STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO FLORENCE COUNTY
Court of Common Pleas

The Honorable Thomas A. Russo, Circuit Court Judge

2010-154481

Charles Pagan,.....Petitioner,

v.

State of South Carolina,.....Respondent.

BRIEF OF RESPONDENT

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II. The PCR court correctly found trial counsel was not ineffective for failing to challenge the photographic lineups.

STATEMENT OF THE CASE

Petitioner was convicted of murder after a jury trial held before the Honorable L. Casey Manning on February 12, 2001, in Florence County. Judge Manning imposed a life sentence. Kernard Redmond, Esquire and James Cox, Esquire represented Petitioner at trial.

Petitioner appealed, and his conviction was affirmed by the Court of Appeals on January 12, 2004. State v. Pagan, 357 S.C. 132, 591 S.E.2d 646 (2004). Petitioner filed a petition for writ of certiorari with the South Carolina Supreme Court and this Court affirmed the conviction as modified. State v. Pagan, 369 S.C. 201, 631 S.E. 2d 262 (2006).

Petitioner filed an application for post-conviction relief on January 16, 2007. The Honorable Thomas A. Russo convened an evidentiary hearing on January 26, 2010. Petitioner was present and was represented by Charles T. Brooks, III, Esquire. Julie M. Thames, Assistant Attorney General was present and represented Respondent. Both petitioner and the defense attorneys testified at the hearing. On March 5, 2010, Judge Russo denied and dismissed Petitioner's application for PCR.

Petitioner appealed and submitted a petition pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988) on June 21, 2011. On October 3, 2012, this Court issued an order denying counsel's Petition to be relieved, and directed the parties to address the questions contained therein. Petitioner filed a Petition for writ of certiorari, Respondent filed a reply to the petition. This brief of Respondent follows.

ARGUMENT

I. The PCR court correctly found trial counsel was not ineffective for failing to object when the trial judge communicated to the jurors regarding purely administrative matters while they were in the jury room.

At the six-day trial of this case, Judge Manning spoke to the jury about logistical matters and the running of the case twice prior to the beginning of deliberations. Judge Manning put his first conversation with the jury on the record as follows:

> Welcome back, Mr. Foreman and members of the jury. Before we begin, I stuck my head in the jury room and stood there for a moment and talked to you all for about five minutes I'm guessing. And I told you then it would be incumbent upon me to place on the record what we discussed is mostly logistical matters about the running of this case. I suggest that was complicated. A lot of witnesses were taking a long while. I thank you all for being patient on behalf of the state as well as on behalf of the defense in this case.
>
> And that I try to avoid working you at night, if I could, after five. And that I really didn't plan to do so that is to work this weekend on the particular matter, but there was a chance we could be back Monday. I don't know, but there's a chance of that. We talked about that. And one young lady asked me about the possibility of taking notes. And I gave you a little to talked about, if one take notes, all would have to take notes. I didn't think it would be necessary to take notes in this case. It wasn't that type of case that I felt notes would be required. And I think somebody asked me whether or not I was the same young man that played basketball. I said what's left of him or something like that. But that was the general nature of the conversation we had; is that correct, members of the jury? App. P. 322, L 16 – P. 323, L 15.

The jurors agreed. App. P. 323, L 16. Judge Manning placed his second Discussion with the jury on the record as follows:

> Before the jury comes out, I stuck my head in and spoke to them a little bit. I'll try to recall basically what I said to them and had to do with logistical matters. How long I thought it was going to take. And I thanked them for their patience during the course of this trial. Explained that there

> was a long and complicated trial that was important to both the victim and the State as well as Mr. Pagan and the defense. And I think I said something along the lines that they had shown the patience of Job or something along those lines.

App. 696, line 20 – 697, line 4.

At the PCR hearing, when asked about his decision to not object to these communications, Defense counsel Redmond's response was that he did not "recall seeing anything that really raised that kind of concern." App. 1228, lines 10-20.

Pagan's cited authority does not support his position that the communication by the court was somehow objectionable. State v. Elmore is inapplicable to this case, and is distinguishable in several significant respects. First, it was a death penalty case reviewed under the now discarded doctrine of *in favorem vitae* review. *See* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

The decision of the court in Elmore relied on this capital status, since in a death penalty case, the defendant must be present at all stages of trial. State v. Taylor, 261 S.C 437, 200 S.E. 2d 387 (1973); State v. James, 116 S.C. 243, 107 S.E. 907 (1921). In this non-death penalty case where the notion of presumptive prejudice does not apply, the proper analysis is to look to the nature of the communication, and whether it was disclosed on the record.

Whereas Pagan relies heavily in his analysis upon Elmore, Pagan's case is further distinguishable, since in Elmore, the conduct of the trial judge included requesting periodic status reports on the jury deliberations, including entering the jury room without counsel during deliberations in the penalty phase of the trial. The description of the

judge's unacceptable actions in Elmore stand in stark contrast with those of the trial judge in this case, since he only discussed administrative and logistical matters, but more importantly, since he immediately disclosed the occurrence of the communication, as well as the content of the communication each time the communication was necessary.

Whereas the trial judge in Elmore communicated material information regarding the jury's decision, the instant case involves communication of logistical matters such as scheduling and small talk about basketball. A trial judge may need to inquire about the comfort of the heat or air conditioning, the status of parking issues, or other inconsequential matters, and various other very harmless logistical issues of practicality that in no way prejudice a criminal defendant's defense.

In Cameron, the Supreme Court indicated that private communication between court officials and members of the jury cannot be tolerated. This case however, does not involve private communication as the trial judge immediately thereafter placed the content of the communication on the public record. State v. Cameron, 311 S.C. 204, 428 S.E. 2d 10, (1993).

In State v. Way, 17 S.E. 39 (1893) the mere fact that one of the State's witnesses walked out of the courtroom with one of the jurors was insufficient to grant a new trial in the absence of any evidence showing the character of the conversation. In Way, it is not clear whether the communication was material to deliberation or if it was harmless. In this case, the harmless character of the conversation is clear since the trial judge immediately placed it on the public record, as was probably his routine in every case.

Invariably in many cases, the issue of note-taking comes up and must be addressed at some point, whether the court brings it up or a member of the jury asks, or simply begins note taking which sometimes then prompts the court to announce policy on juror note-taking. In this case, the trial court felt that this type of communication of logistical matters between court personnel and the jury was necessary for the proper administration of the trial. In State v. Cameron, the mere fact that some conversation occurs between juror and court official does not necessarily prejudice defendant. 311 S.C. 204, 428 S.E. 2d 10, (1993).

To prove counsel ineffective, a PCR applicant must show (1) counsel's performance was deficient, and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Strickland, *supra*. This Court will uphold the PCR court's findings if the findings are supported by probative evidence. Pierce v. State, 338 S.C. 139, 145 S.E. 2d 222, 225 (2000).

Probative evidence supports the PCR judge's findings regarding both elements of Strickland. Counsel did not object after determining nothing had happened with regard to these communications that would prejudice Pagan's trial. Counsel exercised reasonable judgment in this instance, in the light of other instances throughout the trial where they did not hesitate to object when necessary to protect their client's rights. Their exercise of reasonable judgment in this regard shows their performance was not deficient.

Even if for argument's sake one assumes some manner of deficient performance, Pagan is unable to show prejudice as logistics and basketball are not material to Pagan's

guilt or innocence. "Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result." Pagan, 369 S.C. at 212, 631 S.E.2d at 267 (citations omitted). Probative evidence supports the PCR court's findings. Pagan has offered no logical argument on how these two instances of communication with the jury changed the verdict or prejudiced his case, but seems to rely upon presumptive prejudice. Respondent submits this was harmless communication immediately disclosed on the record, that did not prejudice the Applicant in any way.

This Court already noted on direct appeal that Pagan's guilt has been established beyond a reasonable doubt. *See* State v. Pagan, 369 S.C. 201, 631 S.E. 2d 262 (2006). Monique Cooks witnessed the murder, which based on her testimony, Pagan committed because Pagan felt the victim, Gloria, should have timely paid him for the $20.00 worth of crack cocaine. *See* App. 4111-459. Lavenia Helton testified that Pagan's dispute with Gloria began a few weeks earlier, when Pagan demanded crack he believed was rightfully his from Gloria at gunpoint. He was looking for Gloria thereafter until her death. App. 709-714.

In the light of overwhelming evidence of guilt, any ineffectiveness by counsel would result in no prejudice to a defendant. *See* Payne v. State, 355 S.C. 642, 586 S.E.2d 857 (2003) (Although in that case trial counsel's performance was deficient for failing to object to co-defendant's comment on defendant's right to remain silent, Strickland's prejudice prong was not satisfied because there was overwhelming evidence of guilt.)

II. The PCR court correctly found trial counsel was not ineffective for failing to challenge the photographic lineups.

At trial, Lavenia Helton testified she was shown a photo lineup in the investigation where she selected Charles Pagan as the person that killed the victim. App. 719. Counsel did not object to her testimony or to the photo lineup. At the PCR hearing, when asked why he didn't object to the photo lineups, defense counsel Redmond testified that "from what I can recall and obviously with my experience at the time and even now, it was one of those situations where in looking at it, we did not feel that there was an issue." App. 1223-24. Jim Cox who co-defended Pagan indicated he did not object to the line up because "I thought the line ups worked in our favor because the person that she draw the sketch, I didn't think looked like Charles. I didn't, so again, I thought we had a real good chance to win that case hands down." App. 236, lines 19-23.

A component of counsel's strategy was to utilize the difference in appearance between the sketch and anyone in the lineup to show the witness should not be believed. In order to do this, trial counsel would need both the lineup and the sketch to show the visual disparity between the two and to cast doubt on Mr. Cooks ability to accurately report what she claims to have seen. With this trial strategy, it would not have been logical for counsel to object to a lineup which counsel felt could be minimized or potentially work to their client's favor. In such a situation, had counsel objected to the lineup and excluded it, Pagan might have then argued it was ineffective assistance of

counsel to not use the disparity between the lineup and the photo to impeach Ms. Cooks. Counsel has articulated a logical trial strategy for not attempting to exclude the lineup.

Ms. Cooks identified Pagan as the person she saw forcefully holding, stripping clothes off of, and threatening the victim on the night of her murder and also indicated she recognized Pagan the first time she looked at the lineup, but that she was too scared to point him out. Pagan cites Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375 (1972) to establish five factors to determine whether an identification is reliable – this Court need not reach these factors as the instant question is not one of reliable identification but instead is whether trial counsel articulated a reasonable trial strategy for keeping the photo lineup in. In this case both Cox and Redmond articulated a legal basis for not objecting to the lineup. Cox and Redmond attempted to demonstrate to the jury that the line-ups were not credible, but that they felt there was no legal basis to exclude them entirely. The PCR court found that trial counsel attacked the credibility of the line-ups vigorously during cross-examination.

Pagan has not established deficient conduct in this regard, and further, Pagan has not established the line-ups would have been suppressed had trial counsel made the specific objection, nor has Pagan proven that the witness was specifically told who to pick out of the line ups. Not only has Pagan failed to show deficient performance, he has also failed to show prejudice with respect to the lineup.

CONCLUSION

For the reasons stated above, this Court should uphold the lower court's ruling

and deny the requested relief.

Respectfully submitted,

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By:_____
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May 13, 2013

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal From Florence County

Honorable Thomas A. Russo, Circuit Court Judge

CHARLES PAGAN,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

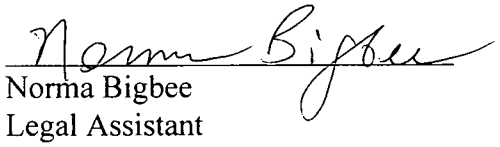
Petitioner.

PROOF OF SERVICE

I, Norma Bigbee, 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 his attorney of record, Robert M. Pachak, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, PO Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.

This 13th day of May, 2013.



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Re: **Charles Pagan v. State of South Carolina**
Appellate Case No: 2010-154481

Dear Mr. Pachak:

Enclosed please find two (2) copies of the Brief of Respondent along with proof of service in the above-referenced case.

Sincerely,

Tyson Andrew Johnson, Sr.
Assistant Attorney General

TAJ/nb
Enclosures

cc: The Honorable Daniel E. Shearouse
(original & 14 enclosed)
Ms. Trisha Allen - with enclosure