THE STATE OF SOUTH CAROLINA
In the Supreme Court

Certiorari to Aiken County
J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2018-000033

DAGGART BERNARD FRAZIER,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner.

PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S ISSUES PRESENTED

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II. Whether the PCR court erred in granting post-conviction relief on grounds that Trial Counsel was ineffective for failing to investigate and prepare for trial including issuing subpoenas for telephone records and prepare for cross-examination of the victim where Frazier failed to present the favorable evidence he asserts Trial Counsel should have obtained, thus failing to meet his burden of proving prejudice.

III. Whether the PCR court erred in granting post-conviction relief on grounds that Trial Counsel was ineffective for failing to make proper objections where the specific instances the court refers to are not objectionable, thus counsel cannot be deficient for failing to object.

IV. Whether the PCR court erred in granting post-conviction relief on grounds that Trial Counsel was ineffective for failing to move for a new trial under the theory of inconsistent verdicts or legal theories when South Carolina does not prohibit either inconsistent verdicts or inconsistent legal theories.

V. Whether the PCR court erred in granting post-conviction relief on grounds that Trial Counsel was ineffective for failing to request a continuance pursuant to Langford, and that Appellate Counsel was ineffective for failing to raise the issue on direct appeal, where no probative evidence supports findings of deficiency or prejudice for either attorney.

STATEMENT OF THE CASE

Respondent Daggart Bernard Frazier (hereinafter "Frazier") is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. Frazier was true bill indicted at the March 2014 term of the Aiken County Grand Jury for first-degree burglary (2014-GS-02-00359), third-degree assault and battery (2014-GS-02-00360), and possession of a weapon during a violent crime (2014-GS-02-00358). The charges stemmed from an incident occurring on December 16, 2013, when Frazier kicked in a dead-bolted door at his ex-girlfriend's house when he saw her socializing inside with friends and family. App. 75. Frazier, apparently suspecting his ex-girlfriend's male friend was a new boyfriend, immediately got into an altercation with him, which continued out the front door of the house and into the yard. App. 76.

Michael Routzong, Esquire represented Frazier on the charges. Frazier proceeded to a jury trial before the Honorable Donald B. Hocker on May 19 – 21, 2014. Frazier was found guilty as indicted for first-degree burglary and third-degree assault and battery. Frazier was found not guilty for possession of a weapon during a violent crime. Judge Hocker sentenced Frazier to a fifteen year term of imprisonment for first-degree burglary and thirty days for third-degree assault and battery.

A timely Notice of Appeal was filed on Frazier's behalf and an Anders brief was submitted. The South Carolina Court of Appeals dismissed the appeal via unpublished opinion State v. Frazier, 2015-UP-319 (Ct. App. filed July 1, 2015). The Remittitur was issued on July 23, 2015.

Frazier filed an application for post-conviction relief on August 3, 2015, claiming he was being held unconstitutionally based on the following allegations:

1. Ineffective assistance of counsel
    a. Failure to research and investigate case.

The State made its Return on November 17, 2015. Frazier filed an amended application for PCR on May 11, 2016, adding the following allegations:

> (a) Ineffective assistance of appellate counsel for failure to brief issues regarding procedure and Langford, as well as brief the substantial breakdown in communication with trial counsel issue;
>
> (b) Ineffective assistance of counsel for failing to investigate the issue of an inner office conflict;[1]
>
> (c) Ineffective assistance of counsel for failing to investigate and prepare for trial including issuing subpoenas for telephone records and public safety records;
>
> (d) Ineffective assistance of counsel for failing to join in Appellant's motion to be relieved due to the complete and substantial breakdown in communication;
>
> (e) Ineffective assistance of counsel for failing to make proper objections and preserve appellate issues;
>
> (f) Ineffective assistance of counsel for failing to object to improper impeachment;
>
> (g) Ineffective assistance of counsel for failing to prepare adequate jury charges and object to improper jury charges;
>
> (h) Ineffective assistance of counsel for failure to move for a new trial under the theory of inconsistent verdicts and fail to preserve for appeal;
>
> (i) Ineffective assistance of counsel for failure to properly investigate and prepare for cross-examination and impeachment of the alleged victim;
>
> (j) Ineffective assistance of counsel for failing to properly research and present a stand your ground defense;
>
> (k) Ineffective assistance of counsel for failing to interview and present witnesses.

An evidentiary hearing was convened at the Aiken County Courthouse on September 18, 2017, before the Honorable J. Mark Hayes, II. Frazier was present and represented by Aimee J.

[1] This issue was expressly abandoned at the evidentiary hearing. App. 354, line 14-17.

Zmroczek, Esquire. The State was represented by Julie A. Coleman, Esquire, from the South Carolina Attorney General's Office. Frazier testified on his own behalf at the evidentiary hearing, and also presented testimony from Christopher Watkins, Kiera Martin, and Daryl Frazier. The State presented testimony from Michael Routzong, Esquire ("Trial Counsel"). Judge Hayes issued an Order Granting Post-Conviction Relief signed on October 25, 2017 and filed on November 6, 2017. The State timely served and filed a Motion to Reconsider Pursuant to Rule 59(e), SCRCP. Judge Hayes denied the motion by Order filed November 27, 2017. This Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

When reviewing questions of fact, this Court may affirm the post-conviction relief judge's grant of relief only if there is probative evidence to support his or her findings. Wolfe v. State, 326 S.C. 158, 163, 485 S.E.2d 367, 369 (1997) (citing McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989)). However, the Court must overturn the post-conviction relief judge if there is no probative evidence to support his findings. Jackson v. State, 329 S.C. 345, 348, 495 S.E.2d 768, 769 (1998) (citing Satterwhite v. State, 325 S.C. 254, 481 S.E.2d 709 (1997); Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996). When reviewing questions of law, the Court conducts a *de novo* review, and must reverse the post-conviction relief judge when his decision is controlled by an error of law. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014) (quoting Jordan v. State, 406 S.C. 443, 752 S.E.2d 538 (2013)).

ARGUMENT

I. The PCR court erred in granting post-conviction relief on grounds that Trial Counsel was ineffective for failing to "join in" Frazier's motion to relieve counsel and that Appellate Counsel was ineffective for failing to raise the issue on direct appeal where no probative evidence supports its finding of either deficiency or prejudice.

In its Order Granting Post-Conviction Relief ("Order"), the PCR court found Trial Counsel was ineffective for failing to "join in" Frazier's *pro se* motion to relieve counsel. The PCR Court further went on to find, in the same ruling, that Appellate Counsel was also ineffective for failing to raise this issue on direct appeal. However, these findings were improper because there is no probative evidence to support the finding of either deficiency or prejudice in either Trial Counsel's actions or Appellate Counsel's actions.

Background

Before Frazier's trial began, he was placed under oath to make a *pro se* motion for a continuance to have counsel relieved and have an opportunity to get another attorney. App. 33. Frazier explained to the trial court that Trial Counsel had only been to see him one time in jail in the month of December, and they had not discussed his case, even though he had spoken to him on the phone sometimes. App. 33, line 16-20. He explained that Trial Counsel had not been doing the things Frazier asked him to do on his behalf, and the conversation had been broken down. App. 33, line 21-25. He further stated that he had spoken to Trial Counsel before at the courthouse. App. 35, line 5-9. The trial court pointed out that Frazier had requested a continuance for an opportunity to retain a new attorney when the case was last scheduled for trial in March, but he did not retain a new attorney in that time. App. 34, line 10-20.

Trial Counsel explained to the trial court, as an officer of the court, that they had spoken several times over the phone and had discussed the basic issues about the case. He explained:

MR. ROUTZONG: There are things that tend to come out the more he, I ask him about a different thing or sometimes he doesn't mention something and it comes out.
That was the case, I think, in this time. But I think this case comes down to his testimony versus her testimony. It's not a lot of other collateral witnesses or testimony ...that are going to be particularly helpful. The jury believes him, that's fine. We can bring all of this out on cross-examination and direct.

App. 35, line 18 – 36, line 3. The interaction continued:

THE COURT: Okay. So if I understand you correctly, counselor, you feel like, you know, whatever amount of time or numbers of times that you've talked with Mr. Frazier that you feel like that's adequate and you're ready to go forward. Is that a correct statement?

MR. ROUTZONG: Yes, sir.

App. 36, line 4-9. The trial court then questioned Frazier on his assertion that the Public Defender's Office had a conflict of interest with his case based on the fact that other attorneys in the PD's office knew information about his case and they tried to get him to plead guilty. Frazier also complained that Trial Counsel had not subpoenaed phone records and public safety records on his behalf that he believed were important. App. 39, line 6-8. The trial court gave Frazier and Trial Counsel an opportunity to discuss this issue off the record. When they returned, the court asked Trial Counsel if he wanted to address the issue of subpoenaing records, and Trial Counsel responded:

MR. ROUTZONG: You're Honor, I really don't see the – I really don't see his point. Maybe there is a point, but I think the greater issue right now has been kind of a complete breakdown in communication. I think that could affect his cooperation and his, outcome of this trial. I think he's not willing to listen to anything I tell him.

THE COURT: Right.

MR. ROUTZONG: And, perhaps another attorney would be able to have a more fortuitous outcome for him. I don't know the answer to that question, but there have been, I would characterize it as a substantial breakdown in communication.

App. 40, line 12-23. The trial court ruled:

THE COURT: All right. Well, Mr. Frazier, if you would stand.
You know, I've not heard anything to give you a viable basis to have Mr. Routzong excused as your attorney.

He's an excellent attorney. I don't know how long he's been practicing but I would assume a fair amount of time. He's been at this before. And since there were efforts to continue last time – of course, I realize a little different request because you thought maybe your family could hire private counsel which did not happen but since this Court has dealt with this request before, I don't see any reason to continue this case nor to excuse Mr. Routzong as your attorney.

You know, he's making decisions. He has an ethical responsibility to you, Mr. Frazier, to provide the best representation possible. And I'm confident he's going to do that.

Now will he agree with everything you want him to do? Probably not. But he's going to make tactical decisions. I assume Mr. Hayes is going to be assisting in some fashion. He's an excellent attorney too. They're going to make decisions.

And you can shake your head all you want to, sir, but I'm just telling you that I don't see where you're going to get any better representation than what you've got here today.

And, again, for them to not agree with every position that you take is not grounds to continue this case, once again, and appoint another lawyer. That's just not a legal basis to do it.

Now, and I know this is not going to happen but if at any time during the course of this trial I believe that the representation is deficient in some way, that your best interests are being compromised by certain decisions that the lawyers may make, then I'll certainly address that. And

> I'll be aware of that, even though I do not anticipate that happening. I'll be very cognizant of that.
>
> And to make sure because one of my jobs, one of my responsibilities is to make sure that all of your constitutional rights are fully protected. And I'm going to make sure that that happens, but just because a request is made to get you another lawyer that in and of itself, you know, doesn't require me to grant that request.
>
> I have to find some really good, sound legal reasons to grant your request. And I've not seen any. Okay?
>
> So, I'm going to deny your request. I would admonish you and encourage you to cooperate with your attorneys to the very best that you can because otherwise if you don't, if you are unhappy about this ruling or whatever, and you decide, well, I'm just not going to cooperate, that just not going to be of much benefit to you.
>
> So I would strongly encourage you to cooperate and listen to what your fine attorneys are advising you. That's their job. That's why they're lawyers. They're here to represent you and advise you to the best of their ability. Okay?

App. 40, line 24 - 43, line 8.

In his PCR application, Frazier alleged Trial Counsel was ineffective for failing to "join in" his motion to relieve counsel based on his statement that there had been a breakdown in communication. At the evidentiary hearing, Trial Counsel testified he met with Frazier in person about four or five times and spoke on the phone multiple times. App. 317, line 2-12. He explained that, although he did say before the trial began that he thought the breakdown in communication could affect the outcome of the trial, looking back now, after the trial, he does not believe that the breakdown in communication *did* affect the outcome of the trial. App. 355, line 3-11 (emphasis added). Trial Counsel testified that he believed Frazier got a fair trial and he represented him to the best of his ability. App. 355, line 12-14.

The PCR Court granted relief on this allegation, finding both that Trial Counsel was ineffective for failing to "join in" on the motion, and that Appellate Counsel was ineffective for failing to raise this issue on direct appeal. App. 378-382.

Discussion

First, the allegation Frazier presented to the PCR court and the PCR court's explanation of its reasoning for granting this allegation are unclear and combine two unrelated issues. The Order does not distinguish whether the allegation is one of ineffective assistance of Trial Counsel for failing to join in the motion or rather ineffective assistance of Appellate Counsel for failing to brief the issue on appeal. The Order seems to combine both allegations together, which is not proper.[2] To be entitled to relief on either of these issues, Frazier must either prove that (1) Trial Counsel was deficient in failing to join in the motion, and if he had joined in the motion, the trial court would have granted the motion, relieved him as counsel, appointed a different attorney, gone to trial with the new attorney, and the jury would have returned a not-guilty verdict; or (2) Appellate Counsel should have fully raised this issue on appeal in a meritorious brief, and if they had done so, the Court of Appeals would have reversed the conviction based on this issue alone.

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[2] Strickland seemingly requires courts to analyze each individual allegation for both deficiency and prejudice. Although cumulative analysis is an unsettled question in South Carolina, South Carolina courts have consistently declined to apply a cumulative error analysis in PCR actions. See e.g., Green v. State, 351 S.C. 184, 196-97, 569 S.E.2d 318, 324-25 (2002) (declining to address whether applicant was entitled to relief based on supposed cumulative effect of counsel's alleged errors); Simpson v. Moore, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006) (finding PCR court did not err in failing to conduct a cumulative error analysis where only one allegation had merit and the "record simply did not contain 'several errors' for the judge to cumulatively assess"); Lorenzen v. State, 376 S.C. 521, 535, 657 S.E.2d 771, 779 (2008) ("Although we recognize that whether the cumulation of several errors, 'which by themselves are not prejudicial, would warrant relief is an unsettled question in South Carolina' we do not believe the facts of this case present an opportunity to definitively decide this question." (citations omitted))).

In addition, a number of other jurisdictions, including the Fourth Circuit Court of Appeals, have held a cumulative effect analysis is inappropriate and that the appropriate analysis focuses upon each individual allegation of ineffective assistance. See Fisher v. Angelone, 163 F.3d 835, 852-53 (4th Cir. 1998); Wainwright v. Lockhart, 80 F.3d 1226 (8th Cir. 1996); Jones v. Sotts, 59 F.3d 143, 147 (10th Cir. 1995).

Neither of these conclusions are supported by the record before the Court. Both individual issues are addressed below.

Trial Counsel's actions

First, the trial transcript shows Trial Counsel was not deficient for failing to "join in" Frazier's motion to have Trial Counsel relieved. When Frazier presented the motion to the trial court, Trial Counsel explained the situation to the judge, including going so far as to say that there was a substantial breakdown in communication. App. 40, line 12-17. There is nothing more that Trial Counsel could have done or said differently. The only difference between what he did and what Frazier now alleges he should have done is to formally say "I am joining in the motion." The failure to say these specific words is of no importance in the outcome of the case, either at trial or on appeal. See Fettler v. Gentner, 396 S.C. 461, 722 S.E.2d 26 (Ct. App. 2012) (holding Appellate courts do not require parties to engage in futile actions in order to preserve issues for appellate review).

Second, Frazier has not proven prejudice, because "joining in" the motion would not have made a difference in the trial judge's ruling. The trial court heard all the facts from both Frazier and Trial Counsel, evaluated the situation, and denied the motion. No further information could have been presented to change the trial court's ruling. Furthermore, even if the trial court *had* granted the motion to relieve Trial Counsel, Frazier cannot prove that Frazier would have won the trial if he had been represented by a different attorney. The evidence against Frazier was the same, and he surely would have faced a similar jury that is just as likely to convict Frazier regardless of who represented him.

Additionally, the Court's ruling that the results of the proceeding would have been different because "[h]ad defense counsel joined in the motion, then that issue would have been

more clearly preserved for appeal" is improper. App. 382. An issue is either preserved or unpreserved for appellate review. It cannot be made "more clearly preserved." It either is or it is not. Frazier was not making the motion to preserve the issue for appeal; rather he made it to try to get his attorney relieved. The motion was presented to the trial court, fully argued, and ruled upon. It is therefore preserved for appeal. Trial Counsel was not deficient in any way for failing to preserve the issue for appellate review, because it was preserved. Regardless, the standard for finding prejudice in this allegation is not whether it was preserved for appeal, but rather whether the trial court would have granted the motion, and if it had granted the motion if the outcome of the proceeding would have been different.

Finally, Trial Counsel's testimony at the evidentiary hearing clearly shows that there was no prejudice. Trial Counsel stated on the record before the trial began that he believed there was a substantial breakdown in communication that would affect his representation at trial. However, he was told to stay on the case and represent Applicant through the trial. At the PCR hearing, Trial Counsel was asked if, looking back now in retrospect, that breakdown in communication *actually did* affect the outcome of the trial, or his ability to try the case. Trial Counsel testified that it *did not*, and the trial was not affected by this potential breakdown in communication. That testimony alone is enough to show there was no prejudice to Applicant on these grounds. No other evidence in the record before the Court supports the PCR court's ruling that Trial Counsel was ineffective for failing to join in the motion.

Appellate Counsel's actions

The PCR court's Order granting this allegation further rules that Appellate Counsel was ineffective for failing to raise this issue on appeal because the trial court had abused its discretion

in denying the motion and the trial court ruling would have been overturned on appeal. No probative evidence in the record, and no South Carolina case law, supports this issue.

First, the Order suggests, as addressed above, that Trial Counsel failed to properly preserve this issue for appellate review. If this were true and the issue were not preserved for appeal due to Trial Counsel's error, then Appellate Counsel cannot be ineffective for failing to raise an unpreserved issue, as it obviously would not be successful on appeal. See Herron v. Century BMW, 395 S.C. 461, 719 S.E.2d 640 (2011) (noting an issue cannot be raised for the first time on appeal).

A motion to relieve counsel is addressed to the discretion of the trial court and will not be disturbed absent an abuse of discretion. State v. Gregory, 364 S.C. 150, 152, 612 S.E.2d 449, 450 (2005). The defendant bears the burden of showing satisfactory cause for removal. State v. Graddick, 345 S.C. 383, 386, 548 S.E.2d 210, 211 (2001) (finding the trial court did not err in denying the defendant's motion to relieve counsel when defendant alleged counsel was not representing his interests, counsel was not fully prepared for the case, and defendant did not feel comfortable going to court with counsel as his lawyer). "Reversals of refusal of a continuance are about as rare as the proverbial hens' teeth." State v. McMillian, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002) (noting a trial court's denial of a motion for continuance will not be disturbed absent a clear abuse of discretion).

The record before the Court shows no abuse of discretion by the trial court in this case. Accordingly, based on South Carolina case law, the results of the direct appeal would not have been different if Appellate Counsel had raised this issue on direct appeal. Therefore, there can be no prejudice to Frazier, and Appellate Counsel cannot be found ineffective.

Accordingly, because there is no probative evidence in the record to support the PCR court's finding that Trial Counsel and Appellate Counsel were ineffective, this finding must be reversed.

II. The PCR court erred in granting post-conviction relief on grounds that Trial Counsel was ineffective for failing to investigate and prepare for trial including issuing subpoenas for telephone records and prepare for cross-examination of the victim where Frazier failed to present the favorable evidence he asserts Trial Counsel should have obtained, thus failing to meet his burden of proving prejudice.

The PCR court granted post-conviction relief based on its ruling that Trial Counsel failed to subpoena cell phone records and interview and call two witnesses at trial to corroborate Applicant's trial testimony. However, there is no probative evidence in the record to support these findings because Frazier failed to present the favorable evidence he asserts Trial Counsel should have presented. Therefore, he failed to meet his burden of proving prejudice, and this ruling must be reversed.

Witnesses

First, this Court should note the testimony of the two witnesses presented at the evidentiary hearing, Kiera Martin and Daryl Frazier, was cumulative to the testimony Frazier presented at trial about how he lived at the victim's house. See State v. Hicks, 257 S.C. 279, 185 S.E.2d 746 (1971) (holding trial court did not abuse its discretion in failing to grant a continuance to allow defense witness to testify to information that was merely cumulative). These witnesses were not necessary to present this defense, as the defense was adequately presented by Trial Counsel at trial. A criminal defense attorney could always do something more in furtherance of his strategy; it is easy for a critiquing party to look back in retrospect and think of several more actions the attorney could have taken. However, Trial Counsel did everything here he needed to present his strategy of showing Applicant could not have burglarized his own

home. Adding these two corroborating witnesses would not be enough to change the outcome of the trial. Cf. State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("Here, two witnesses testified to appellant's alibi defense. Any additional testimony concerning the appellant's alibi would have been cumulative. Because the appellant was not prevented from presenting an alibi defense, and since any testimony by additional alibi witnesses would have been cumulative, the trial judge did not abuse his discretion in denying the appellant's motion for a continuance."). Therefore, there is no deficiency, as it was reasonable for Trial Counsel not to call these witnesses, and there is no prejudice, because there testimony alone would not have changed the outcome of the trial.

Cell Phone Records

Frazier simply cannot meet his burden of proving that he was prejudiced by Trial Counsel's failure to subpoena the cell phone records because the records were not produced at the hearing. The Order granting PCR actually notes all of the South Carolina case law which requires an applicant to produce the evidence that he contends should have been used at trial to meet his burden of proof, and then completely disregards the case law and rules that Frazier has proven he was prejudiced because the evidence is no longer available. There is no case law in South Carolina that supports this finding, and it is completely contrary to established law.

South Carolina courts have repeatedly held that a PCR applicant must produce the favorable evidence or otherwise offer the evidence in accordance with the rules of evidence at the PCR hearing in order to establish prejudice for the failure to present that evidence at trial. Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998). The applicant's mere speculation what the evidence or witnesses' testimony would have been cannot, by itself, satisfy

the applicant's burden of showing prejudice. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995).

Regardless of whether this information is no longer available, the PCR court cannot speculate as to what the cell phone records may have said. Frazier's assertion alone that the cell phone records would have supported a certain defense is not enough to meet the burden of proving that the outcome of the trial would have been different. Accordingly, because no probative evidence supports the PCR court's finding, the finding must be reversed.

III. The PCR court erred in granting post-conviction relief on grounds that Trial Counsel was ineffective for failing to make proper objections where the specific instances the court refers to are not objectionable, thus counsel cannot be deficient for failing to object.

The PCR court further granted post-conviction relief based on its ruling that Trial Counsel was ineffective for failing to make objections to testimony about alleged Brady materials that were not given to Frazier before trial, and to a "Golden Rule" violation. However, these instances were not objectionable, so Trial Counsel cannot be deficient for failing to object.

Failure to object to Brady Violation material

Frazier alleged, and the PCR court found in its order, that Trial Counsel was deficient for failing to object to hearsay testimony about Brady[3] materials that should have been, and were not, turned over by the State. This is incorrect. Trial Counsel cannot be deficient for failing to object to this testimony because the testimony was not improper. Furthermore, the materials that were not turned over in discovery were not Brady materials, and thus there is no Brady violation, because they were written and produced by Frazier himself. The materials in question consisted of letters written by Frazier to the victim from prison and jail phone calls made by Frazier. Brady

[3] Brady v. Maryland, 83 S.Ct. 1194 (1963).

v. Maryland holds that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). This material cannot be withheld from the defendant if the defendant is aware of the statement because he made it.

Trial Counsel even testified at the evidentiary hearing that he did not object to the testimony regarding these materials because he assumed his client knew what he had said in the letters he wrote and the phone calls he made. App. 347, line 21-23 ("This particular case, he is the person that's alleged to have written the letter, so he would know what was in it."). There was simply no reason to object to this testimony on the basis of a Brady violation, so Trial Counsel cannot be deficient. The PCR court did not make a specific finding of prejudice on this allegation, so it is clear there is no resulting prejudice, as well, and Frazier failed to meet either prong of the Strickland test.

Failure to make "Golden Rule" objection

Frazier alleges and the PCR court ruled Trial Counsel was ineffective for failing to object to the Solicitor's improper "Golden Rule" comments in closing argument. This is incorrect because the Solicitor's comments were not improper. South Carolina law states that an improper golden rule argument asks jurors to consider the case from a biased, subjective state of the victims rather than objectively as fair and impartial jurors. Von Dohlen v. State, 360 S.C. 598, 611, 602 S.E.2d 738, 745 (2004). In this case, the Solicitor made the following comment: "The law of burglary is here for this reason, ladies and gentlemen. We have this law so that people can feel safe in their home, so kids can feel safe in their homes, so families can feel safe in their home from actions like this guy." ROA 207, line 20-24.

This statement is clearly not improper or a violation of the golden rule. The Solicitor did not ask the jury to imagine they were in the shoes of the victim. He did not incite emotional responses by describing the terror the victim felt or was faced with when Frazier broke into her home. He simply explained to the jury that the reason we have laws against burglary is to allow people to feel safe in their homes. These statements were not improper, and accordingly were not objectionable. See State v. Durden, 264 S.C. 86, 212 S.E.2d 587 (1975) (citing 23A C.J.S. Criminal Law s 1107).[4] Trial Counsel cannot be deficient for failing to make this objection, and the result of the trial would not have been different if Trial Counsel had made the objection. Therefore, the Strickland test simply is not met and the ruling should be reversed.

Prejudice

Finally, the Order failed to address the prejudice prong of the Strickland test for any of Frazier's allegations of failure to object. There is not finding of prejudice whatsoever in this section of the order. Furthermore, it seems from reading the findings that an improper cumulative error analysis was applied to combine each of the alleged failure to object into one prejudicial mistake. This is improper. In order to find prejudice, the PCR court must find that any *one* of these failure to object singlehandedly changed the outcome of the trial. There is no such finding here.

[4] "So long as he stays within the record and its reasonable inferences, the prosecuting attorney may legitimately appeal to the jury to do their full duty in enforcing the law, or to return the verdict which he conceives it to be their duty to return under the evidence, and may employ any legitimate means of impressing on them their true responsibility in this respect, as by stating that a failure to enforce the law begets lawlessness. Thus, he may in effect tell them that the people look to them for protection against crime, and may illustrate the effect of their verdict on the community or society generally with respect to obedience to, and enforcement of, the law; he has the right to dwell on the evil results of crime and to urge a fearless administration of the criminal law; and he may ask for a conviction, or assert the jury's duty to convict. He may argue with reference to any matter which the jurors may properly consider in arriving at their verdict, and may point out as well the matters which they should not consider."

Furthermore, the standard applied in the Order is incorrect. The Order states, "None of these issues were raised by appellate counsel likely because they were not objected to. For the foregoing reasons, Applicant has met both prongs of the Strickland test." Essentially, the PCR court held that there is prejudice here because Trial Counsel did not object, so the issues were not raised on appeal. This is improper. The proper standard is to find prejudice if the outcome of the trial would have been different if Trial Counsel had made the objection. Accordingly, because there is no prejudice finding, and because the PCR court seems to be applying the wrong standard, this allegation should be reversed.

IV. The PCR court erred in granting post-conviction relief on grounds that Trial Counsel was ineffective for failing to move for a new trial under the theory of inconsistent verdicts or legal theories when South Carolina does not prohibit either inconsistent verdicts or inconsistent legal theories.

In its Order, the PCR court granted post-conviction relief on the basis of Trial Counsel's failure to move for a new trial based on inconsistent verdicts. The Order cited to federal case law about inconsistent verdicts and found Trial Counsel's failure to argue this theory deprived Frazier of his constitutional right to effective counsel. After the State filed a motion to reconsider pursuant to Rule 59(e), SCRCP, pointing out that South Carolina does not prohibit inconsistent verdicts, the PCR court issued an order denying the motion, but holding "The prior order will not be amended, except to the extent that the section dealing with inconsistent verdicts should be altered to reflect inconsistent legal theories." App. 411. No other findings were made, and no specific citations supported this finding.

The PCR court's finding that Trial Counsel was ineffective for failing to move for a new trial under the theory of inconsistent verdicts is improper under South Carolina law because South Carolina no longer prohibits inconsistent verdicts. In 1991, the South Carolina Supreme

Court abolished the rule prohibiting inconsistent verdicts. State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991). Trial Counsel could not have made a successful motion on this basis because it is not a valid argument under the law. Therefore, he cannot be deficient for failing to raise this motion and there is clearly no resulting prejudice.

Even if South Carolina did prohibit inconsistent verdicts, there is no inconsistent verdict in this case. It was an undisputed fact that this burglary occurred during the nighttime, which is an essential element to burglary in the first degree. Even though the jury found Frazier was not carrying a deadly weapon, he still meets all the elements of first-degree burglary. Therefore, the verdicts are not inconsistent.

Furthermore, the Order specifically says that, because of the undisputed fact that the crime occurred at night, the prejudice of this error is speculative. If prejudice is speculative, and there is no concrete finding of prejudice to Frazier, the PCR court cannot grant post-conviction relief on this ground.

Finally, because there are no facts, findings, case law, or citations to support the PCR court's order which amended this ruling to reflect "inconsistent legal theories," the State cannot even respond to the finding, as there is no support for it whatsoever. Accordingly, because there is no probative evidence supporting this ruling, it should be reversed.

V. The PCR court erred in granting post-conviction relief on grounds that Trial Counsel was ineffective for failing to request a continuance pursuant to Langford, and that Appellate Counsel was ineffective for failing to raise the issue on direct appeal, where no probative evidence supports findings of deficiency or prejudice for either attorney.

This Court should reverse the granting of post-conviction relief because no probative evidence supports the PCR court's finding that Trial Counsel was ineffective for failing to make a Langford objection and request a continuance.

Deficiency

The Order explains that State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012), abolished control of the docket by the Solicitors. The Order then immediately states, correctly, "As of the date of this order, Langford has not been implemented, and Solicitors retain control of General Sessions Court dockets." Trial Counsel cannot be deficient for failing to make an objection based on a policy that has not yet been implemented. Strickland holds that in examining deficiency, the court must look to see if Trial Counsel's actions were reasonable under professional norms. "In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Strickland, 466 U.S.at 688, 104 S. Ct. at 2065. It was reasonable under South Carolina professional norms not to make an objection based on Langford, which the PCR court admitted is not our current practice in General Sessions courts. It would be absurd to require Trial Counsel to raise this objection in this circumstance, and to do so would hold all defense attorneys to an unreasonable standard that does not conform to local practice.

Furthermore, and most importantly, Trial Counsel credibly testified at the evidentiary hearing that he had enough time to prepare for trial, he was completely prepared, and there was

no reason to request a continuance. Therefore, he cannot be deficient for failing to make this request, as there was no reason to do so.

Prejudice

As stated above, Trial Counsel testified he was prepared for trial and there was no reason to request a continuance for more time to prepare. Accordingly, there is no prejudice based on his failure to request a continuance, because even if he had been given more time, he would have been just as prepared. Frazier has failed to prove that the outcome of the trial would have been different if this continuance request had been granted. Therefore, there is no prejudice, and this finding should be reversed, as there is no probative evidence in the record to support it.

CONCLUSION

For the foregoing reasons, the State respectfully requests this Court to grant certiorari, dispense with further briefing, and correct this error by reversing the PCR court's ruling granting post-conviction relief. In the alternative, the State requests this Court to grant certiorari and allow the opportunity to fully brief the issue.

Respectfully submitted,

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August 31, 2018

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County
Court of Common Pleas
J. Mark Hayes, II, Circuit Court Judge

RECEIVED
AUG 31 2018
S.C. SUPREME COURT

Appellate Case No. 2018-000033

DAGGART BERNARD FRAZIER,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner.

CERTIFICATE OF SERVICE

I, Julie A. Coleman ~~DeShawn H. Mitchell~~, certify that I have today served the within **Petition for Writ of Certiorari** upon Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, Esquire
S.C. Commission of Indigent Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served. This 31st day of August, 2018.

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