And during that period of time, did you have a

5 conflict with your supervisor, Mr Price?

6 A Yes. (Inaudible)

7 Q. What was the nature of the conflict?

8 A. I was reprimanded several times. One time I took a

9 Granola bar and, instead of leaving, I was there

10 eating. I had coffee and a Granola bar at my desk.

11 I was told then that this was a violation of their

12 policy; that I was not supposed to eat at my desk.

13 And so, you know, I didn't do it anymore. Then,

14 later, they got a basket of fruit and some stuff

15 from someone, an appreciation basket. I believe

16 they were taking part of that while they were there

17 in the same work area, just a few feet from my desk

18 Then a deputy came in -- or agent came in that

19 was needing -- he was going to the range for

20 qualification, and I was the only one there. His

21 sites were off, so I aligned his sites and fired it

22 and showed him it was okay, which he came back later

23 and he said he'd fired a high score. And I was

24 reprimanded because I wasn't a gunsmith and I wasn't

25 supposed to do that, even though I had been to Smith

1 & Wesson, Remington, Ruger, all the different gun
2 companies -- (inaudible) -- school. So then I knew
3 I wasn't supposed to do that.

4 Q. In the letter that you received that's gone into
5 evidence -- in this letter that the State has put
6 into evidence, it says: (As read)

7 "Prior to your employment with the
8 KBI, concerns were raised regarding
9 your operation of a private forensic
10 laboratory."

11 Was there a problem with the fact that you were
12 doing work outside of the KBI?

13 A. I told them when I was hired that I had cases that I
14 had worked previously that I had to finish, both
15 with the Missouri Attorney General. I had a
16 homicide trial going, and I needed to consult with
17 Rachel Smith, the Assistant Attorney General. And
18 we had a pretrial conference with the investigator
19 prior to the trial of Chuck -- (inaudible). And I
20 told them that I needed to go there. She didn't
21 know much about guns And I was caught in between
22 knowing that I should be at the KBI, but needing to
23 help there I was willing to take time off or not
24 even -- you know. And so they knew where I was, but
25 I got calls about that.

1 Then one time we went to a tools sale next
2 door to the lab in the building, and T. L. went with
3 me. We spent two and a half hours over there on
4 lunch hour, and then later I understand that I took
5 a long lunch hour. So that's all directly
6 related to -- and this letter here was not written
7 by Larry Welch. He signed it, but the author is
8 sitting right back there (indicating) in the corner,
9 T. L. Price.

10 Q And is there anything in this letter about you
11 failing to properly investigate a case or review a
12 case or do anything that had to do with a crime
13 scene or a case?

14 A. I had no cases assigned. If I knew this was coming,
15 I've got a stack of commendations, meritorious
16 services, and things I could have brought. I was at
17 a men's church conference in Colorado when I heard
18 about this, and I came directly from there here. So
19 I can't -- I've worked 31 and a half years for
20 Kansas City. I have meritorious service awards
21 I've been acknowledged with several different awards
22 of valor, both from the Army and the Defense
23 Department. This is pretty low to do this.

24 MR. MAXWELL: Objection, Judge.

25 Q (BY MR. McCAUSLAND) All right. All right. That's

1 fine Those awards and those things are indicated
2 in your curriculum vitae, which is in evidence,
3 correct?

4 A. Yes

5 Q. Now, you testified that you resigned, and they put
6 in a letter that says that you were terminated
7 Look at Exhibit CK, which they have also produced
8 from your personnel file. At the bottom, does it
9 show a letter that you prepared offering your
10 resignation?

11 A I was handed this at the meeting, and they said,
12 "Either this or you resign."

13 Q. All right. So what did you do?

14 A I wrote a resignation letter.

15 Q All right.

16 A. And the date shows November 1st.

17 MR. McCAUSLAND: (Displays an exhibit on
18 the screen.)

19 Q. (BY MR. McCAUSLAND) And does the second page of
20 this letter under "Recommendation" show that given
21 the period of time that he -- you were employed at
22 the KBI (September 13, 1999 to November 1st, 1999)
23 and given your acknowledgment that you were not
24 meeting the performance expectation established for
25 you as a Forensic Scientist III (firearms examiner),

- 1 did they recommend that your letter of resignation
2 be accepted?
- 3 A. Yes.
- 4 Q. That's what happened, isn't it?
- 5 A. Yes.
- 6 Q. Now, you were asked: "Do you disagree with Doctor
7 Mitchell's opinion concerning these being contact
8 wounds?" Do you disagree?
- 9 A. I disagree
- 10 Q. And why do you disagree?
- 11 A. I don't think he has the training in firearms to
12 interpret -- (interrupted)
- 13 MR. MAXWELL. I'm going to object to him
14 commenting on another witness.
- 15 THE COURT: Overruled
- 16 A. I think with what was there, if he had been a
17 qualified pathologist, he would have understood what
18 some of those defects were. And if he didn't know,
19 he should have gone to someone that does, outside
20 help, or left it open.
- 21 Q. (BY MR. McCAUSLAND) All right Now, do you totally
22 disagree with everything Mr. Wright did?
- 23 A. No.
- 24 Q. Did you -- we've put into evidence his microscopic
25 examination of the garments where he did a gunshot

- 1 residue microscopic examination, and you studied
2 those results, didn't you?
- 3 A. Yes.
- 4 Q. Are those results inconsistent with your opinions?
- 5 A. Well, one of them. I don't believe that you can say
6 it's contact.. And the reason I say that is because
7 he did sodium rhodizinate --
- 8 (THEREUPON, the court reporter,
9 again, asks the witness speak up
10 and repeat the answer.)
- 11 A. -- he did sodium rhodizinate, which is consistent
12 with lead being present, which you could find if it
13 was 300 yards. The other thing about the Griess,
14 they found some particles. Again, that could be
15 explained either in particles sticking to the bullet
16 or the close range of the 44 Mag. It has a pretty
17 good showering of unburned and partially burned
18 gunpowder. But also from an elevated position, the
19 shooter -- the gunpowder would naturally fall. But
20 there's no pattern. It's just random, as I
21 understand. So it could happen that way.
- 22 Q. (BY MR. McCAUSLAND) All right. But you didn't see
23 anything in his microscopic findings to contradict
24 your opinions, did you?
- 25 A. No.

- 1 Q. And, in fact, you read his opinion, and his opinion
2 , was that the wound in the left upper chest did not
3 have evidence of contact, correct?
- 4 A. Yes
- 5 Q. And you agree with that?
- 6 A. Yes.
- 7 Q. And where you disagree is on the wound over here
8 (indicating) that goes through the jacket and the
9 inner liner and the shirt, correct?
- 10 A. Yes.
- 11 Q. And why is it you disagree and say that's not a
12 contact wound? What are the facts? Just what are
13 the facts? What are the physical findings that
14 support your opinion?
- 15 A. Well, the lack of the residue -- the lack of the
16 residue on the clothing, and the lack of the residue
17 on the skin that he would have as an oblique,
18 angular shot where you don't have a good seal. You
19 have a downward shot. If it was contact, you would
20 have a lot of gas leakage that would be observable.
- 21 Q. All right And did you also say the condition of
22 the ends of the material where the bullet went
23 through the polyethylene jacket -- (interrupted)
- 24 A. It would be melting, yes.
- 25 Q. And is there any evidence of melting here?

1 A. No.

2 Q. And does Mr. Wright, in his examination which you've
3 reviewed, indicate any evidence of melting of the
4 polyethylene outer liner?

5 A. I don't think so

6 MR. MCCAUSLAND: That's all I have, Your
7 Honor.

8 MR. MAXWELL: Two minutes.

9 RE CROSS EXAMINATION

10 BY MR. MAXWELL.

11 Q. Mr. Cayton, we heard that the defendant -- this jury
12 heard that the defendant and Scott Cheever were
13 upstairs -- at the top of the stairs, right here
14 (indicating) You can go look at the diagram. And
15 there was a meth lab, and they were seen by Belinda
16 Cooper working on the meth lab shortly before the
17 sheriff arrived. What you're saying -- assume we --
18 just assume for the sake of this question that we
19 agree with your opinion they weren't contact and
20 they were shot -- that Matt Samuels was shot from
21 the top of the stairs Okay. Assume.

22 A. Yes.

23 Q. Okay That actually makes the shooter and Mr. Denny
24 closer to the meth lab that was in operation than
25 they would have been had he been shot from when the

1 shooter was down the stairs, true?

2 MR. McCAUSLAND: That's beyond the scope of
3 redirect, and I object.

4 THE COURT: Sustained.

5 MR. MAXWELL: That's all I have

6 THE COURT: All right. You may step down,
7 Mr. Cayton. Thank you

8 MR. CAYTON: Thank you. Could I get a copy
9 of that?

10 THE COURT: I'm sure your attorney can
11 provide one to you -- or not your attorney, but the
12 defendant's attorney.

13 MR. CAYTON: (Leaving the witness stand.)

14 THE COURT: All right. Ladies and
15 Gentlemen, I apologize for the late lunch hour.
16 Let's go ahead and take it now. Just remember the
17 admonition that I gave you earlier. Before you
18 leave, though, let me find out kind of where we are.

19 Do you have other witnesses, or do you
20 know?

21 MR. McCAUSLAND: I'm anticipating we're
22 going to rest. If we have anything, it will be very
23 brief. And I will advise the Court and jury when we
24 return from recess

25 THE COURT And are you going to have

1 rebuttal?

2 MR. MAXWELL: Yes, Your Honor.

3 THE COURT: Do you know how many witnesses?

4 MR. MAXWELL: Two.

5 THE COURT: How long?

6 MR. MAXWELL: Twenty minutes.

7 THE COURT: Okay Well, then, that answers
8 my question. Let's take a lunch recess, then, until
9 1:30. So enjoy your lunch. Thank you.

10 (THEREUPON, the jury is excused for
11 the lunch recess; WHEREUPON, the
12 following proceedings were had
13 outside the presence of the jury.)

14 THE COURT: The jury has retired for lunch
15 Now, I received the State's additional proposed jury
16 instructions this morning There's an aid and abet
17 instruction. There's an expanded felony murder
18 instruction And I have something from you that I
19 just got and haven't looked at. I'm going to work
20 on jury instructions over the lunch hour to try to
21 get them finished so there's not a great big delay
22 when the evidence is in. But any comments on the
23 jury instructions at this point?

24 MR. MAXWELL: No I've seen -- defense
25 just handed me his, Judge, and I think the Court got

1 ours earlier this morning.

2 THE COURT: Right. There's nothing further
3 to add at this point?

4 MR. McCAUSLAND: Nothing further.

5 THE COURT: All right.

6 MR. MAXWELL: Judge, I was just told that
7 we have one rebuttal witness, not two.

8 THE COURT: Okay. Well, I don't want to
9 keep the jury sitting around, but I want to -- you
10 know, these jury instructions are awfully critical
11 We'll just see where we get this afternoon. So I'll
12 see you after lunch. Thank you

13 (THEREUPON, the lunch recess was
14 had; WHEREUPON, the following
15 proceedings were had outside the
16 presence of the jury.)

17 THE COURT: All right We're taking this
18 matter up outside the presence of the jury. And
19 you're about ready to call your next witness, as I
20 understand it.

21 MR. McCAUSLAND We're going to rest.

22 THE COURT: Okay.

23 MR. McCAUSLAND I should tell the Court
24 that in the numbering sequence on the "AG" series,
25 we said it was AG-1 through AG-20 something, but

1 there is no AG-4. I don't know why, but there was
2 some kind of a numbering mistake or it got
3 discarded. Anyway, there is no AG-4

4 THE COURT. All right. I'll make a note of
5 that. So you're preparing to rest?

6 MR. McCAUSLAND Yes.

7 THE COURT. And does the State have
8 rebuttal?

9 MR LIND: We have one, Your Honor I
10 asked for this hearing because I'm a little
11 unfamiliar with this. Joyce Demo from the
12 Counseling Center is going to be our witness. I
13 spoke with Ms. Demo, and she told me that because of
14 the HIPAA law, she has a disclaimer she needs to
15 address to the Court and have the Court order her to
16 testify. I thought it might be better to take that
17 up outside the presence of the jury.

18 THE COURT Okay. Is there any other
19 aspect of her testimony we need to talk about?

20 MR. McCAUSLAND: I haven't seen any reports
21 or anything yet

22 MR LIND: Oh, I'm sorry (Handing report
23 to counsel)

24 MR. McCAUSLAND: (Reviewing report)

25 (THEREUPON, an off-the-record

1 discussion was had; WHEREUPON, the
2 following proceedings were had
3 outside the presence of the jury.)

4 THE COURT: All right Ms. Demo, if you'd
5 would come forward, please.

6 MS. DEMO (Complies with the Court's
7 request)

8 THE COURT: (Swearing in the witness.)
9 Thank you. Just have a seat right up there
10 (indicating)

11 MS. DEMO. (Complies with the Court's
12 request.)

13 JOYCE DEMO,
14 called as a rebuttal witness on behalf of the
15 State, was duly sworn, and testified as follows:

16 DIRECT EXAMINATION

17 BY MR. LIND:

18 Q. For the record, ma'am, would you state your name.

19 A. Joyce Demo.

20 Q And, Ms Demo, where are you employed?

21 A South Central Mental Health Counseling Center.

22 Q. And what is your position there?

23 A. My position at this time is I'm the coordinator for
24 the El Dorado facility, an alcohol and drug
25 counselor there, as well as a few other positions.

1 Q. Ma'am, were you subpoenaed to come and testify here
2 today?

3 A. Yes.

4 Q. And as a result of that, did you tell me you had a
5 statement that you believe you need to read because
6 of the HIPAA law?

7 A. Right, a statement of compliance.

8 Q. All right. Go ahead.

9 A. Okay. (As read)

10 "I am here today in compliance
11 with the subpoena to appear (and
12 produce certain documents) at
13 this hearing. I have been
14 apprised that the laws of the
15 State of Kansas (K.S.A. 65-5601
16 to 65-5605 inclusive) and
17 Federal Regulations (42CFR) may
18 preclude me from testifying
19 and/or otherwise disclosing any
20 information or documents which
21 would be considered confidential
22 client/patient information obtained
23 in a confidential relationship
24 without there being a specific
25 statutory exception and an order

1 on the record from a court of
2 competent jurisdiction."

3 So what that is saying is that I need an order by
4 the judge to speak or to present this information.

5 MR. LIND: Your Honor, we'd request that
6 you direct her to comply with the subpoena and
7 provide testimony here today.

8 THE COURT: All right. Let me look at the
9 statute here for a moment. (Reviewing statute)
10 Well, as I understand this -- is this the drug and
11 alcohol evaluation that we -- (interrupted)

12 MR. LIND: Yes, Your Honor.

13 THE COURT: -- saw earlier in this trial?

14 MR. LIND: It is.

15 THE COURT: Okay. And I understand the
16 purpose of this evidence is to impeach or rebut or
17 contradict a statement made by Mr. Denny that he
18 didn't start using certain drugs until he was 18
19 versus 17 and, also; I think him denying ever making
20 certain representations to the folks at the
21 Counseling Center.

22 MR. LIND: That's correct, Your Honor.

23 THE COURT. And this document would
24 contradict that, in your opinion?

25 MR. LIND. Yes And I don't intend to

1 introduce the document, Your Honor. Because it has
2 other items in it, I do not wish to place it before
3 this jury I just intend to question her about
4 it -- his statements that he made. I don't intend
5 to introduce the document itself.

6 THE COURT: Do you want to make any comment
7 at this point, Mr McCausland, about this piece of
8 evidence?

9 MR. McCAUSLAND: No

10 THE COURT. Okay Well, I think it would
11 be permissible rebuttal evidence, and so I will
12 allow it. I will direct that the witness make that
13 information available for purposes of this
14 proceeding Okay?

15 MS. DEMO: Okay.

16 THE COURT: Thank you

17 MR. LIND: Thank you, Your Honor

18 THE COURT. Let's bring the jury in.

19 MR. LIND: Do you want to leave Ms Demo
20 there?

21 THE COURT. Yeah, she's fine.

22 (THEREUPON, the jury enters the
23 courtroom; WHEREUPON, the following
24 proceedings were had in the
25 presence of the jury)

1 THE COURT: All right. The record will
2 reflect the presence of the jury, counsel, and the
3 defendant. Mr. McCausland, do I understand that the
4 defendant is resting his defense in this case?

5 MR. McCAUSLAND: Yes. The defendant rests,
6 Your Honor.

7 THE COURT: All right. Thank you. And
8 does the State have rebuttal witnesses?

9 MR. LIND: Yes, Your Honor, we do.

10 THE COURT: And for the record, Joyce Demo
11 from the Counseling Center is on the witness stand.
12 She's already been placed under oath. You may
13 proceed.

14 MR. LIND: Thank you, Your Honor.

15 DIRECT EXAMINATION

16 (Continued)

17 BY MR. LIND:

18 Q Ms. Demo, can you tell the ladies and gentlemen of
19 the jury where you work.

20 A South Central Mental Health Counseling Center in
21 El Dorado.

22 Q. And what is your position there?

23 A At this time I'm coordinator of the El Dorado
24 facility, an alcohol and drug counselor, as well as
25 other positions

- 1 Q. Okay. And did you work there in October of 1998?
- 2 A. Yes.
- 3 Q. What was your position then?
- 4 A. Alcohol and drug counselor.
- 5 Q. Ma'am, in October of 1998, did you have the occasion
- 6 to speak with a Matt D. Denny of El Dorado?
- 7 A. Yes, I did.
- 8 Q. And what was his date of birth?
- 9 A. 6-21-81.
- 10 Q. Okay. And the date of the interview?
- 11 A. October 12th, 1998
- 12 Q. And his age at the time of the interview?
- 13 A. Seventeen
- 14 Q. Did you discuss with Mr. Denny during this interview
- 15 his use of methamphetamine?
- 16 A. Yes, I did.
- 17 Q. And what did he tell you about his use of
- 18 methamphetamine?
- 19 A. He said that he had used methamphetamine; that he
- 20 would purchase a quarter of meth every month; and it
- 21 would be gone in a couple of days.
- 22 Q. And did he tell you about his last reported use of
- 23 meth at that point?
- 24 A. His last reported use was six months prior to this
- 25 evaluation.

1 Q. Okay. In this evaluation he was 17, correct?

2 A. Correct.

3 Q. And according to what he told you, his last use of
4 meth would have been while he was 16 years old?

5 A. Correct.

6 Q. So he's reporting use well below the age of 18 years
7 old?

8 A. Yes.

9 MR. LIND: Thank you, Your Honor. I have
10 nothing further I'll pass the witness

11 THE COURT: Mr. McCausland, any questions?

12 MR. McCAUSLAND: I have no questions.

13 THE COURT: All right. You may step down.

14 Thank you.

15 MS. DEMO: (Complies with the Court's
16 request)

17 THE COURT: Does the State have any
18 additional rebuttal witnesses?

19 MR. LIND: We do not, Your Honor. We would
20 rest our rebuttal case.

21 THE COURT: I assume there's no
22 surrebuttal.

23 MR. McCAUSLAND: There is no surrebuttal.

24 THE COURT: Okay. Counsel, would you come
25 on up for a minute. Let's talk about logistics.

1 (THEREUPON, counsel approach and an
2 off-the-record bench discussion was
3 had; WHEREUPON, the following
4 proceedings were had in the hearing
5 of the jury.)

6 THE COURT: Ladies and Gentlemen of the
7 Jury, both sides have rested their presentation of
8 evidence in this case at this point. Now is the
9 point in time where the Court finalizes jury
10 instructions. Of course, I've been working on that
11 as we go along. But not until all of the evidence
12 is in does the Court finally know what those jury
13 instructions should be. This process always takes
14 longer than I think it will. Sometimes I'll tell
15 the jury 30 minutes, and it will be 2 hours. The
16 best case scenario here is it's probably going to
17 take an hour and a half to get to a point where I've
18 discussed both off-the-record and on-the-record with
19 the attorneys the jury instructions So if
20 everything went according to plan, you'd probably
21 hear the final arguments about 3:30, which means
22 you'd probably get the case about 5:00, which means
23 you would get it about the time we would be done
24 So I've talked to the attorneys about it,
25 and they agreed that, maybe, the appropriate thing

1 to do would be to go ahead and have you recess for
2 the evening. The attorneys and I will remain here
3 and finish the jury instructions. And at 9 o'clock
4 in the morning, we'll begin with final arguments.
5 Then you'll get the case immediately. So I think
6 that that's what we will do. And I apologize for
7 the delays. But I think, in any event, you're going
8 to be back tomorrow deliberating, and you might as
9 well go straight from opening -- or final arguments
10 right into deliberations.

11 So I'll excuse you for the evening. Just
12 remember the admonition that I gave you earlier.
13 You've now heard all of the evidence, but you have
14 not heard the final arguments of the attorneys. So
15 don't discuss it among yourselves, don't let anyone
16 discuss it with you; don't form or express any
17 opinions about it. Have a pleasant evening. We'll
18 see you at 9 o'clock in the morning for final
19 arguments. Thank you. All right. We're
20 off-the-record at this point.

21 (THEREUPON, the jury is excused for
22 the evening recess, WHEREUPON, the
23 following proceedings were had
24 outside the presence of the jury.)
25 THE COURT. All right. We're on the record

1 in State of Kansas versus Matt Denny, and we're
2 taking this matter up outside the presence of the
3 jury for jury instructions conference between the
4 Court and counsel. The jury has retired for the
5 evening.

6 The Court has prepared certain jury
7 instructions in this case based not only on what I
8 thought was appropriate but, also, on the
9 submissions that both sides have made in this case,
10 which have been very helpful. We've gone over those
11 informally to kind of let me know where counsel
12 stood. I've gone back and made some changes to
13 several of them. I think we're at a point now where
14 we can, on-the-record, indicate approval or
15 disapproval with these instructions. So let's just
16 quickly go over them again, starting with the cover
17 page. I've now listed Mr. Maxwell, Mr. Welch, and
18 Mr. Lind as Assistant Attorneys General. Any
19 objection to the cover page?

20 MR. MAXWELL: No, Your Honor.

21 THE COURT: Okay.

22 MR. McCAUSLAND: No, Your Honor.

23 THE COURT: Let's see, page -- Instruction
24 No. 1, you had both indicated off-the-record that it
25 was agreeable. Is that still your view?

1 MR. McCAUSLAND: No objection.

2 MR. MAXWELL: No objection.

3 THE COURT: Okay Instruction No 2, any
4 objection there?

5 MR. McCAUSLAND. No objection.

6 MR MAXWELL No objection.

7 THE COURT: No. 3, on burden of proof, any
8 objection there?

9 MR MAXWELL. No objection

10 MR McCAUSLAND No objection.

11 THE COURT. Okay. No. 3A: "Ordinarily a
12 person intends all of the usual consequences of his
13 voluntary acts. ."

14 MR. MAXWELL: No objection.

15 MR. McCAUSLAND: No objection.

16 THE COURT. No. 4 are the elements of
17 conspiracy to manufacture methamphetamine. And what
18 I've done is reverted back to, I think, the version
19 that you had actually proposed initially, the State
20 had, which in Paragraph 3 mirrors, apparently, the
21 charging document.

22 MR MAXWELL: It does exactly, Judge

23 THE COURT: Okay.

24 MR McCAUSLAND: No objection

25 MR. MAXWELL: No objection.

1 THE COURT: All right. No. 5 is the -- are
2 the elements of manufacturing methamphetamine. Any
3 objection to that?

4 MR. MAXWELL. No objection.

5 MR. McCAUSLAND: No objection.

6 THE COURT: Okay. No. 6 are the elements
7 of felony murder in the first degree. And we had
8 some considerable discussion off-the-record about
9 this. And as I recall, the joint consensus of all
10 of us was that if the Court removed the word "legal"
11 -- well, let me just say that the version you have
12 in front of you, I still need to fix by taking out
13 the word "legal" so that the last line reads:

14 ". .underlying felony or flight
15 therefrom, and thus becomes the
16 sole cause of death."

17 If I do that, does the State have an objection to
18 that?

19 MR. MAXWELL: No, Your Honor.

20 THE COURT: Okay Does the defendant have
21 an objection to that?

22 MR. McCAUSLAND (No response)

23 THE COURT: Or does he stand mute on that
24 instruction? (Laughing)

25 MR. McCAUSLAND: (Laughing) As I told the

1 Court, I believe this, obviously, is an accurate
2 statement of what's in the case law. I did object
3 to the use of the word "legal," which I felt gave
4 the instruction the implication that the Court was
5 directing the jury to decide something. I'm still
6 not sure that that last clause. "... and thus
7 becomes the sole cause" --

8 (THEREUPON, the court reporter
9 asks counsel to slow down and
10 repeat the last statement.)

11 MR McCausland: I don't believe that last
12 clause is required. " ..and thus becomes the sole
13 cause of death," because I think that is inherent in
14 the part of the instruction that says: " .. only if
15 an extraordinary intervening event supersedes." And
16 it seems to me that that last clause is kind of
17 lawyer-and-judge talk as opposed to what should be
18 given to the jury. And I guess I object to just
19 that clause. The rest of it is all right.

20 MR Maxwell: This is a direct quote from
21 the case, Judge.

22 THE COURT: It's kind of a compilation of
23 quotes from several cases. I think we all agree
24 it's a current statement of the law as given to us
25 by the Supreme Court.. And if I -- the only purpose

1 of this paragraph - this long paragraph that follows
2 the elements - is because I think under the unique
3 facts of this case, if I don't give them some
4 guidance like this, I would be shocked if they don't
5 send out a question immediately saying "What do we
6 do with the facts of this case in terms of felony
7 murder?" It's kind of, you know, the cause and
8 effect So if I don't answer it now, I think I'm
9 going to have to answer it at some point. I do
10 agree with Mr. McCausland that the word "legal" is
11 bothersome, because it seemed to put the Court's
12 stamp of approval on this And I'm not the fact
13 finder; the jury is.

14 So I will give this instruction, and your
15 objection is noted I will give this instruction as
16 I've proposed it, except that I will take out the
17 word "legal " And I'll print out a new copy without
18 that word in there and give it to all of you before
19 we leave this afternoon.

20 So let's move on to No. 7, which is aiding
21 and abetting. Any objection to that?

22 MR. MAXWELL: No objection

23 MR. MCCAUSLAND: No objection.

24 THE COURT: Okay No 8 is the
25 instruction: "Each crime has to be considered

1 separately and distinctly." Is there any objections
2 to that?

3 MR MAXWELL: No objection. Judge, we
4 might want to state on No. 7 that that instruction
5 was pulled down from State vs. Jackson, a Supreme
6 Court case cited last Friday. I'd just note that
7 for the record

8 THE COURT: Okay Well, we talked about
9 that considerably off-the-record and about the fact
10 that there's 54 05 and 54.06, and this is kind of a
11 blending of the two. It's seems to cut both ways,
12 in my view. I could be wrong. But I think in the
13 whole, it's certainly an accurate statement of the
14 law, and there's no objection to it. And,
15 apparently, it is straight out of that last Friday
16 case So we'll hope by the time this gets to the
17 Supreme Court of Kansas, it will still be good law.
18 We're through No. 7; we're through No. 8. How about
19 No. 9?

20 MR. MAXWELL: No objection.

21 MR McCausland: No objection

22 THE COURT: Okay. How about the verdict
23 form? And, again, I've put the conspiracy charge
24 first, the manufacturing charge second, the felony
25 murder charge third

1 MR. MAXWELL: You have them sign on each
2 line, Judge? I just hadn't seen that before.

3 THE COURT. Oh, yes.

4 MR. MAXWELL: Okay.

5 MR. McCAUSLAND: I have no objection.

6 MR. MAXWELL: No objection.

7 THE COURT Well, when they -- no, they're
8 not signing on each line. They're signing on one
9 line of each of the three -- (interrupted)

10 MR. MAXWELL Right

11 THE COURT. If they find him both guilty
12 and not guilty, that would be very confusing

13 MR. MAXWELL: I understand Well, I was
14 talking about -- I've seen the signature block at
15 the end, and they just check whatever.

16 THE COURT: No. We have them sign, instead
17 of check

18 MR. MAXWELL. Okay

19 THE COURT. All right. Anything else on
20 the jury instructions?

21 MR. MAXWELL: No, Your Honor, other than
22 you might want to put on the record about the lesser
23 includeds.

24 THE COURT. Pardon?

25 MR. MAXWELL The lesser includeds that

1 we...

2 THE COURT: We didn't put that on the
3 record already?

4 MR. MAXWELL: No, we have not.

5 THE COURT: We have not?

6 MR. MAXWELL: (Nods head up and down)

7 THE COURT: Well, if we didn't, I'm glad
8 you pointed that out Yeah, you're right. Now that
9 I think about it, we didn't. The question I had --
10 that I raised is whether or not, under the facts of
11 this case, lesser included offenses should be given.
12 And the rule of law, as I understand it, is that,
13 ordinarily, in felony murder cases, you don't give
14 lesser includeds of felony murder because the
15 underlying felony substitutes for the premeditation
16 element. But there's an exception to that rule when
17 the evidence of the underlying felony is weak and
18 inconclusive? That's State versus Foy, 224 Kansas
19 560 -- or 558

20 It's my view that the evidence of the
21 underlying felony - and the underlying felony here
22 is manufacturing methamphetamine - is not weak and
23 it's not inconclusive. In fact, it's fairly much
24 acknowledged by the defendant in this stipulation
25 that there was a meth lab going on out there. Now,

1 he denies participation in it. He denies that he
2 was assisting in the manufacturing. I mean,
3 otherwise, he would have pled guilty to that offense
4 already. So that is still in play and still in
5 dispute. And this jury is going to have to decide
6 if the defendant participated in and is guilty of
7 manufacturing methamphetamine. But I think the
8 evidence is pretty clear that there was a meth lab
9 out there in progress. So I don't believe that
10 lesser includeds of felony murder are appropriate
11 here.

12 Mr. McCausland, do you believe otherwise?

13 MR. McCAUSLAND: No. I don't know what
14 possible lesser included offenses you could give
15 under the law, Your Honor

16 THE COURT: Okay. How about you,
17 Mr. Maxwell?

18 MR. MAXWELL. I don't think they're
19 appropriate, Judge.

20 THE COURT: Okay. Are there any lesser
21 includeds that might -- or should be given under the
22 manufacturing or -- because manufacturing includes
23 attempt to manufacture. So it's kind of a
24 self-contained lesser included.

25 MR. MAXWELL: I don't think they're even --

1 it used to be contained in 65-4159 Both
2 manufacture and attempt to manufacture were inherent
3 in the statute itself. That was changed by the
4 legislature, Judge. The only thing contained in
5 65-4159 now is manufacture. Attempt has to be
6 charged and alleged under K.S.A. 21-3301, the
7 attempt statute now.

8 THE COURT. Okay.

9 MR. MAXWELL: And I don't think - given the
10 fact that there's a stipulation that meth was
11 actually produced from the meth lab - that it's
12 reasonable for any jury to find, if they find the
13 defendant's participation, that it was an attempt as
14 opposed to a completed crime. So I don't think
15 there's any lesser includeds for the manufacture,
16 and I don't think conspiracy has a lesser included.

17 THE COURT. So I was wrong when I said it's
18 a self-contained alternative statute. That really
19 has been taken out. It's now required to be charged
20 separately.

21 MR. MAXWELL: Correct, Your Honor.

22 THE COURT: Okay. Do you see any lesser
23 includeds of manufacturing and conspiracy that
24 should be thought about?

25 MR. McCAUSLAND: No, Your Honor.

1 THE COURT: Okay. Well, let me go fix
2 No. 6 real quick and bring it back so we have that
3 in hand. Then we'll call it a night (Leaving the
4 courtroom briefly and then returning with
5 Instruction No. 6.) Anything else?

6 MR. McCAUSLAND: Nothing further.

7 THE COURT: Okay I'll see you tomorrow.
8

9 (THEREUPON, the following
10 proceedings were adjourned until
11 September 13, 2005, at 9.00 a.m.)
12
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STATE OF KANSAS)
)
COUNTY OF BUTLER)

I, RHONDA L. LANDSVERK, a Certified Shorthand Reporter in and for the State of Kansas, duly commissioned as such by the Supreme Court of the State of Kansas, do hereby certify that I was present at and reported in shorthand the foregoing proceedings had at the aforementioned time and place; further that the foregoing is a true and accurate transcript of my notes requested transcribed.

IN WITNESS WHEREOF, I have hereunto set my hand
and seal on this 17th day of August, 2009.

COPY

Rhonda L. Landsverk, CSE

RHONDA L. LANDSVERK
CERTIFIED SHORTHAND REPORTER

RHONDA L. LANDSVERK
STATE OF
CERTIFIED



STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Freiburger, Edward, 286115,

Applicant,

v

State of South Carolina,

Respondent

IN THE COURT OF COMMON PLEAS

2006CP4003866

ORDER OF DISMISSAL

RICHLAND COUNTY
FILED
2010 FEB -9 PM 12:25
JEANETTE W. MCNEEL
Clerk of Court

PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed July 5, 2006. The Respondent made its Return on February 9, 2007. The Applicant filed several amendments to his original application for Post-Conviction relief. The first amendment was filed on November 13, 2008; the second on July 15, 2009; the third on August 3, 2009; and the fourth on August 17, 2009. The Applicant also filed a "Pretrial Brief" on August 4, 2009. In addition, the Applicant filed a "Notice of Intent to Rely Upon Depositions, Affidavits and other Documentary Evidence" on July 30, 2009. The Respondent filed a reply to the Applicant's notice captioned "Objection to use of Affidavits, Depositions, and Other

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Documentary Evidence in Lieu of Live Testimony" on August 8, 2009.¹ An evidentiary hearing into the matter was convened on August 13, 2009 at the Richland County Courthouse. Because witness John Delgado, Esquire was not available, the record was held open and he testified separately on October 8, 2008.² The Applicant was present at the hearing and was represented by John H. Blume, Esquire. Brian T. Petrano of the South Carolina Attorney General's Office represented the Respondent.

The Applicant himself never testified at the PCR hearing. The Applicant's trial counsels, John Delgado, Esquire, and Katherine Hudgins, Esquire did testify. Applicant's appellate counsel, John S. Nichols, Esquire testified. In addition, this Court heard testimony from Dr. Steven J. Laken, Dr. Adina Schwartz, and SLED Agent Ira B. Parnell, Jr. This Court had before it the records of the Richland County Clerk of Court, the transcripts of the proceedings against the Applicant, the Applicant's records from the South Carolina Department of Corrections, the briefs and opinion from the Applicant's direct appeal, as well as the above mentioned PCR related amendments, briefs, memos, and motions.

August 2002 Jury Trial

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland

¹ The issue of "discovery" prior to the PCR hearing is moot because the Applicant conceded that no depositions were ever taken.

² The Applicant offered trial counsel's testimony in the form of an affidavit, the Respondent objected, ultimately this Court received trial counsel's testimony live.

John H. Blume, Esquire (for the Applicant) (admitted to the bar in 1984)
S.C. Bar No. 443285



County The Applicant was indicted by the June 2001 term of the Richland County Grand Jury for murder (01-GS-40-2955). The Applicant was represented by John Delgado, Esquire, and Katherine Hudgins, Esquire. On July 25, 2002, the Applicant proceeded to trial after which he was found guilty of murder. Applicant was sentenced on August 1, 2002, by the Honorable Henry F. Floyd to confinement for a period of life imprisonment under 1961 law.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected by John S. Nichols. The South Carolina Supreme Court affirmed Applicant's conviction and sentence. State v. Frieburger, Op. No. 26042 (S.C. Ct. App. filed September 26, 2005). Applicant perfected a Petition for Writ of Certiorari to the United States Supreme Court, which was denied on May 22, 2006.

The facts of the case, from our Supreme Court's opinion in the direct appeal, are as follows.

The victim in this case, John Orner, was a taxi-cab driver who regularly serviced soldiers at Fort Jackson in Columbia. Orner received his last dispatch call at 11:15 p.m. on the evening of February 28, 1961 to go to the NCO club at the fort. When he did not return home from his shift the next morning, his family reported him missing. Orner's bloody cab was found around 7:30 a.m. on March 1, 1961, in the [REDACTED]. Orner was not in the cab. His body was found on March 3, 1961, on the side of the road of Highway 601 in lower Richland County. He had died from a gunshot wound to the brain, consistent with having been shot in the head by a passenger.

Frieburger, Frieburger - Case of Dismissal (2001-007806)
Page 3 of 40

GT 23

sitting in the back seat of the cab. Forensics examinations revealed Orner had been killed by a gunshot wound from a .32 caliber bullet fired from a Harrington and Richardson (H & R) revolver.

Freiburger was a private in the army stationed at Fort Jackson in 1961. Pawn shop records revealed that on February 28, 1961, Freiburger purchased a .32 caliber H & R revolver, serial number 9948, from Capital Loan and Pawn Shop at [REDACTED]. A month later, on March 29, 1961, Freiburger was stopped by a Tennessee Highway patrolman, Donald Meredith, at approximately 11.00 p.m. for hitchhiking in Newport, Tennessee. Meredith testified he stopped Freiburger because it was dangerous to be out walking or hitchhiking on the road as people had been struck by cars in the vicinity. Patrolman Meredith questioned Freiburger, then patted him down, discovering a .32 caliber loaded H & R revolver, serial number W9948. Meredith testified that, although Freiburger was not under arrest at the time of the pat down search, "he was going to be for hitchhiking, or I was going to take him back to the jail." Upon finding the weapon, Meredith arrested Freiburger for "carrying arms," and the gun was confiscated.

After Freiburger's arrest, Richland County authorities (investigating Orner's murder) requested and were given the H & R revolver seized by Patrolman Meredith. Testing on the weapon was inconclusive as to whether it was the weapon used in Orner's death. No charges were filed at that time. Forty years later, in August 2000, the Richland County Sheriff's Department reopened the Orner file. Re-testing of the gun and bullet fragments was initially inconclusive. However, SLED retained an independent expert, John Cayton, who

RE 2001-001, 2001-002, 2001-003, 2001-004, 2001-005, 2001-006, 2001-007, 2001-008, 2001-009, 2001-010, 2001-011, 2001-012, 2001-013, 2001-014, 2001-015, 2001-016, 2001-017, 2001-018, 2001-019, 2001-020, 2001-021, 2001-022, 2001-023, 2001-024, 2001-025, 2001-026, 2001-027, 2001-028, 2001-029, 2001-030, 2001-031, 2001-032, 2001-033, 2001-034, 2001-035, 2001-036, 2001-037, 2001-038, 2001-039, 2001-040, 2001-041, 2001-042, 2001-043, 2001-044, 2001-045, 2001-046, 2001-047, 2001-048, 2001-049, 2001-050, 2001-051, 2001-052, 2001-053, 2001-054, 2001-055, 2001-056, 2001-057, 2001-058, 2001-059, 2001-060, 2001-061, 2001-062, 2001-063, 2001-064, 2001-065, 2001-066, 2001-067, 2001-068, 2001-069, 2001-070, 2001-071, 2001-072, 2001-073, 2001-074, 2001-075, 2001-076, 2001-077, 2001-078, 2001-079, 2001-080, 2001-081, 2001-082, 2001-083, 2001-084, 2001-085, 2001-086, 2001-087, 2001-088, 2001-089, 2001-090, 2001-091, 2001-092, 2001-093, 2001-094, 2001-095, 2001-096, 2001-097, 2001-098, 2001-099, 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concluded the weapon retrieved from Freiburger in 1961 was the murder weapon. Freiburger was arrested and charged with murder. The jury convicted him, and he was sentenced to life imprisonment.

...
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, 620 S.E.2d 737 (2005).

Freiburger, 366 S.C. 125, 620 S.E.2d 737 (2005)
125 S.E.2d 737

GL-5

CURRENT ALLEGATIONS

According to his Fourth Amended Application for Post-Conviction Relief, received by this Court on August 12, 2009, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

10 & 11.

GROUND FOR RELIEF WITH SUPPORTING FACTS

- 10(a) *Applicant was deprived of his right of confrontation guaranteed by the Sixth Amendment and Fourteenth Amendments, as well as the corresponding provisions of the South Carolina Constitution, when he was not permitted to cross-examine and confront the witnesses against him when the trial court permitted the prosecution to introduce testimonial hearsay contained in police reports, witness statements prepared by law enforcement, and other documents*
- 11(a) *At trial, the prosecution was permitted to introduce testimonial hearsay contained in police reports, witness statements and other documents. Applicant's trial counsel objected to the admission of the evidence but the trial court determined that the evidence was admissible under state exceptions to the hearsay rule. Because the hearsay was testimonial, and because Applicant was thus deprived of the right to cross-examine the witnesses, the admission of the evidence violated the Confrontation Clause of the Sixth Amendment, the Due Process Clause of the Fourteenth Amendment and the corresponding provisions of the South Carolina Constitution. *Crawford v. Washington*, 541 U.S. 36 (2004).*
- 10(b) *Applicant was denied the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, sec. 14 of the South Carolina Constitution, as a result of trial counsel's failure to adequately preserve the Confrontation Clause and Due Process Clause violations for appellate review*
- 11(b) *The allegation states the relevant facts. *Strickland v. Washington*, 466 U.S. 668 (1984)*
- 10(c) *Applicant was denied the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, sec. 14 of the South Carolina Constitution, as a result of appellate counsel's failure to raise the Confrontation Clause and Due Process Clause violations on direct appeal to the South Carolina Supreme Court*

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- 11(c) The allegation states the relevant facts *Strickland v. Washington*, 466 U.S. 668 (1984)
- 10(d) *Applicant was denied a) the effective assistance of trial counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §14 of the South Carolina Constitution and b) his right to Due Process of Law as a result both of counsel's failure to present evidence that another individual committed the crime and the prosecution's failure to disclose to counsel additional evidence implicating known third parties*
- 11(d) Evidence existed that another soldier stationed at Fort Jackson, John Morgan, was observed by witnesses covered in blood the evening of the murder. Furthermore, evidence existed indicating that this individual disappeared shortly thereafter and went AWOL. Applicant's trial counsel did not present this evidence at trial. Also, Morgan was interviewed by law enforcement in South Carolina after he was found and admitted that he had called a cab to pick him up at Fort Jackson the evening of the murder. The contents of this interview were not disclosed to applicant's trial counsel. Evidence also existed indicating that a gun seized from another location inhabited and frequented by known criminals, not applicant's gun, was in fact the murder weapon. This evidence, if presented, would have created a reasonable doubt as to Applicant's guilt. *Holmes v. South Carolina*, 547 U.S. __ (2006)
- 10(e) *Applicant was denied the effective assistance of trial counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §14 of the South Carolina Constitution as a result of counsel's failure to adequately challenge the state's ballistic evidence and to present expert testimony regarding Applicant's cognitive and mental deficits and ballistics evidence during Applicant's case-in-chief*
- 11(e) Trial counsel failed to adequately challenge the state's ballistics evidence and to garner and present critical expert testimony regarding Applicant's mental and physical condition and ballistics evidence. At trial, the state relied heavily upon applicant's mental and physical condition when questioned by the investigators. Expert testimony rebutting such testimony would have undercut the state's evidence and theory of the case. In addition, the state's only evidence linking applicant to the crime was expert ballistics testimony. Trial counsel failed to challenge the unscientific evidence presented by state's witness Cayton, and failed to present expert testimony rebutting the state's evidence that the bullet, which killed the victim, was discharged from the gun allegedly in applicant's possession. Attacking and rebutting this evidence was critical to mounting a defense to the state's allegations and evidence. Furthermore, additional evidence of Cayton's incompetence was available and could have been used to impeach his conclusions. Counsel's failure to present expert testimony was deficient performance prejudicing applicant. *Strickland v. Washington*, 466 U.S. 668 (1984)
- 10(f) *Applicant was denied the effective assistance of trial counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §14 of the South*

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Carolina Constitution as a result of counsel's failure to present character evidence during Applicant's case-in-chief

- 11(f) Applicant had lived a law abiding and productive life as a business man, member of his community and as a husband, father and grandfather. Numerous witnesses were able, willing and ready to provide character evidence on Applicant's behalf. Counsel's failure to call these witnesses was unreasonable and prejudicial. *Strickland v Washington*, 466 U.S. 668 (1984)
- 10(g) *Applicant's right to a fair trial as guaranteed by the United States Constitution and South Carolina law was violated as a result of the prosecutor's improper argument during closing argument*
- 11(g) The prosecutor violated applicant's right to a fair trial by asserting improper argument during his closing argument. Specifically, the prosecutor flagrantly disobeyed the trial court's order that informing the jury that allegedly applicant was absent without leave (AWOL) after the time of the alleged murder was inadmissible evidence because it was more prejudicial than probative, when the prosecutor made multiple references and implications that applicant was AWOL. In addition, the prosecutor told the jury that the blood found in the front seat of the cab was the victim's blood, however, the state presented no evidence that the blood belonged to the victim. Furthermore, the prosecutor improperly compared the alleged murder of the victim to the treatment of a dog. Specifically, the prosecutor stated that the victim's body was "thrown on the side of the road with less dignity than most people would show to the burial of their dog." Finally, the prosecutor made other arguments which were not supported by any record evidence including that applicant's friend, Abersold and Tilbury, did not know where applicant was the night of the murder despite the fact they were in the same barracks. Prosecutors have a duty to do justice at all times. Every action taken by a prosecutor is to further their duty of doing justice. When a prosecutor engages in improper argument during closing, the prosecutor violates his duty to do justice. *Darden v Wainwright*, 477 U.S. 168 (1985). Further, the prosecutor violates a defendant's right to a fair trial by presenting improper argument to a jury. *Payne v Tennessee*, 501 U.S. 808 (1991); *Hall v Catoe*, 360 S.C. 353, 601 S.E.2d 335 (2004); *State v. Huggins*, 325 S.C. 103, 481 S.E.2d 114 (1997), *State v. Robinson*, 305 S.C. 469, 409 S.E.2d 404 (1991).
- 10(h) *Applicant's right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated as result of trial counsel's failure to object to the prosecutor's improper closing argument.*
- 11(h) Applicant's trial counsel failed to object to the prosecution's improper closing argument. This failure constituted deficient performance that prejudiced applicant. *Strickland v Washington*, 466 U.S. 668 (1984).
- 10(i) *Applicant's right to the effective assistance of appellate counsel as guaranteed by the Sixth*

and Fourteenth Amendments to the United States Constitution and South Carolina law was violated as a result of appellate counsel's failure to assert on appeal that the prosecutor violated applicant's fair trial rights during closing argument.

- 11(i) Appellate counsel failed to raise on appeal the prosecutor's repeated and gross violations of applicant's right to a fair trial due to the prosecutor's improper closing argument. Appellate counsel's failure was deficient performance that prejudiced applicant *Strickland v Washington*, 466 U.S. 668 (1984)
- 10(j) *Applicant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated, and continues to be violated, because newly discovered and obtained evidence reveals that he is actually innocent of the charges.*
- 11(j) Substantial evidence exists establishing applicant's innocence of the offense for which he was convicted and sentenced. Evidence of applicant's innocence has been revealed through post-trial investigations and other newly discovered evidence. Applicant's continued incarceration for a crime he did not commit is a miscarriage of justice and should be remedied immediately
- 10(k) *Applicant right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and South Carolina law was violated as a result of the prosecution's failure to disclose exculpatory material information.*
- 11 (k) John Cayton was called as a ballistics examiner by the prosecution at applicant's trial in 2002. In 1999, Cayton was terminated by the Kansas Bureau of Investigation for failure to follow policies, protocols and procedures. This information was not disclosed to applicant's trial counsel despite the fact that it was material impeachment information. In addition, as noted previously, John Morgan was also a soldier at Fort Jackson at the time of the homicide in question. He went AWOL the evening of Ormer's murder, after having been seen by another soldier with blood on his person. Morgan was subsequently interviewed by law enforcement regarding the incident and admitted that he took a cab from the Fort to downtown Columbia the night of the murder. This was not disclosed to applicant's trial counsel even though it was exculpatory given the prosecution's theory that the perpetrator was a soldier at Fort Jackson.

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At the evidentiary hearing, Applicant proceeded on the allegations stated in his latest application for post-conviction relief. This Order of Dismissal is generally organized in the order the Applicant actually presented his allegations.

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. § 17-27-80 (1985)

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The Applicant did not testify at the hearing. Instead, his supposedly truthful assertion that he did not commit the murder was presented indirectly through witness Laken. Dr. Stephen Laken testified that he has a Ph.D from Johns Hopkins and that he is the President and CEO of Cephos Group in Massachusetts. Dr. Laken also testified regarding his awards and other distinguished honors. Dr. Laken explained that he, via his company, has developed and perfected a functional magnetic resonance imaging (fMRI) procedure that can be used as a lie detector. Essentially, Dr. Laken explained that a subject is placed in the fMRI machine and snapshots are taken of the activity in the brain. Dr. Laken explained that his software then processes the fMRI data and looks for points of the brain that are activated in relationship to specific stimuli, i.e. questions, feelings, or physical stimuli such as pin pricks. Dr. Laken testified that his procedure, and fMRI as a lie detector generally, is published and subjected to peer review. Dr. Laken testified

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that he has presented at many conferences including to the scientific and judicial communities.

Dr. Laken testified that his procedure yields a 98% accuracy rating. Dr. Laken explained the different results, i.e. false negatives and false positives. As Dr. Laken explained, a false positive is when a subject tells the truth and is incorrectly categorized as lying, whereas a false negative is a subject who is lying and is incorrectly categorized as being truthful. Dr. Laken explained that the 2% inaccurate classifications were all false positives – that he has never had a situation which someone was lying and was categorized as telling the truth. Dr. Laken testified that quality controls are in place to screen out subjects who are on illicit drugs or who are psychopaths. The procedure itself involves a subject in the machine reading questions and pressing a button to respond to the question. Dr. Laken explained that subject must remain very still that this would not work on the uncooperative.

Dr. Laken testified that the Applicant was, according to the software, being truthful when he indicated he did not commit the murder and that he was lying when he indicated that he did commit the murder. As Dr. Laken explained the questions submitted to the Applicant were reviewed by the Applicant prior to the test and presented randomly by the machine, and that the approximately sixty (60)

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questions took about sixteen (16) minutes to go through.³ Dr. Laken testified that if the Applicant had no memory of whether he killed the victim then the machine would categorize him as truthful in his claim that he did not kill the victim. Meaning, according to Dr. Laken, if the Applicant had killed the victim and suffered a memory blackout, either due to drugs, alcohol, or brain defects/injury the machine would indicate a truthful response to his answer(s) that he did not kill the victim.

Going far beyond the results of a typical fMRI, Dr. Laken's testimony was offered as expert testimony and/or newly discovered evidence that the Applicant did not kill the victim.⁴ "The party offering the expert must establish that his witness has the necessary qualifications in terms of "knowledge, skill, experience, training or education." Rule 702, SCRE." State v. White, 382 S.C. 265, 273, 676 S.E.2d 684, 688 (2009). The reliability factors for admission of scientific evidence take into consideration: (1) the publications and peer reviews of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001). At the PCR hearing, this Court took the admissibility issue of Dr. Laken's testimony under advisement

³ Dr. Laken did not recall what questions were removed or added, if any, by PCR counsel

⁴ Because the fMRI issue was limited to newly discovered evidence trial counsel was not examined about it

State v. White, 382 S.C. 265, 273, 676 S.E.2d 684, 688 (2009)
State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001)

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The Respondent argued that the testimony was irrelevant because whether the Applicant's remembers killing the victim is not an issue for the trier of fact at the PCR or at trial. In addition, the Respondent argued that the use of an fMRI lie detector is an attempt to usurp the role of the fact finder, i.e. that a particular witness (or someone who does not testify) is credible. This Court finds that Dr. Laken is not qualified to testify as an expert because his testimony was unconvincing. Particularly, Dr. Laken's claim as to his accuracy rating was not consistent. Also, Dr. Laken repeatedly attempted to point out that his process was peer reviewed, yet he never explained during his qualifications if his actual software programming code was peer reviewed. Later, he admitted during cross-examination that no one has peer reviewed his actual computer program which is the very essence of his lie detector process.

"This Court has consistently held the results of polygraph examinations are generally not admissible because the reliability of the tests is questionable." State v Council, 335 S.C. 1, 23, 515 S.E.2d 508, 519 (1999), cert denied, 528 U.S. 1050, 120 S.Ct. 588, 145 L.Ed.2d 489 (1999). Although this Court in Council declined to recognize a per se rule against the admission of polygraph evidence, it indicated that the "admissibility of this type of scientific evidence should be analyzed under Rules 702 and 403, SCRE and the Jones factors." Id. at 24, 515 S.E.2d at 520.

Lorenzen v State, 376 S.C. 521 at 533, 657 S.E.2d 771 at 778 (2008).

"The reliability requirement is designed to exclude so-called 'junk science' - conjuring up memories of the phrenology craze where the bumps on a person's head were felt in order to determine character traits - from federal courts. At the very least, scientific opinions offered under Rule 702 must be based on sound scientific methods and valid procedures."

STATE v. COUNCIL, 335 S.C. 1, 23, 515 S.E.2d 508, 519 (1999), cert denied, 528 U.S. 1050, 120 S.Ct. 588, 145 L.Ed.2d 489 (1999).

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Logerquist v. McVey, 196 Ariz 470 at 481, 1 P 3d 113 at 124 (Ariz. 2000).

Simply put the fMRI as a lie detector is, in light of the limited credible testimony presented, unreliable. The test can not be done on the uncooperative, there is no mention as to how mental disorders may affect the testing, and the questions were one sided. The examples ultimately used to purport reliability were questions subjects were asked about whether they took a watch or a ring, i.e. games in a laboratory/classroom setting with no real consequences. Such a setting is hardly comparable to the efforts one would obviously put toward lying about a murder

Ballistics

The Applicant claims that trial counsel was ineffective for failing to argue and present evidence that firearms expert testimony is unreliable. The Applicant presented testimony from Adina Schwartz, a professor of law who has done extensive academic research and writing critical of the field of firearms identification, she also has a Ph.D. in philosophy and a J.D. The Applicant argues in his latest amendment that trial counsel failed to challenge the unscientific evidence presented by the State's firearms expert. Initially, this Court expected a new firearms expert to testify at the PCR hearing and refute the findings of the State's expert. Rather, the Applicant presented an academic scholar who is not qualified to testify as an expert on firearms. Essentially, Dr. Schwartz was offered by the

THE COURT, 196 Ariz 470 at 481, 1 P 3d 113 at 124 (2000) (Logerquist v. McVey)

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Applicant to express the opinion that firearms and toolmark identification is inherently unreliable. The party offering the expert must establish that his witness has the necessary qualifications in terms of "knowledge, skill, experience, training or education." Rule 702, S.C.R. State v. White, 382 S.C. 265, 273, 676 S.E.2d 684, 688 (2009).

Dr. Schwartz is not a firearms expert, she is at best an academic expert, she is therefore not qualified to testify as to her opinion about the accuracy or inaccuracy of the conclusions reached by the firearms examiner(s) in this case. The next phase of this Court's analysis is Dr. Schwartz' opinion, based on her research and writing as an academic expert, as to the unreliability of firearms and toolmarks identification generally. This argument is essentially that if trial counsel had made this argument the trial court would have erred in admitting the testimony of the State's expert(s). 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.

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First, this Court notes that there was scant evidence presented that this type of argument was (or is) being made in South Carolina criminal cases especially during the time of the Applicant's trial (August 2002). In fact, the presentation at the PCR hearing seems to be an issue of first impression here in South Carolina. The Applicant's expert was evasive and was only able to articulate, at best, a handful of cases where this type of argument was being made *in other states* prior to, or at the time of, the Applicant's trial. There was no mention of South Carolina cases at the time of the trial or now when this type of argument has been made. Accordingly, the argument that firearms expert testimony is not reliable cannot be both a relatively new argument and at the same time something within the professional standards at the time of trial which counsel was purportedly deficient for not employing. Wiggins v. Smith, 539 U.S. 510, 524, 123 S.Ct 2527, 2536 (U.S.,2003) (applying "professional standards" to trial counsel in existence in home state at time of the trial). Accordingly, trial counsel cannot be deficient for failing to present a type of argument at trial that was outside the professional norms in our State at that time

Assuming for the sake of argument that trial counsel's performance was not deficient, and our State's professional norms in 2002 dictated that trial counsel make such a reliability argument regarding firearms experts, the Applicant's case still fails. To satisfy his burden and be afforded any relief the Applicant must demonstrate that had trial counsel presented the Dr. Schwartz type argument the

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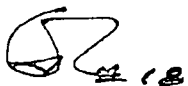
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trial court would not have properly admitted the State's firearms expert(s) and the outcome of the trial would have been different. The Applicant's argument fails on several levels. This Court is not convinced that the trial court's discretionary gatekeeping function in admitting the State's firearms experts would have been defeated by Dr. Schwartz. In short, it is this Court's finding that even if the Dr. Schwartz argument was presented at trial the State's expert(s) would still be properly admitted. The decision to admit or exclude testimony from an expert witness rests within the trial court's sound discretion. State v Price, 368 S.C. 494, 629 S.E.2d 363 (2006). The reliability factors for admission of scientific evidence take into consideration: (1) the publications and peer reviews of the technique, (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. State v Jones, 343 S.C. 562, 541 S.E.2d 813 (2001).

Even with Dr. Schwartz's claims as to unreliability, the trial court would still have been confronted with its inherent gatekeeping function.

Courts are often presented with challenges on both fronts- qualifications and reliability. The party offering the expert must establish that his witness has the necessary qualifications in terms of "knowledge, skill, experience, training or education." Rule 702, SCRE. With respect to qualifications, a witness may satisfy the Rule 702 threshold yet the opponent may still challenge the amount or quality of the qualifications. It is in this latter context that the trial court properly concludes that "defects in the amount and quality of education or experience go to the weight to be accorded the expert's

Findings of Fact and Conclusions of Law (2006) 19

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testimony and not its admissibility” State v. Myers, 301 S.C. 251, 256, 391 S.E.2d 551, 554 (1990). Turning to the reliability factor, a trial court may ultimately take the same approach, but only after making a threshold determination for purposes of admissibility.

State v. White, 382 S.C. 265 at 273, 676 S.E.2d 684 at 688 (2009) (emphasis added).

The Applicant failed to satisfy his burden of proof and demonstrate that had the unreliability argument of firearms evidence been made that the outcome of the trial would have been any different.⁵ Dr. Schwartz’s testimony that firearms expert testimony is not reliable was not convincing testimony. In addition, it was credibly rebutted at the PCR hearing by witness Parnell. SLED agent Ira Byrd Parnell, Jr. testified as a qualified expert in firearms examination both at the trial and at the PCR hearing.⁶ Firearms expert Parnell was present throughout the testimony of Dr. Schwartz. Despite Dr. Schwartz’s claims to the contrary, firearms expert Parnell testified that he has personally taken part in consecutively rifled barrels tests, that the exclusionary language is qualified and has changed somewhat, and that examinations are most certainly verified. Regarding verification, firearms expert Parnell explained that photographs have little if anything to do with verification, that during verification the actual evidence itself is re-examined. In addition, firearms expert Parnell explained that in his opinion Dr. Schwartz confused the

⁵ As stated above, this prejudice prong of the Strickland analysis is only for the sake of argument because the Applicant clearly failed to satisfy the first (deficiency) prong.

⁶ This Court notes the oddity of the Applicant’s claims that firearms expert testimony is unreliable yet at the PCR hearing he had no objection or voir dire whatsoever to witness Parnell being qualified as an expert in firearms and toolmark examinations.

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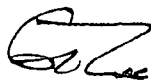
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jargon in her criticism of the firearms examination in this case, i.e. grooves versus land impressions. Accordingly, not only was Dr. Schwartz testimony not convincing, it was overwhelmingly countered by SLED agent Parnell who also testified at the trial – taking the evidence as a whole this Court finds there is insufficient evidence of probative value that would support the Applicant's claim that the outcome of the trial would have been any different, i.e. that the jury would have discounted the State's firearms expert.

Beyond the Strickland analysis, this Court notes that the Applicant's argument is awkward and multi-layered. If this Court were to find there was no prejudice because the trial court could correctly refuse to allow Dr. Schwartz to testify and challenge the reliability of firearms expert testimony then, presumably, the Applicant would claim that he was denied the ability to present a defense. This attempted feat of prestidigitation falls flat. The Applicant was always free to present a firearms expert to rebut the State's. It is obvious that one possible reason for not doing so is the Applicant's apprehension that another expert would confirm the State's. The logic is circular in that if the Applicant was correct that firearms expert testimony is so unreliable then it should be simple to have had multiple examiners review the evidence and exploit their inconsistent results against the State's expert(s).

Apart from a preliminary gatekeeper hearing by the trial court, per Rule 702, SCRE, if Dr. Schwartz's testimony went to the jury it would not be a battle of the

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experts because Dr. Schwartz is not a firearms expert. Instead, if she testified before the jury at the trial to rebut the State's firearms expert it would be akin to having another Rule 702, SCRE hearing played out in front of the jury. The Applicant wants to use Dr. Schwartz testimony to challenge the reliability and demonstrate the shortcomings (as she sees them) regarding the methodologies used by State's firearms expert(s). Challenging a witness' methodology and revealing purported shortcomings can be accomplished by cross-examination, rather than confusing the jury with the testimony of a non firearms expert to challenge a firearms expert.⁷ To be clear, this further analysis is beyond the Applicant's failure to satisfy the two Strickland prongs and is offered only as additional reasoning as to why he failed to satisfy his burden of proof.

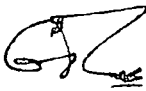
Crawford v. Washington

The United States Supreme Court issued their opinion in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 on March 8, 2004. The Initial Brief of Appellant was filed by Applicant's appellate counsel, John S. Nichols, on April 1, 2004.⁸ The actual opinion affirming the Applicant's conviction and sentence was issued by the South Carolina Supreme Court on September 26, 2005 State v. Frieburger, Op. No. 26042 (S.C. Ct. App. filed September 26, 2005)

⁷ Trial counsel did cross-examine the State's expert in this regard (Trial transcript, p. 736)

⁸ The date of the trial transcript certification by the Court Reporter is November 5, 2002; accordingly, there must have been a significant number of extensions request made and granted for the Initial Brief of Appellant to be filed seventeen (17) months later

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A preliminary question is whether Crawford applies to the Applicant's case when it was issued after his conviction but while his direct appeal was pending. Clearly, it is applicable because the Applicant's direct appeal was not final when Crawford was issued. See Whorton v. Bockting, 549 U.S. 406, 127 S.Ct. 1173 (2007) (holding that Crawford does not apply retroactively on collateral review for cases *already final on direct review*). Applying Crawford to the Applicant's case is not entirely favorable to the Applicant because Crawford holds that the confrontation clause is not applicable to nontestimonial evidence, therefore nontestimonial evidence is, post Crawford, admissible even if it lacks indicia of reliability.

But whatever improvement in reliability Crawford produced in this respect must be considered together with Crawford's elimination of Confrontation Clause protection against the admission of unreliable out-of-court nontestimonial statements. Under Roberts, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Under Crawford, on the other hand, the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.

Whorton v. Bockting, 549 U.S. 406, 420, 127 S.Ct. 1173, 1183 (2007)
(citations omitted)

The Applicant claims he was denied effective assistance of counsel because he claims the prosecution improperly used testimonial evidence against him. The Applicant claims that trial counsel failed to preserve the issues or in the alternative the issues were preserved by trial counsel but that appellate counsel failed to brief them. Regardless of which counsel, trial or appellate, failed to exploit the purported

EX-11, 2011, 10/10/11 COURT OF APPEALS (2011-10-10)

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Crawford issue the analysis is substantially the same. 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.

One of the Applicant's claims is that a Crawford violation occurred when witness Abersold (the Applicant's bunkmate from Fort Jackson) testified at the trial and referenced some prior written statements. The Applicant claims the prior statements were testimonial. The Applicant's Crawford claim regarding witness Abersold fails because Abersold was present at the trial and subject to cross-examination. (Trial transcript, p. 441 - 465).

Finally, we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. See California v. Green, 399 U.S. 149, 162, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970). It is therefore irrelevant that the reliability of some out-of-court statements "cannot be replicated, even if the declarant testifies to the same matters in court." *Post*, at 1377 (quoting United States v. Inadi, 475 U.S. 387, 395, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986)). The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it. (The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. See Tennessee v. Street, 471 U.S. 409, 414, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985).

Crawford v. Washington, 541 U.S. 36, 59-60, 124 S.Ct. 1354, 1369 n.9 (2004).

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As a general note, the facts of the case as explained by the Supreme Court in their opinion affirming the Applicant's conviction and sentence do not reference any information gleaned by witness Abersold. In addition, witness Abersold recalled being interviewed. There is nothing in the record to suggest that witness Abersold remembered nothing that was in the statement(s), he just did not independently recall "certain" responses. (Trial transcript, p. 450 - 451) Witness Abersold authenticated the statement(s), and testified that nothing really happened to explain the difference between his two statements (Trial transcript, p. 461 & 465).

The other portion of the Applicant's purported Crawford violation concerns the testimony of witness Clark regarding the missing persons reports when the victim was first thought to be lost. (While not all of his testimony is purported to be part of the Crawford claim, witness Clark's testimony is at trial transcript, p. 250 - 297). It is this Court's determination that the background information gleaned from witness Clark's review of the missing persons report is not necessarily testimonial, and that there is no real prejudice from its introduction even if it were testimonial.

To determine whether the background information relating the missing person is testimonial our Supreme Court has provided some guidance in light of Crawford and its progeny

The Crawford Court declined to comprehensively define "testimonial." It did, however, state that the "core class of 'testimonial' statements" includes

STATEMENT OF THE COURT: The Court has held that the "core class of 'testimonial' statements" includes statements made to law enforcement or to a government official for the purpose of establishing or proving past or future criminal or civil liability.

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- ex parte in-court testimony or its functional equivalent, such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;

- extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions;

- statements that were made under circumstances which would lead an objective witness reasonably to believe that **689 the statement would be available for use at a later trial; and

- statements taken by police officers in the course of interrogations.

Crawford v. Washington, 541 U.S. at 51-52, 124 S.Ct. 1354 (citations omitted). In addition, the USSC stated that testimony "is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" Id. at 51, 124 S.Ct. 1354 (quoting 2 N. Webster, An American Dictionary of the English Language (1828)). The Crawford Court further observed that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." Id. at 51, 124 S.Ct. 1354.

Just last year, the USSC provided further guidance on the Crawford decision in Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed 2d 224 (2006). There, the USSC dealt with two different domestic violence cases and held (1) a victim's identification of her abuser in response to initial questions from a 911 emergency operator was not testimonial, but (2) where police responded to a domestic disturbance, found the wife and husband at home, and took a statement from the wife about the husband's abuse (while the husband was in another room), the wife's statements were testimonial. The Davis Court explained:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there

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is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis v Washington, 126 S.Ct at 2273-74. The Davis Court specifically noted that its holdings related to police interrogations. Id. at 2274 n. 1

State v Ladner, 373 S.C. 103 at 112, 644 S.E.2d 684 at 688 (2007) (emphasis added).

It is undeniable that the police, initially, were responding to a missing persons issue. The victim could have committed suicide, he could have had a medical related malfunction, he could have just decided to leave town. There are endless non-criminal possibilities that he was not in his cab and the police can check that scene and speak to bystanders without the statements from the bystanders becoming anything more than casual remarks. As stated above from the Landner opinion, the identity of a victim is not testimonial. The statements of the friends, family, or coworkers of the victim that his cab was missing, that his last fare call was to a club, that the meter indicated that fare was \$17.55, etc. were hardly solemn declarations or affirmations made for the purpose of establishing or proving some fact. In any event, the background information provided by witness Clark did not prejudice the Applicant, if it was not presented the outcome would not have been any different. Nothing in the preliminary missing persons complaint were the critical facts of the case.

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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, 620 S.E 2d 737 (2005):

Considering the missing persons complaint information and the testimony of witness Abersold is not testimonial there is no deficiency if trial counsel did not preserve the issue(s) and/or if appellate counsel did not brief it. For the sake of argument, assuming the Applicant is correct that the information is testimonial then the analysis proceeds to whether trial counsel preserved the issues. This Court finds that trial counsel did preserve the Crawford type objection at the trial. Trial counsel, contrary to his affidavit, conceded that the did file several confrontation clause motions prior to the trial and that they held a hearing on the matter See

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J. Edgar Hoover letter

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other weapons." The Hoover letter does not say that, so it may be true that trial counsel never saw a letter saying such specifics. Nevertheless, trial counsel admitted that while he had no independent recollection of the Hoover letter he did (eight years ago) Bates stamp it and he did create the index to the discovery materials that specifically lists the Hoover letter. Finally, when pressed, trial counsel testified that he may not have used it because Lt. Cate had passed away he was not sure how he could get the Hoover letter into evidence.

In light of his live testimony, this Court does not believe trial counsel's affidavit testimony that he never saw the letter. Trial counsel qualified his explanation of the Hoover letter in that he had no present independent recollection. He explained he stamped it, he explained he listed it in the index and he explained that he was not sure how to introduce it. There is no credible evidence that trial counsel was deficient for not seeing the letter – it was provided to him in discovery and he processed it and explained why he did not use it. Nevertheless, for the sake of argument, assuming trial counsel should have used it – the argument is that he could have cross-examined the SLED agents, specifically firearms expert Parnell. At the PCR hearing firearms expert Parnell was cross-examined regarding the Hoover letter. The results were not useful to the Applicant and would have probably been detrimental if done at trial. Parnell, when asked about the letter from Lt. Cate, explained that the letter is not from Lt. Cate but from Strom. Parnell explained that it does not indicate that Cate ever drafted a formal report indicating the weapon

Exhibit, Encl. - Order of Dismissal (20 of 140) (006)
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that killed the victim was from a gun other than the Applicant's. The Applicant failed to satisfy his burden of proof and demonstrate with any credible probative evidence that the Hoover letter was not seen by trial counsel, nor would its use have made the outcome of the trial any different.⁹

John Cayton

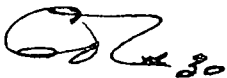
The Applicant contends that the State's firearms expert testified falsely when he claimed he "retired" from the Kansas Bureau of Investigation (KBI). The Applicant claims that it was a Brady violation for the State (or Cayton as an agent for the State) to not reveal that he was actually fired from KBI and did not "retire" as he claimed on the stand. To substantiate his claim that Cayton did not retire, the Applicant produced a transcript from Kansas v. Matt Denny dated September 12, 2005 (case No. 2005-CR-395). In the transcript Cayton (a witness for the defense) is challenged by the government as to whether he retired or he was fired from KBI.

The Applicant's claim fails for several reasons. First, Cayton never testified in the Applicant's trial that he retired from the Kansas Bureau of Investigations, he never mentions KBI.¹⁰ Presumably this Court (and perhaps the jury from the trial) is supposed to know that the KBI is in Topeka, Kansas and that Cayton was referring to KBI when he said "I WORKED IN TOPEKA, KANSAS FOR A COUPLE OF MONTHS AS AN EXAMINER. THEN I RETIRED FOR A COUPLE

⁹ There was never any evidence or argument presented that, even if another gun was used, the Applicant's involvement would be excluded State v. Gregory, 198 S C 98, 16 S E 2d 532 (1941)

¹⁰ Accordingly, there is no prior inconsistent statement – if that is the Applicant's argument

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BY JUDGE



OF YEARS AND THEN I WENT BACK TO WORK." (Trial transcript, p 706 L. 16 - 18) Nevertheless, in the transcript the Applicant provided witness Cayton is confronted with witnesses and/or evidence to substantiate the claim that he was supposedly terminated from KBI. The Applicant did not produce any of the underlying evidence used in the Denny transcript (particularly exhibit 193 from the Denny transcript, p 42, 112 - 120). It is merely speculative that had trial counsel known of this supposed termination that it would have been helpful.

Trial counsel testified that if he had known of the purported termination he would "still be cross examining Mr Cayton about that " That is the exact point the Respondent made, that the Applicant had subpoena power and could have produced Cayton at the PCR to see how he would have responded to being cross examined about his purported termination. Without witness Cayton we are left only with trial counsel's attempt at levity. Otherwise, it is mere speculation that the questioning would be advantageous to the Applicant. The Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E 2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E 2d 538 (1995). A Petitioner must produce the testimony of a witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S C 298, 509 S.E.2d 807 (1998) Conveniently, the Applicant never called witness Cayton to ask him about his

Testimony, 1998-1999 S.C. 333, 509 S.E.2d 807 (1998) (2000-2001)

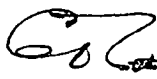
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purported termination – this Court will not speculate as to whether such a line of questioning would have been favorable to the Applicant's case.

Regardless, this Court disagrees with the Applicant's interpretation of the Denny transcript and the claim that the Cayton did not retire from KBI. The Denny transcript taken in full, indicates that Cayton did not agree that he was terminated. Cayton explains that he worked for KBI for a few months after handling some cases with them in the past. Cayton explained that he had some friction with his supervisor at KBI, T.L. Price. Cayton explained that Price was intimidated by his (Cayton's) experience and after a meeting it was agreed that he (Cayton) would resign (Denny transcript, p. 35 – 36). Cayton explained at the Denny trial/hearing that the KBI policies he purportedly violated were not related to case investigations or evidence, but that he ate at his desk (a granola bar) and he sited a gun for another employee even though he was not an official gunsmith (Denny transcript, p. 125). Cayton explained that he also may have taken a long lunch but that he was never accused or reprimanded in anyway for failing to properly investigate a case or scene... (Denny transcript, p. 128). Finally, Cayton explained at the Denny hearing that he resigned rather than be issued a termination letter (Denny transcript, p. 129).

In conclusion, the Denny transcript does not in support the Applicant's argument that Cayton was fired for not following procedures, and it certainly does not support his *suggestion* that he was fired for not following policies or procedures

IN THE COURT OF APPEALS OF THE STATE OF TEXAS
AT THE CITY OF HOUSTON

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related to actual case work as opposed to office or telephone policies. The Applicant never bothered to produce the termination letter that Cayton may have seen that was used in the Denny trial. The Applicant did not produce Cayton, we are left to speculate as to whether if confronted his testimony would change and that the outcome of the trial would be different. Even if speculation were proper, the Denny transcript reflects that Cayton handled the accusation formidably; if the Denny transcript is any indication as to Cayton's reply there is no prejudice.

The Applicant made a passing reference that this was a Brady violation because the State did not turn over the information about Cayton's purported termination and that Cayton himself should have revealed it because he was a State agent.¹¹ The Applicant presented no case law or legal argument as to how a witness for the State is an agent.¹² Nevertheless, Cayton clearly (as indicated by the Denny transcript) disagreed with the interpretation that he was terminated, so there would be nothing for him to disclose. "Brady requires that the State disclose evidence in its possession favorable to the accused and material to guilt or punishment Pennsylvania v Ritchie, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). This rule applies to impeachment evidence as well as exculpatory evidence. State v Bryant, 307 S.C. 458, 461, 415 S.E.2d 806, 808 (1992) (emphasis added).

¹¹ Brady v. Maryland, 373 U.S. 83 (1963)

¹² The Applicant casually referenced "Napue v. Illinois," in support of his Brady argument but in that case the fact that the State's witness was lying was clearly known to the State Napue v. People of State of Ill., 360 U.S. 264, 79 S.Ct. 1173 (1959)

People v. Bryant, 307 S.C. 458, 461, 415 S.E.2d 806, 808 (1992)
People v. Bryant, 307 S.C. 458, 461, 415 S.E.2d 806, 808 (1992)

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There is no evidence that the State of South Carolina was in possession of the purported termination information.

In his critique of firearms experts in general, the Applicant claimed that witness Cayton's testimony was flawed because he testified that the Applicant's gun fired the shot that killed the victim "to the exclusion of any other weapon in the world." (Applicant's Pretrial Brief, p. 17, 28, etc). However, witness Cayton never said that. The Applicant references p. 725 of the trial transcript. Cayton only qualifies his match as to any other .32 Harrington and Richardson (Trial transcript, p. 725 L. 16 - 17) In any even, as discussed above, the Applicant's critique of firearms expert testimony was unconvincing, not prejudicial, and not an argument that was being made in South Carolina at the time of the trial, i.e. not a professional norm.¹³

Closing Argument

The Applicant claimed that trial counsel was ineffective for failing to object to the State's closing argument. When questioned on the matter, trial counsel attempted to plead deficient, yet he was unable to actually articulate a specific example and objection to the State's closing argument except that the Solicitor was holding a binder that may have had a ribbon or a bow on it. If it was such powerful

¹³ The Applicant specifically narrowed his argument regarding firearms expert criticism as ineffective assistance of counsel versus newly discovered evidence

STATE OF SOUTH CAROLINA v. [REDACTED] (2014-03-03)
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negative demonstrative evidence the Applicant could have at least produced the binder for this Court to see Trial counsel was evasive and not particularly credible in his attempt to help his former client, he caved on cross-examination and was not able to adequately explain any purported deficiency let alone anything amounting to any sort of realistic prejudice. The suggestion was that, because some of the jurors may have been military members, they may have thought the binder the Solicitor purportedly held during closing argument may have had something to do with the Applicant, that it may have been negative, and that may have contributed to the outcome. The Applicant failed to satisfy his burden of proof and demonstrate that counsel was deficient (despite counsel's un-credible attempt to concede so) nor did the Applicant demonstrate any prejudice about a binder that may have existed, which was never opened or discussed (the binder, even if it was a military record, could have been the victim's and not the Applicant's).

Regarding any other purportedly improper closing argument(s), the Applicant neglected to examine counsel about anything specific This Court has reviewed the State's closing argument and it reveals nothing beyond reasonable inferences to the record. A Solicitor's closing argument should stay within the record and any reasonable inferences to it. Simmons v. State, 331 S.C. 333, 503 S.E.2d 164 (1998). In addition, one or more of the purportedly improper closing arguments were covered by the Supreme Court's opinion and will not be again addressed here

THE PROSECUTOR'S REQUEST FOR A REHEARING IS DENIED (P. 11/15/2016)
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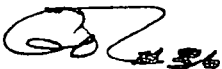
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Character Evidence

The Applicant claims that trial counsel was ineffective for failing to utilize the vast amount of favorable character evidence regarding the Applicant. The Applicant offered many affidavits, but no actual character witnesses other than perhaps his attorneys. Even assuming the Applicant properly presented character witnesses, trial counsel explained his strategic reasoning that he did not want to open the door and allow the State to use any negative character evidence. Trial counsel specifically referenced the State's desire to introduce the evidence that the Applicant was court marshaled and that he was in a military prison. Our courts are understandably wary of second-guessing defense counsel's trial tactics. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). See also Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) and McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). Trial counsel articulated valid strategic reasons for not wanting to open the door with character evidence. The Applicant has not shown that counsel was deficient in that choice of tactics.

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC, Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined

THE OFFICE OF THE ATTORNEY GENERAL (2006-01-01)
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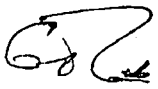


the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result " Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). When there has been a guilty plea, the applicant must prove that counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Alexander v. State, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991).

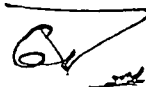
Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms " Cherry, 300 S.C. at 117, 385 S.E.2d at 625, (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for

STRICKLAND, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, 692 (1984)
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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. As discussed above, the Applicant has failed to carry his burden in this action. Therefore, this Court finds that the application must be denied and dismissed

Trial counsel's testimony was not completely credible. Accordingly, this Court finds Applicant has failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by counsel's performance


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CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Counsel was not deficient in any manner, nor was Applicant prejudiced by counsel's representation. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

Except as discussed above, this Court finds that the Applicant failed to raise the remaining allegations set forth in his application at the hearing and has, thereby, waived them. As to any and all allegations that were or could have been raised in the application or at the hearing in this matter, but were not specifically addressed in this Order, this Court finds Applicant failed to present any probative evidence regarding such allegations. Accordingly, this Court finds that Applicant waived such allegations and failed to meet his burden of proof regarding them. Accordingly, they are dismissed with prejudice. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issue at the hearing indicates a voluntary and intentional

ORDER OF DISMISSAL AND WAIVER OF APPEAL
JULY 19, 2014

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relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed

This Court cautions the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review See Rule 203, SCACR. Pursuant to Austin v State, 305 S.C 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71 1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant and counsel are directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 8 day of February, 2010.


The Honorable G. Thomas Cooper, Jr.
Presiding Judge
Fifth Judicial Circuit

COUNSEL, South Carolina

Printed name, date and order of dismissal (if any) (2010-02-08)
FILED IN 10-02-08

STATE OF SOUTH CAROLINA
 COUNTY OF RICHLAND
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
 CASE NO: 2006CP4003866

Edward #286115 Freiburger

vs.

State of South Carolina

Plaintiff

Defendant

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP, ☐ Rule 12(a),
 SCRCP (Vol Nonsuit), ☐ Rule 43(k), SCRCP (Settled), ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON).** ☐ Rule 40(j) SCRCP, ☐ Bankruptcy
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award,
☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX)**☐ Affirmed, ☐ Reversed, ☐ Remanded, ☐ Other

NOTE ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR
 ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL

IT IS ORDERED AND ADJUDGED:

☒ See attached order,☐ Statement of Judgment by the Court

Dated at Columbia, South Carolina, this _____ day of _____, 2010

PRESIDING JUDGE

This judgment was entered on the _____ day of _____, 2010, and a copy mailed first class this
 10th day of February, 2010, to attorneys of record or to parties (when appearing pro se) as follows

John H. Blume III
 Susan Barber Hackett

ATTORNEY(S) FOR THE PLAINTIFF(S)

Robert L Brown
 Brian T Petrano

ATTORNEY(S) FOR THE DEFENDANT(S)

Jeanette W. McBride
 Clerk of Court

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

EDWARD FREIBURGER # 286115,
Applicant,

v.

THE STATE OF SOUTH CAROLINA.
Respondent.

IN THE COURT OF COMMON PLEAS
CA No. 06-CP-40-3866

MOTION TO ALTER OR
AMEND THE JUDGMENT

2010 FEB 25 PM 3:30
FILED
CANCELLER W. McBRIDE
C.C.P. & G.S.

Applicant, Edward Freiburger, by and through undersigned counsel, submits this motion to alter or amend the judgment pursuant to Rule 59(e), SCRPC.¹ Applicant will not rehash arguments made at the post-conviction relief hearing or in the pre-trial brief, but will attempt to confine his complaints to new matters arising from the court's decision to sign verbatim the state's proposed order. In doing so, however, however, applicant in no way abandons or waives any previous argument or issue raised in prior pleadings or hearings relating to his entitlement to post-conviction relief.² As will be set forth in more detail below, the most egregious defects in the order are: 1) it effectively reverses, without explanation, several significant evidentiary rulings made at the post-conviction relief hearing; 2) it implicitly finds that Mr. Delgado and Ms. Hudgins, two respected members of the bar and officers of the court, lied under oath during their testimony at the post-conviction relief hearing, 3) it makes several key factual findings that are without any basis in the

¹The order denying post-conviction relief was signed by the court on February 8, 2010. The judgment was entered on February 10, 2010, and the order was received by undersigned counsel on February 11, 2010. Pursuant to SCRPC 59(e), the ten day period for filing the motion begins to run on the day the order was received.

²Applicant specifically incorporates herein by reference all of his previous submissions, written and oral

record; and, 4) it fails to address at all several issues raised in the pleadings and by the evidence presented in support of the application for post-conviction relief.

I. REVERSAL OF PRIOR EVIDENTIARY RULINGS.

At the PCR hearing, applicant called Dr. Steven Laken, President and CEO of the Cephus Group, to testify regarding the results of his f-MRI analysis. Dr. Laken was qualified by this Court as an expert witness, and then offered his opinion that, based on the f-MRI imaging results, applicant was being truthful when he denied being the perpetrator. This Court took under advisement, pending reviewing proposed orders, the admissibility of the f-MRI results, but it at no point indicated that Dr. Laken was not qualified to testify. The order signed by this Court, however, finds that "Dr. Laken is not qualified to testify as an expert because his testimony was unconvincing." Order at 14

The order gives no reason as to why the Court determined after the hearing that Dr. Laken was not qualified to even render an opinion, and given that this Court previously found Dr. Laken to be qualified, applicant is, as a matter of due process, entitled to know the basis of the reversal of course. Furthermore, the reason given in the order, i.e., that the testimony was "unconvincing," is not a legitimate basis for effectively striking the testimony from the record. While that may be a legitimate reason to give the evidence less weight, it is not a basis for finding Dr. Laken, a respected, well-educated scientist, not qualified to testify.³

Similarly, applicant called Dr. Adina Schwartz, to testify regarding the absence of a scientific basis for several key aspects of forensic firearms identification. Applicant moved that Dr. Schwartz

³Applicant would also note that the order states that "Dr. Laken's claim as to his accuracy rating was not consistent" and that he "never explained... if his actual software programming code was peer reviewed." Order at 14. Neither of these assertions is consistent with the evidence presented at the PCR hearing.

be permitted to testify as an expert witness, and she was so qualified. As detailed in her testimony at the PCR hearing, Dr. Schwartz, who is one of the leading scholars in the country in the area of the history and "science" of ballistics evidence, has been qualified as an expert witness and permitted to testify in numerous cases by numerous courts involving similar challenges to firearms identification. The order signed by this Court, however, reverses the prior expert qualification determination at the PCR hearing and finds that Dr. Schwartz is "not qualified to testify as to her opinion about the accuracy or inaccuracy of the conclusions reached by the firearms examiner(s) in this case." Order at 16.⁴

II. THE J. EDGAR HOOVER LETTER AND THE IMPLICIT FINDING OF FALSE TESTIMONY BY TRIAL COUNSEL.

At the PCR hearing, Applicant offered into evidence a letter written shortly after the 1961 murder of Mr. Orner, by the then head of SLED, J.P. Strom, to J. Edgar Hoover, the Director of the FBI. The letter clearly states that Lt. Cate, then head of firearms identification at SLED, concluded that another similar handgun, not the gun found in applicant's possession, was the murder weapon. Furthermore, the letter reveals that this gun was seized from a household (the Drehr household) which was known to be inhabited by "robbers and thieves." Both Ms. Hudgins and Mr. Delgado testified a) that they had no recollection of seeing this letter, b) that the letter was significant because

⁴While counsel for applicant has never been provided with the transcript of the PCR hearing, to the best of his recollection, Dr. Schwartz's testimony on the conclusions reached by Cayton, the state's firearms examiner in this case, came in without objection. Dr. Schwartz was asked numerous questions about the particular methods and techniques used by Cayton in this case, and the likelihood that those methods and techniques could result in a mistaken identification. Undersigned counsel does not recall that counsel for the state raised any contemporaneous objection. This increases the unfairness of the court's post-PCR hearing reversal of course on the admissibility of Dr. Schwartz's testimony.

it differed from the manner in which Lt. Cates' prior firearms analysis was presented at applicant's trial; and, c) that they had no strategic reason for failing to use the letter at trial⁵

The value of the letter in question to the defense case at trial is clear. The state could find one and only one firearms examiner in the country who would testify that the weapon taken from applicant was the murder weapon; John Cayton, who worked out of a trailer in his backyard in Missouri. Cayton had his own baggage, some of which was known to the jury and some of which, as will be discussed below, was not disclosed by the prosecution. The jury was given the impression that while the prior SLED examiners who examined the gun, including Lt. Cate, ultimately rendered an opinion that the results were inconclusive, it was a very close case. But the Strom letter to Director Hoover flatly contradicts that assertion, and, as trial counsel both acknowledged, could have been effectively used at trial to cast further doubt on Cayton's positive (and unscientific) firearms identification and to inform the jury of another plausible suspect. Thus, given the circumstances, any competent counsel would have used the letter had he or she been aware of its existence.

The order, however, finds that "trial counsel was evasive" and then astonishingly, finds "[i]n light of his live testimony, this Court *does not believe* trial counsel's affidavit testimony that he never saw the letter." Order at 29. Any attempt to sugarcoat the significance of this finding falls flat. This is a finding that Mr. Delgado testified untruthfully under oath in these proceedings. Also, given that Ms. Hudgins' testimony mirrored that of Mr. Delgado, it is a finding that she likewise testified untruthfully. This finding by the Court is unfair to both lawyers, who are well respected members

⁵SLED Agent Ira Parnell, who was called by the state at the PCR hearing, also testified that he had not seen the letter, that he was not aware that Lt. Cate had identified another gun as the murder weapon, and that the information contained in the letter to Director Hoover was inconsistent with what he had been told about Cate's analysis. Mr. Cate was dead at the time of applicant's trial.

of the bar. It is especially uncalled for given that there is no contradictory evidence and also given that common sense and the surrounding circumstances fully support their testimony. What possible strategic reason could there have been for failing to use the letter in a case where the state's entire case for guilt hinged on firearms identification?⁶ This is especially true given the almost godlike status bequeathed on Mr. Cate, who was consistently referred to as the "father" of ballistics evidence in South Carolina, at applicant's trial. There is none, and the order should at a minimum be modified to remove this unfounded implicit assertion that Mr. Delgado and Ms. Hudgins committed perjury.

III. THE CAYTON TERMINATION

Cayton testified at applicant's trial that he "retired" from the KBI. Only in a world where "retired" is synonymous with "fired" would such a statement be true. At the PCR hearing, applicant presented a certified transcript where Cayton admitted (eventually) that he had been fired. Despite there being no contrary evidence, the Order finds that Cayton was not fired from the Kansas Bureau of Investigation for failing to follow policy and procedures. Order at 32. But, the certified transcript introduced at the PCR hearing, is unequivocal that he was, in fact, fired for just that. While it is true that Cayton attempted to "explain away" and give reasons for why it did not work out for him at the

⁶Counsel for applicant also alleged, and presented evidence, that counsel was ineffective for failing to use Ira Parnell's report during the cross-examination of both Mr. Parnell and Mr. Cayton. In the report, Parnell acknowledged that the bullet recovered from the fragments could have been fired from the weapon in applicant's possession, the weapon seized from the Drehr household (which Cates had determined to be the murder weapon) or "*any other* similar weapon." (Emphasis added). At the PCR hearing, counsel offered no strategic reason for failing to use the report during the cross-examination of Agent Parnell or John Cayton. As with the Hoover letter, there is no strategic reason competent counsel would fail to use the report given that without the ballistics evidence, the state's case was clearly insufficient. The order signed by this Court does not address this allegation of ineffective assistance at all.

KBI, he did not deny, and in fact ultimately was forced to admit, that he had been terminated. And the termination letter, quoted at length in the transcript, reveals the reason why, the inability to follow policies and procedures.⁷

The order also concludes that applicant had failed to make out a *Brady* violation because applicant "presented no case law or legal argument as to how a witness for the State is an agent." Order at 33. This is simply not true. During oral argument following the presentation of the evidence and in his proposed order applicant cited *Kyles v Whitley*, 514 U S 419, 437 (1995), where the Supreme Court held 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 " Cayton was a state agent, acting on the state's behalf, and thus was definitely part of the prosecution team subject to *Brady*'s requirements.

IV. CLOSING ARGUMENT.

Applicant also alleged and presented evidence that trial counsel was ineffective for failing to object to certain improper comments made by the solicitor during summation. The order signed by the Court rejects the claim on the basis that applicant's trial counsel's testimony was "evasive" and "incredible" (i.e., counsel lied), that trial counsel "caved on cross-examination" (a self-congratulatory pat on counsel for the state's own back) and that the portions of the argument applicant alleges should have been objected to were "covered by the Supreme Court's opinion and will not again be addressed " Order at 34-35. The first two allegations are not supported by the

⁷Applicant would note that counsel for the state did not call either trial prosecutor at the PCR hearing to testify regarding their knowledge of Cayton's termination. Thus the uncontradicted evidence before this Court reveals that Cayton was terminated by the KBI prior to applicant's trial and that applicant's trial counsel were never informed of the termination.

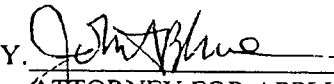
record. Counsel testified only that he had no strategic reason for failing to object to any impermissible argument. This non-controversial statement should hardly lead to allegations that counsel was attempting to concede his own ineffectiveness (and thus, in respondent's view, lie to help his former client). Furthermore, there was nothing "evasive" about trial counsel's failure to identify portions of the argument he should have objected to. The PCR application and applicant's detailed pre-trial brief set forth the legally improper statements. If they were improper, there can be no legitimate strategic reason for failing to object, and it is trial counsel's responsibility to be aware of, and object to, improper argument. That was the point of trial counsel's testimony and calling him (and again by inference Ms. Hudgins) a liar does nothing to change it. Finally, the order's assertion that the portions of the argument which applicant alleges should have been objected to were addressed by the South Carolina Supreme Court on direct appeal is simply not correct.

V. CONCLUSION.

WHEREFORE, for all of the foregoing reasons, and for the reasons set forth in applicant's previous submissions, applicant submits that he is entitled to post-conviction relief. Therefore, the order signed by the Court on February 8, 2010 should be altered or amended to reflect the results of an objective review of the evidence and law, and to grant the relief to which applicant is entitled.

Respectfully submitted,

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

BY: 
ATTORNEY FOR APPLICANT

February 19, 2010

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
EDWARD FREIBURGER # 286115,
Applicant,
v.
THE STATE OF SOUTH CAROLINA.
Respondent.

IN THE COURT OF COMMON PLEAS
CA No. 06-CP-40-3866

CERTIFICATE OF SERVICE

FILED
2010 FEB 25 PM 3:32
JEANILE H. SPRIDGELL
C.C.P. & C.S. RIDGE

I, John H. Blume, hereby certify that I have served upon the attorney for the respondent one
(1) copy of Applicant's Motion to Alter or Amend the Judgment in the above-captioned case by
depositing a copy of same in the United States Mail, first class, postage pre-paid, addressed as
follows:

Brian Petrano, Esq
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211-1549

This the 19th day of February, 2010, in Ithaca, New York


JOHN H. BLUME

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
	)	
	)	2006CP4003866
	)	
Freiburger, Edward, 286115,	)	
	)	
Applicant,	)	
	)	
v.	)	REPLY TO
	)	APPLICANT'S RULE 59(E) MOTION
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

This matter comes before the Court by way of the Applicant's Motion pursuant to Rule 59(e), SCRCP, in which he asks the Court to alter or amend its Order dismissing his Application for post-conviction relief (PCR). The Applicant's motion is dated February 19, 2010 and was received by the Respondent on February 25, 2010. The Respondent (the State) would submit the following:

I.

The PCR Court's Order of Dismissal, filed on February 9, 2010, contains the required findings of facts and conclusions of law as required by S.C. Code Ann. § 17-27-80 (1976), and Rule 52(a) SCRCP. See also, McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991). Based on a review of the Applicant's recent Motion, the Court's Order of Dismissal, and the Respondent's notes/transcript from the PCR hearing, the Respondent respectfully submits that the Court's Order of Dismissal is correct and should not be

disturbed.¹ If, this Court requests a more specific reply, the Respondent would request an opportunity to submit written reply argument(s) – in lieu of another hearing.

II.

Footnote #6

Footnote six (6) of the Applicant's motion suggests that an allegation was not addressed in the Court's Order of Dismissal. Specifically, the Applicant now claims:

⁶Counsel for applicant also alleged, and presented evidence, that counsel was ineffective for failing to use Ira Parnell's report during the cross-examination of both Mr. Parnell and Mr. Cayton. In the report, Parnell acknowledged that the bullet recovered from the fragments could have been fired from the weapon in applicant's possession, the weapon seized from the Drehr household (which Cates had determined to be the murder weapon) or "any other similar weapon" (Emphasis added). At the PCR hearing, counsel offered no strategic reason for failing to use the report during the cross-examination of Agent Parnell or John Cayton. As with the Hoover letter, there is no strategic reason competent counsel would fail to use the report given that without the ballistics evidence, the state's case was clearly insufficient. The order signed by this Court does not address this allegation of ineffective assistance at all.

5

(Applicant's Rule 59(e) Motion, p. 5).

The Respondent submits that the Applicant never presented any evidence in support of this allegation. Accordingly, the PCR Court's Order of Dismissal is sound. The Respondent submits that SLED agent Parnell's formal written report was never submitted as evidence to the PCR Court (although it may have been marked as an exhibit). At the PCR hearing, trial counsel (Delgado) was only asked about the J. Edgar Hoover letter and that issue was fully addressed in the PCR Court's Order of Dismissal.

¹ Footnote six (6) in the Applicant's recent motion is addressed separately
Freiburger, Edward – State's Reply to the Applicant's Rule 59(e) Motion (2006CP4003866)
Page 2 of 5

Trial counsel's affidavit did however purport to address the formal Parnell report:

6 I have also had an opportunity to review Ira Parnell's report of March 2001, which I understand was admitted as Applicant's Exhibit 14 at Mr. Freiburger's PCR hearing of August 13, 2009. In that report Mr. Parnell concluded that either the Dreher gun or the Freiburger gun or any other gun in the world could have fired the bullet which killed Mr. Orner. In contrast, Mr. Cayton concluded that Mr. Freiburger's gun to the exclusion of all other guns in the world fired the bullet which killed Mr. Orner. However, at trial, Mr. Parnell insisted that there was no material difference between his conclusions and the conclusions of Mr. Cayton save for a difference in degree of certainty. I do not presently remember why I did not cross-examine Mr. Parnell on the specific conclusions of his report which are adverse to the conclusions of Mr. Cayton. I cannot currently think of a strategic reason why I did not do so.

(Trial Counsel's Affidavit, p. 2).

In the Applicant's recent motion and in trial counsel's affidavit, the suggestion is that SLED Agent Parnell's report concluded that the Dreher gun, or the Freiburger gun, "or any other gun in the world" could have fired the bullet that killed the victim. The Respondent submits that because the report was never introduced as evidence at the PCR hearing, there was nothing for the PCR Court to consider, i.e. the PCR court has no way of knowing that the Parnell report makes such a conclusion. See Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (finding that where contents of challenged documents were not presented at the PCR hearing, defendant failed to present any evidence of probative value demonstrating how counsel's failure to obtain the unproduced documents in a more timely fashion prejudiced his defense). Harris v. State, 377 S.C. 66, 77, 659 S.E.2d 140, 146 (2008).

SLED Agent Parnell testified at the trial and at the PCR hearing. He never testified that any other gun in the world could have fired the bullet that killed the victim. At trial, SLED Agent Parnell testified (during cross-examination) that his results were "inconclusive," but in agreement with Cayton's opinion because "inconclusive" is "very

nearly a positive”; he explained that Cayton had cleaned the bullet better and saw more. (Trial Transcript, p. 644). At the PCR hearing, SLED Agent Parnell, when asked about his findings, testified that his opinion was that the Dreher gun, the Freiburger gun, or any other six-landed groove right twist thirty-two caliber H&R with dimensionally consistent land and groove impressions could have fired the bullet that killed the victim. **Simply put, the Applicant never presented any evidence that SLED Agent Parnell ever issued a report suggesting that “any other gun in the world” could have fired the bullet that killed the victim.** Accordingly, the PCR Court’s Order of Dismissal is sound.

III.

The State therefore requests that the relief requested by the Applicant be denied and that his Motion be dismissed.

WHEREFORE, having made its Return to the motion, the State requests that the relief requested in the Motion be denied and that said Motion be dismissed.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

BRIAN T. PETRANO
Assistant Attorney General

BY:



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Columbia, SC 29211
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Columbia, South Carolina
March 8, 2010

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

)
) IN THE COURT OF COMMON PLEAS

2006-CP-400-3866

Edward Freiburger, 286115

Applicant,

vs

State of South Carolina,

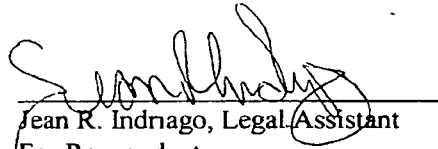
Respondent.

)
)
)
) AFFIDAVIT OF SERVICE BY MAIL
)
)
)
)
)
)

- 1 I am an employee of the Respondent in the above-captioned action.
- 2 Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
- 3 I have this day served a copy of the Reply in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid.

John H. Blume, III, Esquire
Post Office Box 11744
Columbia, South Carolina 29211

DATED this 9th day of March, 2010.


Jean R. Indriago, Legal Assistant
For Respondent

1 STATE OF SOUTH CAROLINA) IN COMMON PLEAS
2 OF RICHLAND) COURT
3)
4 EDWARD FREIBURGER,)
5)
6 -V-) TRANSCRIPT OF
7) RECORD
8 STATE OF S.C.)
9 DEFENDANT.)

10

11 JULY 8, 2010

12 RICHLAND, SOUTH CAROLINA

13

14 B-E-F-O-R-E:

15 HONORABLE CASEY G. THOMAS COOPER, JR., JUDGE;

16

17 A-P-P-E-A-R-A-N-C-E-S

18 FOR THE PLAINTIFF:

19 JOHN BLOOM, ESQ.

20

21 FOR THE DEFENDANT:

22 BRIAN PETRANO, ESQ.

23

24

25

I-N-D-E-X

1

2

PG.

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PCR:

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CERTIFICATE OF REPORTER

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1 (The following proceedings were
2 held on July 8, 2010)

3 THE COURT. All right. Mr. Bloom, it's your
4 motion?

5 MR. BLOOM: Yes, Your Honor. Before going into
6 the substance of the argument on the motion, I would like to
7 put on the record that we had requested that Mr. Freiburger
8 be transported for this hearing this morning. And
9 Mr. Petrano, counsel for the state, did, in fact, request
10 the Department of Corrections to transport Mr. Freiburger.
11 For reasons which are known only to the Department of
12 Corrections, Mr. Freiburger was not brought here today. I
13 have discussed the matter with Mr. Petrano, and we briefly
14 discussed it with you in chambers. And we have made the
15 decision to go forward on the motion at this time without
16 Mr. Freiburger's presence. I think -- obviously he clearly
17 wanted to be here, but I think given the option he would, he
18 would, also like this motion to be resolved. So we want to
19 go forward at this time.

20 THE COURT: All right. I suggest that he
21 certainly -- I don't want to go too far; I would approve a
22 request to have the -- this hearing transcribed, and furnish
23 him a copy.

24 MR. BLOOM: Yes, sir. So, as for the substance of
25 the motion to alter or amend the judgment, I intended to

1 focus on several issues unless the court had questions about
2 other issues which are in the amended application for post
3 conviction relief. The three issues that I wanted to talk
4 about were first, ineffective assistance of counsel for
5 failure to use the Strom to Hoover letter; second, the
6 ineffective assistance of counsel in failure to use the --
7 report; third, the Brady Violation for Mr. Katon's -- false
8 testimony regarding his termination from the Kansas Bureau
9 of Investigation.

10 So as to the first ineffective assistance of
11 counsel for failure to use the Strom Hoover letter, I think
12 the court remembers the testimony and I'm sure reviewed the
13 pleading. It's impossible to overstate the importance of
14 Katon's testimony to the state's case without Mr. Katon
15 there was no case; without this explicit examination,
16 Mr. Freiburger would have never been charged, much less
17 convicted without his testimony that the state could not
18 have gotten to the jury in this matter.

19 His testimony was -- at trial by Agent Parnel's
20 testimony, and his testimony was essentially was that
21 Lieutenant Katon, who was deceased at the time of the trial,
22 who was the dean, or the godfather, or the father, whatever
23 you want to call it, of the ballistics testimony in South
24 Carolina had examined the gun in 1961, and found that even
25 though he couldn't call it a match, it was very close, but,

1 nonetheless, inconclusive And Parnel also testified that
2 Lieutenant Katon had excluded the second -- in Richard's
3 revolver which was found at the Dreher Household in another
4 residence in Columbia.

5 Trial counsel had in his possession two documents
6 which undermine this aspect of the tape -- testimony. The
7 first was the Strom Hoover letter and that's in the record
8 as Applicant's Exhibits 11 and 12. Now, this letter is very
9 important because it says that Lieutenant Katon, in fact,
10 believed that the second gun, the one taken in Chief Strom's
11 words, from a house where there were known thieves and
12 robbers and where anyone of the number people could have
13 taken the gun, the criminal's predisposition was the murder
14 weapon. This letter goes not only to credibility, but it is
15 evidence that a third party committed this crime.

16 Counsel also had in his possession -- Carnel's
17 report. Counsel -- and this report acknowledged that this
18 projectile could have been fired by any -- the exact
19 language is any similarly rifle, firearm of the same
20 caliber. In other words, any gun of the same caliber could
21 have fired the projectile And counsel did use, you know,
22 either one of these documents Now, the question is, you
23 know, why? You know, was there strategic reason for this?
24 Well, no, there wasn't. Mr. Delgado admitted there was no
25 strategic reason, no strategic basis for not using these

1 documents and, you know, there is no reason. I mean,
2 Mr. Delgado is a good lawyer; he is a friend of mine. He is
3 someone I have known for a number of years but, you know, we
4 all make mistakes. And not using that document those
5 documents was an oversight and a mistake. I mean, just
6 think about it in common sense, his whole strategy was to
7 attempt to undermine the ballistic evidence in this case.
8 He knew that Mr -- any chance -- the chances of acquitting
9 Mr. Freiburger and it was a close circumstantial case
10 depended upon undermining the ballistic evidence. And these
11 two documents individually or together did that to great
12 degree. One, it would indicate -- it indicated that, in
13 fact, matched another weapon and it undermined the idea that
14 this other weapon had been excluded, but it also suggested
15 that -- a third party had committed. I mean, would it have
16 made a difference? You know, I think clearly this was a
17 very close case in this. And testimony undermining their
18 credibility which raised the specter of a third party --
19 third party as the perpetrator could easily and reasonably
20 created a reasonable doubt in one or more jurors' minds.

21 And then I think if you look at this in
22 combination with -- we're going to go a little bit out of
23 order in how I presented at the beginning because I think
24 these two sets of issues work together. If you put that
25 together with Mr. Katon's testimony about his term -- about

1 his work with the Kansas Bureau of Investigations the
2 significance is even more prominent.

3 Mr. Katon -- at Mr. Freiburger's trial that he had
4 previously be employed as a ballistic examiner by the Kansas
5 Bureau of Investigation, and that he had retired Well, the
6 correct word rhymed with retired, but it's not retired; it's
7 fired. And he was terminated from the KBI, that's clear
8 from the documents which had been presented. He was
9 terminated for the failure to follow policies, protocols and
10 procedures. And again, this was a -- since the state's case
11 depended so heavily on Katon's testimony, and there was
12 already some evidence which would have undermine that he had
13 made a mistake, and the evidence that he had been terminated
14 by a state agency which is the equivalent of SLED for
15 failing to follow --

16 THE COURT: How so Delgado could have known that?

17 MR. BLOOM: Well, I think this is not pled in our
18 application as an ineffective assistance claim. I think
19 this is a, you know, a Brady or -- violation I think he
20 clearly couldn't have.

21 THE COURT. Right

22 MR. BLOOM: I don't think you can hold Mr. Delgado
23 accountable for what he didn't know, but Mr. Katon was a
24 state agent, and he knew it. And he later was forced to
25 admit it in the subsequent trial. And so we know that there

1 was information out there; we know that it was not
2 disclosed. There's no evidence in the record that for
3 example the state don't call either, either, of the
4 prosecutors in this case to say that they didn't know it.
5 So that the proof is that it was known; that it was in
6 existence, this happened prior to his testimony at trial.
7 The defense didn't know --

8 THE COURT Why do you say it was known by the
9 state?

10 MR. BLOOM: Pardon me?

11 THE COURT: Why do you say it was known by the
12 state?

13 MR. BLOOM: I don't know -- it was known by the
14 state.

15 THE COURT: At the time of trial?

16 MR. BLOOM: Because -- well, it happened prior to
17 trial. Mr. Katon was a state agent, he was part of the
18 prosecution team. Under the supreme court's decision in
19 Kyles versus Whitley and Strickler versus Green, that
20 knowledge is attributable to the prosecution regardless of
21 whether Mr. McMann or Ms. Campbell knew it or not; I think
22 is the relevance or believable. I don't know that they knew
23 it or not, they weren't called as witnesses at the hearing,
24 but the evidence is clearly -- Katon knew it.

25 THE COURT: Yeah.

1 MR. BLOOM: And he was under an obligation to
2 disclose it as an agent. And I think, again, that's very
3 sufficient. These things together, of course, you know, are
4 equally sufficient. Or, you know, these things, I guess the
5 only way to this about it, and I'm not trying to undermine
6 my own case. But I think it's very sufficient that they
7 didn't use -- Mr. Delgado didn't use these document. And I
8 think it's sufficient they didn't disclose it. You know, or
9 any of these reviews, you know, kind of mistakes in the
10 scheme. Well, maybe, not but, I mean, look at the analogy I
11 think is to what is to the medicine, or injury. If someone
12 dies from three small gunshot wounds, do they really care if
13 it was not one big one or three small ones? You know,
14 they're equally dead. If a person is wrongly convicted
15 because of several not necessarily insufficient small, I
16 think these are sufficient mistakes but not huge. Does it
17 mean that they are any less wrongfully convicted because it
18 rest on a combination of things as opposed to one glaring
19 omission? I think, you know, the answer is no.

20 And then there's also the issue of the evidence
21 which was admitted in violation of the confrontation clause.
22 We spent some time talking about this at the hearing, but
23 there are essentially two sets of testimony or hearsay which
24 were admitted. The first was in a police report which is
25 published verbatim. Mr. Clark. Who was a City of Columbia

1 police officer at the time of the investigation, retired at
2 the time of trial. And the other one was a statement by
3 Mr. Eversol, who was in the Army with Mr. Freiburger in
4 1961.

5 THE COURT: That wasn't the -- our appellant
6 courts give wide discretion to the trial judge in terms of
7 the admission of evidence during the course of the trial.

8 MR. BLOOM. Umm --

9 THE COURT: I mean, apparently the trial judge
10 admitted those statements under some exception of the
11 hearsay rule or some -- something that was either pre
12 Crawford or not fully understanding the sufficiency and in
13 light of Crawford?

14 MR. BLOOM. Well, yes, I mean, my recollection or
15 understanding of the record; it's a -- there are a couple of
16 points which is kind of confusing of on what the actual
17 basis was. But was it the judge admitted these documents
18 over defendant's hearsay objection and some combination of
19 business records and ancient documents. It actually -- the
20 time period wasn't hundred percent clear whether it was
21 business records or ancient documents, but under those
22 exceptions to the hearsay rule --

23 MR. PETRANO. And I'm sorry to interrupt, and I
24 probably should have done it earlier but you answered the
25 question, Your Honor. I'm going to object, this is going

1 beyond the actual motion. I don't think the Crawford issue
2 was addressed in the motion for reconsideration. We are
3 limited to the three that were initially listed at that
4 introduction.

5 THE COURT: All right. I'll, I'll, allow it go
6 ahead --

7 MR. BLOOM: Well --

8 THE COURT: It's an interesting argument.

9 MR. BLOOM. Well, so the judge admitted it on
10 the -- basis of some combination of ancient documents and
11 business records. And so it's clear that the state has the
12 right to set up there on rules of evidence; there's no
13 question about that. And that they also have the right to
14 define hearsay and the exception in the ways that are under
15 state law. There are, of course, limits on what the state
16 can do and the states can't make evidence admissible that is
17 barred by some provision of the constitution. And in this
18 case the confrontation clause I think trumps the admission
19 of evidence under those rules, I mean, that is the
20 sufficient, you know, of Crawford and Melendez-Diaz and the
21 other decisions by the Supreme Court. That yes, you can do
22 it but that -- with the limit that, that, confrontation
23 clause ultimately decides what's admissible. And I think
24 the evidence here was not -- was obtained, admitted in
25 violation of the confrontation clause. It is clearly

1 testimonial hearsay, this was gathered during the course of
2 the police investigation into Mr -- death by, you know,
3 police officer agents, and it was offered for the truth of
4 the matter asserted

5 You know, there are, of course, other problems
6 with the evidence in this case which we briefed and were in
7 our order. In Katon's testimony that the gun -- the bullets
8 was fired by this gun exclusion of all others would not be
9 allowed in a consistently growing number of jurisdiction,
10 the lack of scientific basis for Mr. Katon's testimony.
11 And, you know, at the end of the day we submit that this is
12 the recipe of how you convict an innocent man.

13 You know, I believe that Freiburger is innocent.
14 Not just because of the FMRI results although that is
15 powerful and certainly eliminated any doubts that I had, but
16 also because of his entire life history. After his
17 discharge from Army is inconsistent with him being the type
18 of person who would kill someone for money. I mean, you
19 were failure and privy to the testimony, the record, the
20 character affidavits which described Mr. Freiburger's work
21 history, his character, his contributions --

22 MR. PETRANO: I'm sorry, that was specifically
23 excluded.

24 MR. BLOOM: That he made -- some of this was in
25 the record, in the trial. And to me, you know, I think it's

1 -- again I'm a lawyer, I'm an advocate, to me it's just
2 inconceivable that he did this. But you don't have to
3 believe Mr. Freiburger's innocent to grant him a new trial.
4 You know, all you have to conclude is between one reason or
5 a combination of reasons Mr Freiburger deserves a new shots
6 before a new jury that gets to hear all of the relevant and
7 probative evidence.

8 And so finally, let me say this, and this is not I
9 guess really a legal argument for granting our motion but it
10 is a practical one. Here's the reality of the situation, if
11 you deny relief it's hard for me to get the state supreme
12 court to take a look at the case. Almost all PCR
13 applications are denied; you know that from your experience.
14 The State Supreme Court, they don't get the attention they
15 deserve because of the court docket. It's just a certain
16 petition filed by an inmate, a noncapital inmate post
17 conviction relief proceedings. We don't have an automatic
18 right to appeal, so the odds are stacked against us. So if
19 you rule for us, on the other hand, and grant relief, then
20 the state will be the petitioner and those cases are much more
21 unusual and they get reviewed more closely and, if the state
22 Supreme Court thinks that you got it wrong in our favor
23 they'll fix it. But if we're the petitioner, it's all most
24 a foregone conclusion and Mr. Freiburger will not get a new
25 trial. I don't know how that cuts. I don't know whether

1 that means anything at all to you or to, you know, to anyone
2 else. But it's just a hard reality of, you know, the
3 situation. So at the end my -- in conclusion, Your Honor,
4 we would request that you grant Mr. Freiburger's motion and
5 alter, amend the judgment and that you grant post conviction
6 relief in this case and allow Mr. Freiburger to have a new
7 trial before a new jury that gets to hear all of the
8 relevant and probative evidence.

9 THE COURT All right. Thank you.

10 Mr. Petrono.

11 MR. PETRANO: Thank you, Your Honor, I'll just
12 cover the Hoover letter first in replay. This is addressed
13 in your order I thought very elegantly on 28, 29 thoroughly
14 anyway, elegantly was the best word Counsel testified that
15 he probably saw them, I'm not going to put words in his
16 mouth but that was the effective of his testimony.

17 THE COURT: You mean, Delgado.

18 MR. PETRANO: That's correct. Mr. Delgado
19 recognized that, that, was his bate stamp on the Hoover
20 letter, that, that, was his -- he wrote the -- there was a
21 table of contents or an index, whatever you want to call it,
22 of all of the discovery and the Hoover letter and the
23 subsequent letter are line item and categorized and listed
24 He admitted that he did those things. And then finally I
25 think one of the last answers he gives is that he --

1 THE COURT: You're talking about in his testimony
2 or --

3 MR. PETRANO: That's correct.

4 THE COURT: Or his affidavit?

5 MR. PETRANO: No, his testimony here was that he
6 didn't know how to get it in.

7 THE COURT. Right.

8 MR. PETRANO: Because Katon was dead. So that was
9 covered. Then the second part would be the prejudice in the
10 sense that I think the suggestion was and there was a little
11 joke by Mr. Delgado was that, if he had seen the letter, he
12 would still be cross examining I think Parnel or Katon about
13 -- or whatever the case was. We tried to do that at the
14 PCR. The -- Hoover letter was presented to Sled Agent
15 Parnel; he kind of I thought explained it away. Said, Well,
16 Katon doesn't actually make a conclusion that it was
17 positively matched. He just forwards it to the FBI for them
18 to take a look at. There really wasn't any --

19 THE COURT: I don't recall what happened after the
20 Hoover letter.

21 MR. PETRANO: I think it's in the file that the
22 FBI twitters back and said, We don't look at things again --

23 THE COURT: That's right, that's right, I remember
24 now.

25 MR. PETRANO: Okay. Mr. Katon and Mr. Katon

1 supposedly being fired. What we heard here I think three
2 times I counted it was quote unquote, Katon, Katon knew it,
3 Katon knew it. I don't think that's the case. I'll get
4 into how I don't think Kyles applies in a sense that he's a
5 state agent when Kyles really speaks to the police not the
6 solicitor or just a witness I don't think falls into that
7 category. But nonetheless, I don't think Katon did know it.
8 If you look at that transcript Katon says he wasn't fired.
9 Didn't -- doesn't think he was fired. He's adamant about
10 that. He says he resigned. He says he -- his desk and he
11 sighted another gun and there was some friction between him
12 about the guy above him, but there was never any type of
13 allegation that there was any kind of policy violation as
14 far as like a crime scene or handling evidence it was just
15 office stuff, you know, put in your leave slip, don't --
16 your desk that kind of thing He didn't think he was fired.
17 So I don't think that's a Brady type of claim in a sense
18 that he doesn't think he was fired So I don't really get
19 the, well, Katon knew about it part.

20 THE COURT: Well, let's me ask you, would it
21 matter?

22 MR. PETRANO: That's my second part is the
23 suggestion was that if counsel had known that, they would
24 have cross-examined him. And this was, maybe, the part
25 whether the trial counsel's joke was I would still be

1 cross-examining him about that, I might have gotten that
2 wrong the J.F. Hoover Letter. But the point was A, that's
3 speculative, we don't know what would have happened because they
4 never called Katon to cross-examine him or ask him about
5 supposedly being fired. But we kind of have a gist of what
6 his reply would be based on the -- I forget the name but the
7 transcripts from the other cases the Missouri or -- I'm
8 sorry, he denies he was ever fired and he explains it away,
9 just as I summed it up. He had -- sighted a gun and left
10 his office or his desk for an extra long lunch and that's
11 why they asked him to resign and he did. You want to call
12 that firing I, you know, I don't think that's that big of a
13 deal. I don't think that made that big of difference.
14 Obviously, we weren't there live we've just reading that
15 transcript but he explained that way.

16 Back to Kyles v. Whitley, again I don't -- I'm not
17 so sure I take that such a liberal reading of Kyles versus
18 Whitley, United States Supreme Court Case that, that -- that
19 kind of applied to the police and they knew that there was
20 some inconsistent statements from the eyewitness and for
21 whatever reason the prosecution did not present that and I
22 think that one of the prosecutors might have known, one of
23 them didn't. But that was not given over as Brady and that
24 was a clear violation. I don't think Kyles versus Whitley
25 speaks so far as to just old state's witness. Now, I will

1 completely concur and agree that Katon is the case here.

2 So, I'm not just saying he was some random witness. I mean,

3 I'm not going to --

4 THE COURT: A fact witness.

5 MR. PETRANO: That would just be false, you know.

6 But I don't think Kyles goes that far. I think an agent

7 like the police would be as to how Kyles witness be.

8 Because every time that they say I think it's -- every time

9 that they say agent for the state, they say the police; I

10 mean, it's followed right after it. They kind of limit that

11 to not just anybody. But again, back to my point a moment

12 ago that it really wasn't that big of a deal as Katon

13 himself said in the transcript that we have, he just

14 explained in a way that he wasn't fired, he adamant about

15 it, repeatedly

16 I was not really prepared for the Crawford issue

17 today, I think was kind of an ambush. I understand that it

18 was an issue at the PCR, it just wasn't -- I don't really

19 have any research on that as far as a rebuttal but I do

20 think your order speaks to that and explained why these are

21 the main complaints and those witnesses were not testimonial

22 at that time, it has kind of -- I use the phrase I heard in

23 some case "window dressing" in the sense that, A, there be

24 no prejudice, but B it was just testimonial -- non

25 testimonial in telling the story and leading up to the

1 investigation. There was the cab found and they didn't know
2 where it was and -- said this. At that point it really
3 wasn't a murder investigation, it could have been suicide
4 anything like that. Judge, I think your order covers that,
5 I wish I had more, I just didn't have any notice that, that,
6 was going to be an issue here today.

7 THE COURT: All right.

8 THE DEFENDANT: And I'm not trying to be critical.
9 I understand that, that, was a big part of the PCR, I just
10 don't have anything whipped up and ready to explain away.

11 If, Your Honor, has any other questions the state
12 stands by --

13 THE COURT: You disagree with the --

14 MR. PETRANO Sorry.

15 THE COURT Mr. Bloom's response to my question
16 about the manner in which the appellate courts treat the
17 admission of evidence by a trial judge? In other words, it
18 appears to me that there is, generally speaking, a fairly
19 liberal attitude toward the admission of evidence by the
20 trial court in giving the trial court a great deference in
21 terms of what is admitted and what is not admitted under the
22 state rules. And I understand Mr. Bloom's position that
23 regardless of how it was admitted he said that Crawford
24 trumps the state's rule in that regard, but did the Supreme
25 Court address that issue in the direct appeal, do you

1 recall?

2 MR. PETRANO. There's some issues regarding the
3 business records. I think the pawn store receipts are some
4 of the issues on direct appeal, I don't have that in my mind
5 verbatim, but I do agree with the applicant that this is not
6 an ordinance deference in this sense that Crawford came out
7 after the trial, but Crawford does apply in the sense that
8 appellate counsel theoretically could have made the
9 arguments if there were Crawford issues. Obviously, in our
10 reply and in the clerk order -- in the order we take the
11 position that there were no Crawford issues, but it just
12 adds a whole another twist to the normal great deference
13 argument. And I just wanted to acknowledge that and
14 recognize that, and that was really something I had to
15 really wrapped my mind around, and I hope I answered
16 properly.

17 THE COURT. All right. Anything further?

18 MR. BLOOM: Just several brief points. On the
19 last question first, I think Melendez-Diaz versus
20 Massachusetts goes through directly to this. Melendez-Diaz
21 was the case that had to do with whether served reports of
22 examiners are admissible. They were admitted under a
23 business records acceptations in Massachusetts and -- said,
24 Look, that's all fine and good, but the confrontation clause
25 doesn't allow the admission of this type of evidence despite

1 the fact that it falls within an exception to the hearsay
2 rule.

3 On the Katon point, just two quick things, you
4 know, you can sort of read it for yourself; he did attempt
5 to explain the Missouri case, and, you know, we're going to
6 disagree the -- but he wants -- he was continually
7 confronted with -- we to had to admit that he was
8 terminated, fired, for failure to follow the policy and
9 protocol

10 On the Kyles verse Whitley point, I think it
11 clearly would apply to someone such as Mr. Katon, if they
12 weren't within the prosecution team, then you can imagine
13 all kinds of things which would be outside of our common
14 understanding of Brady. Imagine, for example, that Mr.
15 Katon had done the analysis and done it four times, and
16 three times it didn't match. And he finally does it again
17 and gets it. Under the rational argument by Mr. Petrano, he
18 wouldn't be under any obligation to disclose that, because
19 he's not -- even though it's clearly exploratory on the
20 issue because it doesn't apply, that would effectively
21 exclude SLED agents, anybody from SLED, the same rational,
22 wouldn't fall under the prosecution team even if they had --
23 for example DNA testing and excluded the defendant. The
24 prosecution could withhold that on the basis that they're
25 not part of the prosecution team. He was, you know, a state

1 agent hired and retained for the purposes of providing
2 testimony and I think he clearly falls under the Kyles Rule.

3 You know, as for the, the, Hoover Letter I think
4 the evidence on that it would have been clearly admissible.
5 Mr. Parnel, when he testified the -- was confronted with it,
6 he appeared actually very surprised by this. Acknowledged,
7 it was inconsistent with his testimony at trial, because and
8 that he said, Look, I didn't know this. I never seen this,
9 this is inconsistent to what I thought, and with what I
10 said So it would have been a very important, you know, I'm
11 not at all asserting that Mr. Parnel lied at his trial. I'm
12 just saying that he would have given the same testimony if
13 confronted with that document at Mr. Freiburger's trial, and
14 it would have given the jury a very different impression of
15 what the sort of pre Katon state of play was. Which was
16 important to the state's case because, you know, all they
17 had with Katon -- all of these other people had said that it
18 was inconclusive, so they wanted to try and get that
19 evidence as close as possible -- yes, it was inconclusive,
20 but it was very close and we just couldn't exclude it.

21 And, in fact, the documentary evidence which trial
22 counsel had painted a quite different picture, that
23 Lieutenant Katon had, in fact, did find the other gun and
24 that Mr. Parnel thought it could have been that gun or any
25 similarly situated gun So, I think those are significant

1 pieces of evidence which would have given the jury a
2 different view of the state of things in a case this close
3 and it is circumstantial, it could have made the difference
4 between conviction and acquittal, Your Honor.

5 THE COURT: Thank you, Mr. Petrano.

6 MR. PETRANO. No, I just wanted to add I don't
7 think Melendez-Diaz applies in this case in a sense that it
8 acts as more of a testimonial -- non testimonial issue where
9 it was the state's -- the equivalent of SLED toxicology or I
10 think it was a drug analysis

11 THE COURT: Drug case.

12 MR PETRANO: Right. And, so, that was suggestion
13 was that, that, was just business record and Supreme Court
14 said, No, the business is to make weapons so that's not
15 really a business record; Ohio Robinson and indication of,
16 you know, applied reliability. Ohio Robinson is still good
17 for non-testimonial is what we argued at the PCR and that's
18 what the order says in the -- the witnesses in the
19 complaints of the people who -- the hearsay that was
20 introduced was all non-testimonial and, even if there was
21 anything, again, I don't have it all at my fingertips this
22 wasn't an issue in the 59(E) really there is no prejudice
23 here. Thank you, Judge.

24 THE COURT. All right. Anything further?

25 MR. BLOOM: No, sir.

1 THE COURT. All right. I will take it under
2 advisement. Thank you very much.

3 MR. BLOOM: Thank you.

4 END OF PROCEEDINGS

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1 COUNTY OF RICHLAND)

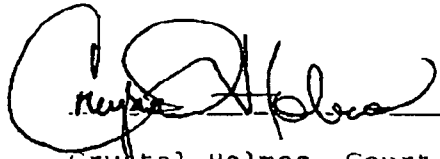
2 CERTIFICATE OF REPORTER

3 I, Crystal Holmes, hereby certify that I reported
4 the preceding case entitled Edward Freiburger V. State of
5 South Carolina, at the Richland County Courthouse, July 8,
6 2010.

7 I FURTHER CERTIFY that the foregoing pages 1
8 through 25 constitute a true, accurate and full transcript
9 of said hearing.

10 I FURTHER CERTIFY that I am not employed by any of
11 the parties hereto and I have no financial interest in the
12 outcome of said case.

13 IN WITNESS WHEREOF, I have heretofore set my hand
14 and seal at Richland County on this 30th day of August,
15 2010.

16 

17 Crystal Holmes, Court Reporter
18 and Notary Public for the
19 State of South Carolina my
Commission Expires:
April 21 2014

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STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
2006-CP-40-03866

Edward Freiburger, 296115,)
Applicant,)
vs.)
State of South Carolina,)
Respondent.)

**ORDER DENYING
APPLICANT'S 59(e) MOTION**

FILED
2010 OCT -7 PM 1:08
JEANETTE W. McBRIDE
C.C.P. & G.S.

The undersigned has reviewed carefully the Applicant's Motion to Alter or Amend the Judgment. In addition, I have reviewed the entire file, with submissions, to determine if my Order of February 8, 2010, is indeed my final opinion of this case. The Applicant's Motion points out four areas of conflict which are categorized as "egregious defects."

I. Reversal of Prior Evidentiary Rulings.

Applicant is correct in that the Court did allow Dr. Steven Laken to testify as an expert about his f-MRI imaging results. However, this testimony, reliable or unreliable, has little to do with the ultimate issue in this case, i.e., the representation of the Applicant by his counsel, Mr. Delgado. Dr. Laken's testimony was extremely interesting and had he testified at trial may have persuaded the jury, but that didn't happen and is not a basis for granting post conviction relief. Similarly with Dr. Adina Swartz, her expert testimony at the PCR hearing was accepted as her opinion of the state of scientific knowledge about ballistics evidence and its potential unreliability. Nevertheless, I do not feel that the



acceptance of this testimony changes the ultimate conclusion of the Order that Mr.

Delgado's performance in representing Applicant was not deficient

II. The J. Edgar Hoover Letter and the Implicit Finding of False

Testimony by Trial Counsel.

The Order does not imply, nor was it meant to imply that Mr Delgado or Ms Hudgins lied under oath during these proceedings. Memories fade, confusion happens, inconsistencies occur, none of which rise to the level of conscious falsehood. The question before the Court is what did Mr Delgado know and when did he know it. Was the Strom letter of such importance to alert an experienced practitioner that this letter could provide exculpatory evidence which should have been used at trial, or was the letter ambiguous such that counsel did not give it much consideration even if he could have gotten it introduced into evidence? Mr Delgado could not explain why he did not try to use the letter as exculpatory evidence (third party guilt) or for cross examination of John Cayton, the State's firearms expert. It may have been error to not try to use the letter in some manner or for some purpose, but that would be a bare thread upon which to grant post conviction relief. Mr Delgado's explanation that he Bates stamped the letter (or perhaps a member of his staff did) and did not ascribe great importance to it satisfies this Court.

III. The Cayton Termination.

I am of the opinion that the Order adequately addresses the John Cayton "termination" issue. Again, Mr Delgado's performance was not deficient on the issue. He challenged Cayton's testimony on cross examination with the knowledge of Cayton's background that he had at the time.



IV. Closing Argument.

Regarding the State's final argument, the Order may have been intemperate and inartful regarding Mr. Delgado's testimony as to why he failed to object to portions of the Solicitor's closing argument, but, after a thorough re-review of the final argument, I affirm the Order's conclusion that the argument reveals nothing beyond reasonable inferences drawn from the testimony and evidence presented during the trial to which Mr Delgado may have felt were not objectionable. As such, I do not find Mr Delgado's performance deficient in this regard.

Conclusion

The testimony, evidence and legal arguments presented during this PCR hearing were articulate and impressive. Had these same presentations been given to Applicant's jury, the result may have been different, and then again, maybe not. But that is not the standard by which I must judge this case.

A two-prong test for determining effective assistance of counsel has been set forth by the U. S. Supreme Court in *Strickland v Washington*, 466 U. S. 668, 104 S. Ct. 2052, 80 L. Ed. (2d) 674 (1984). First, a defendant must show that counsel's performance was deficient. Under this prong, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." 466 U. S. at 688, 104 S. Ct. at 2065. The second prong of the *Strickland* test requires a showing that the deficient performance prejudiced the defendant to the extent that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." The defendant is required to overcome the presumption that counsel was effective in order to receive relief.

Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989).

After careful consideration of the record in this case and the submissions of counsel, this Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or facts not



appropriately considered. Accordingly, this court hereby DENIES Appellant's Motion pursuant to Rule 59(e) SCRCP to Alter or Amend Judgment of this Court's Order of February 8, 2010. Pursuant to Rule 59(f), the court is of the opinion that oral argument is not necessary.

AND IT IS SO ORDERED.



G. THOMAS COOPER, JR.
Judge, Fifth Judicial Circuit

October 7, 2010

Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NO: 2006CP4003866

Edward #286115 Freiburger

vs.

State of South Carolina

Plaintiff

Defendant

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC, ☐ Rule 41(a),
SCRPC (Vol Nonsuit), ☐ Rule 43(k), SCRPC (Settled), ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC, ☐ Bankruptcy,
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award,
☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX)**

☐ Affirmed, ☐ Reversed, ☐ Remanded, ☐ Other

NOTE ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL

IT IS ORDERED AND ADJUDGED:

☒ See attached order,

☐ Statement of Judgment by the Court

Dated at Columbia, South Carolina, this _____ day of _____, 2010

PRESIDING JUDGE

This judgment was entered on the _____ day of _____, 2010, and a copy mailed first class this 8 October 2010, to attorneys of record or to parties (when appearing pro se) as follows

John H. Blume III
Susan Barber Hackett

ATTORNEY(S) FOR THE PLAINTIFF(S)

Robert L Brown
Brian T Petrano

ATTORNEY(S) FOR THE DEFENDANT(S)

Clerk of Court

SCRCP APP-24/FORM 4

SCANNED

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**Appeal from Richland County
Honorable Judge G. Thomas Cooper, Jr., Circuit Judge**

CA No. 06-CP-40-3866

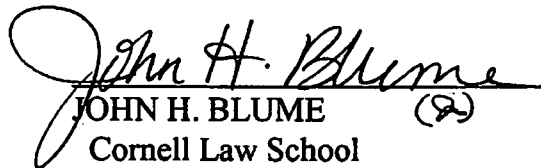
EDWARD FREIBURGER, SCDC #286115, ... Appellant

v.

STATE OF SOUTH CAROLINA, ... Respondent

NOTICE OF APPEAL

Edward Freiburger appeals the order of the Honorable Judge G. Thomas Cooper, Jr., dated February 10, 2010 denying his application for post-conviction relief and the order of October 7, 2010, denying his motion filed pursuant to SCRCivP Rule 59(e).


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

November 4, 2010

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County
Honorable Judge G. Thomas Cooper, Jr., Circuit Judge

CA No. 06-CP-40-3866

EDWARD FREIBURGER, SCDC #286115, ... *Appellant*

v.

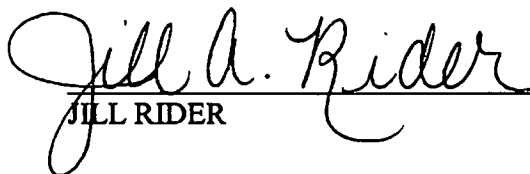
STATE OF SOUTH CAROLINA, ... *Respondent*

PROOF OF SERVICE

I, Jill Rider, hereby certify that I have served upon the attorney for the respondent one (1) copy of appellant's Notice of Appeal in the above-captioned case by depositing a copy of same in the United States Mail, first class, postage pre-paid, addressed as follows:

Brian T. Petrano
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211-1549

This the 4th day of November, 2010, in Columbia, South Carolina.


JILL RIDER

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

CA No. 2006-CP-40-3866

EDWARD FREIBURGER. *Petitioner,*

v.

STATE OF SOUTH CAROLINA *Respondent.*

PETITION FOR WRIT OF CERTIORARI

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Counsel for Petitioner

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OTHER AUTHORITY

U.S. Const. amend. VI.	19

QUESTIONS PRESENTED

The murder conviction challenged in this petition arose out of a homicide that went unsolved for forty years. A prosecution only became viable when a former Kansas forensic examiner claimed to find a match between the same bullet fragment and firearm that at least seven SLED examiners could not make. At trial, the prosecution paired the Kansas examiner's testimony with a weak circumstantial case made primarily through the hearsay contents of police reports. Before the PCR court, petitioner's evidence showed that the State's ballistics evidence could have been destroyed through a combination of SLED reports contradicting the Kansas examiner's conclusions, and documentation proving the same examiner had been fired from a Kansas forensic laboratory for incompetence and then lied about it under oath. The PCR evidence also showed there was no basis consistent with the Sixth Amendment for the admission of the testimonial hearsay contained in the police reports. The PCR court's denial of relief in the face of this evidence raises the following important questions requiring this Court's review:

- I. **WHETHER THE PCR JUDGE ERRED IN FINDING COUNSEL'S FAILURE TO ADEQUATELY CHALLENGE THE BALLISTICS EVIDENCE WAS NOT UNREASONABLE AND PREJUDICIAL?**
- II. **WHETHER THE PCR JUDGE ERRED IN FINDING THE STATE'S FAILURE TO DISCLOSE CAYTON'S PRIOR FALSE TESTIMONY DID NOT VIOLATE THE DUE PROCESS REQUIREMENTS OF *BRADY V. MARYLAND*?**
- III. **WHETHER THE PCR JUDGE ERRED IN FINDING POLICE REPORTS ARE NONTESTIMONIAL HEARSAY AND THUS VIOLATED PETITIONER'S CONFRONTATION CLAUSE RIGHTS AS ESTABLISHED IN *CRAWFORD V. WASHINGTON*?**
- IV. **WHETHER THE PCR JUDGE ERRED IN FINDING APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE THE CONFRONTATION CLAUSE ISSUE ON APPEAL?**

STATEMENT OF THE CASE

Edward Freiburger petitions for review of the post-conviction relief ("PCR") judge's orders denying relief. 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.

On August 2, 2002, Freiburger was found guilty of the 1961 murder of Columbia cab driver, John Orner. This Court affirmed on direct appeal. *State v. Freiburger*, 366 S.C. 125, 620 S.E.2d 737 (2005). Freiburger thereafter applied for post-conviction relief, contending, *inter alia*, that he was entitled to a new trial because: (1) trial counsel were ineffective in failing to object to testimonial hearsay on Confrontation Clause grounds; (2) appellate counsel was ineffective for failing to raise the Confrontation Clause violation on appeal; (3) trial counsel were ineffective for failing to investigate and present evidence of third party guilt; (4) trial counsel were ineffective for failing to challenge the methodology underlying the State's ballistic evidence; (5) trial counsel were ineffective for failing to adequately challenge the ballistics evidence; (6) the State's improper closing argument violated Due Process; (7) the State failed to turn over *Brady* material concerning their key witness, Cayton; (8) trial counsel were ineffective for failing to present character evidence; and (9) newly discovered f-MRI¹ test results proved that Freiburger was being truthful when he denied murdering Orner.

After conducting an evidentiary hearing, the PCR judge adopted the State's proposed order denying relief, which found, among other things, that: (1) the f-MRI evidence did not warrant a new trial; (2) proof of the unreliability of the prosecution's firearms evidence would not have affected

¹The f-MRI, or functional magnetic resonance imaging, test is not a typical polygraph examination, but rather involves a new, more sophisticated and accurate method of determining whether an individual is being truthful. Brain imaging as a method of determining truthfulness has a 98% accuracy rate. App at 1363. Dr. Steve Laken, Founder, President, and CEO of the Cephus Group, a competent and world class leader in the use of f-MRI, personally examined Freiburger and testified at the PCR hearing that he has never had a false negative when testing, i.e., where someone is lying but the results indicate the truth. App. at 1364. Dr. Laken testified that the results of the f-MRI testing established that Freiburger was being truthful when he stated he had no involvement in Orner's murder.

the outcome at trial; (3) the Confrontation Clause arguments had no merit; (4) trial counsel's failure to utilize an FBI letter (the Hoover letter) describing a third-party suspect was not prejudicial; (5) the prosecution's suppression of information regarding Cayton's firing from a state crime lab did not violate *Brady*; (6) the State's closing argument merely made reasonable references to the evidence; and, (7) trial counsel made a strategic decision not to present evidence of Freiburger's good character. In response to Freiburger's subsequent motion to alter or amend the judgment, the PCR judge adhered to most of the previously adopted findings but modified some determinations relating to the veracity of trial counsel's PCR testimony. This petition follows.

FACTUAL BACKGROUND

In 1961, Freiburger was an Army private stationed at Fort Jackson near Columbia, South Carolina. Like many soldiers from Fort Jackson, Freiburger would occasionally visit a pawnshop or stay in a hotel in downtown Columbia when permitted to leave the base. February 28, 1961, was one of those occasions. App. 573-74; 589; 752. On that evening, cab driver John Orner failed to return home after being dispatched to the NCO club at Fort Jackson. Orner's blood-stained cab was found the next day on Assembly Street, near the pawn shops and hotels frequented by soldiers. App. 518; 538-44. That same day, John Morgan, a soldier in Freiburger's unit, went AWOL after returning to the barracks covered in blood. Kay Beaver Statement. Morgan later admitted he had called a cab to pick him up at Fort Jackson on the evening of February 28th. App. at 1488-89. Orner's body was discovered on March 3, 1961, by the side of the road in Lower Richland County. App. 331; 501. 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. 331; 649; 659; 663.

On March 29, 1961, Freiburger was stopped by Tennessee Highway Patrolman, Donald Meredith, for hitchhiking. App. 836. Meredith testified he stopped Freiburger because it was dangerous to be out walking or hitchhiking on the road as people had been struck by cars in the vicinity. App. 837. While patting Freiburger down before putting him in the patrol car, Meredith discovered and seized a .32 caliber H&R gun. App. 838-39. This gun was later given to Richland County authorities investigating Orner's murder. App. 840. Richland 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. 668. Although the tests performed in 1961 were 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 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. 679-81; 859; Hoover letter. Chief Strom went on to request F.B.I. assistance in examining the bullet. Hoover letter. 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 then 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. He maintained consistent, gainful employment, was a loving father and grandfather, and was active in his Catholic church and the surrounding community.³ PCR Exhibits.

²Dreher admitted that a number of known thieves and robbers, including members of his own family, had access to the weapon in his home. Hoover letter.

³Freiburger was described as a kind, peaceful, and gracious soul, and he made many contributions to his community in Fort Wayne, including: starting a successful landscaping business

Nearly forty years later, Richland County's newly-created "cold case" unit reopened the Ormer murder investigation. The Freiburger gun and the Dreher gun were retested by Ira Parnell, supervisor of the SLED Firearms Identification laboratory. App. 889-92. 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. 896-901. Parnell issued a report stating the bullet fragments recovered from Ormer could have been fired by the Freiburger weapon, the Dreher weapon, or by another similarly rifled firearm of the same caliber. Parnell report. Including Cate and Parnell, at least seven SLED examiners tested the evidence and came to the same "inconclusive" results. App. 903-04; 906; 920-24.

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.⁴ 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

and employing his three children to teach them responsibility and to save for college; serving as a Eucharist Minister and the director of Fort Wayne's Catholic Youth Organization for ten years; coaching youth sports; and offering assistance to elderly women in the neighborhood. Affidavits of Habrowski, 5, 6; Jordan, 4,5; Renninger, 4,6,7,8; Tenbarger, 4,7.

⁴Among other infractions, Cayton was found to have failed to follow lab procedures, failed to demonstrate work proficiency, failed to pass a competency test in firearms analysis, failed to take a required tool mark competency test, and failed attend work regularly. Cayton Termination Letter. He also persisted in operating a private lab from his residence, after being warned not to do so, without prior approval of his supervisor. *Id.*

same striations positively matched markings from the Freiburger gun, to the exclusion of all other similar guns. App. 1000. On the basis of this extraordinary claim, Freiburger was charged with Omer's murder in 2001. After being notified of the charge, Freiburger drove himself from Indiana to South Carolina, and turned himself in. App. 485.

At trial, the State built its case around Cayton's scientifically unsound ballistics testimony, supplemented with prejudicial testimonial hearsay and improper jury argument. Additionally, the proceedings were further distorted by what the jury did not hear, including persuasive evidence that a known third party may have committed the homicide, and powerful proof of Freiburger's decent, non-violent character. Acting on this misleading and incomplete evidentiary presentation, the jury convicted Freiburger, and he was subsequently sentenced to life in prison. This Court affirmed on direct appeal. *State v. Freiburger*, 366 S.C. 125, 620 S.E.2d 737 (2005).

Freiburger then filed a PCR application raising a number of grounds for relief. At the PCR hearing, Freiburger presented as newly-discovered evidence the testimony of Dr. Steve Laken, who reported that Freiburger had passed a f-MRI test showing he was truthful when he denied murdering Omer. App. 1359-98. Dr. Adina Schwartz testified regarding the inherent unreliability of modern firearms and tool mark identification.⁵ She explained that unreliability is particularly likely in a case as old as the Omer homicide, because firearms are known to "foul" after decades without proper care. App. 1450. Furthermore, Dr. Schwartz testified that there is no scientific basis to say, as Cayton did at Freiburger's trial, that a particular weapon fired a projectile to the exclusion of all

⁵Dr. 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. 1407-08.

other similar weapons.⁶

Ira Parnell also testified at the hearing, describing the various tests performed on the single bullet fragment and explaining that bodily fluids had degraded the bullet fragments to such an extent that conclusive results could not be obtained. Additionally, despite his trial testimony that he had found no similarities with the Dreher gun, Parnell admitted at the PCR hearing that his report indicated that he could not exclude or include the Freiburger gun, the Dreher gun or any other similar weapon. App. 903-05; 1525-26. He did not disavow his report at the hearing. Parnell also acknowledged the Hoover letter's assertion that Lt. Cate believed the Dreher gun was the murder weapon, although Lt. Cate had not written a formal report on the case. App. 1527-28.

Freiburger also presented the testimony of his trial and appellate counsel. Appellate counsel, John Nichols, testified that while *Crawford* had been announced several weeks before Freiburger's appellate brief was filed, Nichols was not fully aware of that landmark decision, and had not made a strategic decision to omit a Confrontation Clause issue from Freiburger's appeal. App. 1479-86.

⁶The National Research Council, under the auspices of the National Academy of Sciences, agrees with her. National Research Council, *Strengthening Forensic Science in the United States: A Path Forward*, Prepublication Report (2009) (noting that with the exception of nuclear DNA analysis, no forensic method has been rigorously shown to be able to match consistently and with a high degree of certainty to a specific individual or source); National Research Council, *Ballistics Imaging*, Prepublication Report (2008) (noting that the assumption of uniqueness and reproducibility of firearms-related toolmarks has not been fully demonstrated). A number of courts also agree with Dr. Schwartz. See *Melendez-Diaz v. Massachusetts*, 557 U.S. ___, 128 S.Ct. 2527 (2009) (citing the *Strengthening Forensic Science* report and noting ballistics evidence is prone to subjectivity, bias, and unreliability); *United States v. Glynn*, 578 F.Supp. 2d 569 (S.D.N.Y. 2008) (limiting firearms examiners to testifying that their identifications were more likely than not); *United States v. Green*, 405 F.Supp. 2d 104, 109 (2005) (limiting experts to testifying about similarities and not about identification conclusions); *United States v. Monteiro*, 407 F.Supp. 2d 351 (D. Mass. 2006) (excluding firearms identification); *United States v. Diaz*, 2007 WL 485967 (N.D. Cal. Feb. 12, 2007) (preventing experts from testifying to their conclusions to the exclusion of all other firearms in the world).

Trial counsel, Katherine Hudgins, testified that she recalled there was a soldier from Freiburger's unit named John Morgan who had blood on him at the time of the murder and went AWOL shortly thereafter. App. 1488. However, she did not recall whether she knew Morgan was interviewed and admitted to calling a taxi to pick him up at Fort Jackson on the night of the murder. App. 1489. Hudgins did not know why the Hoover letter was not used at trial, and she was not aware of Cayton's 1999 firing from the KBI at the time of Freiburger's trial. App. 1490-91; 1492-97 Finally, trial counsel, John Delgado, testified on a separate date. He explained that although the Hoover letter had been Bates stamped and appeared in his Index, he did not recall the letter at all, and had no strategic reason not to utilize it or Parnell's report at trial. App. 1575-76; 1587-88. Delgado also recognized that Cayton's testimony had been the linchpin of the prosecution's case, such that access to the truth about his firing from KBI would have been powerful evidence and extremely beneficial to the defense. App. 1592-93.

ARGUMENTS

I. THE PCR JUDGE ERRED IN FINDING TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO ADEQUATELY CHALLENGE THE STATE'S BALLISTICS EVIDENCE THAT ONE BULLET FRAGMENT "MATCHED" FREIBURGER'S GUN.

The issue of whether the weapon recovered from Freiburger fired the bullets taken from Orner's body was the crucial point of contention at trial. Without establishing that link, the State could not connect Freiburger to the crime. Its previous failure to do so, before the State found John Cayton, was the reason no one was charged with the crime for almost forty years. Given the importance of the ballistics evidence, it was imperative for trial counsel to use every challenge available to them, including: (a) the Hoover letter, indicating that SLED examiner Millard Cate, a man described as the "dean" of ballistics evidence in South Carolina, concluded that another similar

gun was the murder weapon; and (b) Ira Parnell's report indicating that he could not exclude either the Freiburger or the Dreher gun. There is no probative evidence in the record to support the PCR judge's findings that these ballistic challenges would not have made a difference at trial, and this Court should reverse.

"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)). This Court will reverse if there is no probative evidence to support the PCR court's findings or the decision is controlled by an error of law. *Miller v. State*, 379 S.C. 108, 115, 665 S.E.2d 596, 599 (2008).

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*, 379 S.C. at 117, 665 S.E.2d at 600 (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, ___, 602 S.E.2d 768, 771 (2002) (holding counsel performed unreasonably in failing to present evidence of jail cell configuration which would have shown an adverse witness's testimony impossible).

In this case, trial counsel Katherine Hudgins testified at the PCR hearing that she did not know why the Hoover letter was not used at trial. App. 1490. In his sworn affidavit, trial counsel John Delgado acknowledged that, while it appeared he was provided the Hoover letter in discovery, he had no recollection of having seen it. He also explained that, had it been used at trial, the letter would have been powerful evidence that another gun had been used; he could not recall why he failed to use the letter, and he could imagine no strategic reason for not having done so. Delgado Aff. 2. Delgado further stated that he did not recall why he failed to cross-examine Parnell on the specific conclusions of his report, and he again denied any strategic reason for the omission. *Id.* During live testimony at the PCR hearing, Mr. Delgado also maintained that he had no recollection of the letter and made no strategic decision not to use it. App. 1587-88; 1596.

Ira Parnell also 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. Parnell also acknowledged the contents of the Hoover letter, indicating that SLED examiners tied this murder to a different weapon, and the fact that Lt. Cate never wrote a report excluding the Dreher gun. App. 1525-28. The PCR hearing evidence further established that trial counsel were in possession of both documents. Although Parnell's written report plainly contradicted Cayton's claim that the Freiburger gun – to the exclusion of all other similar guns in the world – 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. 904. Because trial counsel failed to utilize Parnell's report or the Hoover letter, however, the misimpression created by the trial testimony was not effectively challenged.

The PCR judge found that trial counsel's performance was not deficient.⁷ There is no evidence to support the PCR judge's findings. The prosecution's ballistic evidence was, by far, the most important component of the State's case. Trial counsel possessed, but failed to use, two important documents establishing that SLED's preeminent ballistics examiner believed a different weapon killed Orner, and that Parnell's own written assessment of the evidence did not comport with the characterizations he offered at trial. Trial counsel offered no strategic reason for failing to use these important documents, nor could there possibly be one. Counsel's failure to use this evidence, which went to the very heart of the prosecution's case against Freiburger, was constitutionally deficient. *See, e.g., Miller*, 379 S.C. at 117, 665 S.E.2d at 600; *Roberts*, 361 S.C. at ___, 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); *see also Beltran v. Cockrell*, 294 F.3d 730 (5th Cir. 2002) (finding counsel ineffective, such that the petitioner was prejudiced, where counsel failed to adequately investigate and to impeach eyewitness testimony that the defendant was the only person they had picked from photographic lineups); *Steinkuehler v. Meschner*, 176 F.3d 441, 445 (8th Cir. 1999) (affirming grant of relief and finding counsel's failure to use the available impeachment

⁷The original PCR order denying relief included a finding – in direct contravention of the testimony – that trial counsel *did* recall the Hoover letter, and had explained his decision not to use it. *See App. 29* After reconsideration, however, the PCR judge found trial counsel could not explain why he did not try to use the letter. *App. 30*; Order Denying 59(e) Motion, 2. Further, the PCR order drafted by the State addressed the question of trial counsel's failure to effectively cross-examine Parnell with ballistics evidence, but the order failed to mention the Parnell report. Freiburger pointed out this deficiency in his Motion to Alter or Amend, to no avail. *App. 262*

material was prejudicial because it supported petitioner's defense to first-degree murder); *Williams v. Washington*, 59 F.3d 673, 679 (7th Cir. 1995) (granting writ due to trial counsel's ineffectiveness for, in part, failing to impeach state's main witness with available information).

The PCR judge also erred in finding Freiburger had not been prejudiced by counsel's omissions. While the PCR order observed without explanation that utilizing the Hoover letter could have been "detrimental," there is no evidence whatsoever to support that contention. SLED examiner Parnell testified at the PCR hearing, he never contradicted the letter's contents or the contents of his own report, and both clearly contradicted Cayton's claimed identification of Freiburger's gun as the murder weapon. Had the jurors been informed that the initial examiner, whose abilities were lauded at trial, concluded in 1961 that the Dreher gun was most likely the murder weapon, their appraisal of Cayton's claims would have been affected. Moreover, with the Hoover letter before the jury, the prosecution's portrayal of the inconclusive results reached by seven examiners as mere technical adherence to rigorous scientific protocols would have rung hollow.⁸

⁸In closing argument, the solicitor sought to reconcile Parnell's findings with Cayton's claims as follows:

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, but if six people say "oh man . . . Its so close, so close, . . . Every other 32 they looked at was excluded. One and only one [was] so close, so close. Freiburger's. Freiburger's.

...
Mr. Parnell tells them that, that it's not excluded . . . It's so close, remarkable individual similarities, excluded all other 32s.

...
Mr. Parnell says I don't disagree with Mr. Cayton. It's a matter of degree. I don't exclude it. It was so close.

App. 1239-40; 1242; 1243.

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 because Cayton's positive identification constituted the only evidence connecting Freiburger to the homicide, it is more than reasonably probable that discrediting that identification would have resulted in a different outcome at trial. *James*, 372 S.C. at 290, 641 S.E.2d at 901. Accordingly, this Court should reverse the judgment below and grant Freiburger a new trial.

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).

As described above, Cayton's testimony represented the sole evidence connecting Freiburger to Orner's murder. Without Cayton, there was no case against Freiburger. It was, therefore, imperative that the State disclose any impeaching evidence pursuant to *Brady*. The State failed to do so, and the PCR judge erred in finding this failure did not violate Freiburger's right to due process.

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. *State v. Bryant*, 307 S.C. 458, 461, 415 S.E.2d 806, 808 (1992). To establish a due process violation under *Brady*, an individual must show the evidence was: (1) favorable to the accused; (2) in the possession of or known by the prosecution team ; (3) suppressed by the State; and, (4) material to the accused's guilt or innocence or

impeaching. *Kyles v. Whitley*, 514 U.S. 419 (1995); *Gibson v. State*, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Whether or not the State has actual knowledge of impeachment evidence is irrelevant. See *Kyles*, 514 U.S. at 437 (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. 981) 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.
- Q. So let me show you what's – (Pause – the court reporter marked for identification Exhibit 192 which was later changed to State's Exhibit)
- Q. Sir, I'm handing you what's been marked now for identification as State's Exhibit 192. Do you recognize that?

A. Well, I may have seen it. I don't recall actually getting one, but I think they did show it to me.

Q. Okay. That letter is actually your termination letter dated October 29th of 1999?

A. Yes. It says that on there.

Q. Read the first line.

A. "This letter is to advise you of your termination status from your probationary status as a forensic scientist number three with the Kansas Bureau of Investigation pursuant to KSA 75-2946 and KARI-10-6 (c). This termination is based on the following facts."

Q. And it doesn't say anything about you resigning, does it?

A. I'm talking about a conversation we had.

Q. Well sir, my question is, does the letter say anything about you resigning?

A. No.

Q. The letter is signed by who? Go to the last page.

A. Larry Welch.

Q. And who is Larry Welch? The director of the KBI?

A. Yes.

Q. And it says in one of the very first paragraphs, citing the reasons, it was that you failed to follow policies, procedures and protocols of the KBI laboratory section. Is that fair?

App. 1494-1496 Both 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. 1492-97; 1592-95.

Despite this evidence, the PCR judge found “Cayton never testified in [Freiburger’s] trial that he retired from the Kansas Bureau of investigations,” because Cayton never mentioned the letters “KBI.” App. 31. The PCR judge inexplicably found it was mere speculation how Cayton would have responded to being cross-examined about his termination from KBI in the exact manner he was questioned in the *Denny* case. App. 32. The PCR judge also found that Cayton: disagreed that he was fired; believed he did not violate policies related to case investigations, and, instead, violated a policy against eating at his desk and against sitting a gun for another employee; and explained that he resigned rather than being issued a termination letter. App. 33. Finally, the PCR judge found that because Cayton disagreed with the interpretation that he was terminated, there was nothing concrete for the State to disclose pursuant to *Brady*. App. 34.

There is no evidence in the record to support the PCR judge’s findings. Cayton’s testimony that he “retired” from being an examiner in Kansas is patently untrue given he was “fired” from his job as an examiner in Kansas. There is no need to speculate regarding Cayton’s testimony: the certified transcript of the *Denny* case produced at the PCR hearing is unequivocal evidence of how Cayton would have testified regarding his reason for leaving KBI. The *Denny* transcript shows that Cayton was, in fact, fired for failing to follow policies and procedures, despite Cayton’s beliefs to the contrary. 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* and *Kyles*.⁹ The State's failure to produce this material evidence violated Freiburger's due process rights, and this Court should reverse the PCR judge's finding to the contrary and remand for a new trial.

III. THE PCR JUDGE ERRED IN FINDING POLICE REPORTS ARE NOT TESTIMONIAL WITHIN THE MEANING OF *CRAWFORD* v. *WASHINGTON*.

At Freiburger's trial, the prosecution was permitted, over objection, to prove its case with testimonial hearsay, including the testimony of Charles Clark and Gary Abersold. In rejecting Freiburger's claim that the admission of this testimony violated his Sixth Amendment right to confront the witnesses against him, the PCR judge held that the hearsay contents of the police reports admitted through Clark and Abersold were not testimonial.¹⁰ That holding cannot be reconciled with *Crawford v. Washington*, 541 U.S. 36 (2004).¹¹

Charles Clark, a former City of Columbia Police Officer, was permitted to publish verbatim much of the contents of a 1961 Columbia Police Department report in the Orner case. Although Clark was not responsible for preparing the report, at trial he was allowed to read most of its contents to the jury, and to authenticate the report as a document prepared by the Columbia Police Department. App. 567-71. The police report contained information from a number of witnesses who did not

⁹It is also important to note that the State did not call either of the trial prosecutors to deny having knowledge of Cayton's termination.

¹⁰The PCR judge rendered this conclusion in the course of denying relief on Freiburger's claims that trial and appellate counsel were ineffective for failing to raise a Confrontation Clause challenge on direct appeal. App. 25; 27-28.

¹¹*Crawford* was decided after Freiburger's trial but two weeks prior to the filing of his brief on direct appeal, and the PCR judge correctly found that it applies retroactively to this case. *Whorton v. Bockting*, 549 U.S. 406 (2007).

testify at trial and could not be cross-examined. For instance, the report contained information gathered by police officers in the course of their inquiries into the victim's disappearance and subsequently relayed by a police dispatcher to the victim's step-son. App. 569. The dispatcher reported that Orner received a phone call at 11:15 p.m. ordering a taxi, he then proceeded in his taxi to the NCO Club at Fort Jackson, and his abandoned taxi was seen parked at 4:00 a.m. the next day. App. 569. This testimony was crucial in establishing both a time line for the homicide and that a soldier from Fort Jackson was a likely culprit. In addition, the report contained information obtained by Detective Rollinson and Sergeant Harrell, including the reading on the meter and the fact that there was blood on the seat of the taxi. App. 570. None of the other declarants – the police dispatcher, Detective Rollinson, or Sergeant Hartell – were called as witnesses at trial. As a result, Freiburger had no opportunity to cross-examine any of these individuals regarding the police report despite the importance of their statements to the prosecution's circumstantial case that a soldier – i.e., Freiburger – was the killer.

Gary Abersold, Freiburger's bunkmate at Fort Jackson, made two different statements to officers investigating the Orner murder in 1961, to the effect that he accompanied Freiburger to pawn a radio at a pawnshop and that Freiburger at some point gave him .32 caliber ammunition. At trial, Abersold was asked by the State to recount the statements made to Captain Nichols in 1961. While Abersold stated that he recalled making statements to investigators forty years ago, he testified that he had no full and independent recollection of the statements. App. 722-23; 723-24. After being permitted to review the statements, Abersold still maintained that he had no independent, contemporaneous memory of the events in question. In the end, Abersold was permitted to read the statements into the record, but it was impossible to cross-examine him regarding the statements

because he could not remember them.

The PCR judge initially found Freiburger's argument with regard to Abersold failed because Abersold was present at trial and thus subject to cross-examination. App. 24-25. He further found Abersold did not recall "certain responses," the statements were not testimonial, and the testimony was not significant because it was not referenced by the South Carolina Supreme Court in the direct appeal opinion App. 25; 28. As to Clark, the PCR judge found that his relaying of the contents of the police report was non-testimonial, and the information was not critical to the case. App. 27-28. This was clear error.

The Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with witnesses against him." U.S. Const. amend. VI. In South Carolina, the right is guaranteed not only by the Sixth and Fourteenth Amendments, but also by the State Constitution. *State v. Green*, 269 S.C. 657, 661, 239 S.E.2d 485, 487 (1977). In a criminal case it is not constitutionally permissible for the State to present testimonial statements by witnesses who are unavailable to testify and whom defense counsel has not had the opportunity to cross-examine. *Crawford*, 541 U.S. at 68. In *Crawford*, the Supreme Court held that even well-established exceptions to the hearsay rule do not trump the Confrontation Clause because, "[w]here testimonial evidence is at issue . . . the Sixth Amendment demands what common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 67.

Since *Crawford*, the South Carolina Supreme Court and the Supreme Court of the United States have consistently recognized that witness unavailability and a prior opportunity for cross-examination are required whenever the prosecution seeks to admit testimonial hearsay evidence. See e.g. *State v. Mitchell*, 378 S.C. 305, 313-14, 662 S.E.2d 493, 498 (2008) (holding that admission of

an accomplice's prior statement to police under the hearsay exception violated the Confrontation Clause).¹² Statements are "testimonial when the circumstances objectively indicate that there is no ... ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S. 813, 822 (2006) (holding that statements taken by law enforcement as part of a criminal investigation fall squarely in the category of testimonial hearsay).¹³ The mere fact that a report may satisfy a business record or other hearsay exception does not exempt it from the rigors of the Confrontation Clause. See *Melendez-Diaz v. Massachusetts*, 557 U.S. ___, 129 S.Ct. 2527, 2538 (2009) (noting that it has been clear for decades that if the regularly conducted business activity is the production of evidence for use at trial, the evidence is subject to the right of confrontation).

The PCR order's finding that the police reports were not testimonial defies the well established rules described above. The report published through Clark's testimony was replete with information obtained by law enforcement at various stages during the investigation of the case, long after any "emergency" had passed, with an eye toward preserving evidence for prosecution, and it

¹²The only current exception to this rule, which is not applicable here, is when a defendant acts with the clear and explicit intention to prevent a witness from testifying. See *Giles v. California*, 544 U.S. ___, 128 S.Ct. 2678 (2008).

¹³See also, e.g., *State v. Ladner*, 373 S.C. 103, 112, 644 S.E.2d 684, 688 (2007) (noting statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency, and statements are testimonial when the circumstances objectively indicate there is no ongoing emergency and that the primary purpose is to establish or prove past events potentially relevant to future prosecution); see also *Cuyuch v. State*, 667 S.E.2d 85, 89 (Ga. 2008) (holding a witness's identification of the defendant at the crime scene was made for the purpose of establishing past facts with a view to a future prosecution, making the statement testimonial); *State ex rel. J.A.*, 949 A.2d 790, 791 (N.J. 2008) (holding statements describing a robbery committed ten minutes earlier were testimonial).

indisputably was presented for the truth of the matters asserted. Because the investigators involved in the case were not available at trial, Freiburger was unable to cross-examine them. Under these circumstances, this report plainly constituted testimonial hearsay whose admission violated the Sixth Amendment and the rule of *Crawford. Davis*, 547 U.S. at 822. The trial court violated Freiburger's Confrontation Clause rights when it admitted this evidence, and the PCR judge erred in holding otherwise..

Freiburger's Confrontation Clause rights were further violated when the trial court allowed the admission of Abersold's out-of-court statements. Those statements were obtained by police investigators during an active murder investigation, and were submitted for the truth of their assertions. While Abersold was present in court, the PCR judge erred in finding this meant Abersold was subject to cross-examination regarding the statements. Abersold testified that he did not remember the content of the statements and certain facts in them. He was not asked by the State to testify from his memory, nor was he given the statements to refresh his memory. In fact, after being given the opportunity to review his 1961 statement Abersold still had no independent memory of its contents. Instead, the statements were merely read into the record. With a complete and utter inability to recall the information contained in the statements, Freiburger had no opportunity for cross-examination. Abersold, like a witness with no personal knowledge, or a witness exercising his Fifth Amendment rights, was functionally "unavailable" for cross-examination at trial. *See State v. Pfirman*, 300 S.C. 84, 86, 386 S.E.2d 461, 462 (1989) (noting "[w]hen . . . the declarant refuses to admit the statement imputed to him, the accused is denied effective cross-examination in violation of his confrontation rights"); *State v. Terry*, 339 S.C. 352, 529 S.E.2d 274 (2000) (discussing situation where a witness was unavailable due to the exercise of his Fifth Amendment rights).

The admission of the testimonial hearsay evidence was extremely prejudicial. The State's case was entirely circumstantial, consisting of dubious, hotly contested ballistics evidence, and circumstantial information suggesting the killer may have been a soldier from Fort Jackson. As reflected in the solicitor's explicit reliance upon it in closing argument, the testimony of Clark and Abersold substantially bolstered the State's case. App. 1227; 1230; 1232. Had the trial judge correctly excluded the testimonial hearsay, the State would have been unable to establish crucial connections in the case against Freiburger.

IV. THE PCR JUDGE ERRED IN FINDING APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE A CONFRONTATION CLAUSE ISSUE PURSUANT TO *CRAWFORD V. WASHINGTON*.

As noted *supra*, the PCR judge's erroneous determination that the contents of the police reports admitted through Clark and Abersold was made in the context of rejecting Freiburger's claim that appellate counsel was ineffective in failing to raise a Confrontation Clause challenge on direct appeal.¹⁴ Having erroneously determined that no confrontation violation had occurred, the PCR judge went on to hold that trial counsel adequately preserved the issue and appellate counsel made the strongest arguments he thought were applicable. App. 28-29. This, too, was error.

Ineffective assistance can occur when trial counsel fails to raise an objection to exclude otherwise improper evidence. *Mitchell v. State*, 298 S.C. 186, 189, 379 S.E.2d 123, 125 (1989)

¹⁴In his PCR application, Freiburger also argued that trial counsel was ineffective in failing to object on Confrontation Clause grounds to the admission of the testimonial hearsay statements of Clark and Abersold. The PCR judge disagreed and found trial counsel sufficiently preserved *Crawford* objections at trial. App. 28-29. However, to the extent this Court may disagree with the PCR judge's findings that trial counsel adequately preserved objections to this testimony pursuant to *Crawford*, Freiburger alternately argues trial counsel was ineffective in failing to preserve these issues based on arguments similar to the ones above, and stated in detail in his pre-trial brief. App. 107-17

(holding counsel was ineffective for failing to move to exclude the introduction of improper bad character evidence); see *Mason v. Scully*, 16 F.3d 38, 45 (2nd Cir. 1994) (finding counsel ineffective and resulting prejudice where counsel failed to object to testimony by police detective about hearsay statement of non-testifying co-defendant); see also *Girts v. Yanai*, 501 F.3d 743, 759 (6th Cir. 2007) (finding counsel ineffective and resulting prejudice where counsel failed to object to prejudicial statements by prosecutor). Ineffective assistance can also occur when appellate counsel fails to raise an issue on appeal that was properly raised at trial. See, e.g., *Douglas v. California*, 372 U.S. 353, 357-358 (1963) (recognizing constitutional right to counsel on direct appeal); *Southerland v. State*, 337 S.C. 610, 613-617, 524 S.E.2d 833, 834-836 (1999) (appellate counsel ineffective in capital case for failing to raise meritorious record-based challenge to capital sentencing jury instruction); see also *United States v. Cook*, 45 F.3d 388, 395 (10th Cir. 1995) (appellate counsel constitutionally obligated to raise issues which are “obvious from the trial record”); *Matire v. Wainwright*, 811 F.2d 1430, 1438 (11th Cir.1987) (failure to raise issue which “was obvious on the record” constituted deficient performance).

Constitutionally effective appellate counsel would have recognized the *Crawford* violations associated with the Clark and Abersold evidence and raised them on appeal. While the PCR judge correctly noted that appellate counsel Nichols testified he tried to raise every issue he could, the judge failed to acknowledge Nichols’ candid admission that he had no strategic reason for omitting the *Crawford* claim that was apparent from the face of the trial record. App. 1479-82. For the reasons described *infra* in Argument III, the Confrontation Clause claim counsel could have raised was plainly meritorious, and his failure to assert it on direct appeal was constitutionally deficient. Moreover, because there is at least a reasonable probability that raising the claim would have resulted in reversal

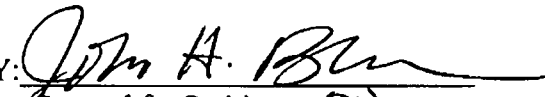
of Freiburger's conviction on direct appeal, appellate counsel's omission was prejudicial. *Southerland*, 337 S.C. at 616, 524 S.E.2d at 836 (citing *Strickland*, 466 U.S. at 685, 696; *Smith v. State*, 309 S.C. 413, 424 S.E.2d 480 (1992)). The PCR judge's finding to the contrary should be reversed.

CONCLUSION

The prosecution's case against Freiburger rested entirely on the uncorroborated claims of a disgraced forensic examiner, and circumstances described with inherently unreliable testimonial hearsay from forty-year old police reports. Had trial counsel utilized documents and evidence available to them, and had the prosecution disclosed the proof of Cayton's termination from the KBI and his dishonesty, the forensic case against Freiburger would have fallen apart. Moreover, had the prosecution not been permitted to bolster the weak forensic evidence with evidence plainly inadmissible under the Confrontation Clause, no rational jury would have voted to convict. Because the PCR court's denial of post-conviction relief is not supported by the evidence or the law, this Court should grant certiorari.

Respectfully submitted,

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

BY: 
Counsel for Petitioner (S)

February 24, 2011

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

CA No. 2006-CP-40-3866

EDWARD FREIBURGER. *Petitioner,*

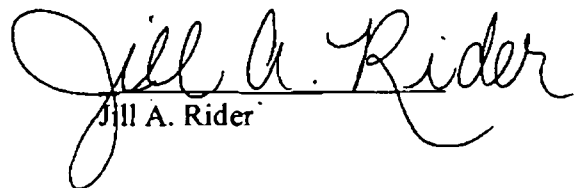
v.

STATE OF SOUTH CAROLINA *Respondent.*

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of Petitioner's Petition for Writ of Certiorari and Appendix was mailed today by first class United States mail, postage prepaid, this 24th day of February, 2011, upon the following:

Brian Petrano
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211


Jill A. Rider

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2006CP4003866

Freiburger, Edward, 286115, ... Petitioner,

v.

State of South Carolina, ... Respondent.

**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**

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY ELLIOTT
Assistant Deputy Attorney General

BRIAN T. PETRANO
Assistant Attorney General

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JOHN H. BLUME

Cornell Law School
Myron Taylor Hall
Ithaca, New York 14853

ATTORNEYS FOR PETITIONER

ATTORNEYS FOR RESPONDENT

PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed July 5, 2006. The Respondent made its Return on February 9, 2007. The Petitioner filed several amendments to his original application for Post-Conviction relief. The first amendment was filed on November 13, 2008; the second on July 15, 2009; the third on August 3, 2009; and the fourth on August 17, 2009. The Petitioner also filed a "Pretrial Brief" on August 4, 2009. In addition, the Petitioner filed a "Notice of Intent to Rely Upon Depositions, Affidavits and other Documentary Evidence" on July 30, 2009. The Respondent filed a reply to the Petitioner's notice captioned "Objection to use of Affidavits, Depositions, and Other Documentary Evidence in Lieu of Live Testimony" on August 8, 2009.¹ An evidentiary hearing into the matter was convened on August 13, 2009 at the Richland County Courthouse. Because witness John Delgado, Esquire [trial counsel] was not available, the record was held open and he testified separately on October 8, 2008.² The Petitioner was present at the hearing and was represented by John H. Blume, Esquire. Brian T. Petrano of the South Carolina Attorney General's Office represented the Respondent.

The Petitioner himself never testified at the PCR hearings. The Petitioner's trial counsels, John Delgado, Esquire, and Katherine Hudgins,

¹ The issue of "discovery" prior to the PCR hearing ending up being moot because the Petitioner conceded that no depositions were ever taken.

² The Petitioner offered trial counsel's testimony in the form of an affidavit, the Respondent objected, ultimately the PCR Court received trial counsel's testimony live.

Esquire did testify. Petitioner's appellate counsel, John S. Nichols, Esquire testified. In addition, the PCR Court heard testimony from Dr. Steven J. Laken, Dr. Adina Schwartz, and SLED Agent Ira B. Parnell, Jr. As the Order of Dismissal explains, the PCR Court had before it the records of the Richland County Clerk of Court, the transcripts of the proceedings against the Petitioner, the Petitioner's records from the South Carolina Department of Corrections, the briefs and opinion from the Petitioner's direct appeal, as well as the above mentioned PCR related amendments, briefs, memos, and motions.

August 2002 Jury Trial

The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. The Petitioner was indicted by the June 2001 term of the Richland County Grand Jury for murder (01-GS-40-2955). The Petitioner was represented by John Delgado, Esquire, and Katherine Hudgins, Esquire. On July 25, 2002, the Petitioner proceeded to trial after which he was found guilty of murder. Petitioner was sentenced on August 1, 2002, by the Honorable Henry F. Floyd to confinement for a period of life imprisonment under 1961 law.

A timely Notice of Appeal was filed on Petitioner's behalf and an appeal was perfected by John S. Nichols. The South Carolina Supreme Court affirmed Petitioner's conviction and sentence. State v. Frieburger, Op. No.

26042 (S.C. Ct. App. filed September 26, 2005). Petitioner perfected a Petition for Writ of Certiorari to the United States Supreme Court, which was denied on May 22, 2006.

The Petition for Writ of Certiorari and the Appendix were filed on February 24, 2011. The Return to Petition for Writ of Certiorari is due today. For the reasons set forth below, the Respondent requests that the time limits for the Return be held in abeyance while the Petitioner corrects the Appendix and/or Petition in compliance with Rule 243(f), SCACR. In the alternative, should this request be denied, the Respondent respectfully requests an extension to complete the Return.

ARGUMENT

THE RESPONDENT REQUESTS THAT THE TIME LIMITS FOR THE RETURN TO PETITION FOR WRIT OF CERTIORARI BE HELD IN ABEYANCE WHILE THE PETITIONER REMOVES/SUPPLEMENTS THE APPENDIX WITH THE REQUIRED DOCUMENTS PER RULE 243(f), SCACR

The Respondent submits that the Appendix, as submitted, is inadequate and is not in compliance with Rule 243(f), SCACR.³ Rule 243 (f), SCACR states:

(f) Content of Appendix. The Appendix shall contain:

- (1) The entire lower court record.
- (2) A copy of the final order entered after the post-conviction proceeding.
- (3) An index setting forth the principal matters contained in the Appendix. This index shall be in the same form required for a Record on Appeal under Rule 210(e).

Rule 243(f), SCACR.

The Respondent submits that the Appendix does not contain the entire lower court record. The lower court record was substantial - as stated by the PCR Court:

This Court had before it the records of the Richland County Clerk of Court, the transcripts of the proceedings against the Applicant, the Applicant's records from the South Carolina Department of Corrections, the briefs and opinion from the Applicant's direct appeal, as well as the ... PCR related amendments, briefs, memos, and motions.

(Order of Dismissal, p. 2; Current Appendix, p. 3).

Specifically, a cursory glance of the Appendix reveals that there are virtually no appellate court records despite the fact that ineffective assistance of appellate counsel is a claim on certiorari. (Current Appendix, p. i; Petition for

³ Rule 243 replaces the former Rule 227, SCACR.

Writ of Certiorari, p. i). The Appendix contains character affidavits which were specifically not admitted by the PCR Court (there does not appear to be an argument that the PCR Court erred in that ruling).⁴ (Current Appendix, p. 1638). Finally, the Appendix contains a transcript and other document(s) that were never before the PCR Court. (Current Appendix, p. 1678 – 1712). These documents attempt to portray one of the State's witnesses at trial in a negative light, yet none of these documents was ever presented to the PCR Court. The Respondent submits that the materials should be permanently struck so that the record is not tainted and that these materials are not exploited as supposedly part of a record in potential future actions, i.e. Federal Habeas or parole.

In all candor, this Respondent concedes that upon receiving the Petition and the Appendix, Petitioner's counsel was immediately contacted regarding these issues and it appeared that he agreed with one or more of these concerns. However, a Return is due today and there is little choice but to file this motion.

⁴ The Respondent concedes that the character affidavits were originally proffered as part of one or more of the Applicant's pre-PCR trial briefs/motions, nevertheless, the PCR Court ruled they were inadmissible. (Current Appendix, p. 1505).

CONCLUSION

For the reasons stated above, the PCR Court should hold the time limits for the Return to Petition for Writ of Certiorari in abeyance and require the Petitioner to correct the Appendix with the required materials and remove the materials that were never before the PCR Court.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY ELLIOTT
Assistant Deputy Attorney General

BRIAN T. PETRANO
Assistant Attorney General

P.O. Box 11549
Columbia, SC 29211
(803) 734-3737

By: _____
ATTORNEYS FOR THE RESPONDENT

Columbia, South Carolina
March 28, 2011

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Richland County
Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Edward Freiburger, 286115,

Petitioner,

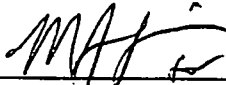
v.

STATE OF SOUTH CAROLINA,

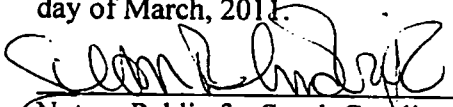
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Motion to Hold Time Limits for the Return to Petition for Writ of Certiorari has been served upon opposing counsel, John H. Blume by mailing two (2) copies addressed to: Cornell Law School; Myron Taylor Hall; Ithaca, New York 14853; with postage prepaid, this 28th day of March, 2011.


BRIAN T. PETRANO
ATTORNEY FOR RESPONDENT

SWORN to before me this 28th
day of March, 2011.

 (L.S.)
Notary Public for South Carolina.

My Commission Expires: ~~My Commission Expires~~
January 30, 2013

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

CA No. 2006-CP-40-3866

EDWARD FREIBURGER. *Petitioner,*

v.

STATE OF SOUTH CAROLINA *Respondent.*

MOTION TO CORRECT THE APPENDIX AND
TO FILE A SUPPLEMENTAL APPENDIX

Counsel for appellant, Edward Freiburger, hereby submits the following motion to remove certain documents from the current appendix and to file a supplemental appendix. This Court should grant the motion for the reasons set forth below.

1. First, several items were inadvertently or erroneously included in the appendix. These include: a) character affidavits; b) a termination letter and c) a deposition in the case of *Ronnie Trotter v. State of Missouri*. The character affidavits were offered and excluded

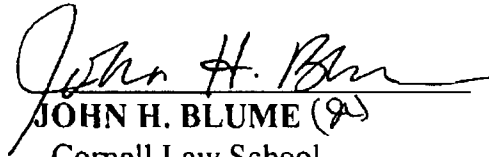
at trial on the basis that they were hearsay. Appellant initially intended to raise on appeal the PCR court's erroneous exclusion of these affidavits but ultimately decided not to do so given the testimony regarding appellant's exemplary life. However, counsel for appellant forgot to remove these items from the record prior to sending it to the printer. The termination letter was referred to in the testimony of several witnesses, and in a transcript excerpt of the testimony of state's trial witness, John Cayton, which was admitted at the PCR hearing. The letter was neither offered nor admitted as evidence at trial (counsel had not yet obtained it), and it was erroneously included in the appendix. Finally, the deposition in the case of *Trotter* was erroneously included in record by undersigned counsel's paralegal instead of the certified copy of the transcript in *State of Kansas v. Matt Denny*.

2. Second, several items were not included in the record by mistake. First, the testimony of John Cayton in *State of Kansas v. Matt Denny*, was admitted into evidence but not included in the appendix due to the mistaken belief that the above referenced deposition was the relevant excerpt. Second, the briefs and other appellate pleadings were inadvertently not included in the appendix. While these documents were not admitted into evidence, they were provided to the PCR Court and counsel for respondent desires to have them made part of the Appendix. However, both for issues of cost and to reduce the size of the record, counsel for appellant would request permission not to include the initial briefs (but only the final briefs and other relevant appellate documents) in the supplemental appendix.

WHEREFORE, undersigned counsel requests permission to correct the current

appendix by removing items which should not have been included in the appendix and to file a supplemental appendix including items which should have been included in the original appendix.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "John H. Blume", written over a horizontal line.

JOHN H. BLUME (92)
Cornell Law School
112 Myron Taylor Hall
Ithaca, NY 14853
(607) 255-1030

April 11, 2011

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

CA No. 2006-CP-40-3866

EDWARD FREIBURGER. *Petitioner,*

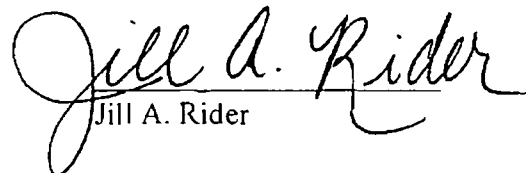
v.

STATE OF SOUTH CAROLINA *Respondent.*

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of Petitioner's Motion to Correct the Appendix and to File a Supplemental Appendix and Proposed Supplemental Appendix was mailed today by first class United States mail, postage prepaid, this 11th day of April, 2011, upon the following:

Brian Petrano
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211


Jill A. Rider

The Supreme Court of South Carolina

Edward Freiburger, Petitioner,
v.
State of South Carolina, Respondent.

ORDER

The State moves to hold the time limits for filing a return to the petition for a writ of certiorari in abeyance while petitioner removes certain documents from the appendix and adds other documents required by Rule 243(f), SCACR. Petitioner has filed a motion to correct the appendix and file a supplemental appendix, conceding the items addressed by respondent in its motion were inadvertently or erroneously included or excluded from the appendix. Petitioner has now filed a supplemental appendix that contains the documents that were not included in the initial appendix. We accept the supplemental appendix as filed.¹ Petitioner shall, within ten days of the date of this order, take steps to remove the documents he acknowledges are improper from the original and copy of the initial appendix on file with this

¹ We note petitioner requested that he not be required to include initial briefs in the supplemental appendix, but only the final briefs and other relevant appellate documents. That request is granted.

Court. The State's request to hold the time limits for filing its return in
abeyance until the appendix is corrected is granted.

IT IS SO ORDERED.



C. J.
FOR THE COURT

Columbia, South Carolina

April 13, 2011

cc: Assistant Attorney General Brian T. Petano
John H. Blume, III, Esquire

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2006CP4003866

Freiburger, Edward, 286115, ... Petitioner,

v.

State of South Carolina, ... Respondent.

**2nd 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**

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY ELLIOTT
Assistant Deputy Attorney General

BRIAN T. PETRANO
Assistant Attorney General

P.O. Box 11549
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JOHN H. BLUME

Cornell Law School
Myron Taylor Hall
Ithaca, New York 14853

ATTORNEYS FOR PETITIONER

ATTORNEYS FOR RESPONDENT

PROCEDURAL HISTORY

August 2002 Jury Trial

The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. The Petitioner was indicted by the June 2001 term of the Richland County Grand Jury for murder (01-GS-40-2955). The Petitioner was represented by John Delgado, Esquire, and Katherine Hudgins, Esquire. On July 25, 2002, the Petitioner proceeded to trial after which he was found guilty of murder. Petitioner was sentenced on August 1, 2002, by the Honorable Henry F. Floyd to confinement for a period of life imprisonment under 1961 law.

A timely Notice of Appeal was filed on Petitioner's behalf and an appeal was perfected by John S. Nichols. The South Carolina Supreme Court affirmed Petitioner's conviction and sentence. State v. Frieburger, Op. No. 26042 (S.C. Ct. App. filed September 26, 2005). Petitioner perfected a Petition for Writ of Certiorari to the United States Supreme Court, which was denied on May 22, 2006.

PCR

This matter comes before the Court by way of an Application for Post-Conviction Relief filed July 5, 2006. The Respondent made its Return on February 9, 2007. The Petitioner filed several amendments to his original application for Post-Conviction relief. The first amendment was filed on November 13, 2008; the second on July 15, 2009; the third on August 3, 2009;

and the fourth on August 17, 2009. The Petitioner also filed a "Pretrial Brief" on August 4, 2009. In addition, the Petitioner filed a "Notice of Intent to Rely Upon Depositions, Affidavits and other Documentary Evidence" on July 30, 2009. The Respondent filed a reply to the Petitioner's notice captioned "Objection to use of Affidavits, Depositions, and Other Documentary Evidence in Lieu of Live Testimony" on August 8, 2009.¹ An evidentiary hearing into the matter was convened on August 13, 2009 at the Richland County Courthouse. Because witness John Delgado, Esquire [trial counsel] was not available, the record was held open and he testified separately on October 8, 2008.² The Petitioner was present at the hearing and was represented by John H. Blume, Esquire. Brian T. Petrano of the South Carolina Attorney General's Office represented the Respondent. Judge Cooper denied PCR. The Order of Dismissal was filed on February 9, 2010. The Petitioner filed a Rule 59(e), SCRCP motion that was received on February 25, 2010. The Return to the Rule 59(e), SCRCP motion was dated March 8, 2010. Judge Cooper held a hearing on the Rule 59(e), SCRCP motion on July 8, 2010. The Order denying the Petitioner's Rule 59(e), SCRCP motion was filed on October 8, 2010.

The Petition for Writ of Certiorari and the Appendix were filed on February 24, 2011. On March 28, 2011, the Respondent filed a

**MOTION TO HOLD TIME LIMITS FOR THE RETURN TO PETITION
FOR WRIT OF CERTIORARI IN ABEYANCE WHILE THE**

¹ The issue of "discovery" prior to the PCR hearing ending up being moot because the Petitioner conceded that no depositions were ever taken.

² The Petitioner offered trial counsel's testimony in the form of an affidavit, the Respondent objected, ultimately the PCR Court received trial counsel's testimony live.

**PETITIONER REMOVES/SUPPLEMENTS THE APPENDIX WITH
THE REQUIRED DOCUMENTS PER RULE 243(f), SCACR**

The Petitioner replied to the Motion on April, 11, 2011. This Court granted the motion on April 13, 2011. The Petitioner explained that they redacted the version of the Appendix on file with this Court (we did not receive a new appendix) and a Supplemental Appendix was filed.³

³ Because the copy of the Appendix in our file was not replaced, it is not perfectly clear what was redacted. A cursory inspection of the Appendix on file with this Court does show that the erroneous transcript and letter were redacted (pages 1678-1712). The Petitioner agreed that the character affidavits were "inadvertently or erroneously included in the appendix" (Motion to Correct Appendix, p. 1), yet the Appendix does still appear to contain the character affidavits discussed in the previous motion to strike (pages 222-234). The Petition itself also references and virtually quotes the struck affidavits (PWOC, p. 4-5). Also, the Appendix contains other affidavits (pages 177-209, 1638-1673) that were never entered into evidence at the PCR hearing, they were merely marked for identification, *see* PCR transcript, p. 133 L. 24 [App. p. 1475].

ARGUMENT

THE RESPONDENT REQUESTS THAT THE TIME LIMITS FOR THE RETURN TO PETITION FOR WRIT OF CERTIORARI BE HELD IN ABEYANCE WHILE THE PETITIONER REMOVES/SUPPLEMENTS THE APPENDIX WITH THE REQUIRED DOCUMENTS PER RULE 243(f), SCACR

The Respondent submits that the Appendix, as submitted, is inadequate and is not in compliance with Rule 243(f), SCACR.⁴ Rule 243 (f), SCACR states:

(f) Content of Appendix. The Appendix shall contain:

- (1) The entire lower court record.**
- (2) A copy of the final order entered after the post-conviction proceeding.**
- (3) An index setting forth the principal matters contained in the Appendix. This index shall be in the same form required for a Record on Appeal under Rule 210(e).**

Rule 243(f), SCACR.

The Respondent submits that the Appendix does not contain the entire lower court record. After receiving three (3) extensions, the Return to Petition for Writ of Certiorari (RPWOC) is due in a few days. Apart from the above listed issues with the existing version of the redacted appendix, it is impossible to craft the RPWOC because the Petitioner has failed to include the exhibits from the PCR hearing that were State/Respondent exhibits. Critically, two of the main allegations in the Petition are counsel's supposed failure to address confrontation clause issues. At the PCR hearing, several exhibits were introduced regarding that exact issue (App. p. 1578).⁵ These are

⁴ Rule 243 replaces the former Rule 227, SCACR.

⁵ Trial counsel filed several pre-trial confrontation clause based motions, and there was a hearing on the

important exhibits; they were referenced in the Order of Dismissal and are directly related to the allegations (App. p. 28-29).

The Respondent recognizes that they have received several extensions on this case. However, today and this weekend were set aside to finally complete the RPWOC and it cannot be done because the Appendix is still incomplete. For the reasons set forth above, and not for the purposes of delay, the Respondent respectfully requests this Court grant the motion to hold the time limits in abeyance while the Petitioner corrects the Appendix in compliance with Rule 243(f), SCACR. In the alternative, should this request be denied, the Respondent respectfully requests an extension to complete the Return.

matter. Those motions and the transcript of the hearing were both introduced at the PCR hearing as an exhibit as part of the examination of trial counsel. For example, one of the pre-trial motions was captioned as "Defendant's Memorandum in Support of Motion to Disallow Certain Writings Pursuant to Denial of Confrontation Clause and Due Process Clause."

CONCLUSION

For the reasons stated above, the Court should hold the time limits for the Return to Petition for Writ of Certiorari in abeyance and require the Petitioner to correct the Appendix with the required materials per the rule.

Respectfully submitted,

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Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

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By: 

ATTORNEYS FOR THE RESPONDENT

Columbia, South Carolina
September 9, 2011

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Richland County
Honorable G. Thomas Cooper, Jr. Circuit Court Judge

Edward Freiburger, 286115,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

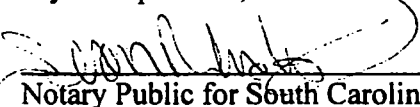
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the 2nd Motion to Hold Time Limits for the Return to Petition for Writ of Certiorari in Abeyance While the Petitioner Removes/Supplements Per Rule 243(f), SCACR, has been served upon opposing counsel, John H. Blume by mailing two (2) copies addressed to: Post Office Box 11744; Columbia, SC 29211; with postage prepaid, this 9th day of September, 2011.


BRIAN T. PETRANO
ATTORNEY FOR RESPONDENT

SWORN to before me this 9th
day of September, 2011.

 (L.S.)
Notary Public for South Carolina.

My Commission Expires: ~~My Commission Expires~~
January 30, 2013

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge S.C. Supreme Court

CA No. 2006-CP-40-3866

RECEIVED

SEP 14 2011

ORIGINAL

EDWARD FREIBURGER. *Petitioner,*

v.

STATE OF SOUTH CAROLINA *Respondent.*

**REPLY TO RESPONDENT'S MOTION TO HOLD TIME LIMITS
FOR FILING THE RETURN IN ABEYANCE**

Petitioner, through undersigned counsel, hereby replies to Respondent's Second Motion to Hold Time Limits for filing the Return to the Petition for Certiorari in Abeyance.

1. Filed along with this Reply is a Supplemental Appendix containing the State's exhibits from the PCR hearing. Counsel inadvertently failed to include these items in the original appendix filed in this matter.

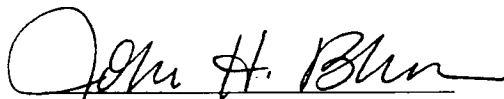
2. Counsel for respondent objects to the inclusion of affidavits in the appendix which were not admitted into evidence by the lower court. These affidavits were included in the appendix for several reasons. First, prior to the PCR hearing, petitioner filed a Notice of Intent to Rely on Affidavits. App. 77. It was (and is) petitioner's understanding that these items were part of the

lower court record and thus should be included in the appendix pursuant to South Carolina Appellate Court Rules 234(f)(1) which says the Appendix shall contain "the entire lower court record." Second, at the time the Appendix was prepared petitioner intended to raise an issue on appeal regarding the lower court's decision to exclude the affidavits given that S.C. Code §17-27-80 specifically states that "[t]he court may receive proof by affidavits, oral testimony or other evidence. . . ." However, undersigned counsel ultimately decided not to pursue this issue on appeal. Finally, the substance of the affidavits relates to petitioner's exemplary character during the forty year period between the time of the underlying crime in this case and petitioner's arrest. There was ample testimony on this point from petitioner's trial counsel at the PCR hearing, and thus the particular items discussed in the affidavits are, for the most part, redundant to the testimony presented at the PCR hearing.

3. However if petitioner's understanding of the meaning of the "entire lower court record" in Rule 234(f) is incorrect, counsel will certainly remove these items from the appendix.

4. Finally, petitioner has no objection to counsel for respondent being provided with additional time to file the return to the petition for writ of certiorari.

Respectfully submitted,


JOHN H. BLUME *JB*
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September 14, 2011



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

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October 19, 2011

Assistant Attorney General Brian T. Petano
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Re: Freiburger, Edward v. The State

Dear Counsel:

The following Order has been endorsed on your 2nd Motion to Hold Time Limits for the Return to the Petition for Writ of Certiorari in Abeyance While Petitioner Removes/Supplements the Appendix in the above entitled case on appeal.

"Motion denied.

s/ Jean H. Toal C.J.
For the Court

October 20, 2011."

Please be advised your Return to the Petition for Writ of Certiorari should be served and filed within ten (10) days of the date of this letter.

Very truly yours,

CLERK

DES/jj

cc: John H. Blume, III, Esquire

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2006CP4003866

Edward Freiburger, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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JOHN W. McINTOSH
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STATEMENT OF ISSUES ON APPEAL

WHETHER SUFFICIENT EVIDENCE OF PROBATIVE VALUE EXISTS TO SUPPORT THE PCR COURT'S CONCLUSION THAT THE PETITIONER FAILED TO DEMONSTRATE BOTH DEFICIENT PERFORMANCE AND PREJUDICE CONCERNING THE BALLISTICS ISSUE?

WHETHER SUFFICIENT EVIDENCE OF PROBATIVE VALUE EXISTS TO SUPPORT THE PCR COURT'S CONCLUSION THAT THE PETITIONER FAILED TO DEMONSTRATE BOTH DEFICIENT PERFORMANCE AND PREJUDICE CONCERNING THE CRAWFORD ISSUE?

STATEMENT OF THE CASE

The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. The Petitioner was indicted by the June 2001 term of the Richland County Grand Jury for murder (01-GS-40-2955). The Petitioner was represented by John Delgado, Esquire, and Katherine Hudgins, Esquire. On July 25, 2002, the Petitioner proceeded to trial after which he was found guilty of murder. Petitioner was sentenced on August 1, 2002, by the Honorable Henry F. Floyd to confinement for a period of life imprisonment under 1961 law.

A timely Notice of Appeal was filed on Petitioner's behalf and an appeal was perfected by John S. Nichols. This Court affirmed Petitioner's conviction and sentence.

1 pat down search of defendant, who was subject to arrest for hitchhiking, was a lawful search incident to arrest;

2 chain of custody established by state at trial was sufficient such that revolver was admissible;

3 pawn shop owner's daughter sufficiently authenticated pawn shop records detailing defendant's purchase of handgun and bullets, such that records were admissible;

4 references during trial that defendant was "stationed" at Fort Leavenworth did not prejudice defendant;

5 solicitor's comment during opening argument that defendant had been arrested for carrying arms was not prejudicial; and

6 circumstantial evidence was sufficient to support conviction.

....

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).

Petitioner perfected a Petition for Writ of Certiorari to the United States Supreme Court, which was denied on May 22, 2006.

This matter comes before the Court by way of an Application for Post-Conviction Relief filed July 5, 2006. The Respondent made its Return on February 9, 2007. The Petitioner filed several amendments to his original application for Post-Conviction relief. The first amendment was filed on November 13, 2008; the second on July 15, 2009; the third on August 3, 2009; and the fourth on August 17, 2009. The Petitioner also filed a "Pretrial Brief" on August 4, 2009. In addition, the Petitioner filed a "Notice of Intent to Rely Upon Depositions, Affidavits and other Documentary Evidence" on July 30, 2009. The Respondent filed a reply to the Petitioner's notice captioned "Objection to use of Affidavits, Depositions, and Other Documentary Evidence

in Lieu of Live Testimony” on August 8, 2009.¹ An evidentiary hearing into the matter was convened on August 13, 2009 at the Richland County Courthouse. Because witness John Delgado, Esquire [trial counsel] was not available, the record was held open and he testified separately on October 8, 2008. The Petitioner was present at the hearing and was represented by John H. Blume, Esquire. Brian T. Petrano of the South Carolina Attorney General’s Office represented the Respondent.

The Petitioner himself never testified at the PCR hearings. The Petitioner’s trial counsels, John Delgado, Esquire, and Katherine Hudgins, Esquire did testify. Petitioner’s appellate counsel, John S. Nichols, Esquire testified. In addition, the PCR Court heard testimony from Dr. Steven J. Laken, Dr. Adina Schwartz, and SLED Agent Ira B. Parnell, Jr.

Judge Cooper denied PCR. The Order of Dismissal was filed on February 9, 2010. The Petitioner filed a Rule 59(e), SCRCP motion that was received on February 25, 2010. The Return to the Rule 59(e), SCRCP motion was dated March 8, 2010. Judge Cooper held a hearing on the Rule 59(e), SCRCP motion on July 8, 2010. The Order denying the Petitioner’s Rule 59(e), SCRCP motion was filed on October 8, 2010.

The Petition for Writ of Certiorari and the Appendix were filed on February 24, 2011. On March 28, 2011, the Respondent filed a

¹ The issue of “discovery” prior to the PCR hearing ending up being moot because the Petitioner conceded that no depositions were ever taken.

**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**

The Petitioner replied to the Motion on April, 11, 2011. This Court granted the motion on April 13, 2011. The Petitioner explained that they redacted the version of the Appendix on file with this Court (the Respondent did not receive a new appendix) and a Supplemental Appendix was filed.² On September 9, 2011, the Respondent filed a:

**2nd 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**

The Petitioner replied to the motion on September 14, 2011 and submitted a 2nd Supplemental Appendix. On October 19, 2011 this Court issued an Order dated October 20, 2011 denying the 2nd motion to hold the time limits in abeyance and advising that the Return to the Petitioner for Writ of Certiorari should be filed within ten (10) days. This Return follows.

² Because the copy of the Appendix in our file was not replaced, it is not perfectly clear what was redacted. A cursory inspection of the Appendix on file with this Court does show that the erroneous transcript and letter were redacted (App. p. 1678-1712). The Petitioner agreed that the character affidavits were "inadvertently or erroneously included in the appendix" (Motion to Correct Appendix, p. 1), yet the Appendix does still appear to contain the character affidavits discussed in the previous motion to strike (App. p. 222-234). The Petition itself also references and virtually quotes the struck affidavits (Petition, p. 4-5). Also, the Appendix contains other affidavits (App. p. 177-209, 1638-1673) that were never entered into evidence at the PCR hearing, they were merely marked for identification, see PCR transcript, p. 133 L. 24 [App. p. 1475].

STANDARD OF REVIEW

The proper standard of review of a post conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). The reviewing court shall reverse the PCR judge's decision if it is controlled by an error of law. Pierce v. State, 338 S.C. 139 (2000). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant 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, 104 S.Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. "[A]ppellate counsel is not required to raise every nonfrivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990). The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland v. Washington. The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386

S.E.2d 624 (1989).

A two-pronged test is used 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 v. State, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland v. Washington. 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 v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

ARGUMENT 1

SUFFICIENT EVIDENCE OF PROBATIVE VALUE EXISTS TO SUPPORT THE PCR COURT'S CONCLUSION THAT THE PETITIONER FAILED TO DEMONSTRATE BOTH DEFICIENT PERFORMANCE AND PREJUDICE CONCERNING THE BALLISTICS ISSUE

As a threshold matter, the Respondent maintains that many of the arguments put forward in the Petition for Writ of Certiorari are based on information that was not before the lower court, or that was rejected by the lower court. For instance, the character affidavits merrily referenced in footnote three (3) of the Petition were rejected by the PCR court. (App. p. 1504-1505).³ Another assertion exists in footnote four (4) of the petition, and the associated text of the petition, a termination letter is referenced. No such letter was ever before the PCR court, and the Petitioner agreed that it was erroneously included, yet it somehow remains virtually quoted in full as part of the Petitioner's claims in his petition. As the PCR court explained, the Petitioner never bothered to call Mr. Cayton as a witness to substantiate the claim that he was ever terminated from any job. (App. p. 31 - 34). The Petitioner references Dr. Laken's hearsay statements that the Petitioner

³ Despite the fact that the court did not admit the character affidavits and the Petitioner himself agreed in his response to the 1st motion to correct the appendix that the character affidavits were inadvertently or erroneously included, they still exist in the record and are specifically referenced in his current Petition. (App. p. 222 - 234).

never lied when he said he did not kill the victim; the PCR court originally allowed Dr. Laken to testify, but specifically rejected his claims for various reasons. (App. p. 14 – 16; 43). Once again, the Petitioner holds these rejected items out as facts for this Court's consideration. (PWOC, p. 2). The Petitioner references what he calls "Parnell Report." (PWOC, p. 5). There was never any "Parnell Report" admitted as evidence before the PCR court. (See, Respondent's Reply to the Petitioner's Rule 59(e), SCRC motion, App. p. 268 – 270). The PCR court did not admit the ballistics affidavits, it merely agreed to having them marked for identification; (App. p. 1475 L. 24), yet those items remain in the Appendix in full. (App. p. 1638 – 1712). At the PCR hearing, the PCR court overruled an objection and admitted the ballistics studies. (App. p. 1475 L. 6). The PCR court expressly explained that "studies" were being discussed, not "affidavits." (App. p. 1473 L. 17 – 20). The Petitioner moved items 3, 4, 5, and 6 into evidence, which were affidavits, not studies. (App. p. 1475, L. 1 – 8; p. 1562 – 1563). It is clear that the PCR court was not intending that the ballistics affidavits be admitted as evidence, they were only marked for identification. (App. p. 1475 L. 9 – 24).⁴

Despite the Petitioner's claims, there is no evidence that Mr. Cayton was ever terminated from KBI, there is certainly no evidence that he was

⁴ The Respondent notes that the Petitioner claimed that the ballistics affidavits were "basically more the general science." (App. p. 1475 L. 16 – 17). Yet, the ballistics affidavits are not general science, they are specifically drafted for this case, for the Petitioner – one is specifically titled "Affidavit of William A. Tobin in Support of Applicant." (App. p. 1645). Another is titled "Affidavit of Alicia L. Carriquiry in Support of Applicant." (App. p. 1668).

terminated for failure to follow ballistics related protocols. The PCR court thoroughly addressed this issue as it was presented at the PCR hearing. (App. p. 29 - 35). As explained in the return to Rule 59(e), SCRCF motion, there is no report by SLED Agent Parnell that claims, "any other H&R .32 caliber weapon, could have been the murder weapon." (PWOC, p. 10). (App p. 268 - 270). At the PCR hearing, trial counsel first claimed that he had not seen the Hoover/Strom letter(s).⁵ (App. p. 1588 L. 1). Eventually, he conceded that he just did not presently recall having seen it, but that he did - at the time - Bates stamp it and specifically include it in his discovery table of contents. (App. p. 1588).⁶ Trial counsel explained "[w]ell, it may have been: How was I going to get that into evidence. Because Mr. Kate had passed away many years before." (App. p. 1588 L. 15 - 18). It was not clear whether the above explanation was a specific recollection or a guess, but counsel did agree that he must have seen the letters at the time because he did stamp them and list them in his file. (App. p. 1588). To be clear, counsel qualified his lack of recollection very carefully. Trial counsel stated, "I do not to this day recall a letter from Mr. Kate (sic) indicating that this weapon was the murder weapon to the exclusion of all other weapons." (App. p. 1588 L. 1 - 3). Well, it is certainly reasonable for trial counsel not to recall such a letter -

⁵ It does not appear that the Petitioner included the affidavit from trial counsel; if it is in the Appendix and this Respondent overlooked its location, it was not intentional. The affidavit was initially provided as a substitute to trial counsel's live testimony. (App. p. 77 - 79; 1570 L. 23 - p. 1571 L. 3). The Strom/Hoover letter(s) are on pages 218 - 220 of the Appendix.

⁶ At the pre-trial hearing when he argued the Confrontation Clause issue(s), trial counsel specifically stated that he applied the Bates stamps to the discovery materials - "I had to do that." (2nd Supplemental App. p. 25 L. 7).

because no such letter exists. Instead, the actual Strom letter does not contain any such phrase as "to the exclusion of all other weapons." (App. p. 218 - 220). Trial counsel is a skilled litigator who worked with PCR counsel to craft his testimony and chose his answers carefully.⁷ This continued even after the PCR hearing as Petitioner asserted in his Rule 59(e), SCRC motion. (App. p. 262 n.6). As explained in the Return to the Rule 59(e) motion, trial counsel was never asked about the Parnell report at the PCR hearing. (App. p. 269). It was trial counsel's affidavit that claimed that he reviewed Parnell's report that said "that any other gun in the world could have fired the bullet which killed Mr. Orner." (App. p. 269).⁸ Parnell's report never claims that "any other gun in the world" could have killed the victim. (App. p. 210 - 212). While the PCR court may have dialed back the rhetoric used to find counsel not credible, the recollection of trial counsel was in doubt. (App. p. 44 - 45). The PCR court evaluated trial counsel's credibility accordingly. The PCR court correctly found that the Petitioner failed to satisfy his burden of proof and demonstrate any prejudice or deficient performance. (App. p. 29 - 35).

As trial counsel explained, there is no direct evidence that Cate ever thought the bullet fragments matched another gun apart from the

⁷ Trial counsel explained that the affidavit was sent to him by PCR counsel and they edited it back and forth. (App. p. 1576, 1584, 1590, 1599).

⁸ This Respondent cannot locate trial counsel's affidavit in the Appendix, it was admitted into evidence on p.1590 ; however, a portion of the affidavit was pasted into the Return to the Rule 59(e), SCRC motion. (App. p. 269).

Petitioner's. Trial counsel explained the Strom letter as "[w]ell, it may have been: How was I going to get that into evidence. Because Mr. Kate [sic] had passed away many years before." (App. p. 1588 L. 15 – 18). In addition, as agent Parnell explained, the Strom letter does not contain a formal opinion. (App. p. 1527 – 1528). Regarding the Parnell report, the claim was that trial counsel's performance was deficient for failing to challenge Parnell at trial about his own report. The PCR court correctly denied relief on this issue. First, the claim was originally that the Parnell report could have been used at trial during examination of Parnell himself to show that he concluded that "any other gun in the world" could have killed the victim. (App. p. 1530 L. 10 – 18). As explained above, the Parnell report never said that. (App. p. 210 – 212). Accordingly, it would be impossible for counsel's performance to be deficient for failing to confront a witness regarding the specifics of a report that do not exist. Prejudice does not exist, because PCR counsel had an ideal opportunity at the PCR hearing to examine Parnell as he thought trial counsel should have done so at trial. (App. p. 1525 – 1533). As the PCR court found, the Petitioner examined Parnell at the PCR hearing and the results were hardly evidence of prejudice. (App. p. 30 – 31). The PCR court correctly noted the hypocrisy that despite the Petitioner's vehement argument that ballistics is not a reliable science and cannot satisfy the Jones factors or Rule 702, SCRE, he had absolutely no voir dire questions or objections whatsoever

to Parnell's qualification as an expert. (App. p. 20; p. 121 - 124; p. 1515 L. 1).⁹
State v. Jones, 343 S.C. 562 (2001).

The PCR court correctly denied the supposed Brady issue as well. (App. p. 34 – 35). Brady v. Maryland, 373 U.S. 83. The Petitioner claims “If a Brady violation is found to have occurred, PCR must be granted.” (Petition, p. 14, *citing*, Riddle v. Ozmint, 369 S.C. 39 (2004)). The phrase “Brady violation” as defined in the Petitioner's Riddle quote encompasses the four (4) pronged analysis that includes a materiality component, i.e. prejudice.

An individual asserting a Brady violation must demonstrate that evidence:

- (1) favorable to the accused;
- (2) in the possession of or known by the prosecution;
- (3) was suppressed by the State; and
- (4) was material to the accused's guilt or innocence or was impeaching.

Riddle v. Ozmint, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006).

Therefore, it is only if the four (4) factors of a supposed Brady violation are demonstrated by the Petitioner that PCR must be granted.

As the PCR court explained, there is no evidence that the State was aware of the contents of the purported termination information. (App. p. 34 – 35). There certainly is no evidence that the State suppressed the supposed information. The PCR court correctly found that there was no evidence that

⁹ While abandoned now on certiorari, Petitioner actually claimed that trial counsel was ineffective for failing to challenge the legitimacy of ballistics science as a whole. (App. p. 121; 1458)

Cayton was fired from KBI. (App. p. 31 – 34). Despite the incomplete hearsay cited in the petition as proof that Cayton was fired, the Petitioner never produced any of the Denny exhibits at the PCR hearing, nor did he call Cayton as a witness and examine him with the purported termination information. (Petition, p. 14 – 15).¹⁰¹¹ While it may be hearsay, the Denny transcript provided sufficient evidence for the PCR court to conclude that there was no evidence that Cayton was fired. The PCR court cited to specific items from the Denny transcript to support its findings. (App. p. 31 – 34). Rather than actually address the Denny transcript and attempt to argue that the PCR court incorrectly cited to probative evidence to support its findings, the Petitioner instead pads his petition with a supposed letter that the PCR court never had, all in an attempt to convince this Court that the PCR court did not know what it was doing. (Petition, p. 5; n. 4). No such termination letter was ever before the PCR court, and the Petitioner agreed that it was erroneously included, yet it remains virtually quoted in full as part of the Petitioner's version of the facts in his petition. The PCR court cannot err in failing to consider supposed evidence that was never before it. As to what was actually presented, the PCR court's order of dismissal correctly cites to the actual materials it had before it. "The appropriate scope of review is that "any

¹⁰ The hearsay quote from the petition is not a verbatim version of what is contained in the Denny transcript. (Petition, p. 14 – 15; Supplemental Appendix, p. 42 L. 8, L. 12; p. 43 L. 3, L. 7, L. 8, L. 11).

¹¹ The Respondent would note that counsel for the Petitioner did not call either trial prosecutor at the PCR hearing to testify regarding their knowledge of Cayton's retirement. Rule 71.1.(e), SCRCP.

evidence" of probative value to support the post-conviction judge's factual findings is sufficient to uphold those findings on appeal." Webb v. State, 281 S.C. 237, 238, 314 S.E.2d 839, 839 (1984).

ARGUMENT 2

SUFFICIENT EVIDENCE OF PROBATIVE VALUE EXISTS TO SUPPORT THE PCR COURT'S CONCLUSION THAT THE PETITIONER FAILED TO DEMONSTRATE BOTH DEFICIENT PERFORMANCE AND PREJUDICE CONCERNING THE CRAWFORD ISSUE

The PCR court correctly denied the Petitioner's Crawford claim(s), the Order of Dismissal, in its entirety and in relevant part, is based on evidence of probative value and is not an error of law. (App. p. 22 – 29). Crawford did not amount to a major watershed change. Whorton v. Bockting, 549 U.S. 406 (2007) (explaining the Crawford decision, while important, was not a profound or sweeping change). The old police report was read into evidence at trial. (App. p. 567 – 571).¹² Trial counsel did object, specifically citing the “Confrontation Clause”; the objection was a renewal of his previous objections/motions that were done in pretrial. (App. p. 294; Second Supplemental Appendix, p. 1 – 79). The pretrial hearing occurred years prior to the issuance of Crawford v. Washington, 541 U.S. 36 (2004).¹³ Nevertheless, trial counsel – a highly skilled litigator with decades of experience - made Crawford type arguments to the trial court during the pre-trial motions/hearings. The trial court agreed that “... ANYTHING IN PREPARATION FOR THE PROSECUTION OF THIS CASE, EVEN

¹² The Petitioner acts as though the pretrial objections never existed.

¹³ The pretrial Confrontation Clause memorandums were filed and the matter was heard on July 25, 2002. See, 2nd Supplemental Appendix.

THOUGH IT'S OVER 30 YEARS, WOULD VIOLATE THE CONFRONTATION CLAUSE." (Second Supplemental Appendix, p. 32). While not an argument presented by the Petitioner, the Respondent notes that it may have been a double edged sword for counsel to make the Confrontation Clause objections during pre-trial. It appears that the State may have altered its approach slightly and made sure to produce actual witnesses as evidence at the trial that it may had otherwise originally intended to introduce some of the evidence without a witness. Nevertheless, even if there was a Confrontation Clause issue with the testimony of Clark, as the PCR court found, there was nothing relayed that was not harmless. (App. p. 28 – 29). See, Lee v. Illinois, 476 U.S. 530 (1986) (finding harmless error analysis appropriate for Confrontation Clause claims).

As the PCR court explained, the introductory evidence from the old police report was not testimonial, it was nothing more than a missing persons report similar to a modern day 911 call.¹⁴ (App. p. 25 - 27). The missing person report was not designed to implicate the criminal assailant (but was to ascertain the nature of the victim's situation) it was not an immediate foregone conclusion that a crime had occurred. State v. Ladner, 373 S.C. 103 (2007) (finding, post Crawford, victim's statement clearly nontestimonial because responses were not designed to implicate the criminal assailant, but to ascertain the nature of the child's injury). Even an actual police

¹⁴ It is literally a "missing person report." (App. p. 280 L. 13).

interrogation of a witness is not necessarily testimonial if the interrogation's "primary purpose" concerns an "ongoing emergency." Davis v. Washington, 547 U.S. 813, 823 (2006).

While Crawford did not amount to anything "watershed," it did established a "new rule of criminal procedure" regarding the Confrontation Clause. Whorton v. Bockting, 549 U.S. 406, 421 (2007). The Petitioner argues that "[t]he mere fact that a report may satisfy a business record or other hearsay exception does not exempt it from the rigors of the Confrontation Clause." (Petition, p. 20). A strict reading of Crawford alone may support such a statement; however, Confrontation Clause jurisprudence has not remained static post Crawford. Bryant has been interpreted by some as "an expansive exception to the Confrontation Clause for violent crimes." Michigan v. Bryant, 131 S.Ct. 1143, at 1173 (2011) (Scalia, J., dissenting); Id., at 1176 (Ginsburg, J., dissenting). Bryant states that in deciding if a statement is testimonial, "standard rules of hearsay, designed to identify some statements as reliable, will be relevant."¹⁵ Bryant at 1155. This is undoubtedly the standard the trial court employed; neither trial counsel nor appellant counsel was deficient – and there is no prejudice.

The Petitioner claims that Clark's reading of the missing person report resulted in Petitioner not having an "opportunity to cross-examine any of the

¹⁵ If a statement is "nontestimonial" then, under Crawford, "the Confrontation Clause has no application to such statements ..." Whorton v. Bockting, at 420.

individuals regarding the police report despite the importance of their statements to the prosecution's circumstantial case that a soldier - i.e., Freiburger - was the killer." (Petition, p. 18). Apart from the disagreement as to whether such evidence was testimonial, the Petitioner ignores all the other circumstantial evidence and insists that the missing persons report was somehow paramount. The 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. p. 687 L. 12 - 20; p. 695 L. 19 - p. 697 L. 5). Petitioner had stayed at the hotel previously. (App. p. 761 L. 6 - 12). Later that day, Columbia police officer Frank Revetta (who testified live at the trial) discovered an abandoned and bloody cab down the street from the Gresham Hotel near the DeSoto Hotel at the intersection of Lady and Assembly streets in downtown Columbia. (App. p. 517 L. 19 - p. 518 L. 19; p. 570 L. 14). Ignoring purported deficient performance for a moment, the PCR court correctly found that the Petitioner failed to demonstrate any prejudice concerning the supposed confrontation issue(s). Even if there was a Confrontation Clause violation, relief is not automatic. See, Lee v. Illinois, 476 U.S. 530, (1986) (remanding case for determination of whether Confrontation Clause error was harmless). The Respondent submits, as explained above, Crawford did not materially affect this case. As explained

above, the missing person report and the portions of Abersold's testimony that the Peittioner claims was a violation of the Crawford could have – and were – argued via the Confrontation Clause during trial. Appellate counsel has impeccable credentials.¹⁶ Appellate counsel was aware of the Confrontation Clause arguments, because he ordered the pre-trial transcript well before he filed his brief.¹⁷ “[A]ppellate counsel is not required to raise every nonfrivolous issue that is presented by the record.” Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990). As explained throughout, the alleged Crawford issues put forward by the Petitioner are not necessarily examples of testimonial statements and they are hardly prejudicial.

As to witness Abersold, the PCR court correctly explained and cited to the record and Crawford that there was no confrontation issue because Abersold was present and did testify at the trial. (App. p. 24 – 25).¹⁸ While not specifically argued at the PCR hearing, the Petitioner now argues that Abersold was “functionally unavailable” and relies on Pfirman. (Petition, p. 21) State v. Pfirman, 300 S.C. 84 (1989). Interestingly, the Petitioner does not rely specifically on Crawford for Abersold because Crawford clearly does not apply as to a witness that “appears for cross-examination at trial,” Crawford,

¹⁶ Appellate counsel explained that he co-authors the Trial Handbook for South Carolina Lawyers [(West), now in its Fifth Edition] including the chapter on out of court statements. (App. p. 1484).

¹⁷ The pre-trial transcript was received by appellate counsel on January 27, 2003, the Initial Brief of Appellant was filed on April 1, 2004. (App. p. 22; 1580 L. 7).

¹⁸ Trial counsel clearly made a Confrontation Clause objection, as to Abersold's reading of his prior statement, anew and by renewing his pre-trial objections. (App. p. 726).

59 n.9. (App. p. 24; p. 738). "For where the declarant is not absent, but is present to testify and to submit to cross-examination, our cases, if anything, support the conclusion that the admission of his out-of-court statements does not create a confrontation problem." California v. Green, 399 U.S. 149, 162, 90 S. Ct. 1930, 1937 (1970), expressly cited with approval by Crawford, 59 n.9. The Petitioner's reliance on Pfirman is also clearly misplaced. This Court overruled Pfirman as to the very issue the Petitioner relies upon. In State v. Stokes, 381 S.C. 390 (2009) this Court overruled Pfirman precisely because Crawford specifically held that if the witness was available at trial and there was an opportunity for cross-examination then the Confrontation Clause is inapplicable. "Furthermore, as to cross-examination specifically, the Confrontation Clause 'guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" State v. Stokes, at 401-02.¹⁹ The PCR court did not lack any evidence of probative value nor did it commit an error law when it concluded that the Petitioner failed to satisfy his burden of proof and demonstrate deficient performance or prejudice.

¹⁹ The Petitioner has never argued that there is some sort of temporal limitation to the legal arguments of his allegations. For instance, the Petitioner has not claimed that because he is claiming appellate counsel should have argued Crawford and the case would have been dismissed had appellate counsel done so at the time, i.e. 2004, then it should not be possible to argue the implication of later cases because they would not yet exist. Glasscock, Inc. v. United States Fidelity and Guar. Co., 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001) (An argument in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief).

CONCLUSION

For the reasons stated above, this Court should affirm the PCR Court's Order and deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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Columbia, South Carolina
October 31, 2011

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Richland County
Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Edward Freiburger, 286115,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari has been served upon opposing counsel, John H. Blume by mailing two (2) copies addressed to: 1247 Sumter Street, Second Floor; Columbia, SC 2920; with postage prepaid, this 31st day of October, 2011.



BRIAN T. PETRANO
ATTORNEY FOR RESPONDENT

SWORN to before me this 31st
day of October, 2011.

 (L.S.)
Notary Public for South Carolina.

My Commission Expires: ~~My Commission Expires~~
January 30, 2013

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

CA No. 2006-CP-40-3866

EDWARD FREIBURGER. *Petitioner,*

v.

STATE OF SOUTH CAROLINA *Respondent.*

PETITIONER'S REPLY

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ARGUMENT IN REPLY

I. THE PCR JUDGE ERRED IN FINDING TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO ADEQUATELY CHALLENGE THE STATE'S BALLISTICS EVIDENCE THAT ONE BULLET FRAGMENT "MATCHED" FREIBURGER'S GUN.

The State argues the PCR judge correctly denied Freiburger's claim that trial counsel was ineffective in failing to adequately challenge the ballistics evidence, largely based on semantics. This is error.

Initially, Freiburger would like to address the State's endless complaints regarding items placed in the Appendix, including: character affidavits; Parnell's ballistics report; Cayton's termination letter; evidence from Dr. Larken; and ballistics affidavits. The character affidavits, Parnell's report, evidence from Dr. Larken, and various ballistics and scientific affidavits relied upon by Dr. Schwartz and other experts were all exhibits before the PCR court, and thus Freiburger placed them in the Appendix pursuant to Appellate Court Rules. Rule 243 (f)(1), SCACR (directing that the entire lower court record be placed in the Appendix). App. 1356; 1471-75; 1488-89; 1492; 1502; 1525 Further, despite the State's argument that the PCR court did not know what it was doing, the PCR court specifically admitted the ballistics affidavit evidence. App. 1474-75

In any event, the contents of all of these exhibits, including the Kansas Bureau of Investigation's letter outlining all the reasons it was terminating Cayton's employment, were brought out via other testimony at the PCR hearing. After reviewing the character affidavits, trial counsel testified about Freiburger's good character and reputation. App. 1501-04 Parnell was questioned about the findings in his report, and he admitted verbatim the precise findings contained therein that another similarly rifled gun could have shot the fatal bullet. App. 1525-27 While Cayton's

termination letter was not available until after the PCR hearing, Freiburger has apologized for inadvertently including it in the Appendix. At the PCR hearing, however, trial counsel Hudgins read from the transcript of the *Denny* case wherein Cayton was specifically asked about the contents of the termination letter, including the fact that he was terminated for failing to follow procedures. App. 1493-97 Trial counsel Delgado was also asked about knowledge of Cayton's firing from the Kansas Bureau of Investigations. App. 1591-94 Further, the PCR court admitted the certified copy of the *Denny* transcript, where the termination letter was discussed and quoted. App. 1593

Despite the State's many allegations of disingenuousness on the part of Freiburger's trial and PCR counsel, Freiburger was not attempting any form of trickery in including these items in the Appendix. All of the information the State complains about was before the trial court or the PCR court, often in multiple forms, and the rules require Freiburger to include everything before the lower court in the Appendix. Thus, Freiburger fails to see how this situation necessitated three pages of histrionic outrage.

Regarding the merits, the prosecution of this case was dependent on the ballistics evidence, without which there was no connection between Freiburger and the crime. Trial counsel had at his disposal the Hoover letter, showing the original investigators believed that another gun fired the fatal bullet, and Parnell's report, showing Parnell thought any other similarly rifled H&R .32 could have fired the bullet. App. 216-19; 1674-76 This evidence would have directly contradicted the State's evidence that a "consensus" existed among experts, including Parnell, that Freiburger's gun was used in the crime.¹ Trial counsel had an obligation to challenge the ballistics evidence, present favorable

¹The State dismisses Freiburger's ballistics arguments based on verbiage, like the phrases, "any other gun in the world," or "to the exclusion of all other weapons." Semantics aside, the State does not argue how failure to challenge the ballistics evidence with evidence that some other weapon

evidence, and expose inconsistencies in Parnell's testimony. *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, ___, 602 S.E.2d 768, 771 (2002) (holding counsel performed unreasonably in failing to present evidence of jail cell configuration which would have shown an adverse witness's testimony impossible); *State v. Dinkins*, 319 S.C. 415, 418, 462 S.E.2d 59, 60 (1995) ("Vigorous cross-examination [and] presentation of contrary evidence . . . are the traditional and appropriate means of attacking shaky but admissible evidence.").

Had trial counsel challenged the only evidence linking Freiburger to the crime, the outcome of the case would undoubtedly have been different. There is no legitimate strategic reason for failing to use this evidence at trial, and trial counsel indicated before the PCR court that he had no strategic reason for failing to do so.² App. 269; 1596 As argued in the Petition for Writ of Certiorari, because this prosecution was based largely on ballistics, any failure to challenge the ballistics evidence amounted to deficient representation resulting in prejudice. There is no evidence in the record to

could have fired the bullet was not prejudicial.

² The State admits trial counsel Delgado could have been guessing when he stated he might have neglected to use the Hoover letter because he did not know how to admit it. Ret. p. 10. The letter could have been admitted as an ancient document, which is how many items were admitted by the State at trial. Nevertheless, trial counsel's stream of consciousness conjecture did not amount to a strategic reason and does not negate the facts that Delgado had the letter at his disposal, and he should have used it in cross-examining the State's witnesses, as PCR counsel did with Parnell at the hearing. App. 1525-28 Delgado specifically testified he had no strategic reason for failing to do so. Further, the State correctly points out that the Delgado affidavit, admitted by the PCR judge as evidence at the hearing, was inadvertently left out of the Appendix. While portions of this affidavit are quoted in the State's Return to Rule 59 (e) motion in the record, a Supplemental Appendix containing the affidavit admitted into evidence at the PCR hearing has been filed with this Court. See Third Supplemental Appendix p. 1-3.

support the PCR court's findings otherwise, and, therefore, the order of the PCR court should be reversed and Freiburger granted relief.

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).

The State argues there is evidence of probative value to support the PCR court's denial of Freiburger's *Brady* argument because: (1) there was no evidence that the State was aware of Cayton's termination or that the State suppressed the information that Cayton was fired; and (2) the PCR court correctly found there was no evidence that Cayton was fired from the KBI. Ret. p. 13-14. These arguments are not supported by the probative evidence from the record.

Despite the State's argument that no evidence exists that Cayton was fired, the *Denny* transcript provides ample proof that Cayton was indeed terminated from his employment for violating rules and procedures and was given a termination letter outlining these reasons, despite Cayton's delusional belief to the contrary. It is well-established that actual knowledge of prosecutors is irrelevant because the knowledge of those acting on the government's behalf is imputed to the prosecutor. *Kyles v. Whitley*, 514 U.S. 419, 438 (1995) (noting that actual knowledge of impeachment evidence is irrelevant, because "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 Strickler v. Greene*, 527 U.S. 263, 280-82 (1999) (noting actual knowledge irrelevant, because prosecutors have a duty to learn of favorable evidence known by others acting on the government's behalf, even police from another county). The State does not address the well-established principle that prosecutors are responsible for all information known by members of the prosecution team and

State actors.

Cayton was the star witness in the prosecution's case and, like the SLED examiners and other officers, he was acting on the government's behalf in opining the bullet recovered was fired from Freiburger's weapon. Evidence that Cayton was fired for failing to follow KBI rules and procedures directly contrasted his testimony that he merely "retired," and also would have undermined the validity of his testing methods of the weapon. This information was clearly favorable to Freiburger, was known by Cayton acting for the State, was withheld by Cayton acting for the State, and was material to guilt and cross-examination. Freiburger was prejudiced because this information would have completely undermined Cayton's testimony and the entire case against him. Because all of the elements to support a *Brady* violation are found in this case, the PCR judge's findings should be reversed and Freiburger granted relief.

III. THE PCR JUDGE ERRED IN: (A) FINDING POLICE REPORTS ARE NOT TESTIMONIAL WITHIN THE MEANING OF *CRAWFORD v. WASHINGTON*; AND (B) FINDING APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE A *CRAWFORD* CLAIM.

The State combines Freiburger's third and fourth arguments in its Return. For the sake of brevity, the issues will be addressed similarly.

The State first argues the information collected by Columbia City Police Department in the course of a criminal investigation and published by Clark was not testimonial because it was a missing person's report, similar to a 911 call, and its admission was not prejudicial or violative of the Confrontation Clause. This is incorrect in both respects.

First, as argued in the Petition for Certiorari, the police report that was read into the record objectively indicated there was no ongoing emergency, thus making it testimonial in nature. Pet.

Cert. 17-21 The police were not attempting to deal with injured victims in an emergency situation or ascertain if medical assistance was needed. The report recounted events over a course of hours, and included information relayed from various people within the police department. The report also detailed information officers obtained in the investigation into the whereabouts of the victim and listed evidence collected at the scene, including blood evidence, with an eye towards future prosecution. App. 560-71 The “primary purpose” of the report was to recount information learned in the investigation, not deal with an ongoing emergency, and it falls squarely within *Crawford*’s meaning of “testimonial.” See *Michigan v. Bryant*, __ U.S. __, 131 S.Ct. 1143, 1164 (2011) (finding the primary purpose of the police questioning of a victim who had been shot was to deal with an ongoing emergency and end a threatening situation, making it nontestimonial); *Davis v. Washington*, 547 U.S. 813, 822 (2006) (holding that statements taken by law enforcement as part of a criminal investigation fall squarely in the category of testimonial hearsay); *State v. Ladner*, 373 S.C. 103, 112, 644 S.E.2d 684, 688 (2007) (noting statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency, and statements are testimonial when the circumstances objectively indicate there is no ongoing emergency and that the primary purpose is to establish or prove past events potentially relevant to future prosecution). The PCR judge erred in finding otherwise.

Second, the admission of the four-decade old testimonial police report violated the Confrontation Clause and was prejudicial. Freiburger was unable to cross-examine the actors in the report. *Crawford*, 541 U.S. at 68. (noting that it is not constitutionally permissible for the State to present testimonial statements of witnesses who are unavailable to testify and whom defense counsel

has not had the opportunity to cross-examine). The circumstantial information relied upon in the report suggested the killer may have been a soldier from Fort Jackson. As reflected in the solicitor's explicit reliance upon it in closing argument, the testimony of Clark and Abersold substantially bolstered the State's case.

Because this case was based entirely on circumstantial evidence and hotly contested ballistics evidence, information from Clark's testimony suggesting that a soldier, like Freiburger, may have been the killer was extremely prejudicial. Had the trial judge correctly excluded the testimonial hearsay, the State would have been unable to establish crucial connections in the case against Freiburger.

As to Abersold, the State argues the Confrontation Clause is satisfied if a witness is physically present at trial. While Abersold was *physically present* at trial, his complete lack of recall about the statements read into the record made him effectively unavailable because he was unable to be cross-examined.³ Presence is certainly a factor to consider, but the purpose of cross-examination is to challenge the content of testimony. *See Crawford*, 541 U.S. at 59-60 (noting that the Confrontation Clause does not bar admission of prior testimonial statements where the declarant is present to "defend or explain it"). In this particular instance, Abersold did not testify regarding the statements at all, he did not testify as to his current beliefs or identification, and he did not defend

³The State focuses on Freiburger's citation to *State v. Pfirman*, 300 S.C. 84, 386 S.E.2d 461 (1989), to undermine the argument about Abersold. While the State is correct that *Pfirman* was later overturned, a fact Petitioner admittedly failed to recognize, this case was not cited for the substance of Petitioner's argument and was only one example given of where a witness is unavailable for cross-examination. The fact still remains that there are many cases where a witness is "functionally unavailable" for cross-examination despite there being no barrier to physical presence at trial. *See Crawford*, 541 U.S. at 68 (noting that wife was unavailable as a witness due to spousal privilege and admitting her statements without prior opportunity for cross-examination violated the Confrontation Clause).

or explain the statements. In fact, Frieburger's opportunity to cross-examine would have been as "meaningful" had the trial court simply sent Abersold home and replaced him with a random person from the street. Because Abersold's forty-year old statements were read into the record, he specifically testified that he had no independent recollection of the contents, and Abersold failed to independently testify as to the contents, Frieburger was denied an opportunity to cross-examine him as to the contents. *Id.* Thus, the question is not whether Frieburger was able to cross-examine Abersold as effectively as he wished, but whether he was able to cross-examine Abersold at all about the report read into the record and admitted as substantive evidence that Frieburger had ammunition. Because, in this particular instance, the witness did not testify about anything, and merely read his prior statement, Frieburger was denied the ability to challenge the information against him in violation of the Confrontation Clause. *Crawford*, 541 U.S. at 59-60 (noting that the Confrontation Clause does not bar admission of prior testimonial statements where the declarant is present to "defend or explain it").

Finally, the State argues appellate counsel was not ineffective for failing to raise the *Crawford* issues on appeal. The State claims experienced appellate counsel was entitled to decide which claims to assert, but the evidence indicates Mr. Nichols did not make a strategic decision to exclude the *Crawford* issue and does not excuse his failure to do so. As argued in the Petition, appellate counsel is deemed ineffective for failing to recognize and raise the meritorious *Crawford* issues on appeal. See *Southerland v. State*, 337 S.C. 610, 613-617, 524 S.E.2d 833, 834-836 (1999) (appellate counsel ineffective in capital case for failing to raise meritorious record-based challenge to capital sentencing jury instruction); see also *United States v. Cook*, 45 F.3d 388, 395 (10th Cir. 1995) (appellate counsel constitutionally obligated to raise issues which are "obvious from the trial

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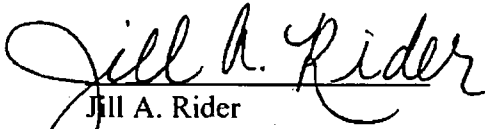
STATE OF SOUTH CAROLINA *Respondent.*

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of Petitioner's Reply was mailed today by first class

United States mail, postage prepaid, this 17th day of November, 2011, upon the following:

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Columbia, SC 29211


Jill A. Rider

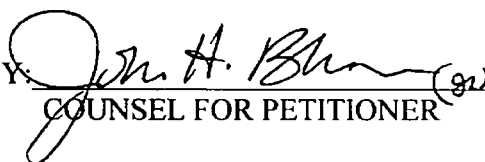
record”); *Matire v. Wainwright*, 811 F.2d 1430, 1438 (11th Cir.1987) (failure to raise issue which “was obvious on the record” constituted deficient performance). Because appellate counsel failed to raise the *Crawford* claims, and, as argued above, the claims would likely have been successful, appellate counsel’s failure resulted in prejudice.

CONCLUSION

The prosecution’s case against Freiburger rested almost entirely on the uncorroborated claims of a disgraced forensic examiner and circumstances and testimonial hearsay from forty-year old police reports. Had trial counsel utilized what was available to them, and had the prosecution disclosed the proof of Cayton’s firing and dishonesty, the forensic case against Freiburger would have fallen apart. Moreover, had the prosecution not been permitted to make its circumstantial case with evidence plainly inadmissible under the Confrontation Clause, no rational jury would have voted to convict. Because the PCR court’s denial of post-conviction relief is not supported by the evidence or the law, this Court should grant certiorari.

Respectfully submitted,

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November 17, 2011

The South Carolina Court of Appeals

Edward Freiburger, Petitioner;

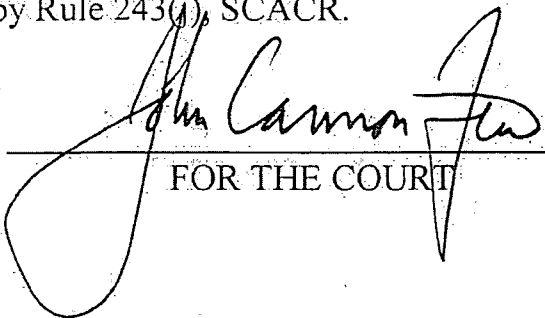
v.

State of South Carolina, Respondent.

Appellate Case No. 2010-177147

ORDER

This matter is before the Court on a petition for a writ of certiorari. The petition for a writ of certiorari is granted. The parties shall proceed to serve and file the appendix and briefs as provided by Rule 243(g), SCACR.


FOR THE COURT

C.J.

Columbia, South Carolina

cc: John H. Blume, III
Alan Wilson
John W. McIntosh
Salley Elliott
Brian T. Petrano

FILED

Aug. 2, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

CA No. 2006-CP-40-3866
Appeal Case No. 2010-177147

EDWARD FREIBURGER.....*Petitioner,*

v.

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

BRIEF OF PETITIONER

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STATEMENT OF ISSUES ON APPEAL

The murder conviction challenged in this appeal arose out of a homicide that was "unsolved" for forty years. A prosecution only became viable when a former Kansas forensic examiner (John Cayton) claimed to find a match between the same bullet fragment and firearm that at least seven SLED examiners refused to make. At trial, the prosecution paired the Kansas examiner's testimony with a weak circumstantial case made primarily through the hearsay contents of police reports. Appellant's evidence at the PCR hearing showed that the State's ballistics evidence could have been totally undermined through a combination of SLED reports contradicting the Kansas examiner's conclusions and a SLED examiner's trial testimony and documentation proving the same examiner had been fired from a Kansas forensic laboratory for incompetence and then lied about it under oath. The PCR evidence also showed there was no basis consistent with the Sixth Amendment's Confrontation Clause for the admission of the testimonial hearsay contained in the police reports. The PCR court's denial of relief in the face of this evidence raises the following important questions:

- I. **WHETHER THE PCR JUDGE ERRED IN FINDING COUNSEL'S FAILURE TO ADEQUATELY CHALLENGE THE BALLISTICS EVIDENCE WAS NOT UNREASONABLE AND PREJUDICIAL?**
- II. **WHETHER THE PCR JUDGE ERRED IN FINDING THE STATE'S FAILURE TO DISCLOSE CAYTON'S PRIOR FALSE TESTIMONY DID NOT VIOLATE THE DUE PROCESS REQUIREMENTS OF *BRADY V. MARYLAND*?**
- III. **WHETHER THE PCR JUDGE ERRED IN FINDING POLICE REPORTS ARE NONTESTIMONIAL HEARSAY AND THUS VIOLATED PETITIONER'S CONFRONTATION CLAUSE RIGHTS AS ESTABLISHED IN *CRAWFORD V. WASHINGTON*?**
- IV. **WHETHER THE PCR JUDGE ERRED IN FINDING APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE THE CONFRONTATION CLAUSE ISSUE ON APPEAL?**

STATEMENT OF THE CASE

Appellant, Edward Freiburger, alleges that the post-conviction relief (“PCR”) judge erred in denying post-conviction relief. 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.

On August 2, 2002, Freiburger was found guilty of the 1961 murder of Columbia cab driver, John Orner. The Supreme Court of South Carolina affirmed on direct appeal. *State v. Freiburger*, 366 S.C. 125, 620 S.E.2d 737 (2005). Freiburger thereafter filed a timely application for post-conviction relief, contending, *inter alia*, that he was entitled to a new trial because: (1) trial counsel were ineffective in failing to object to testimonial hearsay on Confrontation Clause grounds; (2) appellate counsel was ineffective for failing to raise the Confrontation Clause violation on appeal; (3) trial counsel were ineffective for failing to investigate and present evidence of third party guilt; (4) trial counsel were ineffective for failing to challenge the methodology underlying the State’s ballistic evidence; (5) trial counsel were ineffective for failing to adequately challenge the ballistics evidence; (6) the State’s improper closing argument violated Due Process; (7) the State failed to turn over *Brady* material concerning their key witness, Cayton; (8) trial counsel were ineffective for failing to present character evidence; and (9) newly discovered f-MRI¹ test results proved that Freiburger was being truthful when he denied murdering Orner.

¹ The f-MRI, or functional magnetic resonance imaging, test is not a typical polygraph examination, but rather involves a new, more sophisticated and accurate method of determining whether an individual is being truthful. Brain imaging as a method of determining truthfulness has a 98% accuracy rate. App. at 1363. Dr. Steve Laken, Founder, President, and CEO of the Cephus Group, a competent and world class leader in the use of f-MRI, personally examined

After conducting an evidentiary hearing, the PCR judge adopted the State's proposed order denying relief on February 8, 2010, which found, among other things, that: (1) the f-MRI evidence did not warrant a new trial; (2) proof of the unreliability of the prosecution's firearms evidence would not have affected the outcome at trial; (3) the Confrontation Clause arguments had no merit; (4) trial counsel's failure to utilize an FBI letter (the Hoover letter) describing a third-party suspect was not prejudicial; (5) the prosecution's suppression of information regarding Cayton's firing from a state crime lab did not violate *Brady*; (6) the State's closing argument merely made reasonable references to the evidence; and, (7) trial counsel made a strategic decision not to present evidence of Freiburger's good character. In response to Freiburger's subsequent motion to alter or amend the judgment, the PCR judge adhered to most of the previously adopted findings but modified some determinations relating to the veracity of trial counsel's PCR testimony. A petition for writ of certiorari was filed on February 24, 2011. The petition was granted on August 2, 2013.

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. 573-74; 589; 752. That evening, cab driver John Orner failed to return home after being dispatched to the NCO club at Fort Jackson. Orner's blood-stained cab was found the next day on Assembly Street, near the pawn shops and hotels frequented by soldiers. App. 518; 538-44. That same day, John Morgan, a soldier in Freiburger's unit, went AWOL

Freiburger and testified at the PCR hearing that he has never had a false negative when testing, i.e., where someone is lying but the results indicate the truth. App. at 1364. Dr. Laken testified that the results of the f-MRI testing established that Freiburger was being truthful when he stated he had no involvement in Orner's murder.

after returning to the barracks covered in blood. App. 173-74. Morgan later admitted he had called a cab to pick him up at Fort Jackson on the evening of February 28th. App. 1488-89. For reasons which are unclear from the police files, Morgan was never pursued as a suspect. Orner's body was discovered on March 3, 1961, by the side of the road in Lower Richland County. App. 331; 501. 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. 331; 649; 659; 663.

On March 29, 1961, Freiburger was stopped by Tennessee Highway Patrolman, Donald Meredith, for hitchhiking. App. 836. Meredith stopped Freiburger because he believed it was dangerous for an individual to walk or hitchhike on that particular road as people had been struck by cars in the vicinity. App. 837. While patting Freiburger down before putting him in the patrol car, Meredith discovered and seized a .32 caliber H&R gun. App. 838-39. This gun was later given to Richland County authorities investigating Orner's murder. App. 840. Richland 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. 668. 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. 216, 218, 679-81, 859. Chief Strom went on to request F.B.I. assistance in examining the bullet. App. 217, 219. No further action was taken on the case.

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. 216, 218.

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. He maintained consistent, gainful employment, was a loving father and grandfather, and was active in his Catholic church and the surrounding community. *See App. 1501.*

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. 889-92.* 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. 896-901.* 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. 1526-27.* Including Cate and Parnell, at least seven SLED examiners tested the evidence and came to the same "inconclusive" results. *App. 903-04; 906; 920-24.*

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

³ Among other infractions, Cayton was found to have "failed to follow policies, procedures, and protocols of the KBI Laboratory section." *Supplemental App. 43-44.* He also persisted in operating a private lab from his residence, after being warned not to do so, without prior approval of his supervisor. *Supplemental App. 127.*

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. 1000. 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. 485.

At trial, the State built its case around Cayton's scientifically unsound ballistics testimony, supplemented with prejudicial testimonial hearsay and improper jury argument. The proceedings were further distorted by what the jury did not hear, including persuasive evidence that a known third party may have committed the homicide and powerful proof of Freiburger's decent, non-violent character. Acting on this misleading and incomplete evidentiary presentation, the jury convicted Freiburger, and he was subsequently sentenced to life in prison. The Supreme Court of South Carolina affirmed on direct appeal. *State v. Freiburger*, 366 S.C. 125, 620 S.E.2d 737 (2005).

Freiburger then filed a PCR application raising a number of grounds for relief. At the PCR hearing, Freiburger 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. 1359-98. Dr. Adina Schwartz testified regarding the inherent unreliability of modern firearms and tool mark identification.⁴ She explained that unreliability is particularly likely in a case as old as the Orner homicide, because

⁴ 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. 1407-08.

firearms are known to “foul” after decades without proper care. App. 1450. Furthermore, Dr. Schwartz testified that there is no scientific basis to say, as Cayton did at Freiburger’s trial, that a particular weapon fired a projectile to the exclusion of all other similar weapons.⁵ App. 1439-40. 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.1453-57. She concluded this created a “significant risk of misidentification in this case.”⁶ App. 1458.

⁵ The National Research Council, under the auspices of the National Academy of Sciences, agrees with her. National Research Council, *Strengthening Forensic Science in the United States: A Path Forward*, Prepublication Report (2009) (noting that with the exception of nuclear DNA analysis, no forensic method has been rigorously shown to be able to match consistently and with a high degree of certainty to a specific individual or source); National Research Council, *Ballistics Imaging*, Prepublication Report (2008) (noting that the assumption of uniqueness and reproducibility of firearms-related toolmarks has not been fully demonstrated). A number of courts also agree with Dr. Schwartz. See *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) (citing the *Strengthening Forensic Science* report and noting ballistics evidence is prone to subjectivity, bias, and unreliability); *United States v. Glynn*, 578 F. Supp. 2d 569 (S.D.N.Y. 2008) (limiting firearms examiners to testifying that their identifications were more likely than not); *United States v. Green*, 405 F. Supp. 2d 104, 109 (2005) (limiting experts to testifying about similarities and not about identification conclusions); *United States v. Monteiro*, 407 F. Supp. 2d 351 (D. Mass. 2006) (excluding firearms identification); *United States v. Diaz*, No. 05-00167, 2007 WL 485967 (N.D. Cal. Feb. 12, 2007) (preventing experts from testifying to their conclusions to the exclusion of all other firearms in the world).

⁶ Even where courts have accepted expert testimony regarding firearm identification, due to the subjective nature of the analysis, courts find it imperative that the examiner follow established standards in completing the identification. *Monteiro*, 407 F. Supp. 2d at 355 (“[T]he process of deciding that a cartridge case was fired by a particular gun is based primarily on a visual inspection of patterns of toolmarks, and is largely a subjective determination based on experience and expertise. Because of the subjective nature of the matching analysis, a firearms examiner must be qualified through training, experience, and/or proficiency testing to provide expert testimony. Moreover, an examiner must follow the established standards for intellectual rigor in the toolmark identification field with respect to documentation of the reasons for concluding there is a match (including, where appropriate, diagrams, photographs or written descriptions), and peer review of the results by another trained examiner in the laboratory. These standards ensure the reliability of the expert’s results and the testability of the opinion.”).

Ira Parnell also testified at the PCR hearing, describing the various tests performed on the single bullet fragment and explaining that bodily fluids had degraded the bullet fragments to such an extent that conclusive results could not be obtained. App. 1517. Additionally, despite his trial testimony that he had found no similarities with the Dreher gun, Parnell admitted at the PCR hearing that his report indicated that he could not exclude or include the Freiburger gun, the Dreher gun, or any other similar weapon. App. 903-05; 1525-26. Furthermore, he agreed that the contents of his report were in fact true, i.e., that he still could not exclude the Dreher gun or any other similar weapon. Parnell also 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. 1527-28.

Freiburger also presented the testimony of his trial and appellate counsel. Appellate counsel, John Nichols, testified that while *Crawford* had been announced several weeks before Freiburger's appellate brief was filed, Nichols was not fully aware of that landmark decision, and had not made a strategic decision to omit a Confrontation Clause issue from Freiburger's appeal. App. 1479-86. Trial counsel, Katherine Hudgins, testified that she recalled there was a soldier from Freiburger's unit named John Morgan who had blood on him at the time of the murder and went AWOL shortly thereafter. App. 1488. However, she did not recall whether she knew Morgan was interviewed and admitted to calling a taxi to pick him up at Fort Jackson on the night of the murder. App. 1489. Hudgins did not know why the Hoover letter was not used at trial, and she was not aware of Cayton's 1999 firing from the KBI at the time of Freiburger's trial. App. 1490-91; 1492-97. Finally, trial counsel, John Delgado, testified that although the Hoover letter had been Bates stamped and appeared in his Index, he did not recall the letter at all, and had no strategic reason not to utilize it or Parnell's report at trial. App. 1575-76; 1587-88.

Delgado also recognized that Cayton's testimony had been the linchpin of the prosecution's case, such that access to the truth about his firing from KBI would have been powerful evidence and extremely beneficial to the defense. App. 1592-93.

ARGUMENT

I. THE PCR JUDGE ERRED IN FINDING TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO ADEQUATELY CHALLENGE THE STATE'S BALLISTICS EVIDENCE THAT ONE BULLET FRAGMENT "MATCHED" FREIBURGER'S GUN.

The issue of whether the weapon recovered from Freiburger fired the bullets taken from Orner's body was the crucial issue at trial. Without establishing that link, the State could not connect Freiburger to the crime and could not survive a motion for a directed verdict. Its previous failure to do so, before the State found John Cayton, was the reason no one was charged with the crime for almost forty years. Given the importance of the ballistics evidence, it was imperative for trial counsel to use every means available to them, including: (a) the Hoover 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. 672, concluded that another similar gun was the murder weapon; and, (b) Ira Parnell's report indicating that he could not exclude either the Freiburger or the Dreher gun. There is no probative evidence in the record to support the PCR judge's findings that these ballistic challenges would not have made a difference at trial; in fact there is every reason to believe the opposite. Therefore, this Court should reverse.

"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)). This Court will reverse if there is no probative evidence to support the PCR court’s findings or the decision is controlled by an error of law. *Miller v. State*, 379 S.C. 108, 115, 665 S.E.2d 596, 599 (2008).

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*, 379 S.C. at 117, 665 S.E.2d at 600 (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 (2002) (holding counsel performed unreasonably in failing to present evidence of jail cell configuration which would have shown an adverse witness’s testimony impossible).

In this case, trial counsel Katherine Hudgins testified at the PCR hearing that she did not know why the Hoover letter was not used at trial. App. 1490. In his sworn affidavit, trial counsel John Delgado acknowledged that, while it appeared he was provided the Hoover letter in discovery, he had no recollection of having seen it. He also explained that, had it been used at trial, the letter would have been powerful evidence that another gun had been used; he could not recall why he failed to use the letter, and he could imagine no strategic reason for not having done so. Third Supplemental App. 2. Mr. Delgado further stated that he did not recall why he

failed to cross-examine Parnell on the specific conclusions of his report, and he again denied any strategic reason for the omission. Third Supplemental App. 2. During live testimony at the PCR hearing, Mr. Delgado also maintained that he had no recollection of the letter and made no strategic decision not to use it. App. 1587-88; 1596.

Ira Parnell also 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. 1525-26. Parnell also acknowledged the contents of the Hoover letter, indicating that SLED examiners tied this murder to a different weapon, and the fact that Lt. Cate never wrote a report excluding the Dreher gun. App. 1527-28. The PCR hearing evidence further established that trial counsel were in possession of both documents. Although Parnell's written report plainly contradicted Cayton's claim that the Freiburger gun – to the exclusion of all other similar guns in the world – 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. 904. At the PCR hearing, however, he admitted that the contents of his report were true, i.e., based on his examination of the weapon and bullets, he – in fact – could not exclude the Dreher gun as being the murder weapon. Because trial counsel failed to utilize Parnell's report or the Hoover letter, however, the misimpression created by Cayton's and Parnell's trial testimony was not effectively challenged.

The PCR judge found that trial counsel's performance was not deficient.⁷ There is no evidence to support the PCR judge's findings. The prosecution's ballistic evidence was, by far,

⁷ The original PCR order denying relief included a finding—in direct contravention of the testimony—that trial counsel *did* recall the Hoover letter, and had explained his decision not to use it. See App. 29. After reconsideration, however, the PCR judge found trial counsel could not explain why he did not try to use the letter. App. 44. Further, the PCR order drafted by the State addressed the question of trial counsel's failure to effectively cross-examine Parnell with

the most important component of the State's case. Trial counsel possessed, but failed to use, two important documents establishing that SLED's preeminent ballistics examiner believed a different weapon killed Orner, and that Parnell's own written assessment of the evidence did not comport with the characterizations he offered at trial. The PCR judge's specific finding that trial counsel were not deficient because they did not ascribe great importance to the Hoover letter is belied by Delgado's PCR testimony asserting the helpfulness of the letter once he reviewed it during the PCR proceedings. In fact, trial counsel offered no strategic reason for failing to use these important documents, nor could there possibly be one. Counsel's failure to use this evidence, which went to the very heart of the prosecution's case against Freiburger, was constitutionally deficient. *See, e.g., 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); *see also Beltran v. Cockrell*, 294 F.3d 730 (5th Cir. 2002) (finding counsel ineffective, such that the petitioner was prejudiced, where counsel failed to adequately investigate and to impeach eyewitness testimony that the defendant was the only person they had picked from photographic lineups); *Steinkuehler v. Meschner*, 176 F.3d 441, 445 (8th Cir. 1999) (affirming grant of relief and finding counsel's failure to use the available impeachment material was prejudicial because it supported petitioner's defense to first-degree murder); *Williams v. Washington*, 59 F.3d 673, 679 (7th Cir.

ballistics evidence, but the order failed to mention the Parnell report. Freiburger pointed out this deficiency in his Motion to Alter or Amend, to no avail. App. 262.

1995) (granting writ due to trial counsel's ineffectiveness for, in part, failing to impeach state's main witness with available information).

The PCR judge also erred in finding Freiburger had not been prejudiced by counsel's omissions. While the PCR order observed without explanation that utilizing the Hoover letter could have been "detrimental," App. 30, there is no evidence whatsoever to support that contention. When SLED examiner Parnell testified at the PCR hearing, he never contradicted the letter's contents or the contents of his own report. In fact, on cross examination at the PCR hearing, Parnell affirmed Lt. Cate had opined that the weapon taken from the Dreher home (and not Freiburger's gun) was the murder weapon. Thus, both the Hoover letter and Parnell's report clearly contradicted Cayton's claimed conclusive identification of Freiburger's gun as the murder weapon. Had the jurors been informed that the initial examiner, whose abilities were lauded at trial, concluded in 1961 that the Dreher gun was most likely the murder weapon, their appraisal of Cayton's claims would definitely have been affected. Moreover, with the Hoover letter before the jury, the prosecution's portrayal of the inconclusive results reached by seven examiners as mere technical adherence to rigorous scientific protocols would have rung hollow.⁸

⁸ In closing argument, the solicitor sought to reconcile Parnell's findings with Cayton's claims as follows:

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, but if six people say "Oh man. . . . It's so close, so close, . . . Every other 32 they looked at was excluded. One and only one [was] so close, so close. Freiburger's, Freiburger's.

...
Mr. Parnell tells them that, that it's not excluded. . . . It's so close, remarkable individual similarities, excluded all other 32s.

...
Mr. Parnell says I don't disagree with Mr. Cayton. It's a matter of degree. I don't exclude it. It was so close.

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. Because Cayton's positive identification constituted the only evidence connecting Freiburger to the homicide,⁹ it is more than reasonably probable that discrediting that identification would have resulted in a different outcome at trial. *James*, 372 S.C. at 290, 641 S.E.2d at 901. Accordingly, this Court should reverse the judgment below and grant Freiburger a new trial.

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).

As described above, Cayton's testimony represented the sole evidence connecting Freiburger to Orner's murder. Again, and it cannot bear overemphasizing 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). To establish a

App. 1239-40; 1242; 1243.

⁹ The remainder of the State's evidence merely sought to show Freiburger was a soldier, link Freiburger to the gun Cayton later identified as the murder weapon, and to demonstrate Freiburger's presence in the area where the cab was discovered on Assembly Street the day before it was discovered.

due process violation under *Brady*, an individual must show evidence was: (1) favorable to the accused; (2) in the possession of or known by the prosecution team; (3) suppressed by the State; and, (4) material to the accused's guilt or innocence. *Kyles v. Whitley*, 514 U.S. 419 (1995); *Gibson v. State*, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Whether or not the State has actual knowledge of impeachment evidence is irrelevant. See *Kyles*, 514 U.S. at 437 (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. 981. 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.

- Q. So let me show you what's - (Pause - the court reporter marked for identification Exhibit 192 which was later changed to State's Exhibit)
- Q. Sir, I'm handing you what's been marked now for identification as State's Exhibit 192. Do you recognize that?
- A. Well, I may have seen it. I don't recall actually getting one, but I think they did show it to me.
- Q. Okay. That letter is actually your termination letter dated October 29th of 1999?
- A. Yes. It says that on there.
- Q. Read the first line.
- A. "This letter is to advise you of your termination status from your probationary status as a forensic scientist number three with the Kansas Bureau of Investigation pursuant to KSA 75-2946 and KAR1-10-6 (c). This termination is based on the following facts."
- Q. And it doesn't say anything about you resigning, does it?
- A. I'm talking about a conversation we had.
- Q. Well sir, my question is, does the letter say anything about you resigning?
- A. No.
- Q. The letter is signed by who? Go to the last page.
- A. Larry Welch.
- Q. And who is Larry Welch? The director of the KBI?
- A. Yes.
- Q. And it says in one of the very first paragraphs, citing the reasons, it was that you failed to follow policies, procedures and protocols of the KBI laboratory section. Is that fair?

App. 1494-1496; Supplemental App. 42-44. Both 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. 1492-97; 1592-95.

Despite this evidence, the PCR judge found "Cayton never testified in [Freiburger's] trial that he retired from the Kansas Bureau of investigations," because Cayton never mentioned the letters "KBI." App. 31. The PCR judge inexplicably found it was mere speculation how Cayton would have responded to being cross-examined about his termination from KBI in the exact manner he was questioned in the *Denny* case. App. 32. The PCR judge also found that Cayton: disagreed that he was fired; believed he did not violate policies related to case investigations, and, instead, violated a policy against eating at his desk and against sitting a gun for another employee; and explained that he resigned rather than being issued a termination letter. App. 33. Finally, the PCR judge found that because Cayton disagreed with the interpretation that he was terminated, there was nothing concrete for the State to disclose pursuant to *Brady*. App. 34.

No evidence in the record supports the PCR judge's findings. 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. 1495; Supplemental App. 42, 112. There is no need to speculate regarding Cayton's testimony: the certified transcript of the *Denny* case produced at the PCR hearing is unequivocal evidence of how Cayton would have testified regarding his reason for leaving KBI.¹⁰ The *Denny* transcript shows that Cayton was, in fact, fired for failing to follow policies and procedures, despite

¹⁰ Even if Cayton had denied being terminated at Freiburger's trial, he could have been impeached with the termination letter or similar information had the State fulfilled its constitutionally required disclosure obligation.

Cayton's beliefs to the contrary. 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.¹¹ 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*. 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.¹² See *Kyles*, 514 U.S. at 437. The State's failure to produce this material evidence violated Freiburger's due process rights, and this Court should reverse the PCR judge's finding to the contrary and remand for a new trial.

III. THE PCR JUDGE ERRED IN FINDING POLICE REPORTS ARE NOT TESTIMONIAL WITHIN THE MEANING OF *CRAWFORD V. WASHINGTON*.

At Freiburger's trial, the prosecution was permitted, over objection, to prove its case with testimonial hearsay, including the testimony of Charles Clark and Gary Abersold. In rejecting Freiburger's claim that the admission of this testimony violated his Sixth Amendment right to confront the witnesses against him, the PCR judge held that the hearsay contents of the police

¹¹ Even if this Court were to accept the PCR judge's statement that Cayton did not agree he was terminated, but resigned after receiving the termination letter, evidence of a forced resignation still proves Cayton's testimony regarding his retirement false and impeaches Cayton's credibility in his field of "expertise."

¹² It is also important to note that the State did not call either of the trial prosecutors to deny having knowledge of Cayton's termination despite having multiple opportunities to do so. Freiburger filed a trial brief prior to the PCR hearing detailing the Cayton termination letter withholding issue, and the hearing was adjourned and then recontinued and completed months later. If the trial prosecutors had been unaware of Cayton's termination, it is inconceivable that they would not have been called as witnesses by the State at the PCR hearing.

reports admitted through Clark and Abersold were not testimonial.¹³ That holding cannot be reconciled with *Crawford v. Washington*, 541 U.S. 36 (2004).¹⁴

Charles Clark, a former City of Columbia Police Officer, was permitted to publish verbatim much of the contents of a 1961 Columbia Police Department report in the Orner case. Although Clark was not responsible for preparing the report, at trial he was allowed to read most of its contents to the jury, and to authenticate the report as a document prepared by the Columbia Police Department. App. 567-71. The police report contained information from a number of witnesses who did not testify at trial and could not be cross-examined. For instance, the report contained information gathered by police officers in the course of their inquiries into the victim's disappearance and information relayed by a State Cab Company dispatcher to the victim's stepson. App. 569. The dispatcher reported that Orner received a phone call at 11:15 p.m. ordering a taxi, he then proceeded in his taxi to the NCO Club at Fort Jackson, and his abandoned taxi was seen parked at 4:00 a.m. the next day. App. 569. This testimony was crucial in establishing both a time line for the homicide and that a soldier from Fort Jackson was a likely culprit. In addition, the report contained information obtained by Detective Rollinson and Sergeant Harrell, including the reading on the meter and the fact that there was blood on the seat of the taxi. App. 570. None of the declarants – the dispatcher, Detective Rollinson, or Sergeant Hartell – were called as witnesses at trial. As a result, Freiburger had no opportunity to cross-

¹³ The PCR judge rendered this conclusion in the course of denying relief on Freiburger's claims that trial and appellate counsel were ineffective for failing to raise a Confrontation Clause challenge on direct appeal. App. 25; 27-28.

¹⁴ *Crawford* was decided after Freiburger's trial but two weeks prior to the filing of his brief on direct appeal, and the PCR judge correctly found that it applies retroactively to this case. *Whorton v. Bockting*, 549 U.S. 406 (2007).

examine any of these individuals regarding the police report despite the importance of their statements to the prosecution's circumstantial case that a soldier – i.e., Freiburger – was the killer.

Gary Abersold, Freiburger's bunkmate at Fort Jackson, made two different statements to officers investigating the Orner murder in 1961, to the effect that he accompanied Freiburger to pawn a radio at a pawnshop and that Freiburger at some point gave him .32 caliber ammunition. At trial, Abersold was asked by the State to recount the statements made to Captain Nichols in 1961. While Abersold stated that he recalled making statements to investigators forty years ago, he testified that he had no full and independent recollection of the statements. App. 722-23; 723-24. After being permitted to review the statements, Abersold still maintained that he had no independent, contemporaneous memory of the events in question. In the end, Abersold was permitted to read the statements into the record, but it was impossible to cross-examine him regarding the statements because he could not remember them.

The PCR judge initially found Freiburger's argument with regard to Abersold failed because Abersold was present at trial and thus subject to cross-examination. App. 24-25. He further found Abersold did not recall "certain responses," the statements were not testimonial, and the testimony was not significant because it was not referenced by the South Carolina Supreme Court in the direct appeal opinion. App. 25; 28. As to Clark, the PCR judge found that his relaying of the contents of the police report was non-testimonial, and the information was not critical to the case. App. 27-28. The PCR evidence cannot support these findings.

The Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with witnesses against him." U.S. Const. amend. VI. In South Carolina, the right is guaranteed not only by the Sixth and Fourteenth Amendments, but also by the State Constitution. *State v. Green*, 269 S.C. 657, 661, 239 S.E.2d 485, 487 (1977). In

a criminal case, it is not constitutionally permissible for the State to present testimonial statements by witnesses who are unavailable to testify and whom defense counsel has not had the opportunity to cross-examine. *Crawford*, 541 U.S. at 68. In *Crawford*, the Supreme Court held that even well-established exceptions to the hearsay rule do not trump the Confrontation Clause because, “[w]here testimonial evidence is at issue . . . the Sixth Amendment demands what common law required: unavailability and a prior opportunity for cross-examination.” *Id.* at 67.

Since *Crawford*, the South Carolina Supreme Court and the Supreme Court of the United States have consistently recognized that witness unavailability and a prior opportunity for cross-examination are required whenever the prosecution seeks to admit testimonial hearsay evidence. See e.g. *State v. Mitchell*, 378 S.C. 305, 313-14, 662 S.E.2d 493, 498 (2008) (holding that admission of an accomplice’s prior statement to police under the hearsay exception violated the Confrontation Clause).¹⁵ Statements are “testimonial when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” *Davis v. Washington*, 547 U.S. 813, 822 (2006) (holding that statements taken by law enforcement as part of a criminal investigation fall squarely in the category of testimonial hearsay).¹⁶ The relevant

¹⁵ The only current exception to this rule, which is not applicable here, is when a defendant acts with the clear and explicit intention to prevent a witness from testifying. See *Giles v. California*, 554 U.S. 353 (2008).

¹⁶ See *State v. Ladner*, 373 S.C. 103, 112, 644 S.E.2d 684, 688 (2007) (noting statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency, and statements are testimonial when the circumstances objectively indicate there is no ongoing emergency and that the primary purpose is to establish or prove past events potentially relevant to future prosecution); see also *Cuyuch v. State*, 667 S.E.2d 85, 89 (Ga. 2008) (holding a witness’s identification of the defendant at the crime scene was made for the purpose of establishing past facts with a view to a future prosecution, making the statement testimonial);

consideration in determining whether a statement is testimonial is therefore the primary purpose for which the police obtain the statement. The primary purpose determination is made by considering whether the police obtained the statement in order to respond to an ongoing emergency, an “important factor,” the formality of the interaction between the police and the declarant, and the statements and actions of the declarant and the police. *Michigan v. Bryant*, 131 S. Ct. 1143, 1160 (2011). The mere fact that a report may satisfy a business record or other hearsay exception does not exempt it from the rigors of the Confrontation Clause. See *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 321 (2009).

The PCR order’s finding that the police reports were not testimonial cannot withstand scrutiny. The report published through Clark’s testimony was replete with information obtained by law enforcement at various stages during the investigation of the case, long after any “emergency” had passed, with an eye toward preserving evidence for prosecution. In *Bryant*, the Supreme Court determined the statement “I was shot” or “Rick shot me” was obtained in the course of an ongoing emergency where the officer elicited the statement from a man who was lying, mortally wounded, in a gas station parking lot awaiting the arrival of emergency medical services. 131 S. Ct. at 1150, 1163-64. The Court concluded there was an ongoing emergency due to the fact the location of an armed shooter was unknown after he shot the victim within a few minutes of the location where the police found the victim. *Id.* at 1164. The Court, however, explicitly indicated its decision did not “suggest that the emergency continued until Bryant was arrested.” *Id.* Rather, because the statements were made by the victim “within the first few minutes of the police officers’ arrival and well before they secured the scene of the shooting,” *id.* at 1165, the statements were deemed to be made in the course of an ongoing emergency. In

State ex rel. J.A., 949 A.2d 790, 791 (N.J. 2008) (holding statements describing a robbery committed ten minutes earlier were testimonial).

contrast, the police report read into the record in this case was made well after the cab was first seen parked on Assembly Street at 4:00 a.m. and the police had secured the scene and deduced a crime had occurred, sometime between 7:15 and 7:45 a.m. on March 1st. App. 520-21, 568-69. The record contains no indication the police were concerned the perpetrator was still in the area posing a threat. The mere fact that the officers had not identified or located the perpetrator hours after the crime occurred cannot warrant a finding that the statements were made in the course of an ongoing emergency. See *Bryant*, 131 S. Ct. at 1164. At the time the police created their report, the emergency had clearly ceased and the officers were preserving potential evidence for trial, thus making the statements testimonial.

As for formality, the statements published through Clark's testimony were not obtained from a formal station house interrogation like in *Crawford*, see *Davis*, 547 U.S. at 827, but they were far more formal than the non-testimonial statement made in a frantic 911 phone call while the witness was actively being attacked in *Davis*, *id.* at 817, or the non-testimonial statement taken from the witness in *Bryant* while on the ground in a gas station parking lot after being shot and awaiting the arrival of emergency medical services, see *Bryant*, 131 S. Ct. at 1150, 1160. The statements introduced through Clark were calmly made while none of the declarants were actively being threatened. The declarants were merely recounting information they learned over the course of the morning for inclusion in a police investigative report and possible use at trial.

The statements and actions themselves also indicate the primary purpose of the statements was to establish or prove past facts and prepare for a later criminal prosecution. In *Davis*, the Court distinguished between statements made "speaking about events as they were actually happening," and statements taken some time after the events were over "to determine" what had happened, finding statements about past events to be testimonial. See 547 U.S. at 827, 830. As

noted above, the statements in this case were made after the police secured the scene where the cab was found and deduced a crime had occurred. The police were therefore collecting evidence to be used to establish what happened prior to the cab being parked on Assembly Street and in order to prosecute the perpetrator of the crime once he was apprehended. Accordingly, each of the factors important to the primary purpose determination indicate the statements entered through Clark's testimony were made for the purpose of documenting past events and preparing for a future criminal prosecution. The statements were therefore testimonial.

Clark's testimony indisputably was presented for the truth of the matters asserted and, because the investigators involved in the case were not available at trial, Freiburger was unable to cross-examine them. Under these circumstances, these reports plainly constituted testimonial hearsay whose admission violated the Sixth Amendment and the rule of *Crawford. Davis*, 547 U.S. at 822. The trial court violated Freiburger's Confrontation Clause rights when it admitted this evidence, and the PCR judge erred in holding otherwise.

Freiburger's Confrontation Clause rights were further violated when the trial court allowed the admission of Abersold's out-of-court statements. Those statements were obtained by police investigators during an active murder investigation, and were submitted for the truth of their assertions. Abersold's statements were clearly testimonial, as they were obtained after Orner's body had been found, were made in a formal interrogation setting, and the statements and actions of Abersold and the interrogators clearly indicate the purpose of the interrogation was to establish evidence for the possible prosecution of Freiburger. *See App. 722-23; 725*. While the perpetrator of the murder had not yet been located, the Supreme Court has stated that none of its precedent "suggests that an emergency is ongoing in every place . . . for the entire time that the perpetrator of a violent crime is on the loose." *Bryant*, 131 S. Ct. 1159. As testimonial

statements, they must be deemed inadmissible where Frieburger did not have an opportunity to cross examine Abersold. *See Crawford*, 541 U.S. at 68.

While Abersold was present in court, the PCR judge erred in finding this meant Abersold was subject to cross-examination regarding the statements. Abersold testified that he did not remember the content of the statements and certain facts in them. App. 723. He was not asked by the State to testify from his own memory for he had none, nor was he provided with the statements in an attempt to refresh his recollection. In fact, after being given the opportunity to review his 1961 statements, Abersold still had no independent memory of their contents. Instead, the statements were merely read into the record. With a complete and utter inability to recall the information contained in the statements, Frieburger had no opportunity for cross-examination. Abersold's lack of memory left him functionally "unavailable" for cross-examination at trial, despite his physical presence. *United States v. Amaya*, 533 F.2d 188, 190-91 (5th Cir. 1976) (determining a witness was unavailable for Confrontation Clause purposes at trial due to an accident resulting in loss of memory regarding his prior testimony); *see also State v. Young*, 277 Kan. 588, 601, 87 P.3d 308, 318 (2004) ("[A] witness who does not recall making the earlier statement or statements or who simply refuses to testify is not considered available for crossexamination at trial [for purposes of the Sixth Amendment Confrontation Clause]."). This situation is not unlike a witness exercising his Fifth Amendment rights or being otherwise unwilling or unable to submit to cross-examination, who may also be physically present to testify but is nevertheless deemed unavailable for cross-examination. *See Lilly v. Virginia*, 527 U.S. 116, 124 & n.1 (1999) (discussing the situation where a witness is made unavailable due to the exercise of his Fifth Amendment rights); *Commonwealth v. Kirouac*, 405 Mass. 557, 562, 542 N.E.2d 270, 273 (1989) (discussing a situation where a witness is made unavailable due to her

refusal to answer questions on cross-examination). *Cf. Kentucky v. Stincer*, 482 U.S. 730, 739, n.9 (1987) (finding a state rule precluding access to certain information before trial “may hinder [the] defendant’s opportunity for *effective* cross-examination at trial, and thus . . . may violate the Confrontation Clause”) (emphasis in original).

The admission of the testimonial hearsay evidence was extremely prejudicial. The State’s case was entirely circumstantial, consisting of dubious, hotly contested ballistics evidence, and circumstantial information suggesting the killer may have been a soldier from Fort Jackson. As reflected in the solicitor’s explicit reliance upon it in closing argument, the testimony of Clark and Abersold substantially bolstered the State’s case. App. 1227; 1230; 1232. Had the trial judge correctly excluded the testimonial hearsay, the State would have been unable to establish crucial connections in the case against Freiburger.

IV. THE PCR JUDGE ERRED IN FINDING APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE A CONFRONTATION CLAUSE ISSUE PURSUANT TO *CRAWFORD V. WASHINGTON*.

As noted *supra*, the PCR judge’s erroneous determination that the contents of the police reports admitted through Clark and Abersold was made in the context of rejecting Freiburger’s claim that appellate counsel was ineffective in failing to raise a Confrontation Clause challenge on direct appeal.¹⁷ Having erroneously determined that no confrontation violation had occurred, the PCR judge went on to hold that trial counsel adequately preserved the issue and appellate counsel made the strongest arguments he thought were applicable. App. 28-29. This, too, was error.

¹⁷ In his PCR application, Freiburger also argued that trial counsel was ineffective in failing to object on Confrontation Clause grounds to the admission of the testimonial hearsay statements of Clark and Abersold. The PCR judge disagreed and found trial counsel sufficiently preserved *Crawford* objections at trial. App. 28-29. However, to the extent this Court may disagree with the PCR judge’s findings that trial counsel adequately preserved objections to this testimony pursuant to *Crawford*, Freiburger alternately argues trial counsel was ineffective in failing to preserve these issues based on arguments similar to the ones above, and stated in detail in his pre-trial brief. App. 107-17.

Ineffective assistance can occur when trial counsel fails to raise an objection to exclude otherwise improper evidence. *Mitchell v. State*, 298 S.C. 186, 189, 379 S.E.2d 123, 125 (1989) (holding counsel was ineffective for failing to move to exclude the introduction of improper bad character evidence); see *Mason v. Scully*, 16 F.3d 38, 45 (2nd Cir. 1994) (finding counsel ineffective and resulting prejudice where counsel failed to object to testimony by police detective about hearsay statement of non-testifying co-defendant); see also *Girts v. Yanai*, 501 F.3d 743, 759 (6th Cir. 2007) (finding counsel ineffective and resulting prejudice where counsel failed to object to prejudicial statements by prosecutor). Ineffective assistance can also occur when appellate counsel fails to raise an issue on appeal that was properly raised at trial. See, e.g., *Douglas v. California*, 372 U.S. 353, 357-358 (1963) (recognizing constitutional right to counsel on direct appeal); *Southerland v. State*, 337 S.C. 610, 613-617, 524 S.E.2d 833, 834-836 (1999) (finding appellate counsel ineffective in a capital case for failing to raise meritorious record-based challenge to capital sentencing jury instruction); see also *United States v. Cook*, 45 F.3d 388, 395 (10th Cir. 1995) (holding appellate counsel is constitutionally obligated to raise issues which are “obvious from the trial record”); *Matire v. Wainwright*, 811 F.2d 1430, 1438 (11th Cir. 1987) (finding failure to raise an issue which “was obvious on the record” constituted deficient performance).

Constitutionally effective appellate counsel would have recognized the *Crawford* violations associated with the Clark and Abersold evidence and raised them on appeal. While the PCR judge correctly noted that appellate counsel Nichols testified he tried to raise every issue he could, the judge failed to acknowledge Nichols’ candid admission that he had no strategic reason for omitting the *Crawford* claim that was apparent from the face of the trial record. App. 1479-82. For the reasons described *infra* in Argument III, the Confrontation Clause claim counsel could

have raised was plainly meritorious, and his failure to assert it on direct appeal was constitutionally deficient. Moreover, because there is at least a reasonable probability that raising the claim would have resulted in reversal of Freiburger's conviction on direct appeal, appellate counsel's omission was prejudicial. *Southerland*, 337 S.C. at 616, 524 S.E.2d at 836 (citing *Strickland*, 466 U.S. at 685, 696; *Smith v. State*, 309 S.C. 413, 424 S.E.2d 480 (1992)). The PCR judge's finding to the contrary should be reversed.

CONCLUSION

The prosecution's case against Freiburger rested entirely on the uncorroborated claims of a disgraced forensic examiner, and circumstances described with inherently unreliable testimonial hearsay from forty-year old police reports. Had trial counsel utilized documents and evidence available to them, and had the prosecution disclosed the proof of Cayton's termination from the KBI and his dishonesty, the forensic case against Freiburger would have crumbled. Moreover, had the prosecution not been permitted to bolster the weak forensic evidence with evidence plainly inadmissible under the Confrontation Clause, no rational jury would have voted to convict. Because the PCR court's denial of post-conviction relief is not supported by the evidence or the law, this Court should reverse the judgment below, grant post-conviction relief on one or more grounds and remand for a new trial.

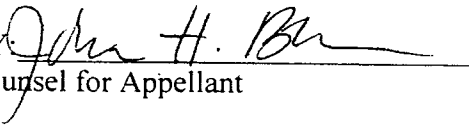
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October 31, 2013.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

CA No. 2006-CP-40-3866
Appeal Case No. 2010-177147

EDWARD FREIBURGER..... *Appellant,*

v.

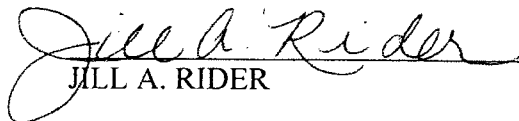
STATE OF SOUTH CAROLINA..... *Respondent.*

CERTIFICATE OF SERVICE

I, Jill A. Rider, hereby certify that one (1) copy of the Brief of Petitioner has been served upon opposing counsel by depositing same in the United States Mail, first class postage pre-paid, addressed as follows:

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This the 31st day of October, 2013, in Columbia, SC.


JILL A. RIDER

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2010-177147
Case No. 2006-CP-40-03866

Edward Freiburger, ... Petitioner,

v.

State of South Carolina, ... Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. Is there evidence of probative value in the record to support the post-conviction relief court's ruling that trial counsel was not ineffective for failing to challenge the State's ballistics evidence?
- II. Is there evidence of probative value in the record to support the post-conviction relief court's determination that the State did not violate the requirements of Brady v. Maryland?
- III. Is there evidence of probative value in the record to support the post-conviction relief court's finding that the police reports were non-testimonial within the meaning of Crawford v. Washington?
- IV. Is there evidence of probative value in the record to support the post-conviction relief court's finding that appellate counsel was not ineffective for failing to raise a confrontation clause issue pursuant to Crawford v. Washington?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. Petitioner was indicted during the June 2001 term of the Richland County Grand Jury for murder (2001-GS-40-2955). Petitioner was represented by John D. Delgado, Esquire, and Katherine H. Hudgins, Esquire. On July 25, 2002, Petitioner proceeded to jury trial before the Honorable Henry F. Floyd, where he was convicted as indicted. On August 1, 2002, Judge Floyd sentenced Petitioner to confinement for a period of life imprisonment under 1961 law.

A timely Notice of Appeal was filed on Petitioner's behalf and an appeal was perfected by John S. Nichols, Esquire. Following briefing and oral argument, the South Carolina Supreme Court affirmed Petitioner's conviction and sentence by published opinion on September 26, 2005. State v. Freiburger, 366 S.C. 125, 137, 620 S.E.2d 737, 743 (2005). Petitioner perfected a Petition for Writ of Certiorari to the United States Supreme Court, which was denied on May 22, 2006.

Thereafter, Petitioner filed a timely application for post-conviction relief on July 5, 2006. Respondent made its Return on February 9, 2007, requesting an evidentiary hearing be held. Petitioner filed several amendments to his original application for post-conviction relief. The first amendment was filed on November 13, 2008; the second on July 15, 2009; the third on August 3, 2009; and the fourth on August 17, 2009. The Petitioner also filed a "Pretrial Brief" on August 4, 2009. Evidentiary hearings into the matter were convened on August 13, 2009 and October 8, 2009, at the Richland County Courthouse before the Honorable G. Thomas Cooper, Jr. Petitioner was present at the

hearing, alongside counsel John H. Blume. Respondent was represented by Assistant Attorney General Brian T. Petrano of the South Carolina Attorney General's Office. Petitioner did not testify at the evidentiary hearings; however, Petitioner did present testimony from trial counsels, John Delgado, Esquire, and Katherine Hudgins, Esquire, and appellate counsel, John S. Nichols, Esquire. Additionally, Petitioner presented testimony from Dr. Steven J. Laken, and Dr. Adina Schwartz. Respondent presented testimony from South Carolina Law Enforcement Division Agent Ira B. Parnell, Jr.

Judge Cooper denied Petitioner post-conviction relief by written Order filed February 9, 2010. Petitioner filed a Rule 59(e), SCRCP, motion that was received on February 25, 2010. Respondent's Return to the Rule 59(e), SCRCP, motion was dated March 8, 2010. Judge Cooper held a hearing on the Rule 59(e), SCRCP, motion on July 8, 2010. The Order denying the Petitioner's Rule 59(e), SCRCP, motion was filed on October 8, 2010.

Petitioner appealed the denial of his post-conviction relief action, filing a Petition for Writ of Certiorari on February 24, 2011. Respondent's Return to the Petition from Writ of Certiorari was filed on October 31, 2011. Petitioner made his Reply on November 17, 2011. This Court granted certiorari on August 2, 2013. The Brief of Petitioner was filed on October 31, 2013. This Brief of Respondent follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief court's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). The reviewing court shall reverse the post-conviction relief court's decision if it is controlled by an error of law. Pierce v. State, 338 S.C. 139, 526 S.E.2d 222 (2000). In a post-conviction relief proceeding, an applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant 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, supra. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, supra. The applicant must overcome this presumption in order to receive relief. Cherry, supra.

A two-pronged test is used 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, supra. 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." Id. A

reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

In regards to claims of ineffective assistance of appellate counsel, “appellate counsel is not required to raise every non-frivolous issue that is presented by the record.” Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990).

“An individual asserting a Brady violation must demonstrate that evidence: (1) [was] favorable to the accused; (2) [was] in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching. 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) (internal citations omitted).

ARGUMENT

- I. There is sufficient evidence of probative value in the record to support the post-conviction relief court's ruling that trial counsel was not ineffective for failing to challenge the State's ballistics evidence.**

Petitioner asserts that the post-conviction relief court erred in refusing to find trial counsels ineffective for not adequately challenging the State's ballistics evidence. Specifically, Petitioner argues that trial counsels failed to properly use: (a) "the Hoover letter" dated July 19, 1961 from SLED Chief J.P. Strom to FBI Direct J. Edgar Hoover (App. p. 1674-1675), and (b) a report from SLED Agent Ira Parnell indicating that he could not exclude either Petitioner's gun or the Dreher gun. BOP p. 9. However, there is evidence of probative value in the record to support the post-conviction relief court's determination that trial counsels were not ineffective in failing to challenge the State's ballistics evidence.

Addressing the "Hoover Letter" first, trial counsel Delgado initially testified at the post-conviction relief hearing that he had not seen the Hoover Letter. (App. p. 1588 L. 1). Eventually, he conceded that he did not presently recall having seen the letter, but that he did – at the time of receipt – Bates stamp it and specifically include it in his discovery table of contents. (App. p. 1588).¹ Trial counsel Delgado explained "[w]ell, it may have been: How was I going to get that into evidence. Because Mr. Kate (sic) had passed away many years before." (App. p. 1588 L. 15 – 18). It was not clear whether the above explanation was a specific recollection or conjecture, but counsel did agree that he must have seen the letter at the time because he did stamp them and list them in his file. (App.

¹ At the pre-trial hearing when he argued the Confrontation Clause issue(s), trial counsel specifically stated that he applied the Bates stamps to the discovery materials – "I had to do that." (Second Supplemental App. p. 25 L. 7).

p. 1588). At the hearing, Delgado qualified his lack of recollection very carefully. He stated, "I do not to this day recall a letter from Mr. Kate (sic) indicating that this weapon was the murder weapon to the exclusion of all other weapons." (App. p. 1588 L. 1 – 3). It is certainly reasonable for trial counsel not to recall such a letter – because no such letter exists. Instead, the actual "Hoover letter" does not contain any such phrase as "to the exclusion of all other weapons." (App. p. 218 – 220). Furthermore, trial counsel Delgado is a skilled litigator who worked with post-conviction relief counsel to craft his testimony and chose his answers carefully.² As trial counsel explained, there is no direct evidence that Cate ever thought the bullet fragments matched another gun apart from Petitioner's gun. In addition, as Agent Parnell explained at the evidentiary hearing, the "Hoover letter" does not contain a formal opinion. (App. p. 1527 – 1528).

In regards to the report from SLED Agent Ira Parnell, there is no such report by Parnell that claims "any other H&R .32 caliber weapon, could have been the murder weapon," despite Petitioner's repeated assertions. (BOP p. 11). (App p. 268 – 270). Parnell's report never claims that "any other gun in the world" could have killed the victim. (App. p. 210 – 212). Petitioner's claim was that trial counsel's performance was deficient for failing to challenge Parnell at trial about his own report. However, the post-conviction relief court correctly denied relief on this issue. First, the claim was originally that the Parnell report could have been used at trial during examination of Parnell himself to show that he concluded that "any other gun in the world" could have killed the victim. (App. p. 1530 L. 10 – 18). As explained above, the Parnell report simply does not say that. (App. p. 210 – 212). Accordingly, it would be impossible for counsels' performance

² Trial counsel explained that the affidavit was sent to him by post-conviction relief counsel and they edited it back and forth. (App. p. 1576, 1584, 1590, 1599).

to be deficient for failing to confront a witness regarding the specifics of a report that does not exist. Prejudice does not exist, because Petitioner had an ideal opportunity at the evidentiary hearing to examine Parnell as he thought trial counsels should have done so at trial. (App. p. 1525 – 1533). As the post-conviction relief court correctly found, Petitioner's examination of Parnell at the evidentiary hearing was not particularly beneficial to Petitioner and did not establish prejudice. (App. p. 30 – 31). The post-conviction relief court correctly noted that despite Petitioner's vehement argument that ballistics is not a reliable science and cannot satisfy the Jones factors or Rule 702, SCRE, he had absolutely no voir dire questions or objections whatsoever to Parnell's qualification as an expert. (App. p. 20; p. 121 - 124; p. 1515 L. 1). State v. Jones, 343 S.C. 562 (2001).

While the post-conviction relief court may have dialed back the rhetoric used to find trial counsel not credible, the record clearly established that the recollection of trial counsel was in doubt. (App. p. 44 – 45). The post-conviction relief court evaluated trial counsel's credibility accordingly. The PCR court correctly found that the Petitioner failed to satisfy his burden of proof and demonstrate any prejudice or deficient performance in regards to this allegation. (App. p. 29 – 35).

II. There is sufficient evidence of probative value in the record to support the post-conviction relief court's determination that the State did not violate the requirements of Brady v. Maryland.

Petitioner asserts that the post-conviction relief court erred in its determination that the State did not violate Brady v. Maryland requirements by failing to “disclose any evidence impeaching Cayton's credibility.” BOP p. 14. However, there is evidence of probative value to support the post-conviction relief court's denial of this allegation.

“An individual asserting a Brady violation must demonstrate that evidence: (1) [was] favorable to the accused; (2) [was] in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching. 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) (internal citations omitted).

Therefore, relief may only be granted if Petitioner establishes that all four factors of a purported Brady violation are demonstrated.

As the post-conviction relief court correctly found, Petitioner presented absolutely no evidence that the State was aware of the contents of the purported termination information.³ (App. p. 34 – 35). Petitioner relies on Kyles v. Whitley, 514 U.S. 419 (1995), for the proposition that the State had a duty to know about the circumstances surrounding the parting of Cayton and the Kansas Bureau of Investigations and the knowledge of Cayton as a government actor is imputed on the State. However, Petitioner has failed to establish that Cayton was a government actor within the scope of Brady. In Kyles, the government actor in question was an informant clearly acting on the government's behalf and with the express direction from law enforcement; in the present case, Cayton was a private expert who was retained to analyze evidence for a specific case. There certainly is no evidence that the State suppressed the supposed information, either intentionally or unintentionally.

³ Petitioner did not call either trial prosecutor at the evidentiary hearings to testify regarding their knowledge of Cayton's retirement. In his Brief, Petitioner states “if the trial prosecutors had been unaware of Cayton's termination, it is inconceivable that they would not have been called as witnesses by the State at the PCR Hearing.” BOP p. 18 fn. 12. However, this is mere speculation, not supported by any evidence in the record. Furthermore, it is an applicant's burden to establish his post-conviction relief claims, not Respondent's burden to refute mere speculation on behalf of an applicant. Butler, supra (in a post-conviction relief proceeding, an applicant bears the burden of proving the allegations in his application).

Additionally, the post-conviction relief court correctly found that there was no evidence that Cayton was fired from the Kansas Bureau of Investigations. (App. p. 31 – 34). In contrast, the only evidence produced by Petitioner in this regard was the transcript of Cayton’s testimony in an unrelated hearing, where Cayton refutes that he was fired and instead resigned. Supp. App. p. 41-44. Petitioner never produced any of the Denny exhibits at the post-conviction relief hearing, such as the termination letter that Petitioner frequently references and Cayton adamantly contests was ever issued to him, nor did he call Cayton as a witness and examine him with the purported termination information. The Denny transcript provided sufficient evidence for the post-conviction relief court to conclude that there was no evidence that Cayton was fired, as Cayton was never issued a termination letter and instead elected to leave the Kansas Bureau of Investigation. The post-conviction relief court cited to specific items from the Denny transcript to support its findings. (App. p. 31 – 34). As the appropriate scope of review is whether there is “any evidence” of probative value to support the post-conviction judge's factual findings, the post-conviction relief court should be affirmed. Webb v. State, 281 S.C. 237, 238, 314 S.E.2d 839, 839 (1984).

III. There is sufficient evidence of probative value in the record to support the post-conviction relief court’s finding that the police reports were non-testimonial within the meaning of Crawford v. Washington.

The post-conviction relief court correctly denied Petitioner’s allegation that trial counsels were ineffective in regards to his Crawford claim. However, the post-conviction relief court’s Order of Dismissal is based on evidence of probative value and is not an error of law. (App. p. 22 – 29).

At Petitioner’s trial, the police report prepared in 1961 was read into evidence at trial by witness Clark. (App. p. 567 – 571). Trial counsel properly objected, specifically

citing the “Confrontation Clause” as a ground for his objection; this objection was a renewal of his previous objections and motions that were the subject of a pre-trial motions hearing. (App. p. 294; Second Supp. App. p. 1 – 79). The pre-trial hearing occurred years prior to the issuance of Crawford v. Washington, 541 U.S. 36 (2004).⁴ Furthermore, Crawford did not amount to a major watershed change. Whorton v. Bockting, 549 U.S. 406 (2007) (explaining the Crawford decision, while important, was not a profound or sweeping change). Nevertheless, trial counsel – a highly skilled litigator with decades of trial experience - made Crawford type arguments to the trial court during the pre-trial motions/hearings. The trial court agreed that “... anything in preparation for the prosecution of this case, even though it’s over thirty years old, would violate the Confrontation Clause.” (Second Supp. App. p. 32).

As the post-conviction relief court properly discerned, the police report was not testimonial, but rather, it was nothing more than a missing persons report similar to a modern day 911 call.⁵ (App. p. 25 - 27). The missing person report was not designed to implicate the criminal assailant, but was to ascertain the nature of the victim’s situation, as it was not an immediate foregone conclusion that a crime had occurred. See State v. Ladner, 373 S.C. 103 (2007) (finding, post Crawford, victim’s statement clearly non-testimonial because responses were not designed to implicate the criminal assailant but to ascertain the nature of the child’s injury). Even an actual police interrogation of a witness is not necessarily testimonial if the interrogation’s “primary purpose” concerns an “ongoing emergency.” Davis v. Washington, 547 U.S. 813, 823 (2006).

⁴ The pre-trial Confrontation Clause memorandums were filed and the matter was heard on July 25, 2002. See Second Supplemental Appendix.

⁵ It is literally a “missing person report.” (App. p. 280 L. 13).

While Crawford did not amount to anything “watershed,” it did established a “new rule of criminal procedure” regarding the Confrontation Clause. Whorton v. Bockting, 549 U.S. 406, 421 (2007). Petitioner argues that “[t]he mere fact that a report may satisfy a business record or other hearsay exception does not exempt it from the rigors of the Confrontation Clause.” (BOP p. 22). A strict reading of Crawford alone may support such a statement; however, Confrontation Clause jurisprudence has not remained static post Crawford. Bryant has been interpreted by some as “an expansive exception to the Confrontation Clause for violent crimes.” Michigan v. Bryant, 131 S.Ct. 1143, at 1173 (2011) (Scalia, J., dissenting); Id., at 1176 (Ginsburg, J., dissenting). Bryant states that in deciding if a statement is testimonial, “standard rules of hearsay, designed to identify some statements as reliable, will be relevant.”⁶ Bryant at 1155. This is undoubtedly the standard the trial court employed; therefore, trial counsel was not deficient.

Additionally, Petitioner has failed to establish any prejudice arising from this alleged deficiency. Petitioner claims that Clark’s reading of the missing person report resulted in Petitioner not having an “opportunity to cross-examine any of the individuals regarding the police report despite the importance of their statements to the prosecution’s circumstantial case that a soldier - i.e., Freiburger - was the killer.” (BOP p. 19-20). Apart from the disagreement as to whether such evidence was testimonial, Petitioner ignores all the other circumstantial evidence and insists that the missing persons report was somehow paramount. The investigation revealed that on the night of March 2, 1961, a

⁶ If a statement is “nontestimonial” then, under Crawford, “the Confrontation Clause has no application to such statements ...” Whorton v. Bockting, at 420.

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. p. 687 L. 12 – 20; p. 695 L. 19 – p. 697 L. 5). Petitioner had stayed at the hotel previously. (App. p. 761 L. 6 – 12). Later that day, Columbia police officer Frank Revetta (who testified live at the trial) discovered an abandoned and bloody cab down the street from the Gresham Hotel near the DeSoto Hotel at the intersection of Lady and Assembly streets in downtown Columbia. (App. p. 517 L. 19 – p. 518 L. 19; p. 570 L. 14). The post-conviction relief court correctly found that the Petitioner failed to demonstrate any prejudice concerning the supposed Confrontation Clause issues. Even if there was a Confrontation Clause violation, relief is not automatic. See Lee v. Illinois, 476 U.S. 530, (1986) (remanding case for determination of whether Confrontation Clause error was harmless). The Respondent submits, as explained above, Crawford did not materially affect this case. As explained above, the missing person report and the portions of Abersold's testimony that the Petitioner claims were a violation of Crawford could have – and were – argued via the Confrontation Clause during trial.

As to witness Abersold, the post-conviction relief court correctly explained and cited to the record and Crawford that there was no confrontation issue because Abersold was present and did testify at the trial. (App. p. 24 – 25).⁷ While not specifically argued at the PCR hearing, Petitioner now argues that Abersold was “functionally unavailable,” thereby creating a Confrontation Clause issue. (BOP p. 25). Crawford clearly does not apply to the testimony of Abersold, as it is inapplicable to a witness that “appears for

⁷ Trial counsel clearly made a Confrontation Clause objection, as to Abersold's reading of his prior statement, anew and by renewing his pre-trial objections. (App. p. 726).

cross-examination at trial,” Crawford, 59 n.9. (App. p. 24; p. 738). “For where the declarant is not absent, but is present to testify and to submit to cross-examination, our cases, if anything, support the conclusion that the admission of his out-of-court statements does not create a confrontation problem.” California v. Green, 399 U.S. 149, 162, 90 S. Ct. 1930, 1937 (1970), expressly cited with approval by Crawford, 59 n.9.

The post-conviction court did not lack any evidence of probative value nor did it commit an error of law when it concluded that the Petitioner failed to satisfy his burden of proof and demonstrate deficient performance or prejudice.

IV. There is sufficient evidence of probative value in the record to support the post-conviction relief court’s finding that appellate counsel was not ineffective for failing to raise a Crawford v. Washington issue on direct appeal.

Petitioner argues that the post-conviction relief court erred in its determination that appellate counsel was not ineffective for failing to raise any Crawford issues on appeal, as “constitutionally effective appellate counsel would have recognized the Crawford violations associated with the Clark and Abersold evidence and raised them on appeal.”

In the present case, appellate counsel has impeccable credentials.⁸ Appellate counsel was aware of the Confrontation Clause arguments, because he ordered the pre-trial transcript well before he filed his brief.⁹ “[A]ppellate counsel is not required to raise every non-frivolous issue that is presented by the record.” Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990). Therefore, Appellate Counsel cannot be deemed

⁸ Appellate counsel explained that he co-authors the Trial Handbook for South Carolina Lawyers [(West), now in its Fifth Edition] including the chapter on out of court statements. (App. p. 1484).

⁹ The pre-trial transcript was received by appellate counsel on January 27, 2003, the Initial Brief of Appellant was filed on April 1, 2004. (App. p. 22; 1580 L. 7).

deficient for electing not to pursue every possible issue that he considered in preparation of filing a client's appellate brief.

Additionally, as explained above, any challenges to the testimony of Clark and Abersold based on Crawford grounds would not have been successful on appeal. Therefore, Petitioner has failed to establish any resulting prejudice.

CONCLUSION

For the reasons stated above, this Court should affirm the post-conviction relief court's denial of post-conviction relief.

Respectfully submitted,

ALAN WILSON
Attorney General

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By: Megan E. Harrigan
COUNSEL FOR THE RESPONDENT

Columbia, South Carolina
March 5, 2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Richland County
The Honorable G. Thomas Cooper, Jr., Circuit Court Judge
Case No. 2006-CP-40-3866
Appellate Case No. 2010-177147

EDWARD FREIBURGER,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PROOF OF SERVICE

I, Megan E. Harrigan, certify that I have served the within **Brief of Respondent** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

John H. Blume, III, Esquire
Blume, Norris, & Franklin-Best, LLC
900 Elmwood Avenue, Suite 101
Columbia, South Carolina 29201

I further certify that all parties required by Rule to be served have been served.

This 5th day of March, 2014


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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

CA No. 2006-CP-40-3866
Appeal Case No. 2010-177147

EDWARD FREIBURGER.....*Petitioner,*

v.

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

PETITIONER'S REPLY BRIEF

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ARGUMENT

I. THE RECORD DOES NOT CONTAIN SUFFICIENT PROBATIVE EVIDENCE TO SUPPORT THE PCR JUDGE'S FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO ADEQUATELY CHALLENGE THE STATE'S BALLISTICS EVIDENCE THAT ONE BULLET FRAGMENT "MATCHED" FREIBURGER'S GUN.

Respondent asserts that the PCR judge correctly found counsel was not deficient in failing to challenge the State's ballistics evidence and that Freiburger was not prejudiced even if counsel's performance was deficient. Both the PCR court and respondent fail to come to grips with the importance of the State's ballistics evidence presented through the testimony of John Cayton. If the jury did not believe Cayton's testimony that the bullet fragment matched Freiburger's gun, there was no case against Freiburger.¹ This fact is clearly demonstrated by the nearly forty years that elapsed between the crime and Freiburger being charged with the murder, a period during which numerous SLED examiners consistently determined that the bullet fragments recovered from the victim could not be conclusively matched to the Freiburger or Dreher² weapons recovered during the investigation.³ The centrality of Cayton's testimony to the State's case is further revealed by the prosecution's efforts to bolster it through SLED examiner Parnell who testified at trial that he and other examiners at SLED, including Lt. Cate the "father" of the SLED Firearms Identification Division, found similarities between the bullet fragments and

¹ Cayton's testimony was the only link between Freiburger and the murder. The remainder of the State's evidence sought to show Freiburger was a soldier, who had been in the area where the cab was found—an area in Columbia frequented by soldiers when they were able to leave Fort Jackson.

² In 1961, law enforcement authorities seized a .32 caliber H&R gun from the home of Aleena Dreher. 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. 216, 218.

³ No fewer than seven SLED firearms examiners are on record as unable to connect the bullet fragments to the Freiburger gun. App. 903-04, 906, 920-24.

Freiburger's gun. App. 904-05. Though all SLED examiners who conducted ballistics analysis found the results to be inconclusive, Parnell testified the difference between his examination and Cayton's was only a matter of degree, testimony which the prosecution emphasized and repeated multiple times during its summation.⁴

Because the State's case completely depended on the jury believing the State's ballistics evidence, it was imperative that the defense use everything in its possession to discredit the evidence. Unfortunately, that did not happen. Trial counsel had had in their possession, but did not use, two important documents directly contradicting Cayton and Parnell's trial testimony: (1) the Hoover letter, and (2) Parnell's report. Despite Respondent's denials, the Hoover Letter explicitly stated that Lt. Cate was of the opinion that the Dreher weapon was the source of the bullet that killed the taxi driver. App. 216, 218. Cate's opinion, expressed in the Hoover Letter, directly contradicts Cayton's conclusion that Freiburger's gun matched the bullet fragments and Parnell's testimony that the difference between Cayton's conclusions and the SLED examiners' was only a matter of degree. *Compare* App. 216, 218 (the Hoover Letter stating "Lt. Cate is of the opinion that this [the Dreher] weapon killed the taxi driver, based on bullet comparisons"), *with* App. 904 (Parnell's testimony stating, "My opinion was that it was an inconclusive result, and there are degrees of inconclusive.") *and* App. 904-05 (Parnell's testimony stating it is a "matter of degrees" and that the other SLED examiners opinions agree with Parnell's). Had the jurors been informed that the initial examiner, whose abilities were lauded at trial, concluded in

⁴ See, e.g., App. 1239-40 ("[S]ix people say 'Oh man. . . It's so close, so close, . . . Every other 32 they looked at was excluded. One and only one [was] so close, so close. . . Freiburger's, Freiburger's."); App. 1242 ("Parnell tells them that, that it's not excluded, it's not excluded. It's so close, remarkable individual similarities, excluded all other 32s."); App. 1243 ("Parnell said, I don't disagree. I don't disagree with Mr. Cayton. It's a matter of degree. I don't exclude it. It was so close.").

1961 that the Dreher gun was most likely the murder weapon, their appraisal of Cayton's claims would definitely have been affected.

Respondent relies on trial counsel's conjecture at the PCR hearing that, at the time he received the letter, he may have wondered how to get the letter into evidence because Cate was deceased at the time of trial.⁵ This, however, does not support a finding that trial counsel did not perform deficiently. At trial, the State entered a number of documents from 1961 as business records and ancient documents without calling the preparers of the documents, indicating trial counsel could have introduced the Hoover Letter using the same evidentiary theory. App. 566-67. The State itself provided the defense with the Hoover Letter during discovery, establishing its authenticity, and in the PCR proceedings its authenticity was never questioned. See Rule 803(8), SCRE. At a minimum, the Hoover Letter could have been used at trial to impeach the expert testimony of Parnell and Cayton. See Rule 703, SCRE (allowing an expert to testify and be questioned on facts or data "made known to the expert at or before the hearing" even if the facts or data are inadmissible). Even if trial counsel held a mistaken belief as to the admissibility of the Hoover Letter, his performance was deficient. See *Hinton v. Alabama*, 134 S. Ct. 1081, 1088 (2014) (finding an attorney's performance deficient under *Strickland v. Washington*, 466 U.S. 668 (1984), where the lawyer failed to seek additional funds to hire a ballistics expert based on a mistaken belief that funding was unavailable).

Respondent also relies on trial counsel's admission that he must have seen the Hoover Letter at the time he received it. BOR 6. Regardless of whether trial counsel saw the Hoover Letter upon receiving it from the State, there can be no strategic reason for not using it at trial to

⁵ This type of *post hoc* rationalization is precisely what the Supreme Court of the United States has mandated courts not rely on in assessing claims of deficient performance. *Harrington v. Richter*, 131 S. Ct. 770, 790 (2011) (quoting *Wiggins v. Smith*, 539 U.S. 510, 526-27 (2003)).

contradict the single most important piece of evidence against Freiburger. Trial counsel admitted he had no such strategic reason. Third Supplemental App. 2. Failure to use the letter at trial was deficient performance. *See Pauling v. State*, 331 S.C. 606, 610-11; 503 S.E.3d 468, 471 (1998) (finding trial counsel ineffective for failing to call a triage nurse as a witness where her notes, which were in the possession of, and used by, trial counsel at trial, stated there was no penetration, impeaching the victim's testimony and proving there was no sexual battery); *Martinez v. State*, 304 S.C. 39, 41, 403 S.E.2d 113, 114 (1991) (finding trial counsel ineffective for failing to subpoena and call a witness known to counsel before trial whose testimony may have made the difference in obtaining an acquittal according to trial counsel).

Similarly, trial counsel offered no—and there could be no—legitimate strategic reason failing to use Parnell's report to impeach Parnell's testimony. Third Supplemental App. 2. Parnell admitted at the PCR hearing that in his report he concluded the bullet fragments could have been fired by the Dreher gun, Freiburger's gun, or *any other* H & R .32 caliber weapon. App. 1525-26 (emphasis added). And, he also expressly refused to disavow his report. In other words, Parnell ultimately found the comparison between the bullet fragments and the weapons in SLED's possession inconclusive. App. 1525-26. This inconclusive finding directly contradicts Cayton's conclusive finding and Parnell's trial testimony that his and Cayton's conclusions were different only in degree.⁶ Given the necessity of undermining Cayton's testimony, and the

⁶ Respondent's argument that the PCR court correctly noted Freiburger's lack of objection to Parnell's qualification as an expert despite Petitioner's arguments that ballistics is not a reliable science is of no importance. BOR 8. Despite the doubts raised about the general reliability of ballistics evidence raised below, the simple fact is that ballistics evidence was presented at trial and was the "crux" of the case. *See* Third Supplemental App. 1. Because the ballistics evidence was the key issue in Freiburger's case, it was imperative for counsel to impeach the ballistics evidence in any way possible, including use of Parnell's own conclusions.

defense trial strategy to do just that, Third Supplemental App. 1, impeaching Parnell with his own report was of paramount importance.

Contrary to Respondent's contention, no probative evidence supports the PCR court's findings that counsel was not ineffective in failing to use the Hoover Letter and the Parnell Report. There cannot possibly be any strategic reason for failing to use the Hoover Letter and the Parnell Report given the nature of the case against Freiburger, nor did trial counsel offer a strategic reason. With the lack of other evidence to connect Freiburger to this crime, counsel's failure to use the documents available to them was prejudicial to Freiburger and this Court should reverse the judgment below.

II. THE RECORD DOES NOT CONTAIN SUFFICIENT PROBATIVE EVIDENCE TO SUPPORT THE PCR JUDGE'S FINDING THAT THE STATE'S FAILURE TO DISCLOSE EVIDENCE REGARDING CAYTON'S FALSE TESTIMONY DID NOT VIOLATE *BRADY V. MARYLAND*, 373 U.S. 83 (1963).

Respondent incorrectly asserts the State had no responsibility to disclose information about Cayton being fired from the Kansas Bureau of Investigations ("KBI"). 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*. To hold otherwise would incongruously allow the State to avoid its *Brady* obligations simply by hiring examiners outside of the SLED organization.

Respondent also wrongly asserts that the PCR court correctly found there was no evidence that Cayton was fired from the KBI. The transcript from *Kansas v. Matt Denny*, case No. 2005-CR-395, introduced at the PCR hearing clearly indicates Cayton was fired. App. 1494-96; Supplemental App. 42-44. 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. 1494. Cayton responded, “*I think that’s obvious.*” App. 1494 (emphasis added). While the actual termination letter given to Cayton was not admitted at the PCR hearing, the certified transcript from *Denny* published the letter verbatim. Supplemental App. 43-44. The letter advised Cayton of his termination based on the fact that he failed to “follow policies, procedures, and protocols of the KBI Laboratory section.” Supplemental App. 43-44. The *Denny* transcript makes clear that Cayton’s trial testimony that he “retired” from being an examiner in Kansas was patently untrue; he was, instead, “fired” by the KBI. This evidence is undoubtedly material given the importance of Cayton’s testimony at Freiburger’s trial. The PCR court’s finding that the State was unaware of Cayton’s testimony and its finding that Cayton was not

actually fired by the KBI are unsupported by evidence of probative value and do not support the conclusion that no *Brady* violation occurred. This Court, therefore, should reverse the decision below and remand for a new trial.⁷

III. THE RECORD DOES NOT CONTAIN SUFFICIENT PROBATIVE EVIDENCE TO SUPPORT THE PCR JUDGE'S FINDING THAT POLICE REPORTS ARE NOT TESTIMONIAL WITHIN THE MEANING OF *CRAWFORD V. WASHINGTON*, 541 U.S. 36 (2004).

Respondent contends that the police report read into the record by Charles Clark was not testimonial under *Crawford* and thus did not violate the confrontation clause. In support of its contention, Respondent asserts that the standard rules of hearsay are relevant in deciding whether a statement is testimonial. *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011). However, the mere fact that a report may satisfy a hearsay exception does not exempt it from the rigors of the Confrontation Clause. See *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 321 (2009). The Court must still consider whether the primary purpose of the testimony was to create "an out-of-court substitute for trial testimony," in which case the statement is testimonial and subject to the Confrontation Clause. *Bryant*, 131 S. Ct. at 1155. In *Bryant*, the Supreme Court indicated that the determination of the primary purpose of the statement depends on whether the statement was obtained to respond to an ongoing emergency, the formality of the interaction, and the content of the statements. *Id.* at 1160. In this case, the police report read into the record was made hours after the police secured the scene where the taxi was found. App. 520-21, 568-69. The Supreme Court explicitly stated that its decision in *Bryant* did not "suggest that the emergency continued until [the perpetrator] was arrested." 131 S. Ct. at 1164. When the police created the report in

⁷ It is also important to consider the materiality from failing to disclose that Cayton was fired from the KBI in conjunction with the prejudice from trial counsel failing to use the Hoover letter and Parnell Report. While both were prejudicial, the combined effect completely dismantles the State's case against Freiburger.

this case, the emergency had ceased and there was no indication of a continuing threat, despite the fact a perpetrator had not been found. Instead, the officers were preserving potential evidence for trial, making the statements testimonial and subject to the confrontation clause.

Respondent also argues that Freiburger failed to demonstrate prejudice by the introduction of these statements. Respondent's argument, however, misstates the record evidence. Respondent references circumstantial evidence that Freiburger registered at the Gresham Hotel, near the area where the cab was found, on the day the police found the cab at the intersection of Lady and Assembly streets. This is factually incorrect. Freiburger registered at the Gresham Hotel on March 2, 1961. App. 694-95. The cab was located and secured by the police around 7:00 a.m. on March 1, 1961. App. 516-18. The fact that Freiburger was in the area over 24 hours after the cab had already been located and secured by police is hardly sufficient circumstantial evidence to convict Freiburger without the evidence from the police reports indicating a soldier from Fort Jackson likely was the killer. The police report read into the record by Clark were, therefore, not harmless.

Respondent further contends that the admission of Abersold's out-of-court statements did not violate the Confrontation Clause because Abersold was physically present at the trial. This argument ignores the fact that Abersold had absolutely no independent recollection of the prior statements he made to police that were read into the record. App. 723. Respondent does not contest the fact that Abersold's statements were testimonial as they were obtained in a formal police interrogation with the purpose of establishing evidence for the possible prosecution of Freiburger. See App. 722-23, 725. As testimonial statements, they are only admissible under *Crawford* where counsel has had an opportunity for cross-examination. See *Crawford*, 541 U.S. at 68. The Confrontation Clause "guarantees an opportunity for effective cross-examination."

Delaware v. Fensterer, 474 U.S. 15, 20 (1985). Though the Clause does not guarantee cross-examination effective in every way, *id.*, Freiburger had no opportunity whatsoever to cross-examine Abersold on information of which he readily admitted he had no recollection. Despite Abersold's physical presence in the courtroom, he was unavailable for cross-examination. *United States v. Amaya*, 533 F.2d 188, 190-91 (5th Cir. 1976) (determining a witness was unavailable for Confrontation Clause purposes at trial due to an accident resulting in loss of memory regarding his prior testimony); *see also State v. Young*, 277 Kan. 588, 601, 87 P.3d 308, 318 (2004) ("[A] witness who does not recall making the earlier statement or statements or who simply refuses to testify is not considered available for crossexamination at trial [for purposes of the Sixth Amendment Confrontation Clause]."). The record, therefore, does not contain sufficient probative evidence to support the PCR judge's finding the police reports read into the record were admissible evidence under the Confrontation Clause and this Court should reverse and remand for a new trial.

IV. THE RECORD DOES NOT CONTAIN SUFFICIENT PROBATIVE EVIDENCE TO SUPPORT THE PCR JUDGE'S FINDING THAT APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE A CONFRONTATION CLAUSE ISSUE PURSUANT TO *CRAWFORD V. WASHINGTON*.

Respondent argues that appellate counsel was aware of the Confrontation Clause arguments because he ordered the trial transcript well before he filed his appellate brief. To the contrary, appellate counsel testified at the PCR hearing that, though the *Crawford* opinion was issued a few weeks before the deadline for the appellate brief, he was "certain [he] did not read *Crawford* before [they] filed the brief." App. 1479. Appellate counsel was not even sure he was aware of *Crawford* before filing the initial brief. App. 1479. Appellate counsel further testified that he did not have a strategic reason for failing to raise the Confrontation Clause issue under

Crawford, despite the fact that his strategy was to “raise every issue [he] could.” As described *supra* in Section III, the police reports entered into evidence through Clark and Abersold were admitted in violation of *Crawford*. Appellate counsel admits he did not read *Crawford* prior to filing his appellate brief and had no strategic reason for failing to raise a claim under *Crawford*. The record, therefore, does not contain sufficient probative evidence to support the PCR judge’s finding that appellate counsel was not ineffective. This Court should reverse the contrary judgment below and remand for a new trial.

CONCLUSION

The evidence presented at the PCR hearing discredited the linchpin of the State's case against Freiburger thus raising the strong possibility that an innocent man convicted by the testimony of a discredited ballistics examiner serving as the prosecutor's hired gun will die in prison for a crime he did not commit. A new jury should hear all of the relevant evidence and make its own assessment as to whether Freiburger did or (as is most likely the case) did not commit the crime for which he is imprisoned. Therefore, for the reasons stated in this Reply Brief, as well as those stated in the Initial Brief of Petitioner, this Court should reverse Freiburger's conviction and remand for a new trial.

Respectfully submitted,

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BY: 
Counsel for Petitioner

March 17, 2014.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

CA No. 2006-CP-40-3866
Appeal Case No. 2010-177147

EDWARD FREIBURGER.....*Petitioner,*

v.

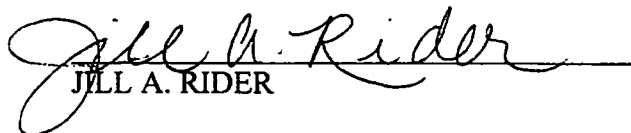
STATE OF SOUTH CAROLINA.....*Respondent.*

CERTIFICATE OF SERVICE

I, Jill A. Rider, hereby certify that one (1) copy of the Brief of Appellant has been served upon opposing counsel by depositing same in the United States Mail, first class postage pre-paid, addressed as follows:

Megan E. Harrigan
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211-1549

This the 17th day of March, 2014, in Columbia, SC.


JILL A. RIDER

The South Carolina Court of Appeals

Edward Freiburger, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2010-177147

The Honorable G. Thomas Cooper, Jr.
Richland County
Trial Court Case No. 2006CP4003866

ORDER

Pursuant to Rule 210(f) of the South Carolina Appellate Court Rules, it is ordered that the Clerk of Court for Richland release:

Applicant's Exhibit #11 (Letter from SLED to FBI)

to be transported to this Court by the South Carolina Attorney General's Office, for consideration in the above referenced matter.

FOR THE COURT

BY


CLERK

Columbia, South Carolina

cc:

John H. Blume, III, Esquire
Lindsey Sterling Vann, Esquire
Megan E. Harrigan, Esquire
Alan McCrory Wilson, Esquire

FILED

10/20/14 87



ALAN WILSON
ATTORNEY GENERAL

October 22, 2014

VIA Hand Delivery

The Honorable Jenny Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Edward Freiburger v. State
Appellate Case No.: 2010-177147

Dear Ms. Kitchings,

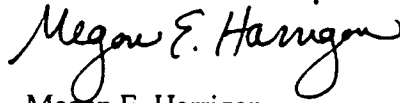
Enclosed please find Applicant's Exhibit No. 11 (letter from SLED to FBI) (for identification only) from the August 13, 2009 Post-Conviction Relief hearing before the Honorable G. Thomas Cooper, Jr., as requested by this Court by Order dated October 20, 2014, pursuant to Rule 210(f), SCACR. Respondent has also enclosed the list of Applicant's exhibits introduced at the hearing (found on App. p. 1345), showing that Applicant's Exhibit No. 11 was marked for identification only but was neither moved nor admitted into evidence. See App. pp. 1489-90. Additionally, Respondent would draw this Court's attention to App. p. 1557, where Respondent expressly objected to the introduction of the transcription of the letter by Mr. Blume's paralegal (despite Petitioner's failure to move for the introduction of the documents into evidence). Appendix pages 1674-75 are improperly included in the Appendix, as this exhibit (both in whole and part) was never introduced into evidence. Similarly, Respondent would also draw this Court's attention to Applicant's Exhibit No. 14 (SLED Ballistics Report by Parnell) (for identification only), which was also only marked for identification and was never moved or admitted into evidence, but was also erroneously included in the Appendix (See App. p. 1676-77). Both of these documents are included in the section listed as "Exhibits to Post-Conviction Relief Hearing" in the Index, despite never been offered or admitted into evidence.

Respondent has previously objected to these and other documents that were improperly included in the Appendix. See Motion to Hold Time Limits for Return to the Petition for a Writ of Certiorari in Abeyance While the Petitioner Removes/Supplements Appendix with Required Documents Per Rule 243(f), SCACR (dated March 28, 2011) and Second Motion to Hold Time Limits for Return to the Petition for a Writ of Certiorari in Abeyance While the Petitioner Removes/Supplements Appendix with Required Documents Per Rule 243(f), SCACR (dated September 9, 2011). In response, Petitioner acknowledged that several documents were erroneously included or excluded from the Appendix. By Order of the Supreme Court dated April 13, 2011, Petitioner was instructed to remove improper documents from the Appendix and supplement with proper documents that were excluded from the Appendix. Despite this Order,

Respondent has never been served or provided with an updated, corrected Appendix, which was highlighted in the Return to Petition for a Writ of Certiorari.

Please let me know if I can provide any additional information to the Court.

Sincerely,

A handwritten signature in black ink, reading "Megan E. Harrigan". The signature is fluid and cursive, with the first name "Megan" being more prominent.

Megan E. Harrigan
Assistant Attorney General
Bar No. 100108

MEH

cc: John H. Blume, III, Esquire (by U.S. Mail)
Lindsay S. Vann, Esquire (by U.S. Mail)

Enclosure: Applicant's Ex. No. 11 from August 13, 2009 PCR Hearing (marked for id only)
List of Applicant's Exhibits from August 13, 2009 PCR Hearing

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

EDWARD FREIBURGER # 286115,
Applicant,

v.

STATE OF SOUTH CAROLINA,
Respondent.

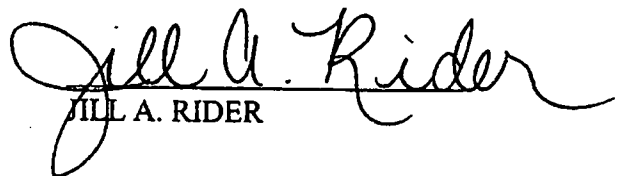
IN THE COURT OF COMMON PLEAS
CA No. CA No. 06-CP-40-3866

AFFIDAVIT OF
JILL A. RIDER

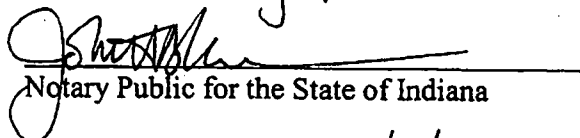
Jill A. Rider, who appeared personally before me, affirms and states the following:

1. I am a paralegal for the law office of Blume, Weyble, & Norris, LLC.
2. I have been employed by John Blume for the past eleven years.
3. At Mr. Blume's request, I reproduced (by retyping) the July 19, 1961, letter from J.P. Strom of the SC Law Enforcement Division to J. Edgar Hoover of the FBI. A photocopy of the letter is attached to this affidavit as exhibit A. The reproduction of the letter is attached to this affidavit as exhibit B.

Further affiant sayeth naught.


JILL A. RIDER

Sworn to and subscribed before me
this 14 day of August, 2009.


Notary Public for the State of Indiana

My commission expires: 3/27/2017



(X)

July 19, 1961

Honorable J. Edgar Hoover
Director
Federal Bureau of Investigation
Washington, D. C.

Re: SLE Case 661-114

John Cross, Victim
Murder - Richmond Co., S. C.
February 28, 1961

ATTENTION: FIREARMS LABORATORY

Dear Mr. Hoover:

On February 28, 1961, Mr. John Cross, a white cab driver was murdered in Richmond County, Georgia, in the back of his cab. The X-Ray showed three pieces of lead, and a few tiny fragments. There was only one entrance wound, and no exit wound. The three pieces of lead were turned over to Lt. R. H. Cate, Firearms Identification Technician, 59th MA, of this Division.

On April 12, 1961, an H & R Revolver, Serial # 9893, was recovered in a house where it is possible that any number of persons could have carried it out. However, the owner, Alonzo Brown, who is an old man, says that he does not believe that anyone had his gun. A number of known thieves, and robbers, including members of his own family have been in this house from time to time. There was no physical evidence other than the gun.

Mr. Cate is of the opinion that this weapon killed the taxi driver, based on bullet comparisons, but has withheld a formal report because of the condition of the bullet.

On May 18, 1961, Sheriff J. S. Blich of Richmond County, submitted another H & R Revolver, Serial # 9948 to Lt. Cate for examination and comparison. This weapon was recovered from an MCL Soldier, Pvt. Fitchner who purchased this weapon on the day of the murder in Columbia, S. C.

000301

Although some similarities were noted, Lt. Cate was unable to establish an identification of any kind. Again there was no physical evidence other than the gun. Pvt. Friaburger denies killing the Cab Driver.

On the account of a soldier being involved Sheriff Sligh requested that Lt. Cate consult the Army Firearms Examiner, Mr. Bird at Fort Gordon. Mr. Bird checked the fatal bullet with bullets from both guns and stated that he did not believe the fatal bullet could be identified with any weapon because of its condition. Mr. Bird made no formal report. He was merely consulted and stated that he would not enter the case officially. And that he would consider the conference confidential. This was on May 31, 1961.

On June 12, 1961 when Special Agent Bob Frasier was in Columbia for the Winnebago Safe Burglary Trial, Lt. Cate showed Mr. Frasier his photo micrographs, and talked to him about this case. Mr. Frasier made no definite comments at that time. This is mentioned in case Mr. Frasier examines this evidence.

Sheriff Sligh has requested, with the full knowledge and consent of Lt. Cate that your laboratory conduct examination and comparisons of this evidence which is being sent by registered letter.

Evidence submitted: K-1 K & B Revolver, serial R W 9893 belonging to Alonzo Dresher.

K-2 K & B Revolver, serial R W 9948 belonging to Pvt. Friaburger.

E-1, E-2 & E-3 pieces of bullet from victim's head.

No shot examinations and comparisons can not be made due to circumstances and FBI request that you give an opinion from your examiner as to the value of the fatal bullet as evidence, and what further course he may pursue.

Should your examiner compare these bullets and effect an identification, you have no opinion, and the substance of Lt. Cate that this will be final, and there will be no disagreement or conflicting testimony.

Your cooperation in this as in all past matters is greatly appreciated.

Yours very truly,

J. P. Strom, Chief

9. Cr. Law Enforcement Div.

000302

July 19, 1961

Honorable J. Edgar Hoover
Director
Federal Bureau of Investigation
United States Department of Justice
Washington, D.C.

Re: SLED Case #61-114
John Orner, Victim
Murder- Richland Co. S.C.
February 28, 1961

ATTENTION: FIREARMS LABORATORY

Dear Mr. Hoover:

On February 28, 1961, Mr. John Orner, a white cab driver, was murdered in Richland County. He was shot in the back of the head. The X-Ray showed three pieces of lead, and a few tiny fragments. There was only one entrance wound, and no exit wound. The three pieces of lead were turned over to Lt. M.N. Cate, Firearms Identification Technician, 59th MA, of this Division.

On April 12, 1961, an H&R Revolver, Serial #9893, was recovered in a house where it is possible that any number of persons could have carried it out. However, the owner, Alonzo Dreher, who is an old man, says that he does not believe that anyone had his gun. A number of known thieves and robbers, including members of his own family have been in this house from time to time. There was no physical evidence other than the gun.

Lt. Cate is of the opinion that this weapon killed the taxi driver, based on bullet comparisons, but has withheld a formal report because of the condition of the bullet.

On May 18, 1961, Sheriff S.S. Sligh of Richland County, submitted another H&R Revolver, Serial #9948, to Lt. Cate for examination, and comparison. This weapon was recovered from an AWOL Soldier, Pvt. Frieburger who purchased this weapon on the day of the murder in Columbia, S.C.

Although some similarities were noted, Lt. Cate was unable to establish an identification of any kind. Again, there was no physical evidence other than the gun. Pvt. Frieburger, denies killing the Cab Driver.

On the account of a solidier being involved Sheriff Sligh requested that Lt. Cate consult the Army Firearms Examiner, Mr. Bird, at Fort Gordon. Mr. Bird checked the fatal bullet with bullets from both guns and stated that he did not believe the fatal bullet could be identified with any weapon because of its condition. Mr. Bird made no formal report. He was merely consulted and

stated that he would not enter the case officially, and that he would consider the conference confidential. This was on May 31, 1961.

On June 12, 1961 when Special Agent Bob Frazier was in Columbia, for the Winnsboro Safe Burglary Trial, Lt. Cate showed Mr. Frazier his photo micrographs, and talked to him about this case. Mr. Frazier made no definite comments at that time. This is mentioned in case Mr. Frasier examines this evidence.

Sheriff Slight has requested, with the full knowledge and consent of Lt. Cate, that your Laboratory conduct examinations and comparisons of this evidence, which is being sent by Railway Express.

Evidence submitted: K-1-H & R Revolver, Serial #9893, belonging to Alonzo Dreher.
K-2-H & R Revolver, Serial #9948, belonging to Pvt. Frieburger.
E-1, E-2 & H-3- piece of bullet from victim's head.

If such examinations and comparisons can not be made due to circumstances and FBI policy, Lt. Cate request an opinion from your examiner as to the value of the fatal bullet as evidence, and what further course he may pursue.

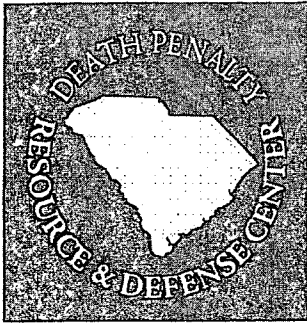
Should your Examiner compare these bullets and effect an identification, you have my assurance, and the assurance of Lt. Cate that this will be final, and there will be no disagreement or conflicting testimony.

Your co-operation in this as in all past matters, is greatly appreciated.

Yours very truly,

J.F. Strom, Chief
S.C. Law Enforcement Division

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October 24, 2014

Via Hand Delivery

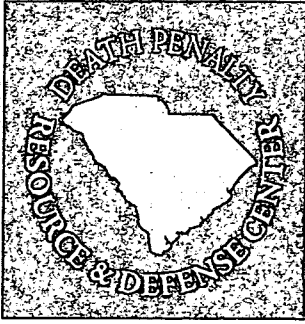
The Honorable Jenny Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

**Re: *Edward Freiburger v. State*
Appellate Case No. 2010-177147**

Dear Ms. Kitchings:

This letter is submitted in response to the Assistant Attorney General's October 22, 2014 letter accompanying the transportation of Applicant's Exhibit #11 (Letter from SLED to FBI).

- Applicant's Exhibit #11 (Letter from SLED to FBI): Undersigned counsel find the Attorney General's histrionic protestations curious. It has never been contested that the Strom to 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 seriously 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. 216, 218, 1490-91, 1674; *see also* App. 1527, 1528, 1595-96. The letter was provided to the PCR court (and opposing counsel) prior to the PCR hearing as part of Applicant's pretrial brief, app. 139-40, 216-19, and was discussed extensively at the PCR hearing. Without objection from the State, Applicant's counsel read the letter into the record (i.e., published its contents) when questioning both trial counsel. App. 1490-91, *see also* 1595-96. At no point did the State contest the contents of the letter or its authenticity. During oral argument before this Court, the Attorney General specifically conceded the admissibility of the letter. Additionally, the contents of the Hoover letter were not disputed during cross-examination of SLED Agent Parnell at the PCR hearing, which is the method in which Applicant argued the letter could and should have been used at trial. App. 1527-28.
- Applicant's Exhibit #14 (SLED Ballistics Report by Parnell): Similarly, regardless of whether the report was admitted into evidence at the PCR hearing, the record is clear that the report was in trial counsel's possession at the time of trial and states: "[The bullet fragments] could have been fired by item 1 [H&R model 732, serial number W-9893 –



the Dreher weapon], item 2 [H&R model 732, serial number W-9948 – the Freiburger weapon], or any other similarly rifled firearm of the same caliber.” App. 1525-26. The report was provided to the PCR court (and opposing counsel) with Applicant’s pretrial brief, app. 139-40, 211-12, and was discussed extensively at the PCR hearing. The State did not contest the contents of the report. Furthermore, the report was used at the PCR hearing in precisely the way that PCR counsel submitted it should have been used at trial, i.e., forcing Agent Parnell to acknowledge that he could not exclude literally thousands of weapons as being the murder weapon. App. 1525-26.

It is also important to note the PCR court did not contest that the letter or the report said what the record demonstrates the documents said or base its denial of relief on the technicalities the Attorney General is now raising for the first time. This is so despite the fact that the order was written by the Attorney General’s Office. Nor did the Attorney General argue that the letter was not properly admitted into evidence in its Return to the Petition for Writ of Certiorari or its Brief on the Merits after Certiorari was granted. This is the case due to the inherently more informal nature of PCR proceedings, and the fact that there was no dispute as to the letter’s authenticity or contents below. In sum, it is the contents of the letter and the report that are the basis of Applicant’s claim, and the contents of both were admitted without objection, are part of the record on appeal and may be considered by this Court.

Sincerely,

Lindsey S. Vann
Counsel for Applicant

cc: Megan E. Harrigan, Assistant Attorney General (via U.S. Mail)

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Edward Freiburger, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2010-177147

ON WRIT OF CERTIORARI

Appeal From Richland County
Henry F. Floyd, Trial Court Judge
G. Thomas Cooper, Jr., Post-Conviction Relief Judge

Opinion No. 5295
Heard October 16, 2014 – Filed February 11, 2015

REVERSED AND REMANDED

John H. Blume, III, Blume Norris & Franklin-Best, LLC,
and Lindsey Sterling Vann, both of Columbia, for
Petitioner.

Attorney General Alan McCrory Wilson and Assistant
Attorney General Megan E. Harrigan, both of Columbia,
for Respondent.

FEW, C.J.: In 2001, the State indicted Edward Freiburger for a murder that occurred in 1961. Following his conviction and the denial of his direct appeal,

Freiburger filed an application for post-conviction relief (PCR), claiming ineffective assistance of counsel. We find the PCR court correctly denied PCR as to all issues except one—Freiburger's claim that trial counsel was ineffective for failing to introduce a letter written in 1961 by the Chief of SLED, J.P. Strom, to the director of the FBI, J. Edgar Hoover. We find the letter would have deeply undermined the foundation of the State's case—its ballistics evidence. We reverse the denial of PCR as to this issue and remand to the court of general sessions for a new trial.

I. Facts and Procedural History

John Orner was a taxi driver in Columbia who regularly transported soldiers to and from the local U.S. Army base—Fort Jackson. On the evening of February 28, 1961, Orner did not return home after being dispatched to pick up a passenger at the base. Police found Orner's blood-stained taxi the next morning on the [REDACTED] Street, near its intersection with Gervais Street. Two days later, police discovered Orner's body by the side of U.S. Highway 601 in lower Richland County. He died from a gunshot wound to the head. Forensic examinations of three bullet fragments removed from Orner's head indicated the bullet was fired from a .32 caliber Harrington and Richardson (H&R) revolver.

In March of 1961, Freiburger was arrested in Tennessee for hitchhiking, and police seized a .32 caliber H&R revolver he was carrying (the "Freiburger gun"). This gun was later given to Richland County authorities in connection with their investigation of Orner's murder. Ballistics experts examined bullets test-fired through the Freiburger gun, as well as another .32 caliber H&R revolver seized from the home of a local resident, Alonzo Dreher (the "Dreher gun"). These ballistics tests yielded inconclusive results, and no charges were brought at that time.

In 2000, the Richland County Sheriff's Department reopened the murder investigation. Lieutenant Ira Parnell, supervisor of the South Carolina Law Enforcement Division's (SLED) Firearms Identification Laboratory, reexamined the three bullet fragments and compared them to the test bullets fired by the Freiburger and Dreher guns. Lt. Parnell also fired his own test bullets with the Freiburger gun. He later issued a report stating the results "were inconclusive" and the bullet fragments "could have been fired by [the Dreher gun], [the Freiburger gun], or by another similarly rifled firearm of the same caliber." Also in 2000, four other SLED ballistics experts compared the test bullets with the three bullet fragments and reached the same inconclusive results. However, John Cayton, a

private ballistics expert hired by the Sheriff's department, concluded striations on one of the bullet fragments matched markings on test bullets from the Freiburger gun, and not the Dreher gun or any similar caliber H&R gun. On the basis of Cayton's opinion, the State indicted Freiburger for the murder of Orner.

At trial, Freiburger was represented by John Delgado and Kathrine Hudgins. Cayton and Lt. Parnell testified as experts for the State. The jury found Freiburger guilty of murder, and the trial court sentenced him to life in prison. The supreme court affirmed his conviction. *State v. Freiburger*, 366 S.C. 125, 620 S.E.2d 737 (2005).

Freiburger filed a PCR application, claiming trial counsel was ineffective for several reasons, including not introducing into evidence Chief Strom's 1961 letter to Hoover (the "Hoover letter"). According to the Hoover letter, Lieutenant Millard Cate—the head of SLED's Firearms Identification Laboratory in 1961—performed comparative ballistics tests on the three bullet fragments and test bullets fired through the Freiburger and Dreher guns. In the letter, Chief Strom stated "Lt. Cate is of the opinion that [the Dreher] weapon killed the taxi driver."¹ The letter further stated that although Lt. Cate noted some similarities between the test bullets from the Freiburger gun and the bullet fragments, he was "unable to establish an identification of any kind." According to the letter, the "Army Firearms Examiner" also reached inconclusive results as to the Freiburger gun.

The PCR court initially found trial counsel was not deficient for failing to introduce the letter. In its order denying Freiburger's Rule 59(e), SCRCP, motion, however, the court stated, "It may have been error to not try to use the letter in some manner or for some purpose." Notwithstanding this, the court denied PCR because it found Freiburger did not prove he was prejudiced by trial counsel's error. This court granted Freiburger's petition for a writ of certiorari.

II. Ineffective Assistance of Counsel

¹ While the record does not reveal how police came to suspect the Dreher gun was involved in the murder, the Hoover letter provides the following information: "[The Dreher gun] was recovered in a house where it is possible that any number of persons could have carried it out. However, the owner Alonzo Dreher, who is an old man, says that he does not believe that anyone had his gun. A number of known thieves and robbers, including members of his own family, have been in this house from time to time."

Under the two-pronged test from *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), a PCR applicant alleging ineffective assistance of counsel must show: (1) trial counsel "failed to render reasonably effective assistance under prevailing professional norms," *Porter v. State*, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006); and (2) "there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different," *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). As to the first prong, Freiburger must prove trial counsel's performance was deficient, "meaning that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (citation and quotation marks omitted). If the State contends the alleged deficiency resulted from a strategic decision made at trial, counsel "must articulate a valid reason for employing a certain strategy." *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (emphasis removed). As to the second prong, Freiburger must show there is a "reasonable probability" that, absent trial counsel's error, "the jury would have had a reasonable doubt as to [his] guilt." *Edwards*, 392 S.C. at 459, 710 S.E.2d at 66; see also *Lounds v. State*, 380 S.C. 454, 459, 670 S.E.2d 646, 649 (2008) ("[W]hen a defendant's conviction is challenged, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." (citation and internal quotations marks omitted)).

Freiburger argues trial counsel was ineffective for failing to introduce the Hoover letter at trial. He correctly points out the letter was the only evidence establishing the Dreher gun as the murder weapon—a scenario under which Freiburger could not be the person who killed Orner. He argues the letter should have been used to contradict Cayton's opinion that the Freiburger gun was the murder weapon, refute a SLED examiners' testimony that he and Lt. Cate "exclude[d]" the Dreher gun, and corroborate the inconclusive results reached by multiple SLED examiners as to the Freiburger gun.

A. Deficiency—The First Prong of *Strickland*

We begin our analysis of whether Freiburger met the first prong of *Strickland* with the State's concession that the letter would have been admissible at trial. When questioned at oral argument regarding the admissibility of the letter, the State responded, "I think it would have been admissible at trial."

The PCR court's statement in its Rule 59(e) order—"[i]t may have been error to not try to use the letter in some manner or for some purpose"—appears to be a finding

of deficiency. There is ample evidence in the record to support this finding. *See Moore v. State*, 399 S.C. 641, 646, 732 S.E.2d 871, 873 (2012) (providing an "any evidence" standard for reviewing a PCR court's ruling). However, to the extent the PCR court did not find Freiburger proved the first prong of *Strickland*, we hold the court's decision is not supported by the evidence. *See Lorenzen v. State*, 376 S.C. 521, 529, 657 S.E.2d 771, 776 (2008) ("A PCR court's findings will be upheld on appeal if there is 'any evidence of probative value sufficient to support them.'" (citation omitted)).

The letter would have been highly beneficial to Freiburger for multiple reasons. 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. For example, Lt. Parnell testified:

My opinion was that it was an inconclusive result, and there are degrees of inconclusive . . . , from no similarities noted, to a lot of similarities noted, to not quite enough. In the case of . . . the bullet fragment from Mr. Orner's head . . . and [the Freiburger gun], I found a remarkable similarity It was just not quite enough for me to conclude that it was fired out of that revolver and no other gun ever made.

The State ended its direct examination of Lt. Parnell by asking, "And the other examiners at SLED, . . . Lt. Defreese, Mr. Collins, Mr. Whittler, Mr. Paavel, their opinion agrees with yours?" Lt. Parnell responded, "That's correct."

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. The letter indicates Lt. Cate saw enough similarities that he reached "the opinion that [the Dreher] weapon" did it. 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. The letter states Lt. Cate observed "some similarities," but he "was unable to establish an identification of any kind."

Finally, the letter contradicted the testimony of another expert for the State, Carl Stokes, who worked for SLED from 1954 until 1981. It would have been particularly important to impeach Stokes with the letter because the State framed his testimony in terms of his relationship with Lt. Cate. Specifically, Stokes testified, "I was [Lt. Cate's] first understudy," and he described all the work he did in this case in terms of his collaboration with Lt. Cate. Stokes explained how "Mr. Cate and I went to the Dunbar Funeral Home" because "the body of John Orner was there . . . and we were there to assist in the recovery of the bullet." Stokes then testified, referring to Lt. Cate and himself, "We recovered three fragments of a bullet," which "remained in our custody," and "Mr. M.M. Cate's initials are on the vial" containing the fragments. Stokes repeatedly identified Lt. Cate's initials on various containers, and then described the work he and Lt. Cate did and the results they reached. He testified "we were able to determine that the fragments were fired from an H&R .32 revolver," "we concluded it was from one bullet," and "we were able to measure the groove of the bullet and determine that it was the same width as a Harrington & Richardson weapon."

Stokes then testified to the conclusions he and Lt. Cate reached regarding the Dreher and Freiburger guns, specifically that "we were able to exclude the [Dreher gun]." (emphasis added). The State asked Stokes to elaborate:

- Q: And when you say "excluded," explain what that means to us, Mr. Stokes?
- A: In comparing the test bullet with the known specimen, you're looking for identifying characteristics, those characteristics that have been imparted on the bullet from the barrel, . . . the individual scratch marks as it passes through the barrel. We look for those identifying characteristics to match together, and we did that in this particular case.
- Q: And the [Dreher gun] was excluded?
- A: *We* excluded it, yes, sir.
- Q: It did not fire that bullet?

A: It did not fire the fragments that we had.

(emphasis added). Stokes later testified as to Lt. Cate, "I don't ever recall any results coming out of the lab that we didn't agree on," and as to the particular results in this case, "Mr. Cate [and I] came to the same opinion."

Stokes' claim that he and Lt. Cate "were able to exclude" the Dreher gun cannot be reconciled with Chief Strom's statement in the Hoover letter—"Lt. Cate is of the opinion that [the Dreher gun] killed the taxi driver." The letter demonstrates Stokes testified incorrectly when he stated, "We were able to exclude [the Dreher gun]" and Lt. Cate concluded "[i]t did not fire the fragments that we had."

This discussion demonstrates the multiple ways trial counsel could have effectively used the letter to benefit the defense. In the face of these benefits, the record contains no basis for a decision not to introduce the letter into evidence. Hudgins testified she knew of no reason why the Hoover letter was not introduced. The PCR court found Delgado saw the letter and "specifically list[ed]" it on an index he created of discovery materials provided by the State. When Delgado was asked at the PCR hearing, "[D]id [you] have a strategic reason not to use this letter?" he responded, "No, sir." Delgado further stated in an affidavit submitted to the PCR court, "I do not presently remember why I did not use the letter at trial and I cannot think of any strategic reason why I would have decided not to use it." In the same affidavit, Delgado stated the letter "would have been powerful evidence."²

We therefore find trial counsel's failure to introduce the Hoover letter requires a finding of deficiency. The letter contains evidence that would have been favorable to Freiburger in several important ways. Trial counsel has not articulated any reason for not introducing it, nor has the State argued there could be such a reason.

² We hesitate to embrace Delgado's testimony. The PCR court stated Delgado "was evasive in his testimony" and gave examples to illustrate Delgado's evasiveness. The PCR court noted significant inconsistencies between Delgado's affidavit and his live testimony and found, "this court does not believe [Delgado's] affidavit testimony." We agree with the PCR court. Delgado made no attempt to defend his actions as trial counsel, but attempted to cast those actions as deficient. He so clearly continued in the PCR proceedings to act as an advocate for Freiburger that the PCR court allowed the State to treat him as a hostile witness. See Rule 611(c), SCRE ("When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.").

Thus, counsel's failure to introduce the letter into evidence was so serious an error that it rendered counsel's performance deficient under the first prong of *Strickland*. See *Edwards*, 392 S.C. at 456, 710 S.E.2d at 64.

B. Prejudice—The Second Prong of *Strickland*

We find Freiburger also met his burden of proof as to the second prong of *Strickland* because 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. See 392 S.C. at 459, 710 S.E.2d at 66.

To frame our discussion of prejudice, we point out the evidence against Freiburger was purely circumstantial, and—other than ballistics—weak. The supreme court discussed the extent of the evidence in affirming the denial of Freiburger's directed verdict motion:

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) [ballistics], 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.

Freiburger, 366 S.C. at 137, 620 S.E.2d at 743. In fact, the State did not indict Freiburger for forty years following Orner's death. Instead, the State brought charges only after it obtained ballistics evidence directly tying Freiburger's gun to the murder—Cayton's expert opinion.

It is also important to note the manner in which the State portrayed Lt. Cate during trial. In addition to the testimony recited above, Stokes testified Lt. Cate was "one of the building blocks" of SLED's firearms identification division who always tried "to avoid an inconclusive" ballistics result. Stokes testified Lt. Cate "did everything possible . . . to identify any weapon that we got. . . . [Lt. Cate] lived by not messing with [the] in between, and we had very few inconclusives." The State began its questions to Lt. Parnell by asking whether he knew and worked for Lt. Cate, and specifically pointed out "you worked with and knew [Lt. Cate] before 1973," but after that "you were under his supervision." In its closing argument, the State emphasized Lt. Cate's positive character, stating, "Mr. Cate must have been a heck of a man, a heck of a man, and he didn't want [anything] in between, no sir, no ma'am. He excluded everything."

The weakness of the State's non-ballistics evidence and the State's efforts to use the expertise of Lt. Cate to its advantage at trial frame our analysis of the importance of the Hoover letter to Freiburger's defense. With this in mind, we find the Hoover letter would have undermined the State's ballistics evidence in three particular ways.

First, it would have negatively impacted the certainty of Cayton's opinion that the Freiburger gun was the murder weapon. The State relied heavily on Cayton's ballistics analysis to convict Freiburger. As Delgado testified at the PCR hearing, "Without John Cayton, the solicitor did not have a case." In fact, Cayton's opinion that the Freiburger gun killed Orner is the only additional evidence the State added since 1961, when it decided not to prosecute Freiburger. Because the State built its case around Cayton's positive identification of the Freiburger gun, Lt. Cate's contrary opinion that the Dreher gun fired the fatal bullet—the only evidence available to *contradict* Cayton's opinion—would have been a great benefit to Freiburger's defense. See *McKnight v. State*, 378 S.C. 33, 55, 661 S.E.2d 354, 365 (2008) (finding counsel's failure to introduce evidence prejudiced defendant because it would have undermined the conclusion of the only expert who testified that the defendant's actions caused the victim's death).

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. Their exclusion of the Dreher gun made the inconclusive results

as to the Freiburger gun logically consistent with Cayton's opinion. However, Lt. Cate's opinion that the Dreher gun was the murder weapon would have prevented this corroborative effect. Specifically, Lt. Cate's opinion that the Dreher gun was the murder weapon necessarily excluded the Freiburger gun—because only one gun could be the murder weapon. Thus, introduction of the letter would have transformed an apparent consensus among firearms examiners into a conflict among experts regarding which gun fired the fatal bullet. *See Ard v. Catoe*, 372 S.C. 318, 330, 642 S.E.2d 590, 596 (2007) (affirming finding of prejudice because "the extent to which the jurors credited [expert]'s testimony . . . was critical to the outcome of the case" and "counsel's failure to refute . . . evidence transformed an arguable case into a clear case" (internal quotation marks omitted)).

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. Because trial counsel did not use the letter, the jury was left with the belief that Lt. Cate excluded the Dreher gun—the direct opposite of what Chief Strom wrote in the Hoover letter.

To support its finding of no prejudice, the PCR court relied on Lt. Parnell's testimony at the PCR hearing. Specifically, Lt. Parnell was asked if he was familiar with a letter written by Lt. Cate in 1961, to which he responded, "Well, Mr. Cate didn't write it." He was then asked if the letter indicated that Lt. Cate believed the Dreher gun killed Orner. Lt. Parnell responded, "I see that in the letter. But I also know that Mr. Cate didn't write a formal report indicating one way or the other. But . . . that is what [the letter] says." Based on this testimony, the court found the presentation of the letter was "not useful to [Freiburger] and would have probably been detrimental if done at trial."

While Lt. Parnell's testimony at the PCR hearing was dismissive of Lt. Cate's opinion in the Hoover letter, his testimony does not support a finding of no prejudice. The PCR court also concluded no prejudice resulted based on "Mr. Delgado's explanation that he . . . did not ascribe great importance to [the letter]." There is no evidence whatsoever to support this finding. In fact, all statements in Delgado's affidavit and live testimony—such as that the letter "would have been helpful" and constituted "powerful evidence" for the defense—directly contradict the court's finding.

The State discounts the importance of the letter, arguing Chief Strom sent the letter to request additional ballistics testing by the FBI, which demonstrates Lt. Cate was unsure of his conclusion. The State contends this decreases any prejudicial effect

of trial counsel's failure to introduce the letter at trial. We believe the State's argument overlooks the importance of the letter to Freiburger's case. It is true Chief Strom requested additional ballistics testing from the FBI. However, the letter demonstrates one of the reasons for the State's request—Lt. Cate believed the Dreher gun was the murder weapon, and thus the State had nobody to prosecute. While we acknowledge Lt. Cate may not have been certain, Chief Strom chose to write "Lt. Cate is of the opinion that [the Dreher] weapon killed the taxi driver," and these are the words the jury would have heard if counsel had introduced the letter. Lt. Cate's uncertainty makes his "opinion" only marginally less significant.

The State best illustrated the importance of the Hoover letter in its own closing argument, in which 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

By the State's own challenge to the jury during closing argument, the existence of an "opinion" that the Dreher gun killed Orner reasonably could have changed the outcome of trial.

We find no evidence to support the PCR court's determination that Freiburger failed to prove prejudice. Rather, we find the admission of the Hoover letter would have deeply undermined the State's case. Counsel's failure to introduce the letter leaves us without confidence in the outcome of the trial. *See Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698 (stating as to the second prong, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome"). Accordingly, we hold the court erred in denying PCR.

III. Conclusion

The order of the PCR court is **REVERSED** and the case is **REMANDED** to the court of general sessions for a new trial.

LOCKEMY, J., concurs.

THOMAS, J. (concurring in part and dissenting in part): I agree with the majority that the PCR court correctly denied Freiburger relief on the issues he

raised concerning alleged violations of *Brady v. Maryland*³ and *Crawford v. Washington*.⁴ I also agree with the majority's decision to affirm the PCR court's refusal to grant relief due to trial counsel's alleged failure to use the Parnell Report when cross-examining Lt. Parnell. As the Hoover letter, I do not dispute that Freiburger's trial counsel had been informed of its existence and that we should not address whether the evidence would have been admissible in view of the State's concession during oral argument. I write separately, however, because I would affirm the PCR court's findings that Freiburger's trial counsel was not ineffective for failing to introduce the letter and that this failure was not prejudicial to Freiburger.

"The burden is on the applicant in a post-conviction proceeding to prove the allegations in his application." *Brannon v. State*, 345 S.C. 437, 439, 548 S.E.2d 866, 867 (2001) (citation omitted). Although "[a]n appellate court must affirm the PCR court's decision when its findings are supported by any evidence of probative value, . . . an appellate court will not affirm the decision when it is not supported by any probative evidence." *Id.* (citations omitted).

"To establish the requisite prejudice necessary to prove a claim of ineffective assistance of counsel, [a PCR applicant] must demonstrate that his attorney's errors had an effect on the judgment against him." *Edwards v. State*, 392 S.C. 449, 458-59, 710 S.E.2d 60, 65 (2011). To accomplish this, the applicant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). "[W]hen a defendant's conviction is challenged, 'the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.'" *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (quoting *Strickland*, 466 U.S. at 695).

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

³ *Brady v. Maryland*, 373 U.S. 83 (1963).

⁴ *Crawford v. Washington*, 541 U.S. 36 (2004).

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.

During the PCR hearing, Parnell acknowledged that he was familiar with the letter and knew it stated that Lt. Cate was of the opinion the Dreher weapon was used to kill the victim. However, Parnell also mentioned that the letter revealed that Cate, though his opinion was based on bullet comparisons, "withheld a formal report because of the condition of the bullet." Furthermore, the letter was addressed to the attention of the Firearms Laboratory of the Federal Bureau of Investigation, and as Parnell acknowledged on cross-examination, "was written for the purpose of obtaining, attempting to obtain assistance from the FBI in doing an additional examination of the bullet." Parnell also testified that the bullet was in three fragments and showed signs of twisting and distortion that could have complicated the identification procedure. Furthermore, as Parnell testified, the letter mentioned that Cate did not document his opinion in a formal report and suggested he was reluctant to do this because the condition of the bullet undermined his confidence in his identification of the murder weapon. Therefore, although I agree with the majority that Cate's opinion, as stated in the Hoover letter, did not support Cayton's positive identification of the Freiburger gun, I would hold the 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.

The majority also finds introduction of the Hoover letter would have been beneficial to Freiburger as a means to impeach Carl Stokes. The PCR court did not rule on this issue, and Freiburger, though he moved to alter or amend the judgment, did not request specific findings of fact or conclusions of law on whether the letter would have discredited Stokes's testimony; therefore, I would not hold Freiburger is entitled to PCR based on this rationale. See *Pruitt v. State*, 310 S.C. 254, 255,

423 S.E.2d 127, 128 (1992) ("[W]e are not abandoning the general rule that issues must be raised to, and ruled on by, the post-conviction judge to be preserved for appellate review.") (*quoted in Marlar v. State*, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007)).

For the foregoing reasons, I would affirm the denial of PCR.

STATE OF SOUTH CAROLINA
In the Court of Appeals

ON WRIT OF CERTIORARI
Appeal from Richland County
G. Thomas Cooper, Jr., Circuit Court Judge
Appellate Case No. 2010-177147

RECEIVED

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SC Court of Appeals

EDWARD FREIBURGER.

Petitioner.

vs.

STATE OF SOUTH CAROLINA.

Respondent.

Opinion No. 5295
Heard October 16, 2014 – Filed February 11, 2015

RESPONDENT'S PETITION FOR REHEARING

On February 11, 2015, this Court reversed the post-conviction relief court's denial of relief to Petitioner and remanded the matter to the court of general sessions for a new trial. Edward Freiburger v. State, Op. No. 5295 (Ct. App. filed February 11, 2015). In reaching this result, a majority of this Court concluded that the post-conviction relief court erred in denying relief as to Petitioner's claim that trial counsel was ineffective for failing to introduce a letter written in 1961 by SLED Chief J.P. Strom to FBI Director J. Edgar Hoover. Pursuant to Rule 221(a), SCACR, Respondent respectfully petitions for rehearing.

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

In seeking rehearing, Respondent respectfully submits that this Court misapprehended the admissibility of the contents of Chief Strom's 1961 letter to Director Hoover (the "Hoover letter").¹ In its opinion, this Court states that Respondent conceded that the Hoover letter would have been admissible at trial. While the State did concede at oral argument that 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. In particular, Respondent did not concede that the opinions attributed to Lt. Cate within the letter, which amount to hearsay within hearsay, would have been admissible at Petitioner's trial. Respondent respectfully submits that 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) (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) ("However, hearsay within

¹ At oral argument, Respondent noted the "transcription" of the Hoover letter prepared by the paralegal of Petitioner's counsel was improperly placed into the Appendix by Petitioner's counsel despite it never having been admitted into evidence and after Respondent explicitly objected to its introduction at the evidentiary hearing. See App. p. 1557. Respondent submits that the improper inclusion of this "transcription" has improperly tainted not only this Court's interpretation of the letter, but also the lower court and any witnesses who viewed it below.

hearsay, or 'double hearsay' is excluded unless each part of the combined statement falls within an exception to the hearsay rule."'). See also Reyes v. Jeffcoat, No. CA 3:12-298-JFA, 2012 WL 4009641, at *2 (D.S.C. Sept. 12, 2012) ("And, while it could be argued that the emails between the parties would be admissible in any event either as an admission by a party opponent or a hearsay statement admissible under the state of mind exception of Rule 803(3), there are other portions of the email that contain, as respondent suggests, hearsay within hearsay, and the court is not aware of any authority that would admit these second level hearsay statements."); 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) (statements in an author's recorded memorandum that are not those of the author constitute hearsay within hearsay); Phoenix Mut. Life Ins. Co. v. Adams, 30 F.3d 554, 567 (4th Cir. 1994) (hearsay within hearsay found in a letter did not fall within a recognized exception to the hearsay rule and therefore, should have been excluded).

Petitioner 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, Respondent respectfully submits that 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); 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), *affirmed*, 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.”) 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) (“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.”). 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.

Therefore, while the Hoover letter itself could have been admitted at Petitioner’s trial, the portions of the letter pertaining to Lt. Cate’s opinion are inadmissible hearsay. These portions would have required redaction before the letter was admitted into evidence or shown to the jury. Respondent submits that as these portions of the Hoover letter are the basis for Petitioner’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. p. 30. This is supported by trial counsel’s testimony at the evidentiary hearing. App. p. 1588. As these pertinent portions of the Hoover letter were inadmissible hearsay, trial counsel cannot be deficient for failing to use the letter at trial. Furthermore, as the relevant portions of the letter that support Petitioner’s argument are

inadmissible hearsay, Petitioner cannot establish any resulting prejudice from trial counsel's failure to use the Hoover letter at trial.

In light of the inadmissibility of the relevant portions of the Hoover letter, which this Court appears to have overlooked, Respondent respectfully submits that this Court erred in its reversal of the post-conviction relief court. Therefore, Respondent asks that this Court reconsider its decision, rehear the matter, and affirm the lower court's denial of post-conviction relief.

Misapprehension of Hoover Letter

Additionally, in seeking rehearing, Respondent respectfully submits that the majority of this Court misapprehended the Hoover letter and incorrectly placed more weight on the letter than warranted. In its opinion, the majority of this Court 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. Respondent respectfully submits that the majority of this Court misconstrued the letter as a formal opinion of Lt. Cate and wrongly gave it heightened meaning. This misapprehension of the Hoover letter resulted in an unwarranted finding that trial counsel's use of the letter would have benefitted Petitioner by "deeply undermin[ing] the foundation of the State's case."

Conversely, the Hoover letter does not amount to any formal opinion as to which weapon was used to kill the victim. 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 Mr. 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 that uncertainty and inconclusive findings from SLED in 1961 regarding both guns; it does not contradict the inconclusive findings as the majority of this Court holds. The letter is merely a request for more assistance and a showing of inconclusive preliminary results, not a formal opinion establishing the Dreher gun as the murder weapon. Therefore, the Hoover letter is simply cumulative to the abundance of testimony in the record that SLED was inconclusive in 1961 as to what weapon killed the victim and would not have disrupted the unanimity of other SLED examiners, as the majority of this Court 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 acknowledges the majority's misapprehension of the Hoover letter. The dissent "would hold that the letter, when considered in its entirety, presented only a differing but still tentative conclusion that another weapon was involved." The dissent then elaborates 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."

In light of this misapprehension of the Hoover letter, Respondent respectfully submits that this Court erred in its reversal of the post-conviction relief court. Therefore, Respondent asks that this Court reconsider its decision, rehear the matter, and affirm the lower court's denial of post-conviction relief.

Misapprehension of Agent Parnell's Testimony

Furthermore, in seeking rehearing, Respondent respectfully submits that the majority of this Court misapprehended the testimony of SLED Agent Ira Parnell. In its opinion, the majority

states that Parnell's testimony was that "he saw no similarity" between the bullet fragments and the Dreher gun. Respondent respectfully notes that 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. pp. 902-03. However, remarkable individual characteristic agreement was found between the Freiburger gun and the fragments. App. pp. 902-03. 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. pp. 902-03. This is consistent with his testimony at the evidentiary hearing, where he testified that there were similar class characteristics between the Dreher gun and the fragments, but no similar individual characteristics. App. pp. 1516-18. This is also consistent with Parnell's SLED Ballistics report (marked for identification only during the evidentiary hearing as Applicant's Ex. 14), where Parnell states that "[g]eneral rifling characteristic similarities were noted" for both the Freiburger and Dreher guns. App. p. 1676. Respondent respectfully submits that the majority misapprehended the testimony of Parnell, which was then used to support its position that trial counsel was deficient and Petitioner was prejudiced.

In light of this misapprehension of Parnell's testimony, Respondent respectfully submits that this Court erred in its reversal of the post-conviction relief court. Therefore, Respondent asks that this Court reconsider its decision, rehear the matter, and affirm the lower court's denial of post-conviction relief.

Overlook of Technological Advances between 1961 and Trial

Moreover, in seeking rehearing, Respondent respectfully submits that the majority of this 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 Petitioner's trial. In its decision, the majority of this Court emphasized the value of this 1961 letter to Petitioner for impeachment and to undermine the State's case at trial. However, Respondent respectfully submits that the majority overlooked the significant technological advances in firearms examination and ballistics between 1961 and Petitioner's trial in 2002, which led to improperly heightened value being appropriated to the Hoover letter and an erroneous finding of prejudice.

At Petitioner's trial, the State presented evidence of technological advancements between 1961 and trial 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. p. 996. Cayton then described how he soaked the bullets and used a sonic cleaner that allowed him to flush loose tissue off the fragments, allowing for a better comparison to the test bullets under a microscope. App. pp. 1000-01. Parnell confirmed this, testifying at Petitioner's trial that Cayton was able to better clean the bullet fragments, allowing him to make a positive identification. App. p. 919. Parnell also testified to this at the evidentiary hearing. App. p. 1523. Based on this testimony, the Hoover letter is of little value to Petitioner, either for impeachment

or otherwise, based on these significant advancements since the letter was written, allowing for a more thorough examination than was possible in 1961. Furthermore, it cannot be said that this letter from 1961 would have impacted Petitioner'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 Petitioner's trial, Respondent respectfully submits that this Court erred in its reversal of the post-conviction relief court. Therefore, Respondent asks that this Court reconsider its decision, rehear the matter, and affirm the lower court's denial of post-conviction relief.

Misapprehension of the Evidence Presented

Additionally, in seeking rehearing, Respondent respectfully submits that the majority of this Court misapprehended the evidence presented at Petitioner's trial in erroneously categorizing the State's case as "purely circumstantial" and "weak." In its opinion, the majority of this Court cites to the opinion from our state Supreme Court when Petitioner's case was on direct appellate review, 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 this Court characterizes this evidence as purely circumstantial and weak. However, when reviewing this same record on direct appeal, the Supreme 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 Petitioner of murder in less than two and a half hours of deliberation. Respondent respectfully submits that the majority of this Court misapprehended the State’s evidence as 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 the majority’s misapprehension and mischaracterization of the evidence presented at Petitioner’s trial, Respondent respectfully submits that this Court erred in its reversal of the post-conviction relief court. Therefore, Respondent asks that this Court reconsider its decision, rehear the matter, and affirm the lower court’s denial of post-conviction relief.

Overlooking that Petitioner did not raise the issue of the letter’s impact regarding Stokes

Finally, in seeking rehearing, Respondent respectfully submits that the majority of this Court overlooked that Petitioner 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 finds in its opinion, Petitioner did not raise this issue below and the post-conviction relief court did not rule upon it. Therefore, it was not properly preserved for review before this Court. See Burgess v State, 402 S.C. 92, 95, 738 S.E.2d 264, 265 (Ct. App. 2013) (finding there

must be sufficient findings of fact and conclusion of law to preserve an issue for appellate review in a PCR action).

In light of the majority of this Court's overlooking that Petitioner did not raise and the lower court did not rule as to whether the Hoover letter would have discredited Stokes' testimony, Respondent respectfully submits that this Court erred in its reversal of the post-conviction relief court. Therefore, Respondent asks that this Court reconsider its decision, rehear the matter, and affirm the lower court's denial of post-conviction relief.

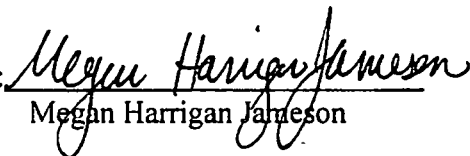
Conclusion

Based on the foregoing reasons coupled with the arguments raised in the Brief of Respondent and raised during the oral argument before this Court, Respondent respectfully requests that this Court reconsider its decision, rehear the matter, and affirm the decision of the lower court denying Petitioner relief.

Respectfully submitted,

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February 26, 2015

STATE OF SOUTH CAROLINA
In the Court of Appeals

ON WRIT OF CERTIORARI
Appeal from Richland County
G. Thomas Cooper, Jr., Circuit Court Judge
Appellate Case No. 2010-177147

EDWARD FREIBURGER,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

Opinion No. 5295
Heard October 16, 2014 – Filed February 11, 2015

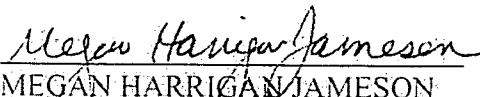
PROOF OF SERVICE

I, Megan Harrigan Jameson, certify that I have served the within Respondent's Petition for Rehearing on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

John H. Blume, III, Esquire
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I further certify that all parties required by Rule to be served have been served.
This 26 day of February, 2015.


MEGAN HARRIGAN JAMESON
Assistant Attorney General
S.C. Bar No. 100108

RECEIVED

FEB 26 2015

SC Court of Appeals

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

CA No. 2006-CP-40-3866
Appeal Case No. 2010-177147
Opinion No. 5295
Heard October 16, 2014 – Filed February 11, 2015

EDWARD FREIBURGER*Petitioner,*

v.

STATE OF SOUTH CAROLINA*Respondent.*

**PETITIONER'S RESPONSE IN OPPOSITION TO
RESPONDENT'S PETITION FOR REHEARING**

Petitioner Edward Freiburger, through undersigned counsel, submits the following response in opposition to Respondent's Petition for Rehearing. As will be discussed below, this Court's determination that Freiburger was denied the right to the effective assistance of counsel due to trial counsel's failure to introduce the letter written in 1961 from SLED Chief J.P. Strom to FBI Director J. Edgar Hoover ("the Hoover Letter") is amply supported by both the record evidence and relevant precedent. As this 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. None of Respondent's arguments show that the Court overlooked or misapprehended any points in reaching the decision to reverse Freiburger's conviction. *See* Rule 221(a), SCACR. Rehearing, therefore, should be denied.

I. THE HOOVER LETTER WAS ADMISSIBLE AT TRIAL

Respondent incorrectly asserts that the Hoover Letter would not have been admissible at Freiburger's trial. Respondent asserts that, while it conceded at oral argument that the letter itself was admissible under the ancient documents exception, Rule 803(16), SCRE, or the records of regularly conducted activity exception, Rule 803(6), SCRE, it did not concede at oral argument the admissibility of Lt. Cate's opinion within the Hoover Letter because the opinion was hearsay within hearsay. Petition for Rehearing 2. Respondent has never before made such a distinction or argument. During oral argument, the Court and Respondent discussed the admissibility of the letter at length. The entire discussion centered on the letter as a whole, without Respondent ever making a distinction between the letter generally and the opinions of Lt. Cate contained within the letter. Respondent's concession to the admissibility of the letter, therefore, conceded the admissibility of the entirety of the letter, including Lt. Cate's opinion.

Even if Respondent's concession did not cover the entirety of the letter (which it did), Respondent'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.¹ 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. 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. 567-571. 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. 569. This information 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

¹ 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. Respondent 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., Smith 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.

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.

Respondent'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. 913-15. 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. 667-68. 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 Respondent relies upon in its petition for rehearing 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, Respondent's argument ignores the fact that the letter was also admissible as impeachment evidence. As the Court 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 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. 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, this Court correctly held that the Hoover Letter was not only admissible but powerful evidence that the jury should have been made aware of. Respondent's new arguments,

presented for the first time in the petition for rehearing, to the contrary do not warrant rehearing of this case.

II. THE COURT DID NOT MISAPPREHEND THE HOOVER LETTER

Contrary to Respondent's argument, this Court correctly considered the Hoover Letter. Respondent asserts this "Court misconstrued the letter as a formal opinion of Lt. Cate and wrongly gave it heightened meaning." Petition for Rehearing 6. However, nothing in the Court's opinion indicates the Court considered Lt. Cate's opinion within the Hoover letter a final report. Instead, the Court directly quoted from the letter, which stated "Lt. Cate is of the opinion that [the Dreher] weapon killed the taxi driver." Regardless of whether the Hoover Letter conveyed a formal opinion of Lt. Cate, this Court correctly found that the letter indicated he was of the opinion that the Dreher gun was the murder weapon and that his opinion undermined the State's ballistics evidence and testimony indicating that all of the SLED examiners to review the case came to inconclusive results. The Court appropriately considered the Hoover Letter and properly found the letter would have been highly beneficial to Freiburger had trial counsel presented it to the jury.

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

Respondent incorrectly asserts this Court misapprehended Agent Parnell's trial testimony. On the contrary, Respondent 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. App. 903. Respondent asserts that Parnell stated "he saw no '*remarkable individual characteristic agreement*' between the Dreher gun and the fragments." Petition for Rehearing 8. Parnell, however, did not make such an assertion. When asking about the Dreher weapon, the State asked if Parnell saw "any remarkable individual characteristic agreement between" the bullet fragment and the test bullet fired by the Dreher weapon. App. 903. Parnell responded, "No, sir. I

saw no similarity between those two items.” App. 903. Despite the State asking about “remarkable individual characteristic agreement,” Parnell responded more broadly that he “saw *no* similarity between the two items.” App. 903 (emphasis added). Accordingly, the Court did not misapprehend Parnell’s testimony and Respondent’s argument to the contrary does not warrant rehearing.

IV. THE COURT APPROPRIATELY CONSIDERED BALLISTICS TECHNOLOGY

Contrary to Respondent’s arguments, this Court appropriately considered the ballistics technology relevant to this case. Respondent asserts that this 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 Petitioner’s trial.” Petition for Rehearing 9. 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) continued to come to inconclusive findings.² See App. 910, 1007.

Additionally, evidence presented at Freiburger’s post-conviction relief hearing demonstrated that the scientific basis for ballistics testing actually is not as strong as it was forty years ago. At the hearing, Dr. Adina Schwartz 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. 1450. Dr. Schwartz also testified that there is no scientific basis to say, as Cayton did at

² Respondent’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. 919-20, 1526.

Freiburger's trial, that a particular weapon fired a projectile to the exclusion of all other similar weapons. App. 1000, 1439-40. The National Research Council, under the auspices of the National Academy of Sciences, has also condemned such testimony. National Research Council, *Strengthening Forensic Science in the United States: A Path Forward*, Prepublication Report (2009) (noting that with the exception of nuclear DNA analysis, no forensic method has been rigorously shown to be able to match consistently with a high degree of certainty to a specific source); National Research Council, *Ballistics Imaging*, Prepublication Report (2008) (noting that the assumption of uniqueness and reproducibility of firearms-related toolmarks has not been fully demonstrated). This Court, 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 rehearing is not warranted.

V. THE COURT DID NOT MISAPPREHEND THE EVIDENCE PRESENTED

This Court accurately described the evidence against Freiburger as "purely circumstantial" and "weak." Respondent argues this Court mischaracterized the evidence against Freiburger in light of the Supreme Court's finding on direct appeal that the circumstantial evidence against Freiburger was sufficient to withstand a directed verdict motion. Petition for Rehearing 11. 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, Respondent's argument ignores the fact that this Court's characterization of the evidence as "purely circumstantial" and "weak" was based on a review of the evidence "other than ballistics." Given that this 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 v. Washington*, 466 U.S. 668, 694 (1984) (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 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. This Court, 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. Rehearing is not warranted based on Respondent's arguments regarding the interpretation of the evidence presented at Freiburger's trial.

VI. THE COURT PROPERLY CONSIDERED THE LETTER'S IMPACT REGARDING STOKES

This Court properly considered the impact the Hoover Letter would have had in impeaching Carl Stokes testimony. Respondent argues this Court 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 Rehearing 11. However, Freiburger properly presented the issue to this Court to allow it to consider whether the Hoover Letter should have been used to impeach Stokes. In his brief before this Court, 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* Brief of Petitioner 13. 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 this Court. *See* Brief of Petitioner 11, 13. In Petitioner's Motion to Alter or Amend the Judgment, Freiburger similarly challenged the post-conviction relief court's finding that the failure to admit the Hoover Letter did not prejudice Freiburger in the lower court. *See* App. 261 ("The value of the letter in question to the defense case at trial is clear."); *see also* App. 1618 (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."). In *Burgess v. State*, 402 S.C. 92, 95, 738 S.E.2d 264, 265 (Ct. App. 2013), cited by Respondent, this Court 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 in *Burgess*, Freiburger did preserve the issue of prejudice, allowing this Court to consider the letter's impact on the outcome of Freiburger's trial, including whether it could have impeached Stokes' testimony.

Further, Freiburger has consistently argued that the Hoover Letter should have been used to undermine evidence presented at trial that seven SLED examiners examined the weapons and reached inconclusive results. *See* App. 261 (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); Brief of Petitioner 13 (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 this Court, have 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 this Court. Accordingly, this Court's consideration of the Hoover Letter's potential value for impeachment of Stokes was proper and rehearing is not warranted on this argument by Respondent.

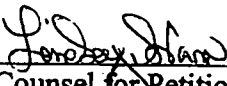
CONCLUSION

This Court's decision to reverse the denial of post-conviction relief is based on a sound understanding and thorough consideration of the evidence presented at trial and at Freiburger's post-conviction relief hearing. The record clearly demonstrates that no evidence of probative value supported the post-conviction relief court's decision that Freiburger's trial counsel were not ineffective in failing to use the Hoover Letter during Freiburger's trial. This Court, therefore, should deny Respondent's Petition for Rehearing.

Respectfully submitted,

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BY: 
Counsel for Petitioner

March 12, 2015.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

CA No. 2006-CP-40-3866
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EDWARD FREIBURGER.....*Petitioner,*

v.

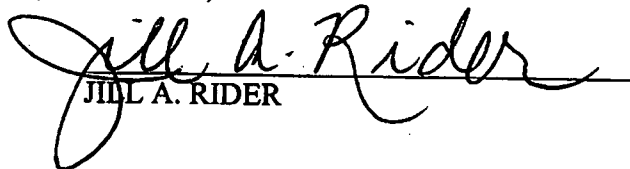
STATE OF SOUTH CAROLINA.....*Respondent.*

CERTIFICATE OF SERVICE

I, Jill A. Rider, hereby certify that one (1) copy of the Petitioner's Response in Opposition to Respondent's Petition for Rehearing has been served upon opposing counsel by depositing same in the United States Mail, first class postage pre-paid, addressed as follows:

Megan E. Harrigan
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211-1549

This the 12th day of March, 2015, in Columbia, SC.


JILL A. RIDER

The South Carolina Court of Appeals

Edward Freiburger, Petitioner,

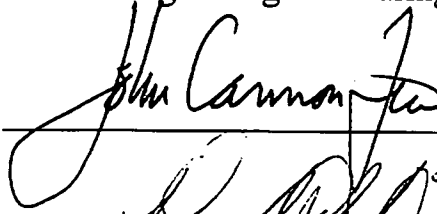
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State of South Carolina, Respondent.

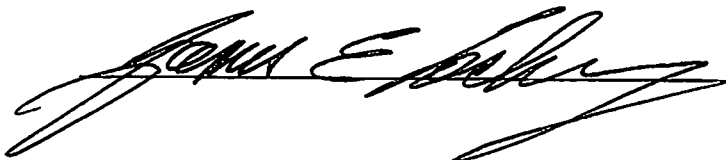
Appellate Case No. 2010-177147

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.


C.J.


J.


J.

Columbia, South Carolina

cc:

John H. Blume, III, Esquire
Lindsey Sterling Vann, Esquire
Megan E. Harrigan, Esquire
Alan McCrory Wilson, Esquire
The Honorable G. Thomas Cooper, Jr.

FILED

August 21, 2015