

October 23, 2014

Honorable Jenny Abbott Kitchings

Clerk of Court Of Appeals

P.O. Box 11629

Columbia, S.C. 29211

Attn: Chief Justice, John C. Few and fellow Judges Of Appeals

There is a great discrepancy in the recent conviction and sentencing of one 34 year old Mr. Jamar Antonio Huggins of Conway S.C.

Case No: 12123508

Investigating Officer: Jonathan Martin (HCPD)

Assigned By: Sgt. Tim Troxell

Senior Assistant Solicitor: Donna E. Elder

Circuit Court Judge: Benjamin H. Culbertson

Horry County Case No: 2013-GS-26-1076-, -077, -078

Defendant Attorney: John R. Long, II

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New Study predicts wrongful conviction rate in the U.S. at 5,000 to 10,000 per year. Despite the extensive constitutional protections built into the American justice system that make it one of the most progressive systems in the

modernized world, it is no secret that some people are accused, and even convicted for crimes they did not commit. We have a system whose foundations rest on humans, and inevitable human errors, mistakes do occur. Like all human beings, officers and prosecuting attorneys sometimes make misjudgments and errors, and even commit misconduct that results in wrongful convictions. Mr. Huggins was wrongfully convicted and sentenced to 15 years on September 17, 2014. The investigating officer Mr. Martin was not thorough in his investigation and in turn led him to be very unprofessional. Mr. Martin claims he was lead to Mr. Huggins by a "nickname" but the description that was given to him of this person did not match that of Mr. Huggins. The suspect was said to be a dark skinned male with short dreads, Mr. Martin found a 2003 DMV photo of Mr. Huggins with short dreadlocks (not touching his shoulders) to use in a photo line-up when the crime happened December 20, 2012 when Mr. Huggins dreadlocks were down his back (mid-back length) which is misleading when he had access to a more current photo of Mr. Huggins. There was supposedly a gun and mask involved in the crime yet Mr. Martin did not request a search warrant for Mr. Huggins home or vehicle. Mr. Martin trusted only the testimony of a admitted crack cocaine addict (Ms. Montgomery) who gave him this nickname and he used that as the foundation of his whole investigation even after she changed her story several times (It is my understanding that detective work was not Mr. Martin's area of expertise at that time which may have played a huge factor in Mr. Huggins wrongful conviction) Ms. Montgomery was a suspect in the crime and co-defendant who later admitted to lying to police and detectives about the case. After about a year in jail and being clean of substance abuse she admitted on the stand that she was told if she gave them a name she would get 10 and the other person would get 30 so she gave them this nickname. While on the stand Ms. Montgomery looks and points at Mr. Huggins and says yes I gave you all a nickname but that's not him, that's not the guy who went to the house with me that night. Ms. Montgomery goes on to say that she knows the guy that did the crime with her but she doesn't wish to say his name now just as she didn't wish to say it before. Her body language is very relaxed and she doesn't seem too bothered by being in the courtroom as she answers some of her questions with "um hum" until the judge tells her to say yes or no. The victims did not identify

Mr. Huggins as a suspect and even after giving a testimony there is still no evidence and no one to say Mr. Huggins committed the crime at hand Ms. Elder still pressed forward in her "win at all cost" attitude. Ms. Elder seemed to have lost sight of what's important and that is to "seek justice". Ms. Elder could not prove beyond a reasonable doubt that Mr. Huggins committed the crime yet the jury still found him guilty with no evidence or witness testimony against him so instead of Ms. Elder helping one victim she has now created two victims by playing a part in placing an innocent man in prison for 15 years. Mr. Huggins was facing 30 years but Judge Culbertson said because there was no gun found and no one was hurt or molested he would drop the kidnapping and armed robbery and run them concurrent. The Huggins family is in the process of fighting this conviction. An appeal has been sent, a couple meetings have taken place one with chief deputy solicitor Jimmy A. Richardson, one with the sheriff's department along with internal affairs where a formal complaint was made against the investigating officer Mr. Jonathan Martin. The NAACP in our area is now involved and seeking justice for this young man and his family. The media is becoming involved as they recorded the family and community march for justice and reported it on the news. The community is outraged and something has got to happen. Mr. Huggins has two children who need him and a 91 year old grandmother one Ms. Willie Dean Whaley, a well known retired teacher and activist in the community to whom he is the caregiver of. I am reaching out to you in a quest to seek justice for Jamar Antonio Huggins and ask that you review his case and help bring this young man home to his family.

DiNedra Smith

843-455-7885 cell phone

dinedrabyrd@yahoo.com email

A Letter Of Complaint

Chief Of Police: Saundra Rhodes

Case No: 12123508

Investigating Officer: Jonathan Martin

Assigned By: Sgt. Tim Troxell

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-There was not a follow up interview with Mr. Moore after Ms. Montgomery said the name "Junk" to see if Mr. Moore knew this person

-There was touch DNA swabs taken from the scene of the crime yet there was no status update on what was found, if anything

-While interviewing Ms. Montgomery she wasn't stopped and asked to clarify or correct herself when she started off saying "Junk" but then began saying "Juice" to find out which one was it as she was talking about the night in question as far as what happened, and telling Mr. Martin what the suspect with the gun was doing and saying

A DMV photo of Mr. Huggins in 2003 was used to identify him as a possible suspect in a 2012 crime. In 2003 his dread locks were short but in 2012 his dread locks were mid-back length. Clearly if a more up to date or current photo would have been used at that time Mr. Huggins would not have fit the line-up or the description given of the suspect.

Ms. Montgomery stated she did not know "Junk's" real name that is until Mr. Martin showed her "a photo", then asks her who is this? She replies that's "Junk" and Mr. Martin then says by "Junk" you are identifying Jamar Huggins (Mr. Martin implicates Jamar Huggins name into the investigation not Ms. Montgomery)

-Ms. Montgomery described "Junk" as 5'07", a grille in his mouth, small dread locks, dark skinned and weighs 200 lbs. Her description clearly was not of Mr. Huggins as he is 5'06", did not have a grille in 2012, his dread locks were long, he's brown skinned and weighs 160. A further investigation should have been conducted as Ms. Montgomery admitted to being addicted to crack cocaine and her story changed each time she was interviewed, she was not a credible witness.

-There was said to have been a gun, and gloves involved in this crime yet there were no search warrants issued for Mr. Huggins home or vehicle at any point and time.

-There was no evidence let alone any substantial evidence other than the word of a crack cocaine addict giving a nick name. Mr. Huggins phone number wasn't in Mr. Moore's phone or Ms. Montgomery's phone. The victim's could not identify Mr. Huggins as one of the possible suspects. There is no reason Mr. Huggins should have been detained or held at J. Rouben Long Detention Center or even threatened with jail time given the facts and lack of evidence

In closing my complaint I would like to say this case has ruined Mr. Huggins life because he could not continue school at HGTC, he lost a job at Wal-Mart because of the pending charges he had from this case at that time and it has caused him and his family a great deal of stress and pain especially his 91 year old grandmother and his two children. Mr. Huggins is an innocent man. This investigation was poorly done and very unprofessional. It is also my understanding that detecting and investigating was not Mr. Martin's areas of expertise therefore he should have not been assigned this case let alone given sole authority without anyone with more knowledge or experience overseeing or guiding him.

DiNedra Smith

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

Keith Lasean Simpson, Respondent-Petitioner,

v.

Michael Moore, Commissioner, S.C. Department of
Corrections, and Henry Dargan McMaster, Attorney
General, State of South Carolina, Petitioner-Respondent.

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Appeal from Spartanburg County
John C. Hayes, III, Circuit Court Judge

Opinion No. 26114
Submitted April 20, 2005 - Filed February 13, 2006

AFFIRMED IN PART; REVERSED IN PART

John H. Blume, III, and Sheri L. Johnson, both of Cornell
Law School, of Ithaca, NY; and Russell Ghent, of
Leatherwood Walker Todd & Mann, of Greenville, for
Respondent-Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy
Attorney General John W. McIntosh, Assistant Deputy
Attorney General Donald J. Zelenka, and Assistant
Attorney General S. Creighton Waters, all of Columbia, for
Petitioner-Respondent.

CHIEF JUSTICE TOAL: Respondent-Petitioner Keith Lasean Simpson (Simpson) was found guilty of murder and received a death sentence. Simpson appealed and this Court affirmed. *State v. Simpson*, 325 S.C. 37, 479 S.E.2d 57 (1996). Simpson filed for post-conviction relief (PCR). The PCR court denied relief on all issues related to guilt but granted relief on sentencing. We affirm in part and reverse in part.

Factual/Procedural Background

Simpson and his accomplice planned to rob a convenience store. Armed with guns, the two men went to a store owned by Joe Harrison. Once there, Simpson went inside the store while his accomplice waited in the parking lot. At the same time, a customer entered the store with his nine-year-old son, Nathan. After making his purchase, the customer went outside to wait for Nathan. Joe Harrison was behind the counter, working the register.

Suddenly, gunshots were fired. A store employee, who was in the back of the store, testified that he saw Harrison walking towards the front door while Simpson shot at Harrison from behind. Nathan testified that he walked towards the front of the store to see what had happened. According to Nathan, Simpson pointed the gun at Nathan's forehead and attempted to fire the gun, but it only made a clicking noise. After this encounter with Simpson, Nathan ran and hid behind a poker machine. Nathan testified that while he was hiding, he saw Simpson go behind the counter and take money from the cash register.

Once the shooting began inside, Simpson's accomplice shot Nathan's father, Tony Scott, outside, in the parking lot. Scott was injured, and Harrison, the owner, died. Simpson and his accomplice fled the scene, pointing their guns and shooting at others in the area, but injuring no one else.

Simpson was indicted for murder, armed robbery, assault and battery with intent to kill, possession of a firearm during commission of a violent crime, and five counts of pointing a firearm.

At trial, Simpson gave a different version of events. He testified that once inside the store, he "chickened out." He claimed that he lifted his shirt, exposing the gun, as a way of signaling to his accomplice that he no longer wanted to rob the store. When Simpson lifted his shirt, Harrison saw the gun, grabbed Simpson by the shirt collar, and the two began to struggle. During the alleged struggle, two shots went off, Harrison began to stagger, and then Simpson fired two additional shots at Harrison. In addition, Simpson testified that he did not take anything from the store when he left.

The jury found Simpson guilty of murder and he was sentenced to death. He was also sentenced to serve consecutive sentences of thirty years for armed robbery, twenty years for assault, and five years for each of the pointing-a-firearm charges. Simpson appealed and this Court affirmed. *State v. Simpson*, 325 S.C. 37, 479 S.E.2d 57 (1996). Simpson filed for post-conviction relief (PCR), and following a hearing, Simpson was denied relief on guilt but granted relief on sentencing. We granted Simpson's and the State's petitions for certiorari.

Simpson raises the following issues for review:

- I. Did the PCR court err in finding counsel was not ineffective for failing to consult an independent forensic pathologist, medical examiner, or homicide-reconstruction expert?
- II. Did the PCR court err by denying Simpson relief due to the State's failure to disclose potentially exculpatory evidence related to the armed-robbery charge?
- III. Did the PCR court err in finding the State did not engage in prosecutorial misconduct?
- IV. Did the PCR court err in finding counsel was not ineffective for failing to call an expert witness to discredit a child witness's testimony?
- V. Did the PCR court err in finding counsel was not ineffective for failing to object to the State's use of peremptory challenges against women?
- VI. Did the PCR court err in failing to conduct a cumulative-error analysis?

The State raises the following issues for review:

- I. Did the PCR court err in finding Simpson was prejudiced by counsel's failure to fully develop Simpson's mitigation case?
- II. Did the PCR court err by considering numerous depositions and affidavits in lieu of live testimony?

Law/Analysis

Standard of Review

This Court gives great deference to the PCR court's findings of fact and conclusions of law. *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000) (citing *McCray v. State*, 317 S.C. 557, 455 S.E.2d 686 (1995)). On review, a PCR judge's findings will be upheld if there is any evidence of probative value sufficient to support them. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). If no probative evidence exists to support the findings, this Court will reverse. *Pierce v. State*, 338 S.C. 139, 144, 526 S.E.2d 222, 225 (2000) (citing *Holland v. State*, 322 S.C. 111, 470 S.E.2d 378 (1996)).

To establish a claim that counsel was ineffective, a PCR applicant must show that (1) counsel's representation fell below an objective standard of reasonableness and (2) but for counsel's errors, there is a reasonable probability that the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. 688, 694 (1984); *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068.

Discussion

Issues Raised by Simpson

I. Failure to Consult a Forensic Expert

Simpson contends that the PCR court erred in finding counsel was not ineffective for failing to consult an independent forensic pathologist, a medical examiner, or a homicide-reconstruction expert. We disagree.

At trial, the State presented the expert testimony of Dr. Wren, the pathologist who performed Harrison's autopsy. Dr. Wren testified that Harrison was shot three times: once through the hand, once through the front abdomen, and once through the back. Dr. Wren stated that all three were distant gunshot wounds, meaning that when fired, the gun was at least twelve inches from the victim.

Defense counsel did not call an expert to rebut Dr. Wren's testimony. Instead, the defense presented Simpson as its sole witness. Simpson testified that the shooting occurred during a struggle over the gun. During closing argument, defense counsel reenacted Simpson's testimony, showing the jury three possible theories regarding the trajectory of the bullets.

At the PCR hearing, defense counsel testified that he did not see a need for calling an expert witness to refute Dr. Wren's testimony. But to show that there was in fact a need for such testimony, PCR counsel called three expert witnesses to the stand. Two of the experts testified that Harrison was shot in the hand while he was gripping the barrel of Simpson's gun, which supported Simpson's testimony that the shots were fired during a struggle. But one expert testified that Harrison could have been shot in the back while lying on the ground or he could have been shot in the back while standing upright and fleeing.

After considering this testimony, the PCR court found that defense counsel was not deficient in failing to consult an expert. The court viewed the allegations against counsel as relating less with trial strategy and more to the degree that counsel should go in pursuing a defense theory. In addition, the court found that even if counsel was deficient, there was no prejudice. The judge found that the expert testimony presented at the PCR hearing added little either factually or theoretically, and did not negate the fact that all of the elements necessary for a murder conviction were present. Therefore, the PCR court found that there was not a reasonable probability the added testimony would have changed the outcome of the guilt phase of the trial.

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington*, 466 U.S. 688, 691 (1984). A decision

heavy measure of deference to counsel's judgments." *Id.* When counsel's performance falls below this standard, a "defendant must show that there is reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

We agree with the PCR court and find that counsel was not deficient in failing to consult a forensic expert. It is clear from the record that counsel's primary strategy was to prove that the shooting occurred during a struggle, and that this struggle somehow negated or lessened Simpson's criminal liability for Harrison's death. However, evidence that Harrison grabbed Simpson by the shirt collar does nothing to explain how and why the gun was pulled from Simpson's waist. Additionally, Simpson himself testified to intentionally shooting a wounded Harrison *twice* after the alleged struggle concluded, once in Harrison's *back*. Even if Simpson's testimony about the struggle was corroborated with expert testimony, there is not a reasonable probability that the jury would not have found Simpson guilty of murder. [1]

Accordingly, we hold that the PCR court properly held that counsel was not ineffective in failing to consult an independent forensic pathologist, a medical examiner, or a homicide-reconstruction expert. [2]

II. Brady Violation

Simpson contends that the PCR court erred in denying relief due to the State's failure to disclose potentially exculpatory evidence related to the armed-robbery charge. We agree.

The armed-robbery charge served as an aggravating circumstance that allowed the State to seek the death penalty. See S.C. Code Ann. § 16-3-20 (1976). Accordingly, it was essential for the State to prove that Simpson actually robbed the store.

When police arrived at the scene of the crime, they noticed that the cash register drawer was open, and there were bills in every slot except the slot that would normally contain twenty-dollar bills. Police also found a bag of money behind the counter, near the register. Instead of preserving the bag and disclosing its existence to Simpson's counsel, the police gave the bag to the victim's brother, Jack Harrison, who helped run the store.

The PCR court found:

The turning over of the bag by law enforcement clearly constitutes sloppy police work in an armed robbery investigation and could be considered a tainting of the scene. Clearly the contents of the bag could have been exculpatory. Clearly this evidence should have been preserved and, thus, been subject to discovery by [Simpson].

Despite this finding, the court ruled that the issue about the bag of money was not preserved for review because Simpson did not specifically raise it in his PCR application. We disagree.

At the PCR hearing, two witnesses were called to testify about the money issue. The first witness was Simpson's defense counsel, who testified that he learned about the bag of money only two hours before testifying. The second witness was Jack Harrison, whom the State called for the specific purpose of addressing the money issue. Jack testified that the money was used to cash customers' checks, and it was unusual for money to be taken from the register and put into the bag.

Given this testimony and the PCR court's ruling on the issue relating to the bag of money, we hold that Simpson should have been permitted to amend his PCR application to conform to the evidence presented. See Rule 15(b), SCRCP (pleadings may be amended, even after judgment, to conform to issues tried by express or implied consent but not raised in the original pleadings); *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 843 (1992) (amendments must conform to evidence presented at trial).

not raise new claims). Moreover, we hold that the State would not be prejudiced by such an amendment given that the State cross-examined Simpson's defense counsel on the issue and was permitted to present its own witness, Jack Harrison, to contest the issue's relevance. See *Harvey v. Strickland*, 350 S.C. 303, 313, 566 S.E.2d 529, 535 (2002) (amendments should be liberally allowed when no prejudice to the opposing party will result).

Turning to the merits, we hold that the State's failure to tell the defense that a bag of money was found behind the counter prejudiced Simpson's case in the penalty phase. "[T]he 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." *Brady v. State of Maryland*, 373 U.S. 83, 87 (1963). A *Brady* claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. *Sheppard v. State*, 357 S.C. 646, 659, 594 S.E.2d 462, 470 (2004). Favorable evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Id.* at 660, 594 S.E.2d at 470.

Armed robbery was both a charge against Simpson in its own right and a statutory aggravating circumstance urged by the State as a ground for imposing the death penalty. There is a reasonable probability that Simpson would not have been found guilty of armed robbery had the evidence about the bag of money been disclosed.**[3]** Moreover, because the State needed to prove that a robbery occurred in order to seek the death penalty, there is a reasonable probability that Simpson would not have received a sentence of death had the State failed to prove Simpson robbed the store.

Therefore, we hold that the PCR court erred in denying relief on this basis. Accordingly, Simpson is entitled to a new trial on the armed robbery charge.

III. Prosecutorial Misconduct

Simpson contends that the PCR court erred in finding that the State did not engage in prosecutorial misconduct in its alleged coaching of the child witness, Nathan. We disagree.

A conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's judgment. *U.S. v. Bagley*, 473 U.S. 667, 678 (1985). The knowing use of perjured testimony is subject to the materiality standard of review: "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 682.

At trial, Detective Rick Gregory testified that he interviewed nine-year-old Nathan Scott the day after the shooting. During their conversation, which Gregory did not record, Nathan told Gregory that he saw a black man go behind the counter and take money out of the cash register. But twelve days later, Gregory obtained a written statement from Nathan in which Nathan mentioned only that he saw a black man go behind the cash register—not that he saw a man take money from the register.

At some point before trial, the State's investigator, Johnny Dyer, went to Nathan's home to discuss the crime. After talking at the house, Dyer took Nathan to the store so that Nathan could explain what he had witnessed and where he had hidden during the incident. Afterwards, Dyer sent a letter to defense counsel stating "Nathan Scott may testify that he saw the black man in the store, and the man had money in his hand that came from the cash register."

Simpson first contends that the State engineered and introduced materially false and misleading testimony regarding whether Nathan saw Simpson take money from the register. We disagree.

Although there is speculation that Dyer attempted to improperly influence Nathan, there is simply no evidence supporting a finding that such misconduct actually occurred. In fact, the State was uncertain

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as to how Nathan would testify. In a letter to defense counsel, Dyer stated that Nathan may testify that he saw Simpson take money from the register. And later, at the PCR hearing, defense counsel explained that he did not call Dyer to testify because counsel was uncertain as to whether Dyer had improperly coached Nathan.

Moreover, there is no evidence to support a finding that Nathan's testimony was false. Defense counsel was aware that Nathan's story had changed throughout the investigation and cross-examined him accordingly. The jury heard this testimony and was able to evaluate Nathan's credibility based on these inconsistencies.

Simpson also contends that, by not telling defense counsel about the meeting with Nathan at home and at the store, the State withheld exculpatory and impeaching evidence in violation of *Brady*. We disagree. Simpson was unable to show that there was a reasonable probability that the result of the trial would have been different had the defense known about the meeting. Therefore, we find that the State did not violate *Brady*. See *Sheppard*, 357 S.C. at 660, 594 S.E.2d at 470 (withheld evidence must be material to guilt or punishment).

Accordingly, we hold that the PCR court properly found that the State did not engage in prosecutorial conduct.

IV. Expert Witness

Simpson contends that the PCR court erred in finding counsel was not ineffective for failing to call an expert witness to discredit Nathan's testimony. We disagree.

At the PCR hearing, defense counsel testified that he did not think that he needed to call an expert witness to discredit Nathan's testimony. After learning that Nathan's recollection of events had changed, counsel decided that the issue could be addressed on cross-examination, and counsel was in fact able to get Nathan to admit on cross that someone from the solicitor's office "helped" him remember that he saw "a black man taking money out of the cash register." Given this admission, counsel concluded that cross-examination "went very well," and therefore there was no need to consult any sort of expert to discredit Nathan's testimony.

In response, Simpson presented expert testimony at the PCR hearing from a developmental psychologist who identified a number of factors—including Nathan's low I.Q., his young age, and the length of time between when the crime occurred and when Nathan was interviewed by investigators—indicating that Nathan would likely remember false details about the shooting.

The PCR court found that counsel "ably, adequately and thoroughly addressed the false memory/suggestion issue at the source, Nathan Scott." In addition, the court found that the cross-examination of Nathan "clearly exposed his" lack of accurate recall and not only his susceptibility to suggestion, but the actual enhancement of his recall by statements to him by others, namely individuals at the Solicitor's office." We agree.

On both direct and cross, Nathan's lack of accurate recall was exposed to the jury. At the PCR hearing, defense counsel explained that he knew Nathan's story had changed, and that he had planned to address this issue on cross-examination. Therefore, we find that counsel was not deficient in failing to call an expert witness to discredit Nathan's testimony. See *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (counsel may avoid a finding of deficiency if he articulates a valid reason for using a certain strategy). [4]

V. Voir Dire

Simpson contends that the PCR court erred in finding counsel was not ineffective for failing to object to the State's use of peremptory challenges against women. We disagree.

In making this contention, Simpson does not argue that the jury was incompetent or impartial. Instead, Simpson argues that counsel was unaware of the then recent decision of *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127, 143 (1994), in which the United States Supreme Court held that the gender-based exercise of peremptory challenges violates the equal protection clause of the Constitution.

At the PCR hearing, defense counsel testified that he did not recall considering the possibility of objecting to the State's use of peremptory strikes on the basis that they were gender-based. The PCR court ruled that counsel's failure to challenge the State's strikes on the basis of gender was consistent with objective standards of reasonableness and not prejudicial to the outcome of Simpson's trial. We agree.

Simpson did not present any evidence that potential jurors were struck simply on the basis of their gender. In addition, Simpson failed to show that he was prejudiced by the jury selected. See *Palacio v. State*, 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999) ("a criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury"). Therefore, we hold that the PCR court properly denied relief on this basis.

VI. Cumulative-Error Analysis

Simpson contends that the PCR court erred in failing to conduct a cumulative-error analysis. We disagree.

When counsel's deficiency is so pervasive as to render a particularized prejudice inquiry unnecessary, a defendant may be relieved of his burden to show prejudice. *Green v. State*, 351 S.C. 184, 196, 569 S.E.2d 318, 324 (2002). Whether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina. *Id.* at 197, 569 S.E.2d at 324-25.

Because the PCR court found that only one of Simpson's allegations had merit, there was no need to conduct a cumulative-error analysis. The record simply did not contain "several errors" for the judge to cumulatively assess. We hold, therefore, that the PCR court did not err in failing to conduct such an analysis.

Issues Raised by the State

I. Mitigation Case

The State argues that the PCR court erred in finding that Simpson was prejudiced by counsel's failure to offer sufficient social history evidence in the mitigation case. We agree.

The United States Supreme Court has held that counsel's failure to conduct a reasonable investigation into mitigating circumstances constitutes ineffective assistance. *Wiggins v. Smith*, 539 U.S. 510, 511 (2003). In *Wiggins*, the Court found that counsel's review of a pre-sentence investigation report and records from the Department of Social Services records did not constitute a reasonable investigation into defendant's background. *Id.* A more in-depth investigation would have revealed the defendant's "severe privation and abuse in the first six years of his life while in the custody of his alcoholic, absentee mother," the "physical torment, sexual molestation, and repeated rape during his subsequent years in foster care," the time he spent homeless, and his diminished mental capacity. *Id.* at 535. Instead, only one significant mitigating factor—Wiggins's lack of a criminal history—was before the jury. *Id.*

Similarly, this Court has found counsel ineffective for failing to adequately investigate and prepare expert testimony about a defendant's mental condition. *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2004). In *Von Dohlen*, a psychiatrist testified at trial that the defendant suffered from "adjustment reaction disorder," as well as pathological intoxication from the abuse of alcohol and Valium. *Id.* at 604, 602 S.E.2d at 741. He also testified that the defendant did not have a chronic mental illness and did

The State argues that the PCR court erred by considering numerous depositions and affidavits in lieu of live testimony. We disagree.

At a PCR evidentiary hearing, “[t]he court may receive proof by affidavits, depositions, oral testimony, or other evidence” S.C. Code Ann. § 17-27-80 (1985). Whether to admit such evidence is within the court’s discretion. *Beckett v. State*, 278 S.C. 223, 224, 294 S.E.2d 46, 47 (1982).

In the present case, the PCR court allowed Simpson to introduce over forty depositions and some twenty-two affidavits into evidence in lieu of live testimony. We find that this decision was within the trial judge’s discretion, resulting in no prejudice to the State. Most of the relevant witnesses testified at the PCR hearing and were cross-examined by the State. In addition, the court gave the State the opportunity to submit additional testimony and affidavits countering the evidence presented by Simpson. Therefore, we hold that the PCR court did not err.

Conclusion

We affirm the PCR court’s decision declining to grant a new trial as to the conviction of murder. As to the conviction of armed robbery, however, we reverse the PCR court’s decision declining to grant relief, because we find that the State withheld potentially exculpatory evidence related to the armed robbery charge. Therefore, Simpson is entitled to a new trial on the armed robbery charge. If the State convicts Simpson of armed robbery on retrial, Simpson will also be entitled to a new trial on the penalty phase of the capital murder charge, given that armed robbery served as the sole aggravating circumstance allowing the State to seek the death penalty. [5]

We also reverse the PCR court’s decision finding that the mitigation case was not fully developed. We find that defense counsel presented a thorough mitigation case on Simpson’s behalf.

Finally, we affirm the PCR court’s decision to consider certain depositions and affidavits in lieu of live testimony.

Therefore, the PCR court’s decision is affirmed in part and reversed in part.

MOORE, WALLER, and BURNETT, J.J., concur. PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: The majority holds the State’s Brady[6] violation entitles Simpson to a new trial on the armed robbery charge, with capital resentencing contingent on the outcome of that trial. In my opinion, such a limited remedy would violate Simpson’s constitutional rights.

In finding a Brady violation, we have necessarily found the nondisclosed evidence was material. In determining materiality for Brady purposes,

The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.

Kyles v. Whitley, 514 U.S. 419, 434 (1995).

I would hold that when, as here, the Brady violation in the guilt phase of a capital trial relates to the aggravating circumstances relied upon by the State in the penalty phase, [7] fundamental fairness requires a new trial.

I am also concerned that to deny Simpson a new sentencing proceeding under these circumstances would violate his Sixth Amendment right to trial by jury. In Ring v. Arizona, 536 U.S. 584 (2002), the United States Supreme Court held that this right entitles the capital defendant to “a jury determination

The original jury which sentenced Simpson to death was deprived, by the State's unconstitutional act, of hearing all of the evidence relevant to the aggravating factors. To deny Simpson the right to have his sentence determined by a jury which has heard all the facts, including those which exculpate him, would violate his Sixth Amendment right to a jury trial. Ring v. Arizona, *supra*; cf. State v. Riddle, 301 S.C. 68, 389 S.E.2d 665 (1990) (capital resentencing reversed where state permitted to prove statutory aggravators merely by introducing defendant's convictions for burglary and armed robbery from the first trial; these convictions were in no way binding on resentencing jury, which had to determine appropriate penalty from the evidence presented to it).

I therefore concur in the majority's determination that the State committed a Brady violation, but dissent from its holding that the error may be remedied by a retrial on the armed robbery charge alone with a contingent new sentencing proceeding. In any case, as explained below, I would hold that counsel were ineffective in failing to present expert testimony to impeach Nathan's credibility, and to dispute the State's forensic evidence. [8]

At trial, Nathan acknowledged that 'someone' had told him what to say, and agreed on cross-examination that the solicitor's office had "helped" him remember. At the PCR hearing, Simpson presented expert testimony that Nathan's low I.Q. [9] and learning disability [10] made him especially susceptible to suggestions about past events, a situation compounded by his young age (nine at the time of the events). Simpson's expert pointed to specific parts of Nathan's testimony that were consistent with false memories. One of Simpson's trial attorneys admitted that while they were aware of the changes in Nathan's testimony, they felt they could deal with it through cross-examination. Simpson's lead counsel echoed this sentiment. Trial counsel did not consult with a memory expert.

The PCR judge found that the attorneys were fully aware before trial of Nathan's belated recollection of having seen Simpson with cash in hand, and was not ineffective in relying only on cross-examination to call Nathan's credibility into question. The majority upholds this ruling. I would reverse.

A PCR applicant claiming trial counsel was ineffective must establish both that counsel's performance was deficient, that is, that it fell below an objective standard of reasonableness, and that the deficient performance prejudiced the applicant's case, that is, but for counsel's deficient performance there is a reasonable probability that the outcome of the proceeding would have been different. Williams v. State, 363 S.C. 341, 611 S.E.2d 232 (2005); Strickland v. Washington, 466 U.S. 668 (1984). On certiorari, this Court will uphold the PCR judge's findings if they are supported by any probative evidence in the record. Williams, *supra*.

The PCR judge found counsel was not ineffective in relying solely on cross-examination to impeach Nathan's credibility. In support of this finding, the PCR judge referred to a juror's affidavit which stated:

I was concerned about the testimony of the little boy who was in the store. I suspected that he might have some memory problems because I was not sure that I could rely on the boy's testimony about Mr. Simpson taking money out of the register and although I signed the verdict form in the end, I was never certain the [sic] Mr. Simpson really committed armed robbery.

The majority affirms the PCR judge's denial of relief to Simpson on this ground, finding the decision to rely on cross-examination of Nathan was "a valid trial strategy." I disagree. Counsel were well aware of the weakness of the State's armed robbery case, and the letter sent shortly before trial alerted them that Nathan 'may' have suddenly remembered a crucial fact. Without exploring the issue of Nathan's background, trial counsel were not in a position to make a strategic decision. Had counsel conducted even a cursory review of Nathan's school records, they would have been aware of his low I.Q. and learning disability. Surely knowledge of these facts, combined with Nathan's critical new recollection, would have sufficient to put trial counsel on notice that Nathan's memory was suspect. In my opinion, counsel were deficient in failing to pursue the credibility of Nathan's recalled memory and in relying on

The State's Brady violation denied Simpson a fair trial. Kyles v. Whitley, *supra*. Further, Simpson demonstrated both deficient performance on the part of his trial attorneys and resulting prejudice from their failure to pursue and present expert testimony. I would reverse Simpson's murder and armed robbery convictions and sentences, and remand for a new trial. [13]

[1] It is these facts, which remained uncontested in the PCR hearing, that compel our finding that counsel was not deficient. Although there is no doubt that some particulars of the crime are in dispute, there can be no doubt about Simpson's malicious conduct which amounted to gunning down a wounded crime victim and attempting to execute the witnesses. We further find that Simpson was erroneously given a voluntary manslaughter charge at trial. Given Simpson's admission to firing on Harrison multiple times after the alleged struggle, under no circumstance could we conclude that Simpson acted without malice or had sufficient legal provocation to use deadly force.

[2] In a PCR proceeding, Simpson may not simply posit suppositions and speculations in an attempt to establish that counsel was ineffective. Judicial scrutiny of counsel's performance is highly deferential and the court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" *Butler v. State*, 286 S.C. 441, 445, 334 S.E.2d 813, 816 (1985) (citing *Strickland*, 466 U.S. at 668). Though hindsight may provide a different view of counsel's actions, Simpson is not entitled to a new trial for the sole purpose of presenting a "fancier" case. *Jones v. State*, 332 S.C. 329, 339, 504 S.E.2d 822, 827 (1998).

[3] There was also a memo to the file written by one of the solicitors identifying possible weaknesses in the case, including the fact that "no robbery (larceny) occurred" and "[t]here was nothing taken from the store . . . only an attempted robbery occurred." But the PCR court did not consider whether the State's failure to disclose this memo constituted a *Brady* violation nor did PCR counsel raise the issue in the Rule 59(e), SCRPC, motion to alter or amend. Therefore, the issue is not preserved for review. See *Noisette v. Ismail*, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991).

[4] The dissent finds that counsel was deficient in failing to consult and present an expert discrediting Nathan's testimony. Again, this conclusion is somewhat confounding given that the PCR court's decisions are reviewed under the "any evidence" standard and there appears to be ample evidence supporting the PCR court's finding. Second, assuming that counsel was deficient, the dissent presents two statements made by jurors citing their doubts as to the credibility of Nathan's testimony. While the dissent finds this is evidence of prejudice, we see this as evidence of a lack of prejudice. The jury in this case returned a unanimous conviction on the armed robbery charge; therefore, it is completely reasonable to assume that any jurors having doubts about Nathan's testimony relied on other evidence in finding Simpson guilty beyond a reasonable doubt. We further note that Nathan's testimony was only relevant to the charge of armed robbery, and Nathan will inevitably have to testify again since we are reversing the armed robbery conviction under *Brady*. Nathan's testimony was not at all relevant to, and had no impact on, Simpson's murder conviction.

[5] We fail to see how, as the dissent suggests, *Ring v. Arizona*, 536 U.S. 584 (2002), in any way suggests that this form of relief is improper. *Ring* and its companion cases stand simply for the proposition that a sentence may not be enhanced by considering facts that have not been proved beyond a reasonable doubt. *Id.* at 602, 609. In no way can these cases be read to provide that the remedy we grant here is constitutionally deficient.

We are equally unpersuaded that the case of *Oregon v. Guzek*, 336 Or. 424, 86 P.3d 1106 (Or. 2004) (scheduled for argument before the United States Supreme Court December 7, 2005), is at all relevant in this matter. *Guzek* deals with the limitations and requirements for mitigation evidence as provided by the due process clause of the Eighth Amendment to the United States Constitution. If Simpson were found guilty of armed robbery on re-trial, it is likely that any "residual doubt" about Simpson's guilt would simply be a collateral attack on the validity of his conviction. Under current Supreme Court

C Jurisprudence, the Eighth Amendment in no way mandates reconsideration by capital juries, in the sentencing phase, of their 'residual doubts' over a defendant's guilt . . . [s]uch lingering doubts are not over any aspect of petitioner's 'character,' 'record,' or 'circumstance of the offense.'" *Franklin v. Lynaugh*, 487 U.S. 164, 74, 108 S.Ct. 2320, 2327 (1988). Until the Supreme Court directs otherwise, we will continue to apply what appears to be well-reasoned and well-settled precedent.

[6] Brady v. Maryland, 373 U.S. 83 (1963).

[7] Murder during the commission of armed robbery, S.C. Code Ann. § 16-3-20(c)(a)(1)(d) (2003) and murder for the purpose of receiving money or any thing of value. § 16-3-20(c)(a)(4) (2003).

[8] I would also find that trial counsel were deficient in failing to be aware of J.E.B. v. Alabama, 511 U.S. 127 (1994), which was decided five months before the capital trial. See Hill v. State, 350 S.C. 465, 567 S.E.2d 847 (2002) (trial counsel rendered deficient performance in failing to be aware of three month old decision). I agree, however, that Simpson failed to demonstrate the requisite prejudice stemming from this deficient performance and thus did not meet his burden of proving this allegation ineffective assistance of counsel. See Williams v. State, 363 S.C. 341, 611 S.E.2d 232 (2005).

[9] Nathan's full scale I.Q. was 71 while his performance I.Q. was 69, placing him in the lowest 3% of children in the United States.

[10] His learning disability included an inability to recall the details of a story while grasping the main theme.

[11] The trial judge charged the jury on voluntary manslaughter based on Simpson's testimony.

[12] I note this theory is in part contradicted by the store employee's testimony that he saw Simpson shoot Harrison as Harrison walked rapidly towards the store phone.

[13] Even if the new jury were to convict Simpson of murder and armed robbery, it is conceivable that Simpson would be entitled to argue and/or have his sentencing jury charged on residual doubt. The United States Supreme Court has on its docket for December 7, 2005, Oregon v. Guzek, No. 04-928. The issue in Guzek is:

Does a capital defendant have a right under the Eighth and Fourteenth Amendments to the United States Constitution to offer evidence and argument in support of a residual-doubt claim - that is, that the jury in a penalty-phase proceeding should consider doubt about the defendant's guilt in deciding whether to impose the death penalty?

Even without a Guzek argument or charge, it is entirely possible that a weaker guilt case would result in a life sentence.

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

Ernest Matthew Riddle, Petitioner,

v.

Jon Ozmint, Director, South Carolina Department of
Corrections, Respondent.

ON WRIT OF CERTIORARI

Appeal From Cherokee County
J. Derham Cole, Post-Conviction Judge
James B. Stephen, Trial Judge

Opinion No. 26153
Heard February 1, 2006 - Filed May 22, 2006

REVERSED

Diana L. Holt and Teresa L. Norris, both of Columbia, for
Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy
Attorney General John W. McIntosh, Assistant Deputy
Attorney General Donald J. Zelenka, and Senior Assistant
Attorney General William Edgar Salter, III, all of Columbia,
for Respondent.

PER CURIAM: We granted certiorari to consider a post-conviction relief (PCR) order denying relief to petitioner, a death row inmate. We find the solicitor's office violated Brady v. Maryland[1] when it suppressed certain evidence involving witness Jason Riddle (Jason), and that that office violated petitioner's due process rights when it failed to correct misstatements made by Jason while testifying against petitioner. See Napue v. Illinois, 360 U.S. 264 (1959). The PCR order denying petitioner relief is reversed, and the matter remanded for further proceedings.

FACTS/PROCEDURAL HISTORY

In the early morning hours of August 8, 1985, Mrs. Abby Sue Mullinax was murdered in her home when her throat was cut. Nineteen-year-old petitioner and his seventeen-year-old brother Jason were arrested on August 20, based on information supplied by their older brother, Bruce. On August 22, Jason gave a statement confessing that he and petitioner[2] had entered the home through a window, that he had stolen money from a purse on a dresser, and that petitioner had cut Mrs. Mullinax's throat.

Petitioner was convicted of the murder, burglary, and armed robbery of Abby Mullinax and received a

C. Death Sentence. There was no physical evidence connecting petitioner with the murder and robbery of Mrs. Mullinax. Rather, the State's case rested on the eyewitness testimony of petitioner's alleged accomplice, his mildly mentally retarded brother Jason, and the testimony of various witnesses concerning petitioner's statements after Mrs. Mullinax's death.

At the 1986 trial Jason testified against petitioner. Bruce, who had been staying with Jimmy and Tammy Lewis in their home near Mrs. Mullinax's, testified that petitioner had come to the Lewis home around 3 or 4 am on the 8th, panicky, covered with blood, and wet from the knees down. Bruce testified that later that day Jason and petitioner were seen with cash, and that when a news story about the murder came on TV, petitioner said, "we don't have to worry about that bitch anymore." Tammy Lewis testified and confirmed Bruce's story about the money and petitioner's statement.

Fourteen-year-old Jerry Walker testified that several days after the murder petitioner said, in a joking manner, that he had killed a woman before. Another witness, James Buster Smith, testified that he, Jerry, and petitioner had gone to a lake around August 12, and that petitioner told them he had known Mrs. Mullinax, and that she had had valuable possessions and money in her home.

Petitioner called his stepmother to testify that Bruce had admitted turning Jason and petitioner in for reward money. Petitioner also called Clifton Coker, the Lewis's neighbor, who testified that shortly after the murder occurred he heard other neighbors Ricky and Lisa Nuzum (also spelled Newsome) up on his porch knocking on his door. He then heard car doors slam as they drove away. The next day he and his roommate found what appeared to be drops of blood on their porch. They cleaned up the blood. Bloodhounds taken to the Mullinax home "tracked" to the area around the Lewis-Nuzum-Coker homes and not to the barn. Although the jury learned only that the State had used bloodhounds but not what trail they had followed, at the PCR hearing the State acknowledged that the dogs had tracked to the Lewis-Nuzum-Coker homes.

On appeal, the Court affirmed the murder conviction but set aside the death sentence. State v. Riddle, 291 S.C. 232, 353 S.E.2d 138 (1987). Following a 1987 resentencing proceeding, a second jury returned a death sentence, which was also reversed on direct appeal. State v. Riddle, 301 S.C. 68, 389 S.E.2d 665 (1990). In 1991, a third jury returned a death sentence which was affirmed. Riddle v. State, 314 S.C. 1, 443 S.E.2d 557 (1994). [3]

This PCR action involves the guilt phase of the 1986 trial and the 1991 resentencing proceeding. We address only the grave constitutional violations which occurred during the 1986 guilt phase, and which mandate reversal of the PCR order.

ISSUES

- 1) Whether there is any evidence to support the PCR judge's finding that no Brady violation occurred?
- 2) Whether the PCR judge erred in concluding that the Solicitor's failure to correct Jason's false trial testimony did not require a new trial?

Scope of Review

On certiorari, this Court must uphold the PCR judge's findings where they are supported by any evidence of probative value in the record. Gibson v. State, 344 S.C. 515, 514 S.E.2d 320 (1999). We are concerned here not with the routine PCR issue whether trial counsel was ineffective, but instead with the question whether prosecutorial misconduct denied petitioner's due process right to a fair trial.

Id.

1. Brady violation

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. Kyles v. Whitley, 514 U.S. 419 (1995); Gibson, *supra*. If a Brady violation is found to have occurred, PCR must be granted. Gibson, *supra*. Petitioner points to several instances of alleged Brady violations. We find it necessary to discuss only two.

First, as noted above, Jason gave a statement confessing to his and petitioner's guilt on August 22, 1985. The first trial commenced on January 27, 1986. On January 22, 1986, Jason gave a second statement to police which petitioner contends was not disclosed to his attorneys. The PCR judge found that had petitioner's counsel interviewed the officer who took notes of the statement between January 22 and the start of the trial, they would have learned of this statement. The PCR judge therefore concluded that the January 22 statement was available to petitioner, and thus the State's failure to disclose this statement did not violate Brady. We disagree. Not only is it unrealistic to require petitioner and his attorneys to reinterview all officers and investigators in the days before the trial, but that is not what Brady requires. The burden is on the solicitor to disclose material evidence which is exculpatory or impeaching. Gibson, *supra*.

The PCR judge also held that nothing in Jason's January 22 statement was material for Brady impeachment purposes. Evidence is material under Brady if there is a "reasonable probability" that the result of the proceeding would have been different had the information been disclosed. E.g., State v. Proctor, 358 S.C. 424, 595 S.E.2d 480 (2004). The question is not whether petitioner would more likely have been acquitted had this evidence been disclosed, but whether, without this impeachment evidence, he received a fair trial "resulting in a verdict worthy of confidence." Kyles v. Whitley, *supra*, at 434.

There were several inconsistencies between Jason's original statement and his trial testimony, and the undisclosed January 22 statement. Among these differences were whether Jason or petitioner removed the window fan from the window before entering the home; whether the brothers both went to the bedroom or whether one went to the kitchen and the other to the bedroom; whether the victim's purse was found on a large or small dresser; whether Jason fell before or after he heard the victim getting up, and where he fell; where he was when he saw petitioner kill Mrs. Mullinax; what he saw or heard as he left the house; and whether they got \$100 or \$125.

The most glaring inconsistency is that in his January 22 statement, Jason claimed that a friend had picked the brothers up after the murder and given them a ride to the barn, whereas in his original statement and in his trial testimony he maintained the brothers had walked the approximately three miles from the Mullinax home to the barn. Before the commencement of the trial, officers questioned the person Jason identified as having given the brothers a ride, who denied having done so. The State therefore chose not to present any evidence of the brothers having been driven to the barn.

The impeachment value of this statement is clear. Either the brothers were given a lift or they were not. Jason could not have been telling the truth in all his statements. Moreover, without the automobile ride, it is difficult to conceive how the brothers were able to travel the three miles from the Mullinax home to the barn, and back to the Lewis's home, in the time between the murder and the time when Bruce testified they returned to the Lewis home.

Whether this statement alone was material under Brady is a close question. As we stated in Gibson, citing the United States Supreme Court:

The overriding theme of the Brady cases is the emphasis the Supreme Court has placed on the prosecutor's responsibility for fair play. In close cases, "the prudent prosecutor will resolve doubtful questions in favor of disclosure. This is as it should be. Such disclosures will serve to justify trust in the prosecutor as the representative... of a sovereignty... whose interest... in a criminal prosecution is not that it shall win a case, but that justice shall be

And it will tend to preserve the criminal trial as a judicial forum for the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations."

Kyles v. Whitley, 514 U.S. at 438-40 (quotes omitted) (citing Berger v. United States, 295 U.S. 78, 88 (1935)).

Our judicial system relies upon the integrity of the participants. State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000). In this case, a prudent solicitor would have chosen to disclose the January 22 questioning and the resulting statement.

When determining whether the suppression of more than one item of evidence was material under Brady, we consider the collective impact of the undisclosed evidence. Kyles v. Whitley, 514 U.S. at 436. The second undisclosed evidentiary item in this case was the fact that on January 24, 1986, two days after Jason's second statement and three days before the trial commenced, several police officers, Solicitor Gossett, and the solicitor's assistant took Jason by automobile to the Mullinax home and from there retraced the route he and Ernest took to the barn. There were questions asked of Jason during this outing, although it is unclear whether any new information was gleaned. The defense was not informed of this trip.

The PCR judge concluded, among other things, that information relating to the trip was in the prosecutor's file and therefore available to the defense under the solicitor's "open file" policy. The evidence at trial, however, was that the solicitor's office maintained an unusual "open file" policy in that they removed not only work product, but also "other documents on a case-by-case basis." Even had a true "open file" policy existed, the existence of such a policy does not negate the solicitor's Brady obligation. Porter v. State, Op. No. _____ (S.C. Sup. Ct. filed March 6, 2006). This is especially so where the "reconstruction" trip took place only three days before trial.

Jason was a young man of limited mental abilities: knowledge of this trip would have bolstered petitioner's contention that Jason was an unreliable witness who had to be coached, and whose testimony was not worthy of belief. Given the absence of any physical evidence tying petitioner to the Mullinax murder, the State's case rested almost exclusively on Jason's recounting.

The PCR judge's finding that the evidence of the January 22nd statement and the January 24 trip was not material under Brady is without evidentiary support in the record, and therefore is reversed.

3) Failure to correct false testimony

At the 1986 trial, Jason was asked more than once whether he had spoken about the case to anyone other than Officer Harris in August 1985 when he gave his first statement. Jason denied speaking with anyone other than his lawyers, neglecting to mention either the January 22, 1986 statement or the trip on January 24, 1986. The solicitor failed to correct Jason's false trial testimony.

The PCR judge found that the State did not violate due process by failing to correct Jason's false testimony because the State may have thought either that Jason misunderstood the questions or that he simply did not recall the recent events. Since the State did not know why Jason failed to testify truthfully, petitioner was found not to have met his burden of showing the State knowingly used perjured testimony.

We disagree. The issue is not why Jason failed to tell the truth: rather, it is why the solicitor, who knew Jason's testimony to be false, failed to correct it.

A "prosecutor's deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice." Giglio v. U.S., 405 U.S. 150, 153 (1972). The failure to correct false evidence is as reprehensible as its presentation. Washington v. State, 324 S.C. 232, 478 S.E.2d 833 (1996). The PCR judge erred in concluding that the State was not obligated to correct Jason's false testimony, and in failing to hold that this violation of petitioner's due process rights

CONCLUSION

The Constitution requires only that a defendant receive a fair trial, not a perfect one. U.S. Const. Am. VI; State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999). Petitioner's trial was rendered fundamentally unfair by prosecutorial misconduct. No probative evidence exists in this record to support the PCR judge's findings and conclusion. Accordingly, the PCR order denying petitioner relief is

REVERSED.

TOAL, C.J., MOORE, BURNETT, PLEICONES, JJ., and Acting Justice Brooks P. Goldsmith, concur.

[1] 373 U.S. 83 (1963).

[2] Years later Jason would recant petitioner's involvement and name Bruce as his accomplice.

[3] All three circuit court proceedings were prosecuted by then-Solicitor Holman A. Gossett, Jr, while petitioner was represented in all trial proceedings by Kenneth L. Holland.

Police and Prosecutorial Misconduct

Police and Prosecutorial Misconduct

Some wrongful convictions are caused by honest mistakes. But in far too many cases, the very people who are responsible for ensuring truth and justice — law enforcement officials and prosecutors — lose sight of these obligations and instead focus solely on securing convictions.

The cases of wrongful convictions are filled with evidence of negligence, fraud or misconduct by prosecutors or police departments.

While many law enforcement officers and prosecutors are honest and trustworthy, criminal justice is a human endeavor and the possibility for negligence, misconduct and corruption exists. Even if one officer of every thousand is dishonest, wrongful convictions will continue to occur.

Common forms of misconduct by law enforcement officials include:

- Employing suggestion when conducting identification procedures
- Coercing false confessions
- Lying or intentionally misleading jurors about their observations
- Failing to turn over exculpatory evidence to prosecutors
- Providing incentives to secure unreliable evidence from informants

Common forms of misconduct by prosecutors include:

- Withholding exculpatory evidence from defense
- Deliberately mishandling, mistreating or destroying evidence
- Allowing witnesses they know or should know are not truthful to testify
- Pressuring defense witnesses not to testify
- Relying on fraudulent forensic experts
- Making misleading arguments that overstate the probative value of testimony

For real life examples of this phenomenon, please read the stories of Dale Helmig, Ted White and Ellen Reasonover.

Police Misconduct: A Preponderance of Perjury

By Ed Haas

On December 1, 1998 Harvard Law School Professor, Alan M. Dershowitz testified before the House of Representatives Judiciary Committee regarding the corrosive influences of perjury in the legal system throughout the United States. When considering credentials, there is probably no other person more qualified to speak about perjury in the U.S. legal system than Dershowitz. He has been teaching criminal law at Harvard Law School for 35 years. He has participated in the litigation of hundreds of federal and state cases, many at the appellate level. He has edited a casebook on criminal law, written ten books, and hundreds of articles dealing with perjury in criminal and civil cases. The key points of Mr. Dershowitz's testimony before the Judiciary Committee are as follows[1]:

- No felony is committed more frequently in the United States than the genre of perjury and false statements
Criminal cases often are decided "according to the preponderance of perjury"
- Police perjury in criminal cases is so pervasive that "hundreds of thousands of law-enforcement officers commit felony perjury every year testifying about drug arrests" alone
- The most heinous brand of lying (perjury by police officers) is the giving of false testimony that results in the imprisonment or execution of an innocent person
- Less egregious, but still quite serious, is false testimony that results in the conviction of a person who committed the criminal conduct, but whose rights were violated in a manner that would preclude conviction if the police were to testify truthfully
- Police Officers are almost taught how to commit perjury when they are in the Police Academy
- Police perjury is not anecdotal. Many commission reports prove rampant abuses in police departments throughout the United States
- Judges and prosecutors tolerate if not encourage police lying in court all in the name of convicting the factually guilty

According to the Mollen Commission [2] the practice of police falsification is so common that it has spawned its own word -- testilying

- Officers commit perjury to serve what they perceive to be "legitimate" law enforcement ends
- In the viewpoint of most police officers, regardless of the legality of the arrest, the defendant is in fact guilty and ought to be arrested
- When prosecutors are preparing for a trial, they often arrange "dry runs" as part of the trial preparation procedure. Frequently, prosecutors skirt along the edge of coercing or leading the police witness
- As a result, impressionable young cops learn to tailor their testimony (commit perjury) to the requirements of the law

There are hundreds of thousands of police officers in the United States today that break the law and commit felony perjury as a calculated, premeditated offense designed to undercut the constitutional rights of unpopular defendants

Of all the instances when and where police officers commit perjury, the enforcement of drug laws top the list. And when it comes to discovering illegal drugs in a defendant's vehicle, residence, possessions, or on their person, police have no fear or deterrent against conducting illegal searches and committing felony perjury; first by filing a false sworn affidavit, then by testifying in court.

Examples of this sort of felony perjury are also found in the Mollen Report. Examples are as follows:

- When officers unlawfully stop and search a vehicle because they believe there are drugs in it, officers will falsely claim in police reports and under oath that the car ran a red light or committed some other traffic violation
- Once pulled over, the police officer will search the occupants of the vehicle as well as the vehicle -- with or without consent -- although the police officer will always indicate that they had consent
- If consent is adamantly opposed by the occupants, the police officer will report, under oath, that the contraband was in plain view
- To conceal an unlawful search that does not involve a vehicle, police officers have been taught to report and testify that they saw a bulge in the person's pocket or saw drugs and money changing hands
- To justify unlawfully entering a residence where officers believe drugs or cash can be found, cops commit felony perjury by claiming that they had information from an unidentified civilian informant

It is an interesting fact that the Mollen Report was published in 1994, and the Dershowitz testimony in 1998, yet police misconduct and felony perjury committed by police officers has not been curtailed, even slightly, since these reports became part of the public record. In fact, the situation has gotten worse; not better. One could argue that since 9/11, an already corrupt and criminal police mentality as been catapulted into a full-fledged police state dimension. Today, law enforcement does what it wants, when it wants, to whomever it wants, with absolutely no restraint whatsoever. Such is the state of police misconduct and miscarriages of justice in South Carolina.

South Carolina has a police misconduct crisis on its hands. Blacks make up 29% of the population in South Carolina, but represent 83% of all South Carolina inmates in state custody for drug law violations. The nation witnessed in November 2003, the infamous Stratford High School drug raid conducted by the Goose Creek Police Department where police pointed loaded guns at approximately 135 unarmed high school students, and threatened the students with police dogs, only to find no drugs. [3] No criminal charges were filed against the officers involved even though it was blatantly obvious to any libertarian-thinking American that what was witnessed on national news was not what the framers of the Constitution for the United States and the Bill of Rights had in mind when they penned, and the states ratified, the Fourth Amendment in

particular. Hardly a week goes by in South Carolina without at least one of its cities daily newspapers reporting on instances of police misconduct, which often get "handled" absent criminal charges, prosecution, and incarceration.

In 2005, South Carolina's Governor, Mark Sanford, established a commission made up primarily of law enforcement, to address and report on police misconduct in South Carolina. To date, no official report has been made public. Also in 2005, members of the South Carolina Senate Judiciary Committee, all twenty-three senators, received a libertarian proposal to directly detect and deter police misconduct in South Carolina. (See the POCAA - Police Officer Conduct Accountability Act [4]) The POCAA calls for mandatory lie detector tests for every police officer that has been accused of police misconduct. While a simple proposal, not one state senator has introduced any legislation that mirrors the POCAA or would serve as protection for the residents of South Carolina against the epidemic of overzealous police officers.

The *Muckraker Report* has spoken with three state senators regarding POCAA, and off the record, each indicated that the proposal has merit but politically, would be suicide. Apparently, no state legislator wants to be the lawmaker on record that sponsors a bill that would place restraint on South Carolina law enforcement, even though thousands of police officers in South Carolina commit felony perjury at a minimum, a few times each year. Meanwhile, Americans are being denied their rights, and incarcerated in one of the most dangerous prison systems in the nation.

Are police officers in South Carolina falsifying documents, conducting illegal searches, and lying under oath? Bearing in mind the information contained in the Mollen Report and the testimony of Alan Dershowitz, here are a few examples taken from sworn affidavits made by police officers of the Charleston Police Department and the North Charleston Police Department between September 1, 2005 and January 31, 2006. Each involves an arrest for violating South Carolina drug laws. Only the police department and complaint number will be listed in the following examples, as these are ongoing criminal cases:

Charleston Police Department

Complaint #: 0521531 -- Defendant was observed driving his 1995 Toyota Pickup (SC 587 XXX) in a high drug area, and was approached by an unknown black male, who then appeared to engage the defendant in a hand to hand transaction. The vehicle left the parking lot and was stopped for the suspicious activity, as well as a non-functioning tag light. The defendant voluntarily consented to a search of the vehicle.

Muckraker Comments -- If you live in what police consider a high drug area, shaking hands could be considered suspicious activity -- particularly if you're a black male. Note that the arresting officer included a non-functioning tag light to justify the stop. By all accounts, the defendant had .8 grams of cocaine in his vehicle, and knew it was there, so why would he consent to having his vehicle searched?

Complaint #: 0521634 -- Officer J. XXXXX conducted a traffic stop of a silver Ford Winstar, (SC 759 XXX) in which defendant was a passenger. After asking the defendant to exit the

vehicle, and receiving consent to search her purse, Officer XXXXX located a white rock-like substance, which field-tested presumptive for cocaine base substance inside the purse. Officer XXXXX additionally located a crack pipe in side pocket of purse.

Muckraker Comments -- If making a routine traffic stop, why was the passenger even spoken to by the arresting officer? Why was the passenger asked to exit the vehicle, and who in their right mind consents to the search of their purse if they know that they have crack cocaine and a crack pipe in their purse? Nobody consents to such a search.

Complaint #: 0523979 -- In that defendant did have a clear small zip lock style bag protruding from the band of his baseball style hat which contained (5) off white-in-color rock like items which field tested presumptive as cocaine base by Cpl. J. XXXXX with a street value of (\$100).

Muckraker Comments -- Not only is this sworn statement suspicious, but the zip lock bag seems to be defying the exact laws of gravity. The arresting officer would have us to believe that the defendant was walking the street with \$100 worth of crack in plain view as casually as carrying a cigarette behind one's ear.

North Charleston Police Department

Complaint #: 05037505 -- Having received a tip from Crime Stoppers of illegal drug activities from Room 223 of Super 8 Motel, Cpl. D. XXXXXX made contact with the defendant and asked for and received consent to search the defendant's room for illegal drugs. During the consented search, Cpl. XXXXXX located approximately 3.4 grams of off white rock-like substance in a plastic baggie, in the nightstand drawer near the defendant's bed.

Muckraker Comments -- Again, who in their right mind gives consent to such a search if they know that they have 3.4 grams of cocaine in the drawer of their nightstand? There is simply no plausible explanation for such consent.

It's as if the Charleston and North Charleston Police Departments are using the Mollen Report as a how-to training manual! These types of arrest affidavits are repeated thousands of times each year in South Carolina and hundreds and thousands of times across the United States. Each potentially represents felony perjury committed by the police. The only tool that will stop this corrosive influence of perjury in the criminal justice system is a statewide and nationwide Police Officer Conduct Accountability Act.

If upright and truly desirable public servants, the arresting officers in the aforementioned cases found in Charleston County, South Carolina, should voluntarily submit to a lie detector test in which they would be asked these four important questions.

1. Have you ever knowingly and intentionally caused or allowed exaggerated statements of fact to be inserted into a written incident report or sworn affidavit?

2. Have you ever knowingly and intentionally made exaggerated, embellished or false statements in a written incident report or sworn affidavit for the purpose of procuring or assisting in the criminal prosecution of a fellow citizen?
3. Have you ever knowingly and intentionally made exaggerated statements of fact while testifying under oath in court for the purpose of procuring or assisting in the criminal prosecution of a fellow citizen?
4. Have you ever knowingly and intentionally stopped and detained a fellow citizen under false pretenses and without reasonable suspicion?

If police perjury is as widespread as Dershowitz and others suggest -- there is little chance that the arresting officers involved in the Charleston and North Charleston cases would pass the lie detector test. If administered to all police officers assigned to the CPD and NCPD, at best, only fifty percent of Charleston and North Charleston Police Officers could answer these types of questions successfully while tethered to a lie detector machine.

Furthermore, if South Carolina were to randomly select 500 police officers to take lie detector tests administered by a private, qualified third party -- tests that asked the four simple questions referenced above, it is unlikely that even a measly seventy-five percent, or 375 police officers would pass the lie detector test. More than likely, only half the police officers sworn to protect and serve in South Carolina would pass the test. Similar lie detector results would be found throughout the United States. This absolute fact should greatly alarm every single patriotic American and serve as a battle cry to gain public support for a Police Officer Conduct Accountability Act in South Carolina and the remaining states of this Republic.

Remember, what we are talking about here is "the most heinous brand of lying" -- the type that results in the imprisonment or even execution of innocent people, as well as the "less egregious" according to Alan Dershowitz, "but still quite serious, perjury that results in the conviction of a person who committed the criminal conduct, but whose rights were violated in a manner that would have precluded conviction had the police testified truthfully". If establishing real accountability of police conduct is not important enough to pass a Police Officer Conduct Accountability Act in South Carolina while we have full knowledge that innocent people are presently incarcerated as the direct result of the arresting officer(s) committing felony perjury, then we the people have officially surrendered what little dignity, respect, and rights we think we have left to the emerging South Carolina and United States Police State.

Police Misconduct Leading to Wrongful Convictions

While there are many honest and ethical law enforcement officials in the United States justice system, there are also some law enforcement officials who unfortunately commit misconduct with regard to the crimes that they are investigating. Not only do these law enforcement officials adversely impact the credibility of other honest officials, but they can literally destroy the lives of persons who are wrongfully accused and even convicted of crimes. From detectives who do not testify truthfully, to police officers that manufacture, destroy, and/or hide evidence, and even law enforcement officials who have improperly influenced witness identifications and suspect confessions, there have been many instances where police misconduct has resulted in wrongful convictions.

Police Misconduct as a Basis for Appeals

The defense counsel's role in a criminal case is to raise reasonable doubt in the mind of the jury. Any sort of misbehavior by law enforcement officials, or any evidence that negatively impacts the credibility of the evidence produced by police, can constitute sufficient reasonable doubt to result in a hung jury or an outright acquittal. In those cases, the justice system works as it should.

However, in other cases, police misconduct is not apparent to the jury, or the defense is unable to definitively prove during trial that any misconduct has occurred. These are the cases in which a person may be – and has been – wrongfully convicted of a crime. Fortunately, criminal convictions are subject to appellate review, which may result in police misconduct coming to light. If an appeals court reviewing a criminal conviction determines that police misconduct has occurred to the extent that it violated the defendant's constitutional rights or impeded his or her ability to have a fair trial, or that the proffered evidence was insufficient to support the conviction, then the appeals court has the power to overturn the criminal conviction.

Police Giving False Testimony

While there are literally thousands of upstanding law enforcement officials, there are also some police officers who are less than honest. Whether their dishonesty stems from an attempt to cover up shoddy police work, a lack of willingness to do their jobs thoroughly and appropriately, or a simple desire to convict suspects whom they believe are guilty, police officers sometimes give testimony that is exaggerated, not fully accurate, and/or just plain fabricated. Due to the respect and credibility that many community members attribute to law enforcement officials, it is easy to see how a police officer's false testimony could result in a wrongful conviction.

Police Improperly Handling Evidence

Law enforcement officials typically are the first responders to a crime, and thus are responsible for properly gathering, preserving, and documenting evidence that can later be used in a criminal prosecution of the crime's perpetrator. Therefore, there is the potential not only for human error by police officers, but also for intentional misconduct. Police mishandle, suppress, doctor, or fabricate evidence for a variety of reasons. Some police officers might wish to cover up a mistake or omission that they made during the initial investigation. Other police officers are convinced that a certain suspect is guilty of a crime, and to choose to improperly manipulate the evidence in order to build a stronger case against that suspect. In any case, police misconduct with regard to evidence in a criminal case can result in wrongful convictions, and form a basis to overturn any convictions on appeal.

Police Coercing Witnesses and Suspects

As part of their job duties, law enforcement officials have the task of interrogating witnesses, eliciting confessions, and interviewing witnesses to crimes. During this process, police officers may inadvertently or purposefully influence the statements of both witnesses and suspects. For instance, a police officer who believes a suspect to be guilty of a crime might place undue or inappropriate pressure on the suspect to confess to a crime that he or she did not commit. Likewise, a police officer who shows a photo array to a witness or administers a line-up might somehow suggest to the witness which person is the subject in question. Improper police tactics such as these can not only result in wrongful convictions, but also can be an appealable issue that might later exonerate the suspect.

Police misconduct refers to inappropriate actions taken by police officers in connection with their official duties. Police misconduct can lead to a miscarriage of justice and sometimes involves discrimination. In an effort to control police misconduct, there is an accelerating trend for civilian agencies to go beyond review to engage directly in investigations and to have much greater input into disciplinary decisions.^[1] With the proliferation of mobile devices capable of recording alleged misconduct, existing eavesdropping laws in some jurisdictions are being leveraged to prosecute civilians, while in other circumstances police will illegally seize or delete evidence.^{[2][3]}

Juries and judges often base their verdicts, sentences, or other important decisions on sworn testimony and signed documents. Statements given under oath and certain legal documents are presumed to be truthful, or at least made in good faith. But how do we know for sure that witnesses and other parties involved in a legal matter are telling the truth? We can't always be certain, but those who are caught knowingly misleading a court face serious criminal charges of perjury.

To "perjure" yourself is to knowingly make false or misleading statements under oath or to sign a legal document you know to be false or misleading. This crime is taken very seriously because the foundation of the legal system depends on trust and credibility. After all, just one sworn statement has the power to tip the scales of justice and dramatically alter someone's life.

Perjury is considered a crime against justice, since lying under oath compromises the authority of courts, grand juries, governing bodies, and public officials. Other crimes against justice include Criminal Contempt of Court, Probation Violation, and tampering with evidence.

Penalties

State and federal penalties for perjury include fines and/or prison terms upon conviction. Federal law (18 USC § 1621), for example, states that anyone found guilty of the crime will be fined or imprisoned for up to five years. Most state laws have similar provisions, but judges typically have discretion to use leniency (including probation in lieu of a prison sentence) where appropriate. Perjury is considered a very serious crime against the integrity of the justice system.

Prosecutorial Misconduct

Prosecutors wield more power than any other actors in the criminal justice system. They have unreviewable power to go forward with a case or dismiss charges, to cut a deal with a defendant for a guilty plea or stand pat, and to recommend a severe sentence or plead for leniency. Unchecked power is always subject to abuse, and prosecutors sometimes engage in misconduct. Prosecutorial misconduct weakens the public's perception of the integrity of the legal system and undermines the ability of the courts to achieve justice.

Politically motivated prosecutions

Given the breadth of criminal law, prosecutors can find reason to prosecute just about anybody if they have the time, the money, and the motive. Critics of independent counsel Kenneth Starr's prosecution of President Clinton allege that Starr's primary motive for prosecution related to matters other than Clinton's alleged perjury. Anthony Lewis, a columnist for the *New York Times*, calls Starr's prosecution of Clinton "politics dressed as law." Lewis claims no other prosecutor in the United States would have gone forward with a prosecution of a citizen for false testimony about sex in a civil case. In Lewis's opinion, few citizens have led such unblemished lives as to prevent a determined prosecutor from finding some basis for an indictment or information.

Suppressing evidence favorable to the defendant

Sometimes prosecutors, in their zeal to obtain a conviction, fail to turn over factual evidence that is favorable to the defendant when the evidence is material to guilt or punishment. One of the greatest threats to rational and fair fact-finding in criminal cases comes from a prosecutor's hiding evidence that might prove a defendant's innocence. Between 1963, when the U.S. Supreme Court ruled in *Brady v. Maryland* that such a practice is a deprivation of due process, and 1999, at least 381 defendants nationally had a homicide conviction thrown out because prosecutors concealed evidence. Of the 381 defendants, 67 had been sentenced to death. The consequences of such misconduct when it is discovered can be serious. Convictions are reversed, cases are retried, appeals are brought that cost taxpayers millions of dollars, and public confidence in prosecutors is undermined.

Suborning perjury

When prosecutors knowingly allow the use of perjured testimony, a defendant's right to a fair trial is violated. The Supreme Court first established this rule in *Mooney v. Holohan* (1935), in which the Court said that the deliberate use of perjured testimony by the prosecutor and the deliberate nondisclosure of evidence that would have impeached such perjury violated the defendant's right to a fair trial. Ethically, a lawyer can't call a witness who he or she knows is going to lie. To do so is called **suborning perjury**. Critics of former Los Angeles district attorney Marcia Clark claim that she knew that police officer Mark Fuhrman (who said he had found a bloody glove behind O.J. Simpson's residence) was going to lie on the witness stand about not having used the "N" word. Clark's decision to call Fuhrman to testify may have lost the

Simpson case because it opened the door for Simpson's defense team to expose Furhrman's perjury to the jury, thereby raising reasonable doubts in the jurors' minds about the credibility of the testimony of police officers in this case.

Controlling prosecutorial misconduct

Sanctions for prosecutorial misconduct include appellate reversal of convictions, finding the prosecutor in contempt of court, referring the prosecutor to a bar association grievance committee, and removing the prosecutor from office.

In the view of legal analyst Bennett Gershman, prosecutorial misconduct persists because of the unavailability or inadequacy of penalties visited upon the prosecutor personally in the event of unethical behavior. Although an appellate court can punish a prosecutor by telling him or her not to act in the same way again or by reversing a conviction, such sanctions don't hold the prosecutor personally accountable. During the course of a trial, the prosecutor is absolutely immune from any civil liability that might arise due to his or her official conduct. Moreover, appellate courts can affirm a conviction despite the presence of serious prosecutorial misconduct by merely invoking the **harmless error doctrine**. Under this doctrine, an appellate court determines that errors were of such a minor or trivial nature that they didn't harm the defendant's rights.

The Ethical Prosecutor

The Role of the Prosecutor – Seeking Justice

The prosecutor is held to a higher standard than other attorneys in our legal system due to the great responsibility that comes with the position. As the United States Supreme Court proclaimed in *Berger v. United States*:

The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocent suffer. He may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. [3]

Exercising Prosecutorial Discretion

The prosecutor's authority to exercise discretion in charging decisions is a key component of our criminal justice system. [4] RPC 3.8(a) requires that the prosecutor refrain from prosecuting a charge not supported by probable cause, while national standards establish that a prosecution should only proceed on the basis of sufficient admissible evidence to support a conviction. [5] Prosecutorial discretion is subject to constitutional constraints such as equal protection and due process. [6] The prosecutor should only file charges that adequately encompass the offense or offenses believed to have been committed and that rationally address the nature and scope of the alleged criminal activity. [7] National standards specify a number of factors the prosecutor should consider, and factors that should not be considered, in charging decisions. [8]

Responsibilities to Victims

The pursuit of justice includes, in no small part, justice for victims. Crime victims in Nevada are accorded several constitutional and statutory rights in criminal proceedings. [9] However, justice cannot be achieved for victims, and victims cannot properly exercise their rights, without programs to inform them and assist them in navigating the justice system. While the prosecutor does not represent victims, available resources should be allocated to victim assistance programs in accordance with statutory requirements and national standards. [10]

Fairness in Discovery

While there are specific statutory responsibilities imposed upon the prosecutor in criminal procedure that fall within the scope of RPC 3.4, the most fundamental duty is the U.S. Supreme Court's pronouncement in *Brady v. Maryland* that due process requires the timely disclosure of

all material evidence possessed by the prosecution team that is favorable to the defense. [11] The Brady rule is codified in RPC 3.8(d), requiring disclosure of all evidence known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense. [12] The duty encompasses impeachment evidence as well as exculpatory evidence. [13] Evidence is material when there is a reasonable probability that had the evidence been available to the defense, a different verdict would have resulted. [14] The duty of the prosecutor to disclose Brady material is present even if the defendant has made no request for the material. [15] The prosecutor has an affirmative duty to learn of any favorable evidence known to any party acting on the State's behalf in a case. [16] The duty to disclose Brady material is a continuing one, applicable pre-trial, during trial and even post-trial. [17]

Fairness at Trial

In addition to constitutional limitations on the exclusion of jurors, [18] prosecutors are subject to intense scrutiny of statements at any stage of trial that may constitute prejudicial misconduct. The standard is "whether a prosecutor's statements so infected the proceedings with unfairness as to make the resulting conviction a denial of due process." [19] Since it is reversible error if a prosecutor's misconduct violates the right to a fair trial, it is vital that the prosecutor be familiar with extensive Nevada case law analyzing prosecutorial misconduct to avoid such pitfalls. [20]

Trial Publicity

The prohibition on extrajudicial statements set forth in RPC 3.6(a) extends to statements by the prosecutor in a criminal proceeding likely to increase public condemnation of the accused. [21] Prosecutors are further required under RPC 3.8(f) to exercise reasonable care to prevent any party acting on the State's behalf in a case from making extrajudicial statements prohibited under Rule 3.6. [22] "The prosecutor should strive to protect the both the rights of the individual accused of a crime and the right of the public to know." [23] Rule 3.6(b) specifies the type of actual information directly relevant to a case that is appropriate for disclosure, while national standards provide further detail on what information may or may not be appropriate for disclosure in a criminal proceeding. [24]

The prosecutor is an independent administrator of justice. The primary responsibility of a prosecutor is to seek justice, which can only be achieved by the representation and presentation of the truth. This responsibility includes, but is not limited to, ensuring that the guilty are held accountable, that the innocent are protected from unwarranted harm and the rights of all participants, particularly the victims of crimes are represented. A prosecutor must abide by all applicable provisions of the rules of ethical conduct in his or her jurisdiction.

Judge says prosecutors should follow the law. Prosecutors revolt.

I've addressed the problem of prosecutorial misconduct here a few times before — both its prevalence, and the fact that misbehaving prosecutors are rarely sanctioned or disciplined. Recently (or perhaps the better word is *finally*), some judges have begun to speak out about the problem including, most notably, Alex Kozinski, the influential judge on the U.S. Court of Appeals for the 9th Circuit.

Late last year, South Carolina State Supreme Court Justice Donald Beatty joined Kozinski. At a state solicitors' convention in Myrtle Beach, Beatty cautioned that prosecutors in the state have been “getting away with too much for too long.” He added, “The court will no longer overlook unethical conduct, such as witness tampering, selective and retaliatory prosecutions, perjury and suppression of evidence. You better follow the rules or we are coming after you and will make an example. The pendulum has been swinging in the wrong direction for too long and now it's going in the other direction. Your bar licenses will be in jeopardy. We will take your license.”

You'd think that there's little here with which a conscientious prosecutor could quarrel. At most, a prosecutor might argue that Beatty exaggerated the extent of misconduct in South Carolina. (I don't know if that's true, only that that's a conceivable response.) But that prosecutors shouldn't suborn perjury, shouldn't retaliate against political opponents, shouldn't suppress evidence, and that those who do should be disciplined — these don't seem like controversial things to say. If most prosecutors are following the rules, you'd think they'd have little to fear, and in fact would *want* their rogue colleagues identified and sanctioned.

The state's prosecutors didn't see it that way. Beatty singled out South Carolina's 9th Judicial District in particular. There's a good reason for that: He noted in his talk that two prosecutors from that district, overseen by Solicitor Scarlett Wilson, had already been suspended for misconduct and at the time of his talk, another complaint was pending. A recent complaint by the state's association of criminal defense lawyers recently laid out a list of other complaints (PDF) against Wilson's office. (You can read Wilson's response here.)

But Wilson took personal offense at Beatty's comments. She accused him of bias and sent a letter asking him to recuse himself from criminal cases that come out of her district. In one sense, Wilson is unquestionably correct. Beatty *is* biased. He's clearly biased against prosecutors who commit misconduct. But that's a bias you probably want in a judge, particularly one that sits on a state supreme court. It's also a bias that isn't nearly common enough in judges. (Not only do most judges not name misbehaving prosecutors in public, they don't even name them in court opinions.)

Other prosecutors around the state jumped on, and now at least 13 of the head prosecutors in the state's 16 judicial districts, along with South Carolina Attorney General Alan Wilson, are asking for Beatty's to be recused from criminal cases. This would presumably end his career as a state supreme court justice.

Over at the Connecticut Law Tribune, the public defender who writes under the pseudonym "Gideon" comments on this mess:

Why, then, is it so inappropriate for Justice Beatty to remind stewards of justice that their charge includes not only securing convictions, but also maintaining the integrity of the criminal justice system? What is so particularly offensive about the justice making his opinion known? Certainly no one would argue that there are two competing opinions to be had here; there is no pro-suppression of exculpatory evidence lobby. So is it merely the petulance of being chided in public?

This isn't an unusual occurrence, however. Prosecutors in San Diego have long used a state law to "disqualify" pro-defense judges. Just a few months ago, they boycotted a superior court judge because he issued a few too many rulings upholding the Fourth Amendment, in favor of defendants. They claim that these statements and rulings evince an underlying bias that these judges have, making them unfit to be neutral and detached magistrates in criminal court.

Also in Santa Clara County, Calif., where a few years ago former district attorney Delores Carr responded to a series of scandals in which her office failed to expose exculpatory evidence, and one of her assistants was sanctioned, by boycotting the judge who ruled against her, and then attempting to restrict the power of the state bar to discipline prosecutors. (Something the bar rarely does, anyway.)

In these days when the media and the masses equate every arrest with guilt and every acquittal with a mistaken jury and a technicality in the law, these incidents show that some prosecutors aren't above playing to these base sentiments, or worse, actually believe these very things.

Why else would a judge who sides with a defendant and his Fourth Amendment rights be unfit to sit in criminal court? Why else would it be grounds to disqualify a judge for reminding prosecutors of their ethical obligation?

Justice Beatty's remarks are troubling, but not for the reasons the attorney general of South Carolina thinks. They're troubling because they reveal that prosecutors there engage in witness tampering, retaliatory and selective prosecutions and even perjury. They're troubling because they reveal that perhaps the South Carolina Supreme Court has been aware of this unethical conduct but has heretofore turned a blind eye to it ("no longer overlook..."). They're troubling because they reveal that justice in South Carolina isn't what justice should be and some want to keep it that way.

One more example: Recently in Arizona, the state's supreme court recommended adopting an ethics rule that would require prosecutors to disclose "new, credible, and material evidence" of a wrongful conviction, make that information available to the convicted and then "undertake further investigation or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit."

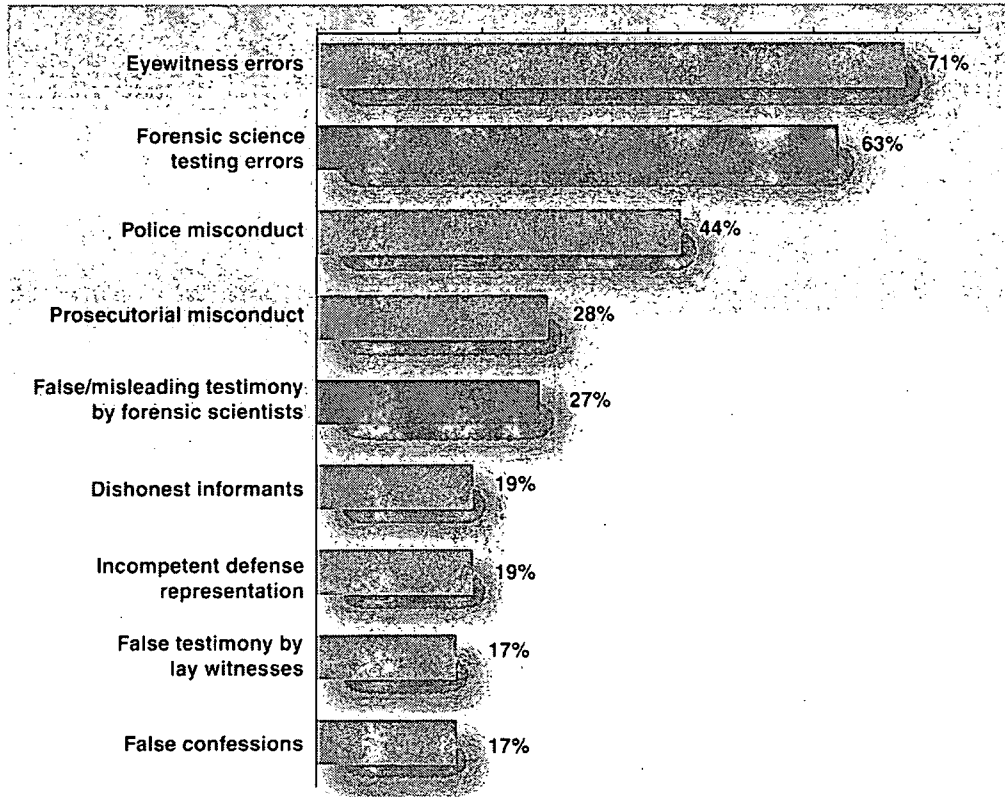
This seems like a pretty sensible guideline. Yet the office of Maricopa County Attorney William Montgomery opposed it. Why? According to a comment Montgomery's office submitted to the

court, because there's "no convincing evidence that Arizona has a 'problem' of wrongful convictions" or that "prosecutors have failed to take corrective action when appropriate." In a debate a couple of weeks ago, Montgomery reiterated his opposition. He said he already follows the rule, and so he was insulted that anyone would suggest an ethical guideline would be necessary to hold him to it.

Of course, even if Montgomery himself always follows the proposed rule, he isn't the only prosecutor in Arizona. Nor will he be the last prosecutor in Maricopa County. Certainly he can't believe that every current and future prosecutor in Arizona will now and always do the right thing when presented with evidence of a wrongful conviction. Perhaps it's true that only the rare, rogue, isolated prosecutor would hide, obscure, or sit on such evidence. But if disclosure of that evidence is the right thing to do, it's difficult to understand why anyone would oppose giving the state bar a way to discipline that prosecutor, rare, rogue, isolated as he may be.

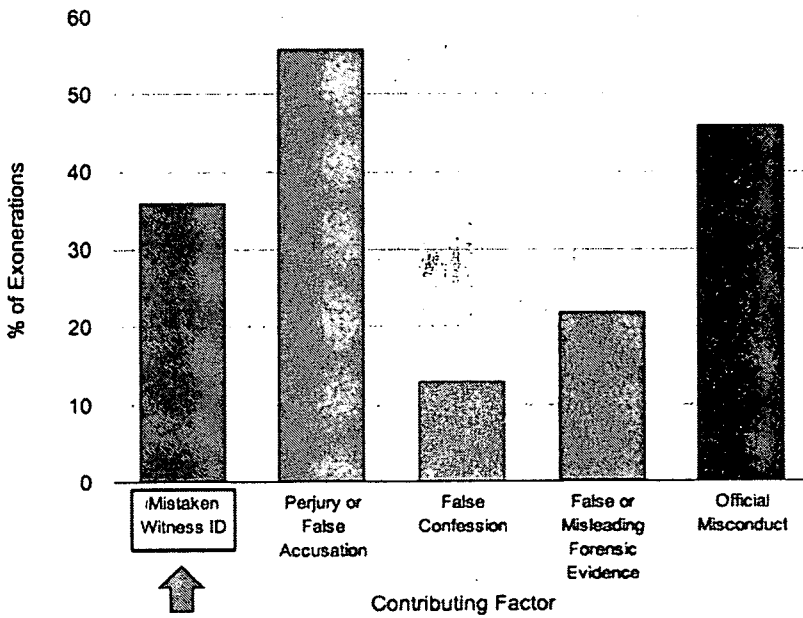
The most plausible explanation for all of these stories is that a significant number of prosecutors just don't want to be held accountable to anyone but themselves. I suppose a lot of us would like to have that sort of protection in our jobs. But few of us do. And the rest of us don't hold positions that give us the power to to ruin someone's life with criminal charges, to convince a jury to put someone in prison or to ask the state to put someone to death.

Wrongful Convictions Statistics



% EXONERATIONS BY CONTRIBUTING FACTOR

National Registry of Exonerations
8/21/2014 Total = 1409



Absolutely Unacceptable

Mr. Huggins is told he will go to one of two prisons when he leaves Kirkland....

RIDGEVILLE, SC (WCSC) -

When entering **South Carolina's most dangerous prison**, the first thing you notice is the noise. The second thing you notice is the smell. It is obvious that Lieber Correctional Institution is no country club.

"Forget about the fancy facade, you know, the bricks the landscape, it's still an all male penitentiary," said Lieber Prison Major Thierry Nettles.

More than 1,500 inmates live at Lieber. The prison is surrounded by razor wire so sharp that it will cut or even kill. It makes it virtually impossible for prisoners to break out.

"They don't want to be here," said warden Wayne McCabe. "They broke a law to get here. Our responsibility is to make sure they stay."

It is just as tough to get into Lieber. In this special report, we had to remove our shoes, walk through a metal detector and get patted down by an officer.

There are 251 officers to watch over the inmates. They include Capt. Ann Sheppard who has worked at the prison for 16 years.

"In the beginning, it was a little scary for me being a female and dealing with all of the hardened criminals," Sheppard said.

Early on, Sheppard said she worried about possibly getting killed.

"That thought has crossed my mind in the beginning," Sheppard said. "And that's only normal to feel that way when you initially come inside the prison, listening to the doors slam behind you."

We got to tour one of the most dangerous parts of the prison called "Lockup." It houses some of the most violent offenders. Anyone who enters that area has to wear what is called an anti-stabbing vest and a face shield for protection.

Officer Patrick Lundgren doesn't mind dealing with these prisoners.

"You control every part of their life and if you are doing it right, they can't do anything to you," Lundgren said.

But the inmates can make life difficult for the folks who work here. The contraband team seizes hundreds of cell phones that are tossed over the prison fences. Lieber is also home to death row, where convicted killers wait to be executed.

After taking this tour, it makes you wonder why these men and women want to work around such dangerous people.

"If I can save one, then I know I've done my job," Sheppard said.

There are several programs in place at Lieber to help inmates re-enter society.

The warden is starting character unit that will allow well behaved inmates to spend more time out of their cells.

Lee Correctional Institution (LCI) is a South Carolina Department of Corrections state prison for men located in Bishopville, Lee County, South Carolina.^[1] The facility opened in 1993 to replace the decommissioned Central Correctional Institution located in downtown Columbia, South Carolina.^[2]

LCI is the largest of nine maximum-security prisons for males in the South Carolina state system.^[3] Characterized as the state's most dangerous facility, inmates took over portions of the prison twice between April 2012 and February 2013;^[4] in the four years prior to September 2012 the facility was the scene of three hostage situations and four uncontrolled fights.^[5]

In closing, Jamar A. Huggins does not belong in a prison let alone either one of these prisons! **Mr. Huggins is an innocent man** and deserves to be home with his family not locked away like some wild animal. The Huggins family along with other community activist will not rest until Mr. Huggins is **exonerated** or given a **fair trial** with a **sense of urgency**, the community is outraged and tired of seeing our young men taken from their mothers and children solely behind the win at all cost ego of a "proud" solicitor and the misconduct of a unprofessional detective, we are taking a stand against such injustice and will continue to fight this until we see results!