ALAN WILSON
ATTORNEY GENERAL

May 14, 2012

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RE: **Nathaniel Ferguson v. State of South Carolina**
2009-CP-30-725

Dear Mr. Shearouse:

The Return to the Petition for Writ of Certiorari in the above appeal is due to be served and filed today. However, this is to respectfully request a 30-day extension to serve and file this Return to the Petition for Writ of Certiorari.

This extension request is not intended for the purpose of delay. Rather, this extension request is necessitated by a heavy workload.

Sincerely,

Harrison D. Brant
Assistant Attorney General

HDB:cey

cc: Tricia A. Blanchette, Esquire

REMBERT C. DENNIS BUILDING • POST OFFICE BOX 11549 • COLUMBIA, SC 29211-1549 • TELEPHONE 803-734-3970 • FACSIMILE 803-253-6283

The Supreme Court of South Carolina

Nathaniel K. Ferguson, Respondent-Petitioner,

v.

State of South Carolina, Petitioner-Respondent.

The Honorable Eugene C. Griffin, Jr.
Laurens County
Trial Court Case No. 2009-CP-30-00725

ORDER

The request for an extension until May 3, 2012 to serve and file the Petitioner-Respondent's Reply to the Return to the Petition for Writ of Certiorari is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY _____
Clerk

Columbia, South Carolina

April 24, 2012

cc: Assistant Attorney General Harrison Brant
Tricia A. Blanchette, Esquire

ALAN WILSON
ATTORNEY GENERAL

April 23, 2012

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RE: **Nathaniel Ferguson v. State of South Carolina**
2009-CP-30-725

Dear Mr. Shearouse:

The Reply to the Return to the Petition for Writ of Certiorari in the above appeal is due to be served and filed today. However, this is to respectfully request a 10-day extension to serve and file this Reply to the Return to the Petition for Writ of Certiorari.

This extension request is not intended for the purpose of delay. Rather, this extension request is necessitated by a heavy workload.

Sincerely,

Harrison D. Brant
Assistant Attorney General

HDB:cey

cc: Tricia A. Blanchette, Esquire

LAW OFFICE OF TRICIA A. BLANCHETTE

April 13, 2012
VIA HAND DELIVERY

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: Nathaniel Ferguson v. State

Dear Sir:

For filing in the above referenced PCR cross-appeal, I have attached an original and six copies of a Petition for Writ of Certiorari and Return to Petition for Writ of Certiorari. I have also attached an original Certificate of Service.

Thank you for your assistance with this matter. Please contact my office with any questions.

Yours truly,

Tricia A. Blanchette
Attorney at Law

cc: Harrison D. Brant, Assistant Deputy Attorney General
Nathaniel Ferguson

PO Box 12725 | Columbia SC 29211

p: 803.988.0008 | **f:** 803.988.8070 | **e:** blanchettelaw@gmail.com

The Supreme Court of South Carolina

Nathaniel K. Ferguson, Respondent-Petitioner,

v.

State of South Carolina, Petitioner-Respondent.

The Honorable Eugene C. Griffin, Jr.
Laurens County
Trial Court Case No. 2009-CP-30-00725

ORDER

The request for an extension until May 4, 2012 to serve and file the Respondent-Petitioner's Petition for Writ of Certiorari and the Return to the Petitioner-Respondent's Petition is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY _____
Clerk

Columbia, South Carolina

March 27, 2012

cc: Assistant Attorney General Harrison Brant
Tricia A. Blanchette, Esquire

LAW OFFICE OF TRICIA A. BLANCHETTE

March 26, 2012

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: Nathaniel Ferguson v. State

Dear Sir:

I am writing to request my first extension for filing the Respondent-Petitioner's Return to Petition for Writ of Certiorari and Petition in the above referenced PCR Appeal. I am currently in my thirty-sixth week of pregnancy, and I have been placed on strict bed rest. Therefore, this extension is not for the purposes of delay, but it is being made to comply with my doctor's orders.

Thank you for your assistance with this matter. Please contact my office with any questions.

Yours truly,

Tricia A. Blanchette
Attorney at Law

cc: Harrison Brant, Assistant Attorney General
Nathaniel Ferguson

PO Box 12725 | Columbia SC 29211

p: 803.988.0008 | **f:** 803.988.8070 | **e:** blanchettelaw@gmail.com

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
MAR 5 2012
S.C. Supreme Court

March 5, 2012

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: **Nathaniel K. Ferguson. Jr. v. State of South Carolina**
2009-CP-30-0725

Dear Mr. Shearouse:

I am enclosing the original and six (6) copies of the Petition for Writ of Certiorari and Appendix in the above case.

Sincerely,

Harrison D. Brant
Assistant Attorney General

HDB:cey
Enclosures

cc: Tricia A. Blanchette, Esquire
Trisha Allen, Victim Services

The Supreme Court of South Carolina

Nathaniel K. Ferguson, Respondent-Petitioner,

v.

State of South Carolina, Petitioner-Respondent.

The Honorable Eugene C. Griffin, Jr.
Laurens County
Trial Court Case No. 2009-CP-30-00725

ORDER

For good cause shown, the request for an extension until March 5, 2012 to serve and file the Petition for Writ of Certiorari and Appendix is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY _____
Clerk

Columbia, South Carolina

February 3, 2012

cc: Assistant Attorney General Harrison Brant
Tricia A. Blanchette, Esquire

ALAN WILSON
ATTORNEY GENERAL

February 2, 2012

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RE: **Nathaniel Ferguson v. State of South Carolina**
2009-CP-30-725

Dear Mr. Shearouse:

The Petition for Writ of Certiorari in the above appeal is due to be served and filed today. However, this is to respectfully request a 30-day extension to serve and file this Brief of Respondent.

This extension request is not intended for the purpose of delay. Rather, this extension request is necessitated by a heavy workload.

Sincerely,

Harrison D. Brant
Assistant Attorney General

HDB:cey

cc: Tricia A. Blanchette, Esquire

The Supreme Court of South Carolina

Nathaniel K. Ferguson, Respondent-Petitioner,

v.

State of South Carolina, Petitioner-Respondent.

The Honorable Eugene C. Griffin, Jr.
Laurens County
Trial Court Case No. 2009-CP-30-00725

ORDER

The request for an extension until February 2, 3012 to serve and file the Petition for Writ of Certiorari and Appendix is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY Brenda F. Shealy
Chief Deputy Clerk

Columbia, South Carolina

January 5, 2012

cc: Assistant Attorney General Harrison Brant
Tricia A. Blanchette, Esquire

ALAN WILSON
ATTORNEY GENERAL

January 3, 2012

VIA HAND DELIVERY
The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RE: **Nathaniel K. Ferguson, Jr., #310367 v. State of South Carolina**
2009-CP-30-0725

Dear Mr. Shearouse:

The Petition for Writ of Certiorari and Appendix in the above appeal is due to be served and filed today. However, this is to respectfully request a 30-day extension to serve and file the Petition for Writ of Certiorari and Appendix.

This extension request is not intended for the purpose of delay. Rather, this extension request is necessitated by a heavy workload and is for good cause.

Sincerely,

Harrison Brant
Assistant Attorney General

cc: Tricia A. Blanchette, Esquire

LAW OFFICE OF TRICIA A. BLANCHETTE

January 3, 2012

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: Nathaniel Ferguson v. State

Dear Sir:

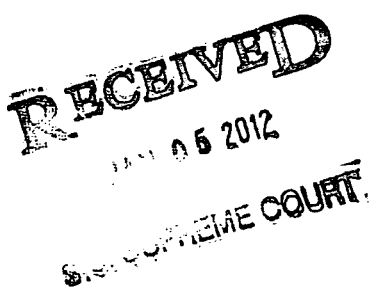
I am writing to inform the Court that I received a copy of the Post Conviction Relief hearing transcript from the Office of the Attorney General on January 3, 2012. I have calendared the Respondent-Petitioner's Petition for Writ of Certiorari for 30 days from that date, which I calculated to be February 1, 2012. If this date is incorrect, please notify me accordingly.

Thank you for your assistance with this matter. Please contact my office with any questions.

Yours truly,

Tricia A. Blanchette
Attorney at Law

cc: Salley W. Elliott, Assistant Deputy Attorney General
Nathaniel Ferguson



PO Box 12725 | Columbia SC 29211

p: 803.988.0008 | **f:** 803.988.8070 | **e:** blanchettelaw@gmail.com

ALAN WILSON
ATTORNEY GENERAL

December 22, 2011

The Honorable Daniel E. Shearouse
Clerk of the South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Nathaniel Ferguson v. State of South Carolina
2009-CP-30-725

Dear Mr. Shearouse:

This letter is to advise that we received the post-conviction relief hearing transcript in the above captioned matter on December 1, 2011. We have calendared the State's Petition for Writ of Certiorari to be due 30 days from that date. If this date, January 3, 2012, is incorrect or inconsistent with your records, please contact this office.

If I can be of any further assistance, please do not hesitate to contact me.

Sincerely,

Salley W. Elliott
Assistant Attorney General

SWE/ab

cc: Tricia A. Blanchette, Esquire

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

November 16, 2011

Tricia A. Blanchette, Esquire
Law Office of Tricia A. Blanchette, LLC
P.O. Box 12725
Columbia, SC 29211

Re: Ferguson, Nathaniel K. Jr. v. The STATE

Dear Ms. Blanchette:

The following Order has been endorsed on your Petition for Appeal Bond in the above entitled case on appeal.

"Petition denied.

s/ Jean H. Toal C.J.
For the Court

November 16, 2011."

Very truly yours,

CLERK

DES/jj

cc: Assistant Attorney General J. Rutledge Johnson

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LAURENS COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Case No.: 2009-CP-30-0725

Nathaniel Ferguson,.....Respondent-Petitioner,

vs.

State of South Carolina,.....Petitioner-Respondent.

PETITION FOR APPEAL BOND

Respondent-Petitioner, through his undersigned counsel, respectfully petitions this Court for an appellate bond pursuant to Rule 240, SCACR, and Rule 243(k), SCACR. The Respondent-Petitioner is requesting an appellate bond during the pendency of the State's appeal and his cross-appeal of the Order Granting Application for Post Conviction Relief, which was issued by the Honorable Eugene C. Griffith, Jr., on July 5, 2011 and on file with this Court.

PROCEDURAL HISTORY

This matter came before the lower court by way of an Application for Post Conviction Relief filed on June 10, 2009. The State made its return on or about October 1, 2009. An Amendment to Application for Post Conviction Relief was filed by the Respondent-Petitioner on March 25, 2011. An evidentiary hearing into the matter was

held in front of the Honorable Eugene C. Griffith, Jr., on April 14, 2011 at the Newberry County Courthouse. The Respondent-Petitioner was present and represented by Tricia A. Blanchette, Esquire. The State was represented by Harrison D. Brant, Assistant Attorney General, and David Spencer, Senior Assistant Attorney General.

On July 5, 2011, the Honorable Eugene C. Griffith, Jr., issued an Order Granting Application for Post Conviction Relief, which was filed on July 6, 2011. On or about July 20, 2011, the State submitted a Motion to Alter or Amend Pursuant to Rule 59(e), SCRCP, and/or Motion to Reopen the Record for Additional Testimony Pursuant to Rule 59(a) and 60 (b), SCRCP. The Respondent-Petitioner, through counsel, submitted a Response to Respondent's Post-Judgment Motion on July 25, 2011. On August 2, 2011, the Honorable Eugene C. Griffith, Jr., issued an Order Denying Motion to Reconsider, which was filed on August 4, 2011. On August 10, 2011, the State filed a Notice of Intent to Appeal on August 10, 2011. Thereafter, the Respondent-Petitioner filed a Notice of Intent to Cross-Appeal on September 6, 2011.

GROUNDS IN SUPPORT OF REQUEST FOR BOND

By way of the Order Granting Application for Post Conviction Relief, the Honorable Eugene C. Griffith, Jr., granted the Respondent-Petitioner relief on the issue of prosecutorial misconduct. The Respondent-Petitioner would urge this Court to find that there is a good probability that he will prevail on appellate review since the Petitioner failed to call the Solicitor to refute the allegations of prosecutorial misconduct. Furthermore, the Honorable Eugene C. Griffith, Jr., failed to grant relief on a number of issues of ineffective assistance of counsel despite trial counsel's admissions of

deficiency. Thus, the Respondent-Petitioner has filed a cross-appeal, which also contributes to the probability that he will prevail on appeal.

While incarcerated, the Respondent-Petitioner has worked towards rehabilitation and been actively involved in various programs offered at Broad River Correctional Institution in order to better himself, contribute to the institution and assist other inmates in their pursuit of knowledge and rehabilitation. While at Broad River Correctional Institution, the Respondent-Petitioner participated in the following programs and received the attached certificates: Membership into the Christians-In-Action (January 15, 2006), HIV/AIDS Education – Eight Sessions (July 28, 2006), Alcohol and Drugs Group – Seven Sessions (November 6, 2006), Impact of Crime Class (May 1, 2007), Lifeskills Group – Twelve Sessions (May 2, 2007), Depression Management Group – Five Sessions (August 9, 2007), Depression Management and Education Group – Five Sessions (April 9, 2010), Islamic Life Skills – Self Concept (March 1, 2010-May 24, 2010), Consistently Participating in Alcohol and Drug Group (April 2011). On all possible ratings, the Respondent-Petitioner received an excellent rating.

During his entire incarceration, the Respondent-Petitioner has remained disciplinary free. To support this assertion, a copy of his Record Summary Report from the South Carolina Department of Corrections is attached. Furthermore, the Respondent-Petitioner has remained in a steady job assignment at that same institution throughout his incarceration.

By way of his attached letter, the Respondent-Petitioner has written his reasons for making this Petition of the Court. As his letter indicates, the Respondent is a loving father, and he is requesting the opportunity to provide for his family. The Respondent

also has aging parents and looks forward to the opportunity to provide their care and assist them with their financials needs. By way of her attached letter, the Respondent-Petitioner's mother has affirmed that she will provide a home, love and support for him at 49 Webb Road in Greenville, South Carolina. The Respondent-Petitioner has obtained the signatures of thirty community members with their contact information for this Court to show the immense community support waiting for him. A copy of two Petitions of Support is attached. To show the support of his local church and expected involvement therein, the Respondent-Petitioner has also obtained a letter of support from his pastor, a copy of which is attached. It is clear that the Respondent-Petitioner will have the support of his family, church and community and does not present a flight risk or a concern to the community.

In order to provide for his family, the Respondent-Petitioner has made arrangements to obtain a position with Dwight Thurman, Operator of Thurman Moving and Storage in Greenville, South Carolina. To verify this assertion, Mr. Thurman has provided the attached letter dated August 25, 2011.

The Respondent-Petitioner has prepared a comprehensive plan, as evidenced by the attachments, which he will immediately put into place if this Court grants this Petition. Furthermore, the Respondent-Petitioner has the support of his family, community, and church family. It is clear that the Respondent-Petitioner has taken full advantage of every opportunity while incarcerated and he respectfully requests the opportunity to be a contributor to society outside the walls of a prison. Based upon the reasons set forth in his letter and this comprehensive plan, the Respondent-Petitioner submits that his case presents an exceptional circumstance that warrants the granting of

this Petition. Therefore, the Respondent-Petitioner would respectfully request that this Court grant his Petition for an Appellate Bond Pursuant to Rule 240, SCACR, and Rule 243(k), SCACR.

Respectfully submitted,

Tricia A. Blanchette
PO Box 12725
Columbia, SC 29211
(803) 988-0008
Attorney for Respondent-Petitioner

October 17, 2011
Columbia, South Carolina

Petition denied.

C.J.

For the Court

November 16, 2011

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LAURENS COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Case No.: 2009-CP-30-0725

Nathaniel Ferguson,.....Respondent-Petitioner,

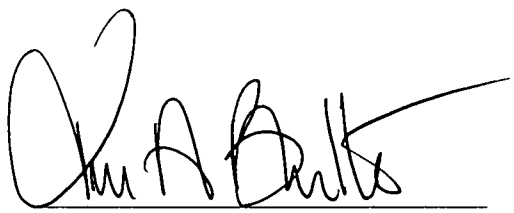
vs.

State of South Carolina,.....Petitioner-Respondent.

CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney for the Respondent-Petitioner, hereby certify that I placed in the mail this 17th day of October 2011, a copy of a Petition for Appeal Bond to Harrison D. Brant of the Attorney General's Office, at:

Office of the Attorney General
ATT: Harrison D. Brant, Ast. AG
PO Box 11549
Columbia, SC 29211



Tricia A. Blanchette
PO Box 12725
Columbia, SC 29211
(803) 988-0008

October 17, 2011

Certificate of Membership

Nathaniel Ferguson

is granted membership into the
Christians-In-Action of
Broad River Correctional Institution

For in the one spirit we were all baptized into one body.

1 Corinthians 12:13

January 15, 2006
Columbia, South Carolina

For in the one spirit we were all baptized into one body.

1 Corinthians 12:13

Harry Plyler, President

Rev. Ken Ritchie, CIA Sponsor

Rev. Glenn S. Sherman, Acting Senior Chaplain

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

Mental Health Services

****

STATEMENT OF PARTICIPATION

****

THIS IS TO ACKNOWLEDGE THAT Nathaniel Ferguson, 310367

HAS PARTICIPATED IN 8 Sessions

OF HIV/AIDS Education

LEVEL OF PARTICIPATION

POOR _____ AVERAGE _____ GOOD _____ EXCELLENT x

THIS IS NOT TO BE INTERPRETED AS A STATEMENT OF PROGRESS. PROGRESS REPORTS ARE AVAILABLE UPON REQUEST BY APPROPRIATE OFFICIALS.

DATE: 7/28/06

****

BRCI

INSTITUTION

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

Social Work Services

****

STATEMENT OF PARTICIPATION

****

THIS IS TO ACKNOWLEDGE THAT NATHANIEL FERGUSON #310367

HAS PARTICIPATED IN 7 Sessions

OF ALCOHOL & DRUGS GROUP

LEVEL OF PARTICIPATION

POOR _____ AVERAGE _____ GOOD _____ EXCELLENT X

THIS IS NOT TO BE INTERPRETED AS A STATEMENT OF PROGRESS. PROGRESS REPORTS ARE AVAILABLE UPON REQUEST BY APPROPRIATE OFFICIALS.

DATE: 11-06-06

****

Britchell E. Gray

SOCIAL WORKER

BRCI

INSTITUTION

South Carolina Department of Corrections

Certificate of Participation

Presented to

Nathaniel Ferguson

In Recognition of Your Performance

in

The Impact of Crime Class

Presented this first Day of May, 2007

E Deas Paulette Fair
Teacher

Principal

Warden

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

Social Work Services

****

STATEMENT OF PARTICIPATION

****

THIS IS TO ACKNOWLEDGE THAT NATHANIEL FERGUSON #310367

HAS PARTICIPATED IN TWELVE SESSIONS

OF LIFESKILLS GROUP

LEVEL OF PARTICIPATION

POOR _____ AVERAGE _____ GOOD _____ EXCELLENT X

THIS IS NOT TO BE INTERPRETED AS A STATEMENT OF PROGRESS. PROGRESS REPORTS ARE AVAILABLE UPON REQUEST BY APPROPRIATE OFFICIALS.

DATE: 5/2/07

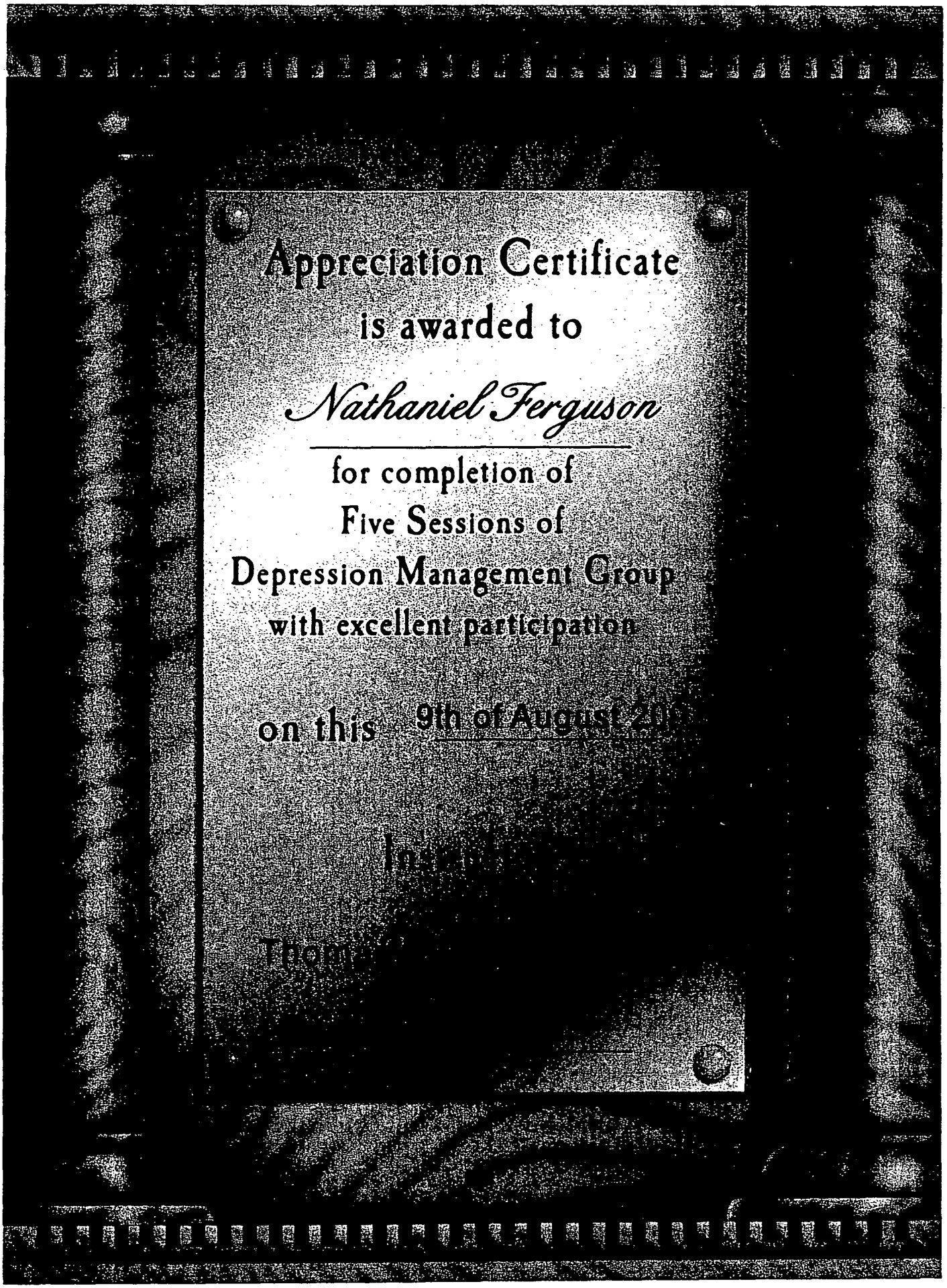
****

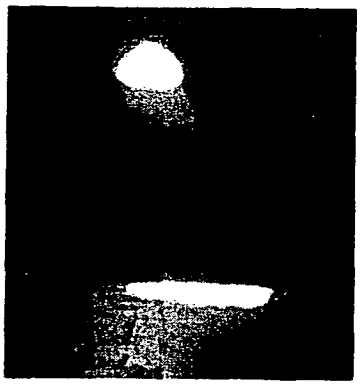
Mitchell Gray

SOCIAL WORKER

BRCI

INSTITUTION


Appreciation Certificate
is awarded to
Nathaniel Ferguson
for completion of
Five Sessions of
Depression Management Group
with excellent participation
on this 9th of August 20



Certificate of Participation

Presented To

Nathan Ferguson

For

Successfully Completing Five Sessions of Depression Management & Education Group

4/9/2010

Human Service Coordinator I

بسم الله الرحمن الرحيم

Islamic Life Skills-Self Concept

SCDC

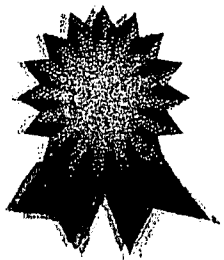
Inmate Services

Pastoral Care Services/Islamic Affairs Section

Recognizes

Nathaniel Ferguson

Completion of Islamic Life Skills-Self Concept, March 1, 2010-May-24,2010 Broad River Correctional Institution



Chaplain III Mike Brown Chaplain Tamir A. Mutakabbir Chaplain II Omar Shaheed

May 24, 2010

CERTIFICATE OF PARTICIPATION

Presented To: Nathaniel Ferguson

For:

Consistently Participating in Alcohol and Drug Education Group

April 2011

Paulette Fair & Elizabeth Deas
Group Facilitator

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
RECORD SUMMARY REPORT DATED 09/28/11 C023

FERGUSON,NATHANIEL K. FBI # 567324EA4 SID# SC00434046 SCDC # 310367
OFFENDER TYPE.: ADULT-STRAIGHT SENTENCE
INSTITUTION ..: BROAD RIVER CORR. INST. DORM.....: C0228A
SECURITY/CUST.: 3 MINIMUM IN RACE....:B SEX...:M
CURR INCARC SENT...: 35 YRS 0 MOS 0 DYS PROJ MAXOUT DATE: 05/07/2039
CENTRAL MONITORING.: YES PROJ PAROLE DATE: 00/00/0000
SOCIAL SECURITY #...: [redacted] EWC JOB..: LAUNDRY ROOM ATTENDA
EDUC PGM.: NO CURR EDUC PROGRAM
CURRENT PROGRAM..: NO CURRENT PROGRAM EWC LEVEL: 3F5 EEC LEVEL:
AGE...: 47 DATE OF BIRTH..: 2/ 2/64 ASSIGNMENT..: COMMISSARY

PREVIOUS NUMBERS:
** NO PREVIOUS NUMBERS **

CURRENT OFFENSES	SENTENCE YRS	MOS	DYS	COUNTY	SENTENCE START	V/NV	CATEGORY
FIREARMS PROVISION	5	0	0	LAURENS	5/15/20	4 N	3
MURDER	30	0	0	LAURENS	5/15/20	4 V	5

PRIOR COMMITMENTS OVER 90 DAYS:
NO PRIOR COMMITMENTS OVER 90 DAYS
DETAINERS (HOLD,WANTED,NOTIFY):
NO DETAINERS
NO DETAINERS
ESCAPES:
NO ESCAPE HISTORY
CRIMINAL CHARGES:
NO CRIMINAL CHARGES WHILE IN CUSTODY
NO CRIMINAL CHARGES HISTORY
ASSAULTIVE DISCIPLINARIES:
NO ASSAULTIVE DISCIPLINARY HISTORY
NON-ASSAULTIVE DISCIPLINARIES:
9/26/10 REFUSING OR FAILING OBEY OTHER
HISTORY OF MOVEMENTS:

4/14/11	BROAD RIVER	INCARCERATED	RETURN FROM COURT
4/13/11	LAURENS CO	AUTH ABSENCE (AWL)	TO COURT
3/ 8/10	BROAD RIVER	INCARCERATED	RETURN FROM COURT
3/ 8/10	GREENWOOD CO	AUTH ABSENCE (AWL)	TO COURT
4/ 1/ 8	BROAD RIVER	INCARCERATED	ADMINISTRATIVE
4/ 1/ 8	KIRKLAND	INCARCERATED	MEDICAL
8/22/ 5	BROAD RIVER	INCARCERATED	ADMINISTRATIVE
7/25/ 5	KIRKLAND	INCARCERATED	R&E PROCESSING
7/25/ 5	PERRY	INCARCERATED	NEW ADMISSION

HISTORY OF EARNED WORK CREDIT ASSIGNMENTS:

JOB DESCRIPTION	START DATE	END DATE	TERMINATION REASON	JOB LVL
LAUNDRY ROOM ATTENDA	08/23/05	0/ 0/ 0		3F5

HISTORY OF EARNED EDUCATION CREDITS:

EEC DESCRIPTION	START DATE	END DATE	TERMINATION REASON

NO SCHOOL ASSIGNMENTS
********* END OF REPORT *********

Honorable Justices of the South Carolina Supreme Court:

I Nathaniel K. Ferguson have been incarcerated here at Broad River Institution going on 8 years. I am asking this court for bond for the following reasons. Before this incident, I worked for a Waste Water Treatment Plant, called Western Carolina Sewer Authority for almost 10 years. I had full custody of two of my kids, Kenae and Kendall Furguson. As a parent, I've missed out on so much as graduation, prom etc. to make bond means a lot to me. To be able to continue to love and support my kids and Grand-kids. I have an elderly mother that needs my love, care, and support. To make bond gives me a way to work and go to school at night, to receive my Commercial Drivers License so that I can be more valuable to my family, friends and my community. To make bond will let me give back to my community. While incarcerated I wanted to better myself, and use my time wisely, by educating myself by maintaining a continuous pursuit of knowledge, and conducting myself in a good manner to be free of any disciplinary. I strived to obtain a high level of good communication skills and maintain a respectful relationship with the staff and administration of the institution. I've learned to be more self-discipline. I know I could do more good for my community being out there with them, instead of back here. I would like to work with a little league football team or any sport and help teach kids values, principles, and self-worth. I want to be a role model for my kids and grand-kids, and my community. I'm almost 50 years old, I have no time for foolishness. I have my job set up and I'm preparing for school at night. I plead my case for the opportunity to work and be a tax-paying and law-abiding citizen.

Sincerely,

Nathaniel K. Ferguson.

Nathaniel K. Furguson

DATE: 8-25, 2011

TO WHOM IT MAY CONCERN:

I AM ESTER LEAN FERGUSON, WHO RESIDE AT 49 WEBB ROAD GREENVILLE, SOUTH CAROLINA 29601. MY PHONE NUMBER IS 864-288-1786

I SUBMIT TO YOU, THAT NATHANIEL FERGUSON, (MY SON) IS WELCOME AT OUR HOME AND HAVE THE LOVE AND SUPPORT THAT WILL ASSIST IN ADJUSTING TO HIS REENTRY INTO SOCIETY. WHATEVER REQUIREMENTS AND CHALLENGES THAT HE IS TO MEET. WE STAND READY TO SUPPORT HIM IN ALL THOSE ENDEAVORS.

I THANK YOU FOR ALL YOUR CONSIDERATION IN ALLOWING HIM TO BE THE BEST HE CAN BE.

SINCERELY,

S/

ESTHER LEAN FERGUSON

(MOTHER)

* Esther Lean Ferguson

PETITION OF SUPPORT

WE THE UNDERSIGNED, BY OUR SIGNATURE'S BELOW SUPPORTS MR. NATHANIEL FERGUSON EFFORTS AND STATEMENTS BELOW TO OBTAIN BOND WHILE AWAITING THE COURT AND/OR STATE'S DETERMINATION FOR RETRIAL. WE MAY BE REACHED AT OUR ADDRESS OR PHONE NUMBERS LISTED BELOW FOR ANY FURTHER COMMENTS.

1. Esther Ferguson	288-1786	49 Webb rd. Gville
2. Dwight Thurman	270-4881	#1 Alden Ct Golle S.C 29611
3. Kenda Ferguson	275-8396	217 Broadmoss Dr.
4. Kenisha Allen	243.8284	9100 Boiling Rd. Ext.
5. Valerie Simmons	430-6245	8 Cooperfield ave
6. Keith Simmons	640-1751	8 Cooperfield ave
John Henry Austin	306-8555	103 Redrow St. Easley S.C 29640
8. Kathy Carcesser	385-0462	1 Alden Ct. Gville 29611
9. James Thurman	243-2719	162 Canty Rd Golle.
10. Robert Thurman	243-3173	160 Canty Rd Golle
11. [illegible]	288-0767	114 Perkins Mill Rd
12. [illegible]	859-6352	205 East 2nd Ave.
13. Keith Simmons	346-7601	8 cooperfield ave.
14. Keith Simmons	438-2684	116 Boxwood Circle
15. Kendrick Sutton	382-9339	1011 W. Butler Rd. Apt. 224

I, NATHANIEL FERGUSON, WILL BE RESIDING AT 49 WEBB ROAD IN GREENVILLE, SOUTH CAROLINA WITH MY MOTHER ESTHER LEAN FERGUSON. ALSO, WILL BE EMPLOYED WITH MR. DWIGHT THURMAN AS A ACTING SUPERVISOR IN MOVING AND STORAGE. I THANK YOU AGAIN FOR YOUR SUPPORT.

S/
NATHANIEL FERGUSON

PETITION OF SUPPORT

WE THE UNDERSIGNED, BY OUR SIGNATURE'S BELOW SUPPORTS MR. NATHANIEL FERGUSON EFFORTS AND STATEMENTS BELOW TO OBTAIN BOND WHILE AWAITING THE COURT AND/OR STATE'S DETERMINATION FOR RETRIAL. WE MAY BE REACHED AT OUR ADDRESS OR PHONE NUMBERS LISTED BELOW FOR ANY FURTHER COMMENTS.

1.	Felicia Lindsey	567-6816	803 McElhaney rd apt 14 Travelers Rest SC 29690
2.	Jacquenette Miller	346-2877	1168 Little Cedar Creek Rd Williamston SC 29697
3.	Andre Miller	346 2877	1168 Little Cedar Creek Rd Williamston SC 29697
4.	Lela Downs	277-8455	319 Crosby Cir. Greenville, S.C. 29605
5.	Keidra Thurman	380-1910	2903 River Rd Piedmont SC, 29673
6.	Kelsi Bates	430-1200	102 whitney court Mauldin SC 29662
7.	Tanya Webb	630-4928	515 Riley Rd. Easley S.C. 29642
8.	Cheryl Hunt	430-6646	102 Whitney Ct. Mauldin SC 29662
9.	Tony Evans	884-6308	2903 River Rd. Piedmont S.C. 29673
10	Earnestine Hunter	420-3258	17 E. Welcome Road Greenville SC 29611
11.	Frankie Gray	277-4296	108 Pine Creek Court Ex Greenville, SC
12.	Yvonne Elrod	360-0913	9 Brownwood Dr., Greenville, SC 29605
13.	Shelby Barksdale	269-7817	9 Brownwood Dr., Greenville, SC 29611
14.	Velma M. Haywood	864-855-6221	400 Lia Way Easley, SC 29642
15.	Mamie Jackson	864-859-3263	106 Baker Court Easley S.C 29640

I, NATHANIEL FERGUSON, WILL BE RESIDING AT 49 WEBB ROAD IN GREENVILLE, SOUTH CAROLINA WITH MY MOTHER ESTHER LEAN FERGUSON. ALSO, WILL BE EMPLOYED WITH MR. DWIGHT THURMAN AS A ACTING SUPERVISOR IN MOVING AND STORAGE. I THANK YOU AGAIN FOR YOUR SUPPORT.

S/
NATHANIEL FERGUSON

Easley Charge United Methodist Church
Easley Chapel & John Wesley
Post Office Box 825
Easley, South Carolina 29641
Velma Martin Haywood, Senior Pastor

Reference:

Nathaniel K. Ferguson # 310367
B.R.C.I. Congree 228
4460 Broad River Road
Columbia, South Carolina 29210

Greetings in Jesus Name,

This is to put on record as my belief that Nathaniel has served time and is very remorseful for the wrong decisions that were made. Therefore, we are asking for a second chance under the law. We will be most grateful. As Nathaniel pastor, I will see that part of his spiritual life will be full filled through Worship, attending Bible study, Sunday school and helping any way in the life of the church.

Thank you for this consideration in this important matter.

In Jesus Name,

Velma M. Haywood, Senior Pastor

DATE: 8/25, 2011

TO WHOM IT MAY CONCERN:

I AM DWIGHT THURMAN, AN OPERATOR OF A MOVING AND STORAGE SERVICE IN THE GREENVILLE, SOUTH CAROLINA AREA.

THIS LETTER IS TO EXPRESS MY SUPPORT FOR NATHANIEL FERGUSON WHO WOULD BE EMPLOYED WITH ME IN MY MOVING & STORAGE SERVICE. I'VE KNOWN MR. FERGUSON FOR A NUMBER OF YEARS AND FEEL HE WOULD BE A GREAT ACCESS TO MY BUSINESS TO INCLUDE THE COMMUNITY HE WOULD BE RETURNING TO. I PRAY, THAT YOU WOULD GIVE HIM THAT OPPORTRUNITY TO RESTART HIS LIFE AGAIN..

I APPRECIATE YOUR DECISION IN HIS FAVOR AND KNOW HE WILL NEVER GIVE YOU A REASON TO REGRET YOUR APPROVAL.

SINCERELY,

S/

DWIGHT THURMAN, OPERATOR
THURMAN MOVING & STORAGE
1 AL COURT
GREENVILLE, S.C. 29607
PH: 864-295-1687

x Dwight F Thurman

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Laurens County
Eugene C. Griffith, Jr., Circuit Court Judge

2009-CP-30-0725

Nathaniel K. Ferguson,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner.

RETURN TO PETITION FOR APPEAL BOND

The State of South Carolina respectfully submits the following in opposition to the Respondent's petition for appeal bond:

1. The Respondent, Nathaniel K. Ferguson, was indicted at the July 2004 term of the Laurens County Grand Jury for Murder and Possession of a weapon during the commission of a violent crime (04-GS-30-628). Chip Price, Esquire, represented the Respondent. On July 19-20, 2005, the Respondent proceeded to trial, after which the jury found him guilty of both charges. The Honorable James W. Johnson, Jr. sentenced the Respondent to confinement for thirty (30) years for murder and five (5) years, consecutive, for possession of a weapon during the commission of a violent crime.

A timely Notice of Appeal was filed on the Respondent's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed the Respondent's conviction and

sentence. State v. Ferguson, Op. No. 4342 (S.C. Ct. App. Filed February 20, 2008). The Respondent subsequently filed a Petition for Rehearing with the Court of Appeals, which was denied by Order dated May 22, 2008. The Respondent then filed a Petition for Writ of Certiorari with the South Carolina Supreme Court, which was denied by Order dated March 5, 2009. The Remittitur was issued on March 11, 2009.

2. The Respondent filed an application for post-conviction relief on June 10, 2009. The Petitioner made its Return on or about October 1, 2009. The Respondent filed an amendment to his application for post-conviction relief on March 5, 2011. An evidentiary hearing into the matter was convened on April 14, 2011 at the Newberry County Courthouse. The Respondent was present at the hearing and was represented by Tricia A. Blanchette, Esquire. The Petitioner was represented by Harrison Brant, Assistant Attorney General and David Spencer, Senior Assistant Attorney General. By Order dated July 5, 2011, the Honorable Eugene C. Griffith, Jr. granted post-conviction relief and remanded the case to the Court of General Sessions for a new trial. Thereafter, the State filed and served notice of appeal. The appeal is presently pending before this Court.

3. The Respondent moves this Court to issue an order releasing him on bond pending the State's appeal. In support of his petition for appeal bond, the Respondent asserts that he has had no disciplinary problems, has taken several rehabilitative classes while incarcerated, has support from members of his community, has the support of the pastor at Easley Charge United Methodist Church, has two children, his mother has agreed to let him live with her, and has a job lined up with a moving company.

4. First, the State asserts the Respondent should be precluded from release on bond pending appeal because the sentence of imprisonment the Respondent received is in excess of ten

(10) years. See S.C. Code Ann. Section 18-1-90 (Supp. 2005) ("bail is not allowed when the defendant has been sentenced to death, life imprisonment, or imprisonment for more than ten years.").

5. However, should this Court consider the request pursuant to Whitener v. State, 225 S.C. 244, 81 S.E.2d 784 (1954), Respondent asks this Court to exercise its discretion to deny the Respondent's petition. Rule 243(k), SCACR, provides that the Respondent's release on bond pending appeal from a post-conviction relief order shall be exercised with caution and only in exceptional circumstances after reviewing factors such as the probability of success on appeal and the relief granted, the seriousness of the crime committed, the danger to the community if the Respondent is released, and the character and circumstances of the Respondent. The State contends that exceptional circumstances do not exist in this case to warrant Respondent's release on bond pending appeal. For the reasons set forth below, the State requests that this Court deny Respondent's petition for release on bond pending appeal.

6. The State asserts it is unlikely the Respondent will prevail once this Court has the opportunity to review the issue on appeal.

First, the PCR court erred by allowing the Respondent to amend his application at the beginning of the evidentiary hearing to include a claim of prosecutorial misconduct when the State only agreed to allow the respondent to amend on the specific issue of whether a Brady or Rule 5, SCRimP, violation had occurred.

Second, the PCR court erred by improperly granting relief based on prosecutorial misconduct for failing to properly conduct and disclose an interview with the Respondent's key witness.

The relevant statutes are Rule 5(a)(1)(C), SCRimP, which requires the prosecution to allow the defendant to inspect or otherwise obtain a copy of any evidence material to the preparation of the defense, or intended for use by the prosecution in chief at trial and 5(a)(2), SCRimP, which provides that 5(a)(1)(c) "does *not* authorize the discovery or inspection of reports, memoranda, or other internal prosecution documents made by the attorney for the prosecution or other prosecution agents." Clearly, Investigator Davenport was an agent for the prosecution, and thus, his notes were not subject to disclosure.

Additionally, a Brady violation occurs when: (1) evidence *favorable* to the accused (2) in the possession of the prosecution (3) was suppressed by the State; (4) and was material to the accused guilt or innocence or was impeaching. Riddle v. Ozmint, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006). Evidence from the Respondent's key witness was clearly inculpatory, not exculpatory. Furthermore, the trial transcript establishes trial counsel knew about the interview where the prior inconsistent statement was made months in advance of trial, and counsel received a copy of the investigator's notes from the interview the morning prior to the key witness's testimony. Moreover, trial counsel testified at the PCR hearing that he spoke with key witness about the interview after it happened.

Third, the PCR court erred by improperly granting relief based on prosecutorial misconduct for blurring the lines between attorney and witness on cross-examination.

The PCR court's Order found the Solicitor "failed to lay the proper foundation before interjection his version of the meeting through cross-examination during which he clearly pitted his credibility against that of Kenae Ferguson (Respondent's key witness)." (Order Granting PCR p. 26). However, the PCR Court sets forth no facts to support this finding. Instead, the trial

transcript supports the conclusion that the Solicitor's cross-examination of Kenae Ferguson laid a proper foundation for the introduction of her prior inconsistent statement.

> Extrinsic evidence of a prior inconsistent statement is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that [she] has made the prior inconsistent statement, extrinsic evidence of such statement is admissible.
>
> Rule 613(b), SCRE

Here, Kenae testified on direct examination that she never saw from where any of the gun shots came. (Tr. p. 484). On cross-examination, the Solicitor asked Kenae whether she remembered meeting with the Solicitor, an investigator, and another officer on April 12, 2005, at about 11:00 at her high school, and she responded affirmatively. (Tr. pp. 493-94). She then testified the she never observed her father shoot at any time. (Tr. pp. 497, 499). The Solicitor then again asked Kenae whether she remember the point in time referenced earlier when she talked with him and an investigator at Hillcrest High School, to which Kenae responded, "Yes." (Tr. pp. 500-501). The Solicitor subsequently asked Kenae whether she recalled saying that after one or two shots she went out to see what was happening, and she stated she did not remember. (Tr. p. 501). The Solicitor then asked whether she told anyone that she saw the victim laying on the ground with the gun beside her, and then, the defendant shot again. She stated that she did not remember, but could not admit or deny whether she made that statement. (Tr. p. 501). Accordingly, a proper foundation was laid, and extrinsic evidence of the statement via Investigator Davenport testimony as to the girl's statement was properly admitted.

Nevertheless, all of this testimony and the issues presented at the PCR hearing were available to the Applicant at trial and on appeal therefrom. Therefore, these issues were not properly before the PCR court.

Lastly, the PCR court erred by not altering or amending its Order pursuant to 59(A), 59 (E), and/or 60(B) SCRCP. The PCR court's Order granted relief on the aforementioned reasons as well as prosecutorial misconduct for failing to place a reply witness on the State's witness list and disclose the witness during jury selection and for failing to honor the sequestration order. These findings of prosecutorial misconduct were based on matters about which the State lacked notice and was not given an opportunity to respond. Accordingly, the PCR Court denied the State a meaningful opportunity to respond to these grounds.

7. As to the other factors for consideration, the Respondent stands convicted of murder, which carries a penalty of thirty (30) years to life in prison, and possession of a weapon during the commission of a violent crime, which carries a penalty of five (5) years. In this case, the State's evidence indicated that Respondent shot Victim after she went to a power pole to turn on her water. (Tr. p. 88, lines 2-3). The Respondent killed Victim by shooting her three (3) times with a .25 automatic pistol. (Tr. p. 88, line 1, lines 17-18). The Victim was not only Respondent's neighbor, but also the grandmother of two of his children. (Tr. p. 109, line 17; p. 94, line 10). The enormity and nature of this most violent offense alone should preclude Respondent's release on bond pending appeal.

8. The Respondent has a fairly extensive prior record, including convictions in General Sessions for Assault of a High and Aggravated Nature (1989) and Criminal Domestic Violence (2001), and convictions in Magistrate's Court for Discharging a Firearm (1984), Resisting Arrest (1989), Simple Assault and Battery (1993), and Discharging a Firearm (1993). (Tr. p. 614, line 10- p. 615, line 4; Tr. p. 617, lines 17-25). The pattern of the offenses committed by the Respondent reveals that the Respondent has engaged in illegal conduct of

increasing severity and of a violent nature and that he will likely commit a violent crime of like nature if released to the community.

9. The Respondent also faces a sentence of thirty (30) years if the appeal by the State is successful or the possibility of facing a life sentence upon re-trial if the State's appeal is not successful. The chance of forfeiture of bail and escape is high in view of the fact Respondent has little to lose by absconding or committing additional offenses.

10. No substantial purpose would be served by the granting of a bond at this point. The Respondent's active assistance is not necessary in his appellate case.

11. Based upon the foregoing, the State requests that this Court deny the Respondent's request for release on bond pending appeal.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

J. RUTLEDGE JOHNSON
Staff Attorney

BY: _____

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR PETITIONER

October 24, 2011.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Laurens County

The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

NATHANIEL K. FERGUSON,

Respondent,

STATE OF SOUTH CAROLINA

Petitioner.

PROOF OF SERVICE

I, CHANDRA E. YOUNG, certify that I have served the Return to Petition for Appeal Bond in on opposing counsel by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Tricia A. Blanchette, Esquire
PO Box 12725
Columbia, SC 29211

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

This 25TH day of October, 2011.

CHANDRA E. YOUNG
Legal Assistant
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ALAN WILSON
ATTORNEY GENERAL

October 27, 2011

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Nathaniel Ferguson v. State of South Carolina

Dear Mr. Shearouse:

Please find enclosed three letters our office received today from family member of the victim in the Post-Conviction Relief appeal listed above. Nathaniel Ferguson petitioned this Court for release on appeal bond. The three letters were forwarded from the family members of the victim in response to the appeal bond request and pursuant to the Victim's Bill of Rights. Please consider the letters as supplementation to the State's opposition to Mr. Ferguson's request to be released on bond pending the Post-Conviction Relief appeal.

By copy of this letter, I am providing the enclosures to opposing counsel.

Sincerely,

Salley W. Elliott
Assistant Deputy Attorney General

SWE/ab

cc: Tricia A. Blanchette, Esquire

To whom it may concern:

I Kimberly M. Wilson daughter of Virgia A. Wilson request that bond be denied for Nathaniel K. Ferguson. My mom has a very loving, strong individual that helped any and everyone she was able to. Murdering her was very senseless on Kens behalf. I live with the fear in my heart of Ken possibly being released because of the abuse that I received up until this tragic event. Ken when being placed in the police cars the day of the murder looked at me and told me that I am next. This your honor I feel that he is going to hold until he is able to actually do what he said and take my life next. Fear of my life to endangerment for my kids life, is something a person should not have to go thru when a man has already done a crime such as murder but wants the chance to

be back on the streets like nothing has even happened. My family is still hurting and missing my mom releasing Ken on bond would only cause more pain. I am requesting from the bottom of my heart that the request for bond be denied.

Thanking you in advance.

Sincerely,

Kinsey Mzlen

To whom it may convern,
Natheniel kennedy Ferguson
should not get a baund to get
out of jail. He should not get out
because he did something wrong
now he has to recieve the
punishment. He should be a
man and own up to what
he did. I feel this way because
I loved my grandmother with
all my heart and him doing
that is like cutting my heart
into piecer. That is why I think
Natheniel Kennedy, Ferguson
should not get a baund and do
his time.

Sincerely,

Kenya Ferguson

To whom it may concern,

I feel that my brother, Daniel Kennedy Ferguson should not be granted bond. He committed a crime and should serve his time. He took the life of my grandmother, and he deserves all the time he can get. Granting his bond will only give him a chance to hurt me and my family. I want my nana to rest in peace, and I want justice to be served. The only way that will happen is if he serves all of his time. With this being said your honor please deny his bond.

-Kynidei Ferguson

ALAN WILSON
ATTORNEY GENERAL

October 25, 2011

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: **Nathaniel K. Ferguson v. State of South Carolina**
2009-CP-30-0725

Dear Mr. Shearouse:

I am enclosing the original and six (6) copies of the Return to Petition for Appeal Bond in the above case.

Sincerely,

J. Rutledge Johnson
Assistant Attorney General

JRJ:cey
Enclosures

cc: Tricia A. Blanchette, Esquire
Trisha Allen, Victim Services

LAW OFFICE OF TRICIA A. BLANCHETTE

October 17, 2011
VIA HAND DELIVERY

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: Nathaniel Ferguson v. State

Dear Sir:

For filing, attached please find an original and six copies of a Petition for Appeal Bond, with a Certificate of Service. In support of this Petition, also please find an original and six copies of sixteen attachments.

Thank you for your assistance with this matter. Please contact my office with any questions.

Yours truly,

Tricia A. Blanchette
Attorney at Law

cc: Harrison Brant, Assistant Attorney General
Nathaniel Ferguson

PO Box 12725 | Columbia SC 29211

p: 803.988.0008 | **f:** 803.988.8070 | **e:** blanchettelaw@gmail.com

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

September 7, 2011

Assistant Attorney General Harrison D. Brant
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Tricia A. Blanchette, Esquire
Law Office of Tricia A. Blanchette, LLC
P.O. Box 12725
Columbia, SC 29211

Re: Ferguson, Nathaniel K. Jr. v. The STATE

Dear Counsel:

We have received a Notice of Appeal from each of you in the above entitled matter. Unless notified by you to the contrary, these appeals will be consolidated for consideration by the Court under the South Carolina Appellate Court Rules, and we anticipate receiving only one appendix.

When appeals are consolidated, the party filing the first Notice of Appeal, State of South Carolina, has been designated as the Petitioner/Respondent and the party filing the second Notice of Appeal, Nathaniel K. Ferguson, has been designated as the Respondent/Petitioner.

Please notify this Court upon receipt of the trial transcript from the Court Reporter. Each party is allowed to serve and file a Petition for Writ of Certiorari and Return as provided for in Rule 227 of the South Carolina Appellate Court Rules.

Very truly yours,

CLERK

DES/jj

cc: Appellate Defense

LAW OFFICE OF TRICIA A. BLANCHETTE

September 6, 2011
VIA HAND DELIVERY

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: Nathaniel Ferguson v. State

Dear Sir:

Pursuant to Rule 203(c), SCACR, enclosed for filing is a Notice of Cross-Appeal for the above case. Also enclosed are the following:

(1) Proof of service on the Petitioner-Respondent.

(2) A copy of the Order Granting Application for Post Conviction Relief and Order Denying Motion to Reconsider.

Thank you for your assistance with this matter. Please contact my office with any questions.

Yours truly,

Tricia A. Blanchette
Attorney at Law

cc: Harrison Brant, Assistant Attorney General
Nathaniel Ferguson

PO Box 12725 | Columbia SC 29211

p: 803.988.0008 | **f:** 803.988.8070 | **e:** blanchettelaw@gmail.com

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
SEP - 6 2011
S.C. Supreme Court

APPEAL FROM LAURENS COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Case No.: 2009-CP-30-0725

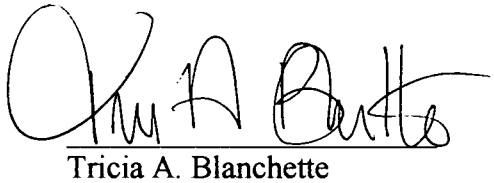
Nathaniel Ferguson,.....Respondent-Petitioner,

vs.

State of South Carolina,.....Petitioner-Respondent.

NOTICE OF CROSS-APPEAL

Nathaniel Ferguson cross-appeals the Order Granting Application for Post Conviction Relief, which was signed by the Honorable Eugene C. Griffith, Jr., on July 5, 2011 and filed on July 6, 2011. On August 2, 2011, the Honorable Eugene C. Griffith, Jr., issued an Order Denying Motion to Reconsider, which was filed on August 4, 2011. Nathaniel Ferguson, through counsel, received notice of the Order Denying Motion to Reconsider on August 8, 2011.



Tricia A. Blanchette
PO Box 12725
Columbia, SC 29211
(803) 988-0008

Other Counsel of Record:

Harrison D. Brant
Assistant Attorney General
PO Box 11549
Columbia, SC 29211

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LAURENS COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Case No.: 2009-CP-30-0725

Nathaniel Ferguson,.....Respondent-Petitioner,

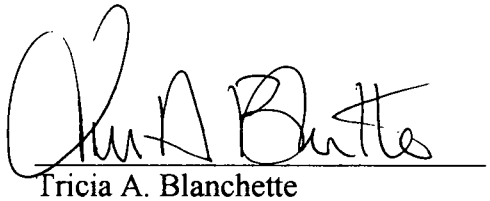
vs.

State of South Carolina,.....Petitioner-Respondent.

CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney for the Respondent-Petitioner, hereby certify that I placed in the mail this 6th day of September 2011, a copy of a Notice of Cross-Appeal to Harrison D. Brant of the Attorney General's Office, at:

Office of the Attorney General
ATT: Harrison D. Brant, Ast. AG
PO Box 11549
Columbia, SC 29211



Tricia A. Blanchette
PO Box 12725
Columbia, SC 29211
(803) 988-0008

September 6, 2011

FORM 4

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

Nathaniel Ferguson, # 310367,

PLAINTIFF(S)

JUDGMENT IN A CIVIL CASE

CASE NO. 2009 CP- 30 - 725

State of South Carolina,

DEFENDANT(S)

CHECK ONE:

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____.

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____.

IT IS ORDERED AND ADJUDGED: ☑ See attached order; ☐ Statement of Judgment by the Court:

Order Denying Motion to Reconsider

Dated at _____, South Carolina, this _____ day of _____, 20_____.

PRESIDING JUDGE

This judgment was entered on the 4th day of August, 20 11, and a copy mailed first class this 4th day of August, 20 11 to attorneys of record or to parties (when appearing pro se) as follows:

Tricia A. Blanchette, Esq.

ATTORNEY(S) FOR THE PLAINTIFF(S)

Harrison D. Brant, Esq.
Assistant Attorney General

ATTORNEY(S) FOR THE DEFENDANT(S)

Lynn H. Lancaster
CLERK OF COURT

SCRCP FORM 4 (Revised 5/00)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	LYNN W. LANCASTER
COUNTY OF LAURENS	)	Case No. 2009-CP-30-725
		11 AUG -4 P 1:20
Nathaniel Ferguson, #310367,	)	
	)	
Plaintiff,	)	LAURENS COUNTY CLERK OF COURT ORDER DENYING MOTION TO RECONSIDER
	)	
v.	)	
	)	
State of South Carolina	)	
	)	
Defendant.	)	
	)	

A TRUE COPY OF ORIGINAL
Lynn W. Lancaster
Lynn W. Lancaster
Laurens County CCCP & GS

This matter comes before the Court upon motion of Harrison D. Brant, attorney for the State of South Carolina to Alter, Amend or Reconsider under Rule 59(e), SCRCP, the final order issued July 5, 2011. The motion is respectfully denied.

IT IS SO ORDERED.

Eugene C. Griffith, Jr.

August 2nd, 2011
Newberry, South Carolina

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LAURENS	)	EIGHTH JUDICIAL CIRCUIT
	)	
Nathaniel K. Ferguson, Jr., 310367,	)	2009-CP-30-725
	)	
v.	)	ORDER GRANTING APPLICATION
	)	FOR POST CONVICTION RELIEF
State of South Carolina,	)	
Respondent.	)	
	)	

PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post Conviction Relief filed on June 10, 2009. The State submitted a Return on or about October 1, 2009. The Applicant, through counsel, submitted an Amendment to Application for Post Conviction Relief on March 25, 2011, which added the following specific allegations:

1. Ineffective assistance of trial counsel for failure to prepare and investigate prior to trial.

2. Ineffective assistance of trial counsel for failure to utilize witnesses on the Applicant's behalf.

3. Ineffective assistance of trial counsel for failure to ensure that the Applicant had full knowledge and understanding when he rejected the plea offered by the State.

4. Ineffective assistance of trial counsel for failure to properly investigate and address the interview of Kenae Ferguson at school. Failure to object to improper impeachment and a violation of the confrontation clause during the cross examination of Kenae Ferguson.

5. Ineffective assistance of trial counsel for failure to present argument on the oral statement purportedly given to Officer Cutting at the scene during the Jackson v. Denno hearing.

6. Ineffective assistance of trial counsel for failure to properly advise and/or utilize the Applicant as a witness during the Jackson v. Denno hearing and/or trial.

SCDJ

7. Ineffective assistance of trial counsel for failure to further impeach the testimony of Kim Wilson.

8. Ineffective assistance of trial counsel for the failure to effectively utilize testimony, exhibits, and case law in the areas of self-defense, defense of others and voluntary manslaughter. Specifically, but not limited to the following:

    a. Failure to present evidence of character and prior difficulties. See State v. Day, 341 S.C. 410, 535 S.E.2d 431 (2000), State v. Hill, 129 S.C. 166, 123 S.E.817 (1924).

    b. Failure to address fear in relation to voluntary manslaughter. See State v. Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010).

    c. Failure to properly address the victim's toxicology results and the Applicant's knowledge of her prescription drug usage. See State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998).

    d. Failure to request a self-defense instruction that was narrowly tailored to the facts of the Applicant's case. See State v. Day, 341 S.C. 410, 535 S.E.2d 431 (2000). Specifically but not limited to instructions on fear, prior difficulty, duty to wait, and good character. See State v. Hill, 129 S.C. 166, 123 S.E. 817 (1924), State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997), State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989).

9. Ineffective assistance of trial counsel for failure to address the trial court's failure to utilize the proper analysis and/or standard in denying the Applicant's motion for mistrial. Transcript pp. 213-215.

10. Ineffective assistance of trial counsel for failure to object to the trial court's jury instructions. Specifically, but not limited to the following:

    a. Failure to object to the malice instruction at issue in State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). Transcript p. 595.

    b. Failure to object to burden shifting in the court's self defense instruction. Transcript p. 602.

11. Ineffective assistance of appellate counsel for failure to properly raise all meritorious issues on appeal. Specifically, but not limited to the following:

    a. Failure to address the issue involving the interview of Kenae Ferguson at her school.

SEH

b. Failure to address the standard applied by the trial court in denying the Applicant's motion for a mistrial.

An evidentiary hearing into the matter was held on April 14, 2011 at the Newberry County Courthouse in front of the Honorable Eugene C. Griffith, Jr. The Applicant was present at the hearing and was represented by Tricia A. Blanchette, Esquire. The Respondent was represented by Harrison Brant, Assistant Attorney General, and David Spencer, Senior Assistant Attorney General.

At the beginning of the evidentiary hearing, Applicant's counsel explained the testimony may also establish prosecutorial misconduct as to the issue raised in the Amendment regarding Kanae Ferguson. The State consented to this verbal amendment. During the evidentiary hearing, Applicant's counsel called Kent Jones and Chip Price, Esquire, to the stand. The Applicant also testified on his own behalf. Applicant's counsel admitted twelve exhibits and provided the Court and the State a copy of the following cases: Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998), Kolle v. State, 386 S.C. 578, 690 S.E.2d 73 (2010), State v. Bottoms, 260 S.C. 187, 195 S.E.2d 116 (1973), State v. Sierra, 337 S.C. 368, 523 S.E.2d 187 (Ct. App. 1999), Riddle v. Ozmint, 369 S.C. 39, 631 S.E.2d 70 (2006), State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998), State v. Day, 341 S.C. 410, 535 S.E2d 431 (2000), State v. Hill, 129 S.C. 166, 123 S.E. 817 (1924), State v. Jackson, 384 S.C. 29, 681 S.E.2d 17 (Ct. App. 2009), State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997), State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989), State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). This Court also had before it a copy of the Application, the Respondent's Return, the Applicant's Amendments, the records of the Laurens County Clerk of Court concerning the subject

conviction, and the Applicant's records from the South Carolina Department of Corrections.

The Applicant is presently confined in the South Department of Corrections pursuant to orders of commitment from the Laurens County Clerk of Court. The Applicant was indicted for Murder and Possession of a Weapon During the Commission of a Violent Crime (2004-GS-30-628) during the July 2004 term of the Laurens County Grand Jury.

On July 20, 2005, the Applicant proceeded to trial in front of the Honorable James W. Johnson. The Applicant was represented by Chip Price, Esquire. The jury found the Applicant guilty as indicted. The Honorable James W. Johnson sentenced the Applicant to a term of thirty (30) years for Murder and five (5) years consecutive for Possession of a Weapon During the Commission of a Violent Crime.

A timely Notice of Appeal was filed, and an appeal was perfected by the Office of Appellate Defense. On February 20, 2008, the South Carolina Court of Appeals affirmed the Applicant's conviction and sentence. State v. Ferguson, Op. No. 4342 (S.C. Ct. App. filed February 20, 2008). Robert M. Dudek, Deputy Chief Attorney for Capital Appeals, filed a Petition for Rehearing with the Court of Appeals, which was denied by Order dated May 22, 2008. A Petition for Writ of Certiorari was filed with the South Carolina Supreme Court, which was denied by Order dated March 5, 2009. The Remittitur was issued on March 11, 2009.

APPLICABLE LAW

In a PCR Action, the "burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP).

For the Applicant to meet his burden of proof and prevail on his allegations of ineffective assistance of trial or appellate counsel, the two-prong test applicable to such a claim must be met. See Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2065 (1984). The first prong analyzes whether counsel failed to render reasonably effective assistance under the prevailing professional norms. Id. The second prong places the burden on the applicant to show that but for counsel's deficient performance the outcome would have been different. Id. The second prong is known as the "prejudice" requirement. This requirement is met if counsel's actions or inactions resulted in prejudice to the Petitioner. See Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 539 (1995).

SUMMARY OF TESTIMONY AND EVIDENCE PRESENTED AT POST CONVICTION RELIEF HEARING

A. Testimony of Nathaniel Ferguson

When the Applicant took the stand, he acknowledged that he had filed the present Application alleging ineffective assistance of trial and appellate counsel and requesting a new trial. The Applicant testified that he was arrested on May 13, 2004, and he retained Chip Price, Esquire, shortly after his arrest. The Applicant recalled meeting with trial counsel around ten times and reviewing the discovery documents. The Applicant specifically recalled raising concerns about the photos contained in the discovery, and the Applicant identified and PCR counsel introduced a map and photo to explain his

concerns. Applicant's Exhibit #1 & 2. The Applicant explained that his attorney spoke with some but not all of his potential witnesses, and the Applicant identified and PCR counsel introduced a copy of the trial witness list. Applicant's Exhibit #3. The Applicant testified that the trial strategy was self-defense and counsel had obtained a crime scene expert and psychologist. The Applicant explained that he did not meet with either expert even though the psychologist testified at trial.

Regarding plea offers, the Applicant recalled an offer for manslaughter, which carried a twenty year cap. The Applicant explained that he did not fully understand the elements of murder and manslaughter when he chose to reject the plea offer. The Applicant also explained that he lacked the knowledge and understanding needed to properly consider the plea offer.

Turning to trial, the Applicant was not sure if counsel filed any pre-trial motions, but he noted that his trial began with a Jackson v. Denno hearing. Referencing the transcript, the Applicant noted that Officer Cutting took the stand during the Jackson v. Denno hearing and explained that he was dispatched and arrived at the scene. Transcript p. 25-27. Officer Cutting testified that he found the Applicant standing on the hedgerow, and the Applicant provided him with both guns and stated "I'm the one that did the shooting." Transcript p. 27, lns 13-23. The Applicant explained that he was very surprised by Officer Cutting's testimony since he did not make that statement and he had no notice that the officer was going to testify to it.

Continuing with the Jackson v. Denno hearing, the Applicant pointed out that Lt. Wakeland testified that he arrived after Officer Cutting, and he did not hear the purported conversation. Transcript pp. 36-38. When Lt. Bolt took the stand, he testified that he

arrived after about twenty minutes, he got the Applicant out of the patrol car and the Applicant was very cooperative. Transcript pp. 44-46. Lt. Bolt specifically testified that he asked the Applicant if he needed a lawyer to which he responded that "he needed to talk about it." Transcript p. 46, lns 21-24. He also testified that the Applicant informed him that the victim's gun clicked. Transcript p. 50, lns 18-19. Lt. Bolt testified about obtaining two written statements from the Applicant, and he acknowledged on cross-examination that his report did not include the verbal statement. Transcript pp. 58, 66, 69, lns 11-14. In light of Lt. Bolt's testimony, the Applicant explained that he asked him to check the victim's gun. The Applicant identified and counsel introduced pictures of the victim's gun and a diagram. Applicant's Exhibits #4 & 5. The Applicant was not sure why he was not called as a witness at the Jackson v. Denno hearing, but he noted that his attorney argued that he did not receive notice of the verbal statements despite his specific request for all statements. Transcript pp. 72-74. In response, the trial court suppressed the verbal statement purportedly given to Lt. Bolt but allowed the statement given to Officer Cutting as an excited utterance. Transcript p. 74.

While on the stand, the Applicant identified and counsel introduced his two written statements. Applicant's Exhibit #6 & 7. The Applicant pointed out that his statement included the fact that he was speaking with his mother on the phone right before the incident took place and his statements referenced Kent Jones. The Applicant explained that Kent Jones' home was in close proximity to the incident location and Kent Jones had experienced prior difficulty with the victim. The Applicant further explained that he requested that counsel speak with Kent Jones and utilize him as a witness at trial.

The Applicant acknowledged that Kent Jones was on the defense witness list, but he did not know why he was not called at trial.

When asked, the Applicant testified that he had been involved with Kim Wilson, the victim's daughter, for a number of years and had split up with her shortly before the incident at issue. He explained that Kim Wilson ("Kim") testified at trial, and he identified and counsel introduced a copy of her written statement. Applicant's Exhibit #8. The Applicant further explained that the State introduced Kim's statement and asked her about several inconsistencies. Transcript pp. 169-170. On cross-examination, trial counsel asked Kim about her location during the shooting, and she responded that she saw the first shot through the window, the second shot while on the porch, and she did not see the third shot. Transcript pp. 180-181, 181, ln 12, 182, ln 20. The Applicant noted that trial counsel failed to ask her about her written statement which indicated that she was on the porch during the entire shooting. The Applicant also noted that trial counsel failed to question Kim about the inconsistencies between her statement and her testimony regarding the victim being armed.

Continuing with the testimony of Kim Wilson, the Applicant explained that the only issue raised on appeal was the court's failure to grant a mistrial after Kim's testimony regarding an alleged threat. During redirect, Kim testified that "He looked at me and told me that I was next." Transcript p. 198, lns 4-5. Immediately, thereafter, trial counsel moved to strike the absurd statement since he received no notice. Transcript p. 198, lns 6-8. In response, the State indicated that trial counsel had been informed about the statement, and trial counsel countered that he had not received notice and requested a mistrial. Transcript pp. 198-99. The trial court sustained counsel's objection finding that

Kim's testimony was not responsive to the question presented on redirect. Transcript pp. 206, 207, lns 7-13. After making this ruling, the court expressed concern with whether a curative instruction was sufficient and if the jury could erase the alleged threat from their minds. Transcript p. 207, lns 10-13, 19-25. After a lunch break, the court concluded that the answer would have been proper if the question was asked correctly, and he denied the request for a mistrial and gave a curative instruction. Transcript pp. 213, 216-17. The Applicant noted that the State indicated that they did not plan to ask the question correctly. Transcript p. 215. The Applicant also noted that the court failed to conduct a prejudice analysis and trial counsel did not bring the failure to the court's attention.

After addressing the testimony of Kim Wilson and the alleged threat, the Applicant explained that his daughter Kanae Ferguson ("Kanae") was present during the incident at issue and provided a statement to law enforcement. Applicant's Exhibit #9. Turning to the transcript, the Applicant noted that the Solicitor asked Kanae about inconsistencies with her statement and he asked her about a prior meeting at her high school. Transcript p. 493, lns 17-20. After Kanae acknowledged the meeting, the Solicitor stated that he went to her high school and met with her on April 12th, and he proceeded to ask her specific questions about that meeting. Transcript pp. 493, 500. On redirect, Kanae explained that she was hauled out of her high school class with no notice to her or her parents. Transcript pp. 506-7. When the defense rested, the State requested to call Investigator Davenport as a reply witness, and trial counsel objected due to a violation of the sequestration order and lack of notice. Transcript pp. 511-13. Following argument from both sides, the court indicated a concern as a parent, found a technical

violation of the sequestration order but ruled that Investigator Davenport would be allowed to testify in reply. Transcript pp. 515-16.

Relying upon the transcript, the Applicant highlighted Investigator Davenport's testimony, which directly impeached the testimony of Kanae Ferguson. Specifically, Investigator Davenport testified that Kanae indicated that she could not see what was in the victim's hand and that the Applicant shot the victim after she was on the ground. Transcript pp. 518, 520, lns 4-6. The Applicant testified that it was clear that this testimony had a prejudicial effect on the jury since they requested a copy of the statement, which did not exist, during deliberations. Transcript p. 608. The Applicant explained that Kanae was the key witness to help establish his self-defense claim and if he would have known about the school interview and purported statement it would have been a major factor in trial preparation. He also explained that he did not know that the Solicitor could utilize cross-examination to testify about his memory of the meeting with Kanae and that he could impeach Kanae even after she admitted making the statement at issue.

The Applicant candidly admitted that he chose to not testify, but he made his decision based upon the advice of his trial counsel. He explained that his decision was made without full knowledge of the State's case since the State failed to give his attorney notice of key evidence that was used against him at trial. The Applicant noted that his statements were introduced, but he explained that his statements did not provide the full picture of the facts to the jury. Thereafter, the Applicant testified to a detailed account of the facts surrounding the incident at issue.

Even though the Applicant did not testify, he explained that the primary strategy at trial was to establish that he was acting in self-defense or in defense of others (his children). The Applicant highlighted the testimony of several trial witnesses, which had a bearing on his claim of self-defense or defense of others. The Applicant pointed out that the State called Gary Bryson to testify about driving by and seeing the shooting at issue. Transcript p. 220. The Applicant noted that Gary Bryson errantly testified that both of the Applicant's children were outside during the shooting. Transcript pp. 223-24. The Applicant also noted that the State called Agent Shacker and Dr. Sexton that both testified about the prescription drugs in the victim's system and how such drugs would affect her inhibitions and coordination. Transcript pp. 263-4, 440-42. The Applicant identified and counsel introduced a SLED report, which contained the victim's toxicology results. Applicant's Exhibit #11. As to defense witnesses, the Applicant explained that Dr. Horne was utilized as an expert witness and testified regarding the scientific phenomenon of fight vs. flight. Transcript p. 461. The Applicant acknowledged that the State questioned Dr. Horne about his failure to meet with the Applicant, and the Applicant explained that he did not know why he did not meet with Dr. Horne prior to trial. Transcript p. 464. The Applicant highlighted his daughter's testimony and explained that her testimony was vital to his defense since she was an eyewitness to the events that lead to the shooting at issue. Transcript pp. 477, 481, 483. The Applicant also explained that his mother testified about the call she had received from Kim Wilson and the warning she had given him over the phone immediately before the shooting. Transcript p. 510.

Through extensive testimony, the Applicant alleged that trial counsel failed to effectively utilize testimony, exhibits, and case law in the areas of self-defense, defense of others, and voluntary manslaughter. The Applicant testified to and provided examples of how trial counsel failed to present evidence of character and prior difficulties pursuant State v. Day, 341 S.C. 410, 535 S.E.2d 431 (2000) and State v. Hill, 129 S.C. 166, 123 S.E.817 (1924), failed to address fear in relation to voluntary manslaughter pursuant to State v. Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010), and failed to address the victim's toxicology results and the Applicant's knowledge of her prescription drug usage pursuant to State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998). The Applicant also testified that trial counsel requested a defense of others jury instruction, but he explained that trial counsel failed to properly establish the defense at trial.

As to closing arguments, the Applicant noted that trial counsel informed the jury that the Applicant had no problems with the victim in the ten years prior to the shooting. Transcript p. 549. The Applicant testified that this point was reiterated by the State in closing arguments, and the State argued that the Applicant could have gone to the home of Kent Jones to get away. Transcript pp. 558, 571. The Applicant made it clear that trial counsel's argument was in complete contradiction to the information he had given trial counsel about prior difficulties he and Kent Jones had experienced with the victim. The Applicant also noted that the State's reference to Kent Jones demonstrated why he was needed at trial.

Turning to the jury instructions, the Applicant identified and counsel introduced a copy of written jury charges, and the Applicant explained that all the discussions regarding jury requests were held in chambers. Applicant's Exhibit #12. Through

detailed testimony, the Applicant alleged that trial counsel failed to request a self-defense instruction that was narrowly tailored to the facts of the Applicant's case pursuant to State v. Day, 341 S.C. 410, 535 S.E.2d 431 (2000). The Applicant also highlighted the malice instruction given by the court and testified that trial counsel failed to object as was done in State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). Transcript p. 595. The Applicant also testified that trial counsel should have objected when the trial court improperly shifted the burden during the self-defense instruction. Transcript p. 602, lns 9-15.

Finally, the Applicant explained that he was alleging ineffective assistance of appellate counsel in relation to the brief submitted by Robert M. Dudek of the Office of Appellate Defense. In support of his allegation, PCR counsel provided the Court and the State a copy of Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). The Applicant testified that appellate counsel failed to raise any issues stemming from Kanae's trial testimony. The Applicant also explained that appellate counsel submitted an argument regarding the trial court's denial of a mistrial, which did not address the trial court's failure to address prejudice.

B. Testimony of Kent Jones

When Kent Jones was called to the stand, he confirmed that he was under subpoena and was a relative of the victim. Mr. Jones explained that his home was located adjacent to the mobile homes where the shooting took place, and he further explained that he shared a driveway with the victim. He recalled that Chip Price came to his house and met with him prior to the Applicant's trial. He further recalled playing one or two phone messages for Mr. Price that he had received from the Applicant on the day in question.

He remembered being able to hear Kim Wilson and the Applicant "fussing" on one message. He could not remember speaking with anyone from the Solicitor's Office. He confirmed that the Applicant and his children had used his shower due to the situation with the water. He testified that he was not in fear of the victim, but he did have to call the cops over an issue with their shared driveway. He acknowledged that the Applicant had experienced prior difficulty with the victim, but he never knew the Applicant to resort to violence. He explained that he was not in fear of the Applicant. When asked, he stated that he did not have any firsthand knowledge of the victim's prescription drug use.

C. Testimony of Chip Price, Esquire

When Chip Price, Esquire, took the stand, he explained that he had practiced law for thirty-five years, primarily in the area of criminal law. He recalled being retained by the Applicant and meeting with him at the detention center. He acknowledged that he did not hire a private investigator, but he did retain two experts. He explained that one expert, Dr. Horne, testified at trial, and he did not meet with the Applicant since he testified to a theory not the specifics of the Applicant's case. He explained that he filed very specific discovery motions, but the State failed to give him notice of major trial matters. He recalled receiving discovery from the Solicitor's Office, but he clearly recalled the trial being an ambush of non-disclosed information from the Solicitor's Office.

Mr. Price acknowledged that he had heard the testimony of Kent Jones earlier from the stand, and he confirmed that he met with Mr. Jones at this home. Mr. Price explained that he choose not to call Kent Jones due to the recorded message(s) and his concerns regarding those message(s). Mr. Price recalled listening to the message or

messages with Mr. Jones, but PCR counsel's objection was sustained when the State repeatedly asked Mr. Price about the specific contents of the message(s). Looking back, Mr. Price explained that it would have been helpful to call Kent Jones as a witness.

Regarding the plea offer, Mr. Price explained that he should have "leaned" on the Applicant harder to take the plea. He further explained that the Applicant relied upon his advice in deciding to reject the plea offer and he should have advised him better. He also explained that he had no idea about the surprises that were in store at trial when he advised the Applicant to reject the plea offer. Mr. Price stated that the Solicitor ambushed him with the verbal statement attributed to the Applicant, the undisclosed meeting with Kanae Ferguson, the testimony of Kim Wilson regarding a threat, and the investigator's reply testimony.

As to the Jackson v. Denno hearing, Mr. Price recalled filing discovery motions requesting any statements attributed to the Applicant, and he was surprised by the verbal statements attributed to the Applicant by the officers. Mr. Price questioned his decision to rely upon the Applicant's statements instead of calling him as a witness in order to establish the primary defense theory of self-defense. Without his testimony, Mr. Price acknowledged that there was no evidence of prior difficulties, and he truly questioned whether he was ineffective and too rigid with his trial strategy. Mr. Price was adamant that he was in error when he stated in closing that the Applicant experienced no prior problems with the victim, and he testified that he should have more fully explored prior difficulties and his failure to do so may have kept the court from charging it to the jury.

Regarding the victim, Mr. Price readily admitted that he should have fully addressed the victim's character at trial. He did recall addressing her toxicology results

through the state's witnesses. He admitted that he should have located witnesses to address her character because without any evidence of her character he had no basis to request a jury instruction on it.

Turning to the trial testimony of Kim Wilson, Mr. Price admitted that he failed to use Kim Wilson's statement to impeach her even after the State had introduced it and pointed out inconsistencies during her direct testimony. Despite filing specific discovery motions, Mr. Price explained that he had no notice of the statement or threat she testified that she received from the Applicant. When asked about his motion for a mistrial, Mr. Price admitted that he should have specifically requested that the trial court address the prejudice prong.

Mr. Price explained that Kanae Ferguson was the key witness for the defense since he advised the Applicant to not take the stand. He explained that the Solicitor provided him with no notice prior to trial of his meeting with Kanae at her high school, but he may have been told about it by her mother. He admitted that he should have objected when the Solicitor asked her about the meeting and impeached her through his recollection of the meeting. He was adamant that he was in error for failing to object, but he explained that he was utterly ambushed by the Solicitor. He explained that Investigator Davenport was not on the witness list, was not conveyed as a witness to the jury, and was present in the courtroom for every witness except Kanae. Mr. Price testified that he vehemently objected to the State calling Investigator Davenport in reply, and the court found that the sequestration order had been violated by the State. Yet, Mr. Price explained that Investigator Davenport was allowed to testify as a reply witness, and he perceived that the jury was greatly influenced by his testimony. He recalled the jury

asking for a copy of Kanae's statement from the high school meeting, and he remembered knowing that the jury was strongly considering that interview during their deliberations. Transcript p. 608. When asked about the direct appeal, he indicated that he was shocked to hear that nothing was raised on appeal regarding the impeachment of Kanae and the reply testimony of Investigator Davenport.

Turning to the jury instructions, Mr. Price recalled that the trial court gave a "standard" self-defense instruction mostly impart because he did not ask for more. He admitted that he did not ask for a narrowly tailored self-defense instruction, he did not ask for an instruction on fear, and he failed to put any evidence in the record to have a legitimate request for an instruction on character. As to the malice instruction, Mr. Price indicated that he was familiar with State v. Belcher, and he readily admitted that he should have objected to the malice instruction. Transcript p. 595.

Mr. Price made it clear that he stayed too locked into his trial theory and/or strategy. He explained that he worked hard, but he was too rigid. When asked about the Solicitor's conduct, Mr. Price said he was completely ambushed and the Solicitor failed to comply with the standards set forth in Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555 (1995).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the entire record and has heard the testimony and arguments as presented at the hearing. This Court has also had the opportunity to observe each witness and pass upon his or her credibility. This Court has weighed the testimony accordingly. This Court finds the testimony of the Applicant,

Kent Jones, and Chip Price, Esquire, to be credible. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

A. Ineffective Assistance of Trial Counsel

Based upon the testimony, exhibits and arguments presented at the evidentiary hearing, this Court finds that trial counsel did not fail to render reasonably effective assistance under the prevailing professional norms since he properly prepared and investigated the Applicant's case prior to trial. In Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008), the Supreme Court of South Carolina reversed the lower court and granted PCR relief when counsel failed to conduct a reasonable investigation. The Court held that a reasonable investigation includes interviewing witnesses and conducting an independent investigation of the facts of the case. Lounds, 380 S.C. at 460, 670 S.E.2d at 649, See Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007). Even though trial counsel did not utilize a private investigator, this Court finds that counsel diligently investigated and prepared the case prior to trial, and this Court finds that the Applicant's testimony does not refute such a finding. Since this Court finds that trial counsel conducted a reasonable investigation and preparation of the Applicant's case, it is not necessary to analyze if the Applicant suffered prejudice on this claim.

The Applicant has claimed that trial counsel was ineffective for failure to ensure that the Applicant had full knowledge and understanding when he rejected the plea offered by the State. See Kolle v. State, 386 S.C. 578, 690 S.E.2d 73 (2010) (Finding counsel ineffective for advising defendant to reject the plea offered by the State.). While on the stand, the Applicant explained that he did not have a full understanding of the State's case against him, he did not understand the elements of manslaughter and murder

nor did he fully understand the elements of self-defense when he rejected the plea offer. On the contrary, trial counsel testified that he explained the discovery he received and explained the applicable laws to the Applicant, but he regretted not pressuring the Applicant to take the plea. He explained that he was ambushed with major evidentiary issues at trial, which are discussed in detail below, and if he would have known the extent of the withheld evidence he would advised the Applicant to take the plea. This Court finds that trial counsel cannot be held accountable for evidentiary issues that were not disclosed by the Solicitor. This Court further finds that trial counsel rendered reasonably effective assistance in advising the Applicant based upon the information he was provided by the State; therefore, this claim must fail.

The Applicant has also claimed that trial counsel was ineffective for failing to utilize witnesses on his behalf, and the Applicant called Kent Jones to testify at the evidentiary hearing. In Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1999), the South Carolina Supreme Court addressed whether trial counsel was ineffective for failing to call a witness at trial. The Court reasoned as follows:

> This Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998)(applicant established prejudice where nurse's notes presented at PCR hearing corroborated lack of penetration in sexual assault case); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995)(where witnesses applicant claimed could have provided an alibi defense did not testify at the PCR hearing, he could not establish any prejudice from counsel's failure to contact these witnesses); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992) (where applicant did not offer witnesses at PCR hearing but merely alleged they would have provided him with alibi defense and testified victims had recanted their trial testimony, he failed to establish prejudice); see also Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998) (applicant failed to establish prejudice from counsel's failure to investigate criminal backgrounds of

> victims and witnesses where he failed to substantiate at PCR hearing that victims and witnesses had criminal records). "The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice." Glover v. State, supra, S.C. at 498-99, S.E.2d at 540.

Bannister, 333 S.C. at 303, 509 S.E.2d at 809. At the evidentiary hearing, trial counsel concluded that he should have called Kent Jones as a witness, but trial counsel based this conclusion on the outcome of the trial. Trial counsel also testified that he met with Kent Jones and chose to not call him as a witness due to concerns over phone messages he received from the Applicant. This Court finds that trial counsel made an informed and valid decision to not utilize the testimony of Kent Jones. Therefore, this claim does not rise to the level of ineffective assistance of counsel and must fail.

Regarding the Jackson v. Denno hearing, the Applicant made the following claims:

1. Ineffective assistance of trial counsel for failure to present argument on the oral statement purportedly given to Officer Cutting at the scene during the Jackson v. Denno hearing.

2. Ineffective assistance of trial counsel for failure to properly advise and/or utilize the Applicant as a witness during the Jackson v. Denno hearing and/or trial.

At the evidentiary hearing, the Applicant testified in support of these claims. When asked, trial counsel explained that he received no notice from the State regarding the verbal statements attributed to the Applicant during the hearing, and he was successful in suppressing one of the statements. Again, this Court cannot find counsel ineffective when he filed specific discovery motions on which the State failed to comply.

The Applicant has also alleged and explained that trial counsel was ineffective for failing to utilize him as a witness at the Jackson v. Denno hearing and at trial. While on

the stand, the Applicant provided a detailed account of the events in question and explained that he relied upon counsel's advice that his statements provided a sufficient account of his version of events. In response, Mr. Price explained that he did not call the Applicant as a witness at the Jackson v. Denno hearing because he did not have notice of the verbal statements. He explained that he questioned his decision to rely upon the Applicant's statements instead of calling him as a witness in order to establish the primary defense theory of self-defense. Without his testimony, Mr. Price acknowledged that there was no evidence of prior difficulties, and he truly questioned whether he was ineffective and too rigid with his trial strategy. This Court finds that trial counsel made a decision to not utilize the Applicant as a witness based upon the information that was provided by the State prior to trial. It appears that trial counsel would have made a different decision if he had been the recipient of full disclosure. As was stated by trial counsel, the Applicant was subjected to trial by ambush. As a result, this Court cannot find trial counsel ineffective for choosing to not call the Applicant as a witness at the Jackson v. Denno hearing or at trial; therefore, this claim must fail.

Regarding the trial testimony of Kim Wilson, the Applicant has claimed that trial counsel was ineffective for failing for further impeach Kim Wilson and for failing to address the court's analysis of the motion for a mistrial. While on the stand, the Applicant addressed these claims, which were not refuted by trial counsel's testimony. Trial counsel readily admitted that he failed to use Kim's statement to impeach her despite the State introducing it on direct and pointing out several inconsistencies. Counsel explained that he was not given notice of the alleged threat testified to by Kim Wilson, so he immediately moved to strike it and requested a mistrial. When asked about

the trial court's analysis of his motion for a mistrial, Mr. Price agreed that he failed to request that the court specifically rule on prejudice. Despite counsel's acknowledgement of his failure, this court finds that such failure is reasonable under prevailing professional norms. The record establishes that trial counsel thoroughly cross-examined Kim Wilson and his cross-examination was not rendered ineffective due to his failure to utilize her statement. Counsel made it clear that he received absolutely no notice of the alleged threat and he tried his best to recover and argue for a mistrial. Even though counsel failed to specifically request that the trial court rule on prejudice, trial counsel vehemently argued for a mistrial and preserved the issue for appeal. Therefore, the Applicant's claims concerning the testimony of Kim Wilson must fail.

Furthermore, the Applicant has alleged that trial counsel was ineffective for his failure to properly address the interview of Kanae Ferguson at her high school and make contemporaneous objections during the State's cross examination of her. Specifically, the Applicant relied upon State v. Sierra, 337 S.C. 368, 523 S.E.2d 187 (Ct. App. 1999), to allege that the Solicitor blurred the lines between being attorney and witness in violation of the Confrontation Clause with his interjection of his recollection of the meeting at Kanae's high school during cross-examination. In response, trial counsel readily admitted that he failed to object to the Solicitor's questions, but he explained that he was not given notice of the meeting at Kanae's high school and had only been provided notes from it on the morning of Kanae's testimony. He further explained that he did not object because he was not prepared to respond to this information that was not disclosed by the Solicitor despite the filing of very specific discovery motions.

In Holman v. State, 381 S.C. 491, 674 S.E.2d 171 (2009), the Supreme Court of South Carolina reversed the lower court and granted relief finding that trial counsel was ineffective for failing to object to prejudicial evidence. This Court finds that trial counsel's failure to enter contemporaneous objections during Kanae's testimony does not amount to ineffective assistance of counsel as was found in Holman. Clearly, this Court cannot find trial counsel ineffective when he was blindsided by the Solicitor and was on the receiving end of prosecutorial misconduct, which is discussed in detail below.

Through his Amendment and testimony, the Applicant has alleged that trial counsel failed to effectively utilize testimony, exhibits, and case law in the areas of self-defense, defense of others, and voluntary manslaughter. The Applicant testified to and provided examples of how trial counsel failed to present evidence of character and prior difficulties pursuant to State v. Day, 341 S.C. 410, 535 S.E.2d 431 (2000) and State v. Hill, 129 S.C. 166, 123 S.E.817 (1924), failed to address fear in relation to voluntary manslaughter pursuant to State v. Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010), and failed to address the victim's toxicology results and the Applicant's knowledge of her prescription drug usage pursuant to State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998). While on the stand, counsel readily admitted that he was too rigid with his trial strategy and he admitted that he should have more fully addressed the victim's character at trial and more fully explored all aspects of self-defense and voluntary manslaughter. This Court has considered the testimony and the trial record and finds trial counsel's admissions that he should have done more does not amount to ineffective assistance of counsel nor has the Applicant shown resulting prejudice.

The Applicant has further alleged that trial counsel was ineffective for failing to request a self-defense instruction that was narrowly tailored to the facts of his case pursuant to State v. Day, 341 S.C. 410, 535 S.E.2d 431 (2000) and failed to request instructions on fear, prior difficulty, duty to wait, and good character pursuant to State v. Hill, 129 S.C. 166, 123 S.E. 817 (1924), State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997), and State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989). In response to these allegations, counsel recalled having a charging conference in chambers and identified the requests he submitted to the court. As a result, this Court cannot find that trial counsel was ineffective nor was the Applicant prejudiced since trial counsel made specific requests to charge and submitted those request for the court's review. Therefore, the Applicant's claims regarding counsel's request to charge must fail.

Regarding the jury instructions, the Applicant claimed that trial counsel failed to object when the trial court improperly shifted the burden during the self-defense instruction. This Court has thoroughly reviewed the instruction at issue and finds that trial counsel was not ineffective for failing to object to the instruction. As a result, this claim must fail. The Applicant also alleged that trial counsel should have objected similarly to State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), to the malice instruction. In response, trial counsel testified that he should have objected to the malice instruction. Despite counsel's admission, this Court finds that the clear ruling in Belcher is controlling. In Belcher, the South Carolina Supreme Court stated: "Our ruling, however, will not apply to convictions challenged on post-conviction relief." 385 S.C. at 613, 685 S.E.2d at 811. Therefore, the Applicant's claim is not a proper basis for granting post conviction relief and must fail.

B. Prosecutorial Misconduct

Our judicial system relies upon the integrity of the participants. State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000). With this in mind, the Constitution requires only that a defendant receive a fair not a perfect trial. U.S. Const. Am. VI; State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999), Riddle v. Ozmint, 369 S.C. 69, 631 S.E.2d 70 (2006). This Court finds that the Applicant's case was rendered fundamentally unfair by prosecutorial misconduct. This Court further finds that the Respondent failed to call any witnesses or submit any evidence to rebut this finding.

The general test for reversible prosecutorial misconduct has two prongs: 1) the prosecutor's remarks or conduct must have in fact been improper, and 2) such remarks or conduct must have prejudicially affected the Applicant's substantial rights as to deprive him of a fair trial. United States v. Golding, 168 F.3d 700, 702 (4th Cir. 1999), United States v. Chorman, 910 F.2d 102, 113 (4th Cir. 1990). In State v. Hutto, 356 S.C. 384, 387-88, 589 S.E.2d 202, 203-4, the South Carolina Court of Appeals, explained:

> Challenges alleging prosecutorial misconduct typically involve a prosecutor's improper efforts to collect evidence or unfair trial tactics. See, e.g., State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000) (assistant solicitor viewed the surreptitious videotaping of privileged attorney-client communication); State v. Huggins, 325 S.C. 103, 481 S.E.2d 114 (1997) (prosecutor discussed matters outside of the evidence during closing arguments); State v. Chisolm, 312 S.C. 235, 439 S.E.2d 850 (1994) (prosecutor improperly audiotaped telephone conversation with defendant, who was represented by counsel); State v. Robinson, 305 S.C. 469, 409 S.E.2d 404 (1991) (prosecutor allegedly used previously suppressed evidence at trial); State v. Atkins, 303 S.C. 214, 399 S.E.2d 760 (1990) (prosecutor allegedly obtained confidential medical records in violation of attorney-client privilege); State v. Pee Dee News Co., 286 S.C. 562, 336 S.E.2d 8 (1985) (prosecutor asked improper questions at trial); State v. Craig, 267 S.C. 262, 227 S.E.2d 306 (1976) (prosecutor's conduct at trial allegedly was calculated to arouse unfair prejudice against defendant).

Here, the Solicitor failed to properly conduct and disclose an interview with the Applicant's key witness despite counsel's specific discovery requests, blurred the lines between attorney and witness on cross-examination, failed to place a witness on the State's witness list and disclose the witness during jury selection, and failed to honor the sequestration order. In State v. Sierra, 337 S.C. 368, 378, 523 S.E.2d 187, 192 (Ct. App. 1999), the South Carolina Court of Appeals addressed the Solicitor's cross-examination of a defense witness and held that the "cross-examination allowed an unfair assault upon the credibility of his denial on this most critical issue, in violation of Sierra's Sixth and Fourteenth Amendment right of confrontation." The Court explained that there is an inherent danger when the cross examiner obtained the prior inconsistent statement since the cross examiner publishes his version of the prior inconsistent statement thus pitting his credibility against that of the witness and blurring the lines between attorney and witness. Id. at 373, 523 S.E.2d at 189. In the instant case, the Solicitor obtained the prior inconsistent statement from a minor (Kanae) during an interview at her high school without a parent present and failed to fully disclose the interview and the investigator's notes prior to the day of her testimony at trial. He further failed to lay the proper foundation before interjecting his version of the meeting through cross-examination during which he clearly pitted his credibility against that of Kanae Ferguson. Trial counsel explained that he was blindsided by the Solicitor's interview and use of it to impeach Kanae; therefore, he failed to object during the cross-examination and only realized the Solicitor's true intentions when he called Investigator Davenport in reply.

In Sierra, the Court of Appeals noted that the Solicitor's actions that blurred the lines between attorney and witness during cross-examination set the stage for an

improper closing argument; whereas, here, the Solicitor's actions set the stage for the use of a non-disclosed witness for which trial counsel was admittedly not prepared. It is clear from the record and the testimony at the evidentiary hearing that Investigator Davenport's testimony was highly damaging to the credibility of the Applicant's key witness. While on the stand, the Applicant explained that he would have testified at trial if he would have known that the State planned to utilize Investigator Davenport in that capacity at trial, and trial counsel also made it clear that disclosure would have completely changed his trial preparation and strategy. Due to the Solicitor's conduct, neither trial counsel nor the Applicant knew how the State intended to devastate his primary defense at trial through an undisclosed witness that sat through the trial despite a clear sequestration order from the trial court. Interestingly, Investigator Davenport was not present during the testimony of Kanae Ferguson, which further demonstrates that the State planned to call him as a witness but kept this information from counsel and the court. In Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633 (1935), the Supreme Court of the United States explained the importance of the prosecutor's role in the judicial process:

> The United States Attorney 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 innocence 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.

Here, the Solicitor violated this duty and the Applicant was prejudiced as a result. Not only was trial preparation and counsel's strategy affected by the Solicitor's conduct, but

the jury was also impacted. When asked, trial counsel explained that it appeared that the jury was greatly swayed by the Solicitor's cross-examination and Investigator Davenport's testimony, which culminated in the jury's request for a copy of the statement from the interview. Transcript p. 608. The jury was not provided a copy of the statement since a statement was not disclosed or produced by the State. As a result, the jury was left with the Solicitor's interjection of the facts through his questions on cross-examination and the improper reply testimony of Investigator Davenport on which to make their finding. For the foregoing reasons, this Court finds that the Solicitor's actions amounted to prosecutorial misconduct. This Court further finds that the Applicant's trial was rendered fundamentally unfair by the Solicitor's conduct and this finding was not refuted by evidence or testimony from the State at the evidentiary hearing. As a result, the Applicant must be granted a new trial.

C. Ineffective Assistance of Appellate Counsel

Based upon the testimony, exhibits and arguments presented at the evidentiary hearing, this Court finds that the Applicant has failed to show that appellate counsel's performance was deficient under prevailing professional norms and that he was prejudiced as a result of such deficient performance. To prevail on his claim of ineffective assistance of appellate counsel, the Applicant must establish that there is a reasonable probability that the result of the proceeding would have been different, the conviction and sentence would have been overturned, if appellate counsel raised the issues alleged by the Applicant. See Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). This Court acknowledges that the Applicant and counsel testified that appellate counsel failed to raise an argument regarding the testimony of Kanae Ferguson and

Investigator Davenport on appeal, but this Court finds that this is not an issue of ineffective assistance of appellate counsel but is an issue of prosecutorial conduct as discussed above. The Applicant also alleged that appellate counsel failed to argue that the trial court did not conduct a prejudice analysis in denying the Applicant's motion for a mistrial. This Court finds that appellate counsel raised the trial court's denial of the Applicant's motion for a mistrial and this issue was fully addressed by the appellate court. Therefore, this Court finds that this claim must fail.

Therefore, based upon the foregoing, this Court orders that the Application for Post Conviction Relief is hereby granted solely on the issue of prosecutorial misconduct. This Court further finds that no other allegations were raised at the PCR hearing that have not been addressed herein. Therefore, any additional allegations are deemed waived because no evidence was presented.

IT IS THERFORE ORDERED:

1. That Applicant has met his burden of proof as to his allegations of prosecutorial misconduct;

2. That the Application for Post Conviction Relief be granted;

3. That Applicant's convictions and sentences on Indictment No.: 2004-GS-30-628 be vacated and granted a new trial;

4. That Applicant be released from the custody of South Carolina Department of Corrections and transferred to the custody of the Laurens County Detention Center pending the disposition of Indictment No.: 2004-GS-30-628.

AND IT IS SO ORDERED this 5th day of July, 2011

The Honorable Eugene C. Griffith, Jr.
Judge, Eighth Judicial Circuit

Newberry, South Carolina

A TRUE COPY OF ORIGINAL
Lynn W. Lancaster
Lynn W. Lancaster
Laurens County CCCP & GS

ALAN WILSON
ATTORNEY GENERAL

August 10, 2011

Joy E. Holtson
Court Reporter
118 Sandy Beach Drive
Prosperity SC 29127

RE: Nathaniel K. Ferguson v. State of South Carolina
09-CP-30-0725

Dear Ms. Holston:

Please prepare a transcript of the post conviction hearing of the above named individual taken on April 14, 2011, before the Honorable Griffith, for the term of the Court of Common Pleas for Laurens County.

Please prepare the transcript in accordance with the format requirements as set forth in the Court Reporter Manual. Please note that the amended Rule 227(e) (3), SCACR, now requires as detailed an index for PCR hearings as for trial transcripts filled in the Supreme Court. The index should include all exhibits. If exhibits were not introduced, then please note that no exhibits were submitted at the hearing.

If you will prepare this transcript and forward it to me along with your statement, I will arrange for payment. Please note that all statements are to be signed.

Sincerely,

Chandra Young,
Legal Assistant

/cey

cc: The Honorable Daniel Shearouse, Clerk of the Supreme Court of South Carolina
Court Administration
Tricia A. Blanchette, Esquire
Appellate Defense

ALAN WILSON
ATTORNEY GENERAL

August 10, 2011

The Honorable Daniel E. Shearouse
Clerk of the Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: Nathaniel K. Ferguson v. State of South Carolina
09-CP-30-0725

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

1. Proof of service of the notice of appeal on the respondent.
2. A copy of the order which is to be challenged on appeal.
3. A copy of the letter to the court reporter requesting the PCR transcript.

Sincerely,

Harrison D. Brant
Assistant Attorney General

HDB/cey
Enclosures

cc: Tricia A. Blanchette, Esquire
The Honorable Lynn W. Lancaster, Clerk of Court of Laurens County
The Honorable Jerry Peace, Eighth Circuit Solicitor
Appellate Defense
David Tatarsky, SCDC
Trisha Allen, Victims Services

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
AUG 10 2011
S.C. Supreme Court

APPEAL FROM LAURENS COUNTY
Court of Common Pleas

The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Case No.: 2009-CP-30-0725

Nathaniel K. Ferguson, Jr., #310367,..... Respondent,

v.

State of South Carolina,..... Petitioner.

NOTICE OF APPEAL

The State of South Carolina appeals the Order of the Honorable Eugene C. Griffith, Jr., dated July 5, 2011, granting Post-Conviction Relief to the Respondent. The State received written notice of the order denying Respondent's motion to reconsider on August 5, 2011. A copy of the order on appeal is attached to this notice.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

[*Signatures continued on next page*]

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

HARRISON D. BRANT
Assistant Attorney General

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

By: _____
Attorneys for the Petitioner

Columbia, South Carolina
August 10, 2011

Other counsel of record:

Tricia A. Blanchette, Esquire
Law Office of Tricia A. Blanchette
P. O. Box 12725
Columbia, S.C. 29211

RECEIVED
AUG 10 2011
S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LAURENS COUNTY
Court of Common Pleas

The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Case No.: 2009-CP-30-0725

Nathaniel K. Ferguson, Jr., #310367,..... Respondent,

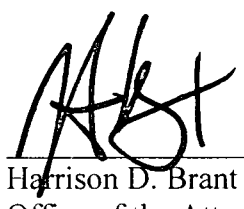
v.

State of South Carolina,..... Petitioner.

PROOF OF SERVICE

I, Harrison D. Brant, certify that I have today served the Notice of Appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, on August 10, 2011, to his attorney of record, Tricia A. Blanchette, Esquire, at the address below.

Tricia A. Blanchette, Esquire
Law Office of Tricia A. Blanchette
P. O. Box 12725
Columbia, S.C. 29211



Harrison D. Brant
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

8
HB

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF LAURENS) EIGHTH JUDICIAL CIRCUIT
)
Nathaniel K. Ferguson, Jr., 310367,) 2009-CP-30-725
)
v.) ORDER GRANTING APPLICATION
) FOR POST CONVICTION RELIEF
State of South Carolina,)
Respondent.)
)

PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post Conviction Relief filed on June 10, 2009. The State submitted a Return on or about October 1, 2009. The Applicant, through counsel, submitted an Amendment to Application for Post Conviction Relief on March 25, 2011, which added the following specific allegations:

1. Ineffective assistance of trial counsel for failure to prepare and investigate prior to trial.

2. Ineffective assistance of trial counsel for failure to utilize witnesses on the Applicant's behalf.

3. Ineffective assistance of trial counsel for failure to ensure that the Applicant had full knowledge and understanding when he rejected the plea offered by the State.

4. Ineffective assistance of trial counsel for failure to properly investigate and address the interview of Kenae Ferguson at school. Failure to object to improper impeachment and a violation of the confrontation clause during the cross examination of Kenae Ferguson.

5. Ineffective assistance of trial counsel for failure to present argument on the oral statement purportedly given to Officer Cutting at the scene during the Jackson v. Denno hearing.

6. Ineffective assistance of trial counsel for failure to properly advise and/or utilize the Applicant as a witness during the Jackson v. Denno hearing and/or trial.

SCDI

ATTORNEY GENERAL'S OFFICE

RECEIVED 2.14.11

ADMINISTRATIVE INSTRUCTIONS

HB ✓ FILE ____ OPEN ____ END

____ HAVE ____ COPIES MADE

____ ROUTE TO ____

____ ORDER ____ TRANSCRIPT

____ PEN RECORDS ____ CLERK RECORDS

✓ OTHER Scan

✓ e-mail copy to Tasha Allen

✓ Calendar date for 59(e) - 10 days from receipt

7. Ineffective assistance of trial counsel for failure to further impeach the testimony of Kim Wilson.

8. Ineffective assistance of trial counsel for the failure to effectively utilize testimony, exhibits, and case law in the areas of self-defense, defense of others and voluntary manslaughter. Specifically, but not limited to the following:

    a. Failure to present evidence of character and prior difficulties. See State v. Day, 341 S.C. 410, 535 S.E.2d 431 (2000), State v. Hill, 129 S.C. 166, 123 S.E.817 (1924).

    b. Failure to address fear in relation to voluntary manslaughter. See State v. Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010).

    c. Failure to properly address the victim's toxicology results and the Applicant's knowledge of her prescription drug usage. See State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998).

    d. Failure to request a self-defense instruction that was narrowly tailored to the facts of the Applicant's case. See State v. Day, 341 S.C. 410, 535 S.E.2d 431 (2000). Specifically but not limited to instructions on fear, prior difficulty, duty to wait, and good character. See State v. Hill, 129 S.C. 166, 123 S.E. 817 (1924), State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997), State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989).

9. Ineffective assistance of trial counsel for failure to address the trial court's failure to utilize the proper analysis and/or standard in denying the Applicant's motion for mistrial. Transcript pp. 213-215.

10. Ineffective assistance of trial counsel for failure to object to the trial court's jury instructions. Specifically, but not limited to the following:

    a. Failure to object to the malice instruction at issue in State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). Transcript p. 595.

    b. Failure to object to burden shifting in the court's self defense instruction. Transcript p. 602.

11. Ineffective assistance of appellate counsel for failure to properly raise all meritorious issues on appeal. Specifically, but not limited to the following:

    a. Failure to address the issue involving the interview of Kenae Ferguson at her school.

Jesse

b. Failure to address the standard applied by the trial court in denying the Applicant's motion for a mistrial.

An evidentiary hearing into the matter was held on April 14, 2011 at the Newberry County Courthouse in front of the Honorable Eugene C. Griffith, Jr. The Applicant was present at the hearing and was represented by Tricia A. Blanchette, Esquire. The Respondent was represented by Harrison Brant, Assistant Attorney General, and David Spencer, Senior Assistant Attorney General.

At the beginning of the evidentiary hearing, Applicant's counsel explained the testimony may also establish prosecutorial misconduct as to the issue raised in the Amendment regarding Kanae Ferguson. The State consented to this verbal amendment. During the evidentiary hearing, Applicant's counsel called Kent Jones and Chip Price, Esquire, to the stand. The Applicant also testified on his own behalf. Applicant's counsel admitted twelve exhibits and provided the Court and the State a copy of the following cases: Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998), Kolle v. State, 386 S.C. 578, 690 S.E.2d 73 (2010), State v. Bottoms, 260 S.C. 187, 195 S.E.2d 116 (1973), State v. Sierra, 337 S.C. 368, 523 S.E.2d 187 (Ct. App. 1999), Riddle v. Ozmint, 369 S.C. 39, 631 S.E.2d 70 (2006), State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998), State v. Day, 341 S.C. 410, 535 S.E2d 431 (2000), State v. Hill, 129 S.C. 166, 123 S.E. 817 (1924), State v. Jackson, 384 S.C. 29, 681 S.E.2d 17 (Ct. App. 2009), State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997), State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989), State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). This Court also had before it a copy of the Application, the Respondent's Return, the Applicant's Amendments, the records of the Laurens County Clerk of Court concerning the subject

conviction, and the Applicant's records from the South Carolina Department of Corrections.

The Applicant is presently confined in the South Department of Corrections pursuant to orders of commitment from the Laurens County Clerk of Court. The Applicant was indicted for Murder and Possession of a Weapon During the Commission of a Violent Crime (2004-GS-30-628) during the July 2004 term of the Laurens County Grand Jury.

On July 20, 2005, the Applicant proceeded to trial in front of the Honorable James W. Johnson. The Applicant was represented by Chip Price, Esquire. The jury found the Applicant guilty as indicted. The Honorable James W. Johnson sentenced the Applicant to a term of thirty (30) years for Murder and five (5) years consecutive for Possession of a Weapon During the Commission of a Violent Crime.

A timely Notice of Appeal was filed, and an appeal was perfected by the Office of Appellate Defense. On February 20, 2008, the South Carolina Court of Appeals affirmed the Applicant's conviction and sentence. State v. Ferguson, Op. No. 4342 (S.C. Ct. App. filed February 20, 2008). Robert M. Dudek, Deputy Chief Attorney for Capital Appeals, filed a Petition for Rehearing with the Court of Appeals, which was denied by Order dated May 22, 2008. A Petition for Writ of Certiorari was filed with the South Carolina Supreme Court, which was denied by Order dated March 5, 2009. The Remittitur was issued on March 11, 2009.

APPLICABLE LAW

In a PCR Action, the "burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP).

For the Applicant to meet his burden of proof and prevail on his allegations of ineffective assistance of trial or appellate counsel, the two-prong test applicable to such a claim must be met. See Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2065 (1984). The first prong analyzes whether counsel failed to render reasonably effective assistance under the prevailing professional norms. Id. The second prong places the burden on the applicant to show that but for counsel's deficient performance the outcome would have been different. Id. The second prong is known as the "prejudice" requirement. This requirement is met if counsel's actions or inactions resulted in prejudice to the Petitioner. See Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 539 (1995).

SUMMARY OF TESTIMONY AND EVIDENCE PRESENTED AT POST CONVICTION RELIEF HEARING

A. Testimony of Nathaniel Ferguson

When the Applicant took the stand, he acknowledged that he had filed the present Application alleging ineffective assistance of trial and appellate counsel and requesting a new trial. The Applicant testified that he was arrested on May 13, 2004, and he retained Chip Price, Esquire, shortly after his arrest. The Applicant recalled meeting with trial counsel around ten times and reviewing the discovery documents. The Applicant specifically recalled raising concerns about the photos contained in the discovery, and the Applicant identified and PCR counsel introduced a map and photo to explain his

concerns. Applicant's Exhibit #1 & 2. The Applicant explained that his attorney spoke with some but not all of his potential witnesses, and the Applicant identified and PCR counsel introduced a copy of the trial witness list. Applicant's Exhibit #3. The Applicant testified that the trial strategy was self-defense and counsel had obtained a crime scene expert and psychologist. The Applicant explained that he did not meet with either expert even though the psychologist testified at trial.

Regarding plea offers, the Applicant recalled an offer for manslaughter, which carried a twenty year cap. The Applicant explained that he did not fully understand the elements of murder and manslaughter when he chose to reject the plea offer. The Applicant also explained that he lacked the knowledge and understanding needed to properly consider the plea offer.

Turning to trial, the Applicant was not sure if counsel filed any pre-trial motions, but he noted that his trial began with a Jackson v. Denno hearing. Referencing the transcript, the Applicant noted that Officer Cutting took the stand during the Jackson v. Denno hearing and explained that he was dispatched and arrived at the scene. Transcript p. 25-27. Officer Cutting testified that he found the Applicant standing on the hedgerow, and the Applicant provided him with both guns and stated "I'm the one that did the shooting." Transcript p. 27, lns 13-23. The Applicant explained that he was very surprised by Officer Cutting's testimony since he did not make that statement and he had no notice that the officer was going to testify to it.

Continuing with the Jackson v. Denno hearing, the Applicant pointed out that Lt. Wakeland testified that he arrived after Officer Cutting, and he did not hear the purported conversation. Transcript pp. 36-38. When Lt. Bolt took the stand, he testified that he

arrived after about twenty minutes, he got the Applicant out of the patrol car and the Applicant was very cooperative. Transcript pp. 44-46. Lt. Bolt specifically testified that he asked the Applicant if he needed a lawyer to which he responded that "he needed to talk about it." Transcript p. 46, lns 21-24. He also testified that the Applicant informed him that the victim's gun clicked. Transcript p. 50, lns 18-19. Lt. Bolt testified about obtaining two written statements from the Applicant, and he acknowledged on cross-examination that his report did not include the verbal statement. Transcript pp. 58, 66, 69, lns 11-14. In light of Lt. Bolt's testimony, the Applicant explained that he asked him to check the victim's gun. The Applicant identified and counsel introduced pictures of the victim's gun and a diagram. Applicant's Exhibits #4 & 5. The Applicant was not sure why he was not called as a witness at the Jackson v. Denno hearing, but he noted that his attorney argued that he did not receive notice of the verbal statements despite his specific request for all statements. Transcript pp. 72-74. In response, the trial court suppressed the verbal statement purportedly given to Lt. Bolt but allowed the statement given to Officer Cutting as an excited utterance. Transcript p. 74.

While on the stand, the Applicant identified and counsel introduced his two written statements. Applicant's Exhibit #6 & 7. The Applicant pointed out that his statement included the fact that he was speaking with his mother on the phone right before the incident took place and his statements referenced Kent Jones. The Applicant explained that Kent Jones' home was in close proximity to the incident location and Kent Jones had experienced prior difficulty with the victim. The Applicant further explained that he requested that counsel speak with Kent Jones and utilize him as a witness at trial.

The Applicant acknowledged that Kent Jones was on the defense witness list, but he did not know why he was not called at trial.

When asked, the Applicant testified that he had been involved with Kim Wilson, the victim's daughter, for a number of years and had split up with her shortly before the incident at issue. He explained that Kim Wilson ("Kim") testified at trial, and he identified and counsel introduced a copy of her written statement. Applicant's Exhibit #8. The Applicant further explained that the State introduced Kim's statement and asked her about several inconsistencies. Transcript pp. 169-170. On cross-examination, trial counsel asked Kim about her location during the shooting, and she responded that she saw the first shot through the window, the second shot while on the porch, and she did not see the third shot. Transcript pp. 180-181, 181, ln 12, 182, ln 20. The Applicant noted that trial counsel failed to ask her about her written statement which indicated that she was on the porch during the entire shooting. The Applicant also noted that trial counsel failed to question Kim about the inconsistencies between her statement and her testimony regarding the victim being armed.

Continuing with the testimony of Kim Wilson, the Applicant explained that the only issue raised on appeal was the court's failure to grant a mistrial after Kim's testimony regarding an alleged threat. During redirect, Kim testified that "He looked at me and told me that I was next." Transcript p. 198, lns 4-5. Immediately, thereafter, trial counsel moved to strike the absurd statement since he received no notice. Transcript p. 198, lns 6-8. In response, the State indicated that trial counsel had been informed about the statement, and trial counsel countered that he had not received notice and requested a mistrial. Transcript pp. 198-99. The trial court sustained counsel's objection finding that

Kim's testimony was not responsive to the question presented on redirect. Transcript pp. 206, 207, lns 7-13. After making this ruling, the court expressed concern with whether a curative instruction was sufficient and if the jury could erase the alleged threat from their minds. Transcript p. 207, lns 10-13, 19-25. After a lunch break, the court concluded that the answer would have been proper if the question was asked correctly, and he denied the request for a mistrial and gave a curative instruction. Transcript pp. 213, 216-17. The Applicant noted that the State indicated that they did not plan to ask the question correctly. Transcript p. 215. The Applicant also noted that the court failed to conduct a prejudice analysis and trial counsel did not bring the failure to the court's attention.

After addressing the testimony of Kim Wilson and the alleged threat, the Applicant explained that his daughter Kanae Ferguson ("Kanae") was present during the incident at issue and provided a statement to law enforcement. Applicant's Exhibit #9. Turning to the transcript, the Applicant noted that the Solicitor asked Kanae about inconsistencies with her statement and he asked her about a prior meeting at her high school. Transcript p. 493, lns 17-20. After Kanae acknowledged the meeting, the Solicitor stated that he went to her high school and met with her on April 12th, and he proceeded to ask her specific questions about that meeting. Transcript pp. 493, 500. On redirect, Kanae explained that she was hauled out of her high school class with no notice to her or her parents. Transcript pp. 506-7. When the defense rested, the State requested to call Investigator Davenport as a reply witness, and trial counsel objected due to a violation of the sequestration order and lack of notice. Transcript pp. 511-13. Following argument from both sides, the court indicated a concern as a parent, found a technical

violation of the sequestration order but ruled that Investigator Davenport would be allowed to testify in reply. Transcript pp. 515-16.

Relying upon the transcript, the Applicant highlighted Investigator Davenport's testimony, which directly impeached the testimony of Kanae Ferguson. Specifically, Investigator Davenport testified that Kanae indicated that she could not see what was in the victim's hand and that the Applicant shot the victim after she was on the ground. Transcript pp. 518, 520, lns 4-6. The Applicant testified that it was clear that this testimony had a prejudicial effect on the jury since they requested a copy of the statement, which did not exist, during deliberations. Transcript p. 608. The Applicant explained that Kanae was the key witness to help establish his self-defense claim and if he would have known about the school interview and purported statement it would have been a major factor in trial preparation. He also explained that he did not know that the Solicitor could utilize cross-examination to testify about his memory of the meeting with Kanae and that he could impeach Kanae even after she admitted making the statement at issue.

The Applicant candidly admitted that he chose to not testify, but he made his decision based upon the advice of his trial counsel. He explained that his decision was made without full knowledge of the State's case since the State failed to give his attorney notice of key evidence that was used against him at trial. The Applicant noted that his statements were introduced, but he explained that his statements did not provide the full picture of the facts to the jury. Thereafter, the Applicant testified to a detailed account of the facts surrounding the incident at issue.

Even though the Applicant did not testify, he explained that the primary strategy at trial was to establish that he was acting in self-defense or in defense of others (his children). The Applicant highlighted the testimony of several trial witnesses, which had a bearing on his claim of self-defense or defense of others. The Applicant pointed out that the State called Gary Bryson to testify about driving by and seeing the shooting at issue. Transcript p. 220. The Applicant noted that Gary Bryson errantly testified that both of the Applicant's children were outside during the shooting. Transcript pp. 223-24. The Applicant also noted that the State called Agent Shacker and Dr. Sexton that both testified about the prescription drugs in the victim's system and how such drugs would affect her inhibitions and coordination. Transcript pp. 263-4, 440-42. The Applicant identified and counsel introduced a SLED report, which contained the victim's toxicology results. Applicant's Exhibit #11. As to defense witnesses, the Applicant explained that Dr. Horne was utilized as an expert witness and testified regarding the scientific phenomenon of fight vs. flight. Transcript p. 461. The Applicant acknowledged that the State questioned Dr. Horne about his failure to meet with the Applicant, and the Applicant explained that he did not know why he did not meet with Dr. Horne prior to trial. Transcript p. 464. The Applicant highlighted his daughter's testimony and explained that her testimony was vital to his defense since she was an eyewitness to the events that lead to the shooting at issue. Transcript pp. 477, 481, 483. The Applicant also explained that his mother testified about the call she had received from Kim Wilson and the warning she had given him over the phone immediately before the shooting. Transcript p. 510.

Through extensive testimony, the Applicant alleged that trial counsel failed to effectively utilize testimony, exhibits, and case law in the areas of self-defense, defense of others, and voluntary manslaughter. The Applicant testified to and provided examples of how trial counsel failed to present evidence of character and prior difficulties pursuant State v. Day, 341 S.C. 410, 535 S.E.2d 431 (2000) and State v. Hill, 129 S.C. 166, 123 S.E.817 (1924), failed to address fear in relation to voluntary manslaughter pursuant to State v. Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010), and failed to address the victim's toxicology results and the Applicant's knowledge of her prescription drug usage pursuant to State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998). The Applicant also testified that trial counsel requested a defense of others jury instruction, but he explained that trial counsel failed to properly establish the defense at trial.

As to closing arguments, the Applicant noted that trial counsel informed the jury that the Applicant had no problems with the victim in the ten years prior to the shooting. Transcript p. 549. The Applicant testified that this point was reiterated by the State in closing arguments, and the State argued that the Applicant could have gone to the home of Kent Jones to get away. Transcript pp. 558, 571. The Applicant made it clear that trial counsel's argument was in complete contradiction to the information he had given trial counsel about prior difficulties he and Kent Jones had experienced with the victim. The Applicant also noted that the State's reference to Kent Jones demonstrated why he was needed at trial.

Turning to the jury instructions, the Applicant identified and counsel introduced a copy of written jury charges, and the Applicant explained that all the discussions regarding jury requests were held in chambers. Applicant's Exhibit #12. Through

detailed testimony, the Applicant alleged that trial counsel failed to request a self-defense instruction that was narrowly tailored to the facts of the Applicant's case pursuant to State v. Day, 341 S.C. 410, 535 S.E.2d 431 (2000). The Applicant also highlighted the malice instruction given by the court and testified that trial counsel failed to object as was done in State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). Transcript p. 595. The Applicant also testified that trial counsel should have objected when the trial court improperly shifted the burden during the self-defense instruction. Transcript p. 602, lns 9-15.

Finally, the Applicant explained that he was alleging ineffective assistance of appellate counsel in relation to the brief submitted by Robert M. Dudek of the Office of Appellate Defense. In support of his allegation, PCR counsel provided the Court and the State a copy of Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). The Applicant testified that appellate counsel failed to raise any issues stemming from Kanae's trial testimony. The Applicant also explained that appellate counsel submitted an argument regarding the trial court's denial of a mistrial, which did not address the trial court's failure to address prejudice.

B. Testimony of Kent Jones

When Kent Jones was called to the stand, he confirmed that he was under subpoena and was a relative of the victim. Mr. Jones explained that his home was located adjacent to the mobile homes where the shooting took place, and he further explained that he shared a driveway with the victim. He recalled that Chip Price came to his house and met with him prior to the Applicant's trial. He further recalled playing one or two phone messages for Mr. Price that he had received from the Applicant on the day in question.

He remembered being able to hear Kim Wilson and the Applicant "fussing" on one message. He could not remember speaking with anyone from the Solicitor's Office. He confirmed that the Applicant and his children had used his shower due to the situation with the water. He testified that he was not in fear of the victim, but he did have to call the cops over an issue with their shared driveway. He acknowledged that the Applicant had experienced prior difficulty with the victim, but he never knew the Applicant to resort to violence. He explained that he was not in fear of the Applicant. When asked, he stated that he did not have any firsthand knowledge of the victim's prescription drug use.

C. Testimony of Chip Price, Esquire

When Chip Price, Esquire, took the stand, he explained that he had practiced law for thirty-five years, primarily in the area of criminal law. He recalled being retained by the Applicant and meeting with him at the detention center. He acknowledged that he did not hire a private investigator, but he did retain two experts. He explained that one expert, Dr. Horne, testified at trial, and he did not meet with the Applicant since he testified to a theory not the specifics of the Applicant's case. He explained that he filed very specific discovery motions, but the State failed to give him notice of major trial matters. He recalled receiving discovery from the Solicitor's Office, but he clearly recalled the trial being an ambush of non-disclosed information from the Solicitor's Office.

Mr. Price acknowledged that he had heard the testimony of Kent Jones earlier from the stand, and he confirmed that he met with Mr. Jones at this home. Mr. Price explained that he choose not to call Kent Jones due to the recorded message(s) and his concerns regarding those message(s). Mr. Price recalled listening to the message or

messages with Mr. Jones, but PCR counsel's objection was sustained when the State repeatedly asked Mr. Price about the specific contents of the message(s). Looking back, Mr. Price explained that it would have been helpful to call Kent Jones as a witness.

Regarding the plea offer, Mr. Price explained that he should have "leaned" on the Applicant harder to take the plea. He further explained that the Applicant relied upon his advice in deciding to reject the plea offer and he should have advised him better. He also explained that he had no idea about the surprises that were in store at trial when he advised the Applicant to reject the plea offer. Mr. Price stated that the Solicitor ambushed him with the verbal statement attributed to the Applicant, the undisclosed meeting with Kanae Ferguson, the testimony of Kim Wilson regarding a threat, and the investigator's reply testimony.

As to the Jackson v. Denno hearing, Mr. Price recalled filing discovery motions requesting any statements attributed to the Applicant, and he was surprised by the verbal statements attributed to the Applicant by the officers. Mr. Price questioned his decision to rely upon the Applicant's statements instead of calling him as a witness in order to establish the primary defense theory of self-defense. Without his testimony, Mr. Price acknowledged that there was no evidence of prior difficulties, and he truly questioned whether he was ineffective and too rigid with his trial strategy. Mr. Price was adamant that he was in error when he stated in closing that the Applicant experienced no prior problems with the victim, and he testified that he should have more fully explored prior difficulties and his failure to do so may have kept the court from charging it to the jury.

Regarding the victim, Mr. Price readily admitted that he should have fully addressed the victim's character at trial. He did recall addressing her toxicology results

through the state's witnesses. He admitted that he should have located witnesses to address her character because without any evidence of her character he had no basis to request a jury instruction on it.

Turning to the trial testimony of Kim Wilson, Mr. Price admitted that he failed to use Kim Wilson's statement to impeach her even after the State had introduced it and pointed out inconsistencies during her direct testimony. Despite filing specific discovery motions, Mr. Price explained that he had no notice of the statement or threat she testified that she received from the Applicant. When asked about his motion for a mistrial, Mr. Price admitted that he should have specifically requested that the trial court address the prejudice prong.

Mr. Price explained that Kanae Ferguson was the key witness for the defense since he advised the Applicant to not take the stand. He explained that the Solicitor provided him with no notice prior to trial of his meeting with Kanae at her high school, but he may have been told about it by her mother. He admitted that he should have objected when the Solicitor asked her about the meeting and impeached her through his recollection of the meeting. He was adamant that he was in error for failing to object, but he explained that he was utterly ambushed by the Solicitor. He explained that Investigator Davenport was not on the witness list, was not conveyed as a witness to the jury, and was present in the courtroom for every witness except Kanae.. Mr. Price testified that he vehemently objected to the State calling Investigator Davenport in reply, and the court found that the sequestration order had been violated by the State. Yet, Mr. Price explained that Investigator Davenport was allowed to testify as a reply witness, and he perceived that the jury was greatly influenced by his testimony. He recalled the jury

asking for a copy of Kanae's statement from the high school meeting, and he remembered knowing that the jury was strongly considering that interview during their deliberations. Transcript p. 608. When asked about the direct appeal, he indicated that he was shocked to hear that nothing was raised on appeal regarding the impeachment of Kanae and the reply testimony of Investigator Davenport.

Turning to the jury instructions, Mr. Price recalled that the trial court gave a "standard" self-defense instruction mostly impart because he did not ask for more. He admitted that he did not ask for a narrowly tailored self-defense instruction, he did not ask for an instruction on fear, and he failed to put any evidence in the record to have a legitimate request for an instruction on character. As to the malice instruction, Mr. Price indicated that he was familiar with State v. Belcher, and he readily admitted that he should have objected to the malice instruction. Transcript p. 595.

Mr. Price made it clear that he stayed too locked into his trial theory and/or strategy. He explained that he worked hard, but he was too rigid. When asked about the Solicitor's conduct, Mr. Price said he was completely ambushed and the Solicitor failed to comply with the standards set forth in Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555 (1995).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the entire record and has heard the testimony and arguments as presented at the hearing. This Court has also had the opportunity to observe each witness and pass upon his or her credibility. This Court has weighed the testimony accordingly. This Court finds the testimony of the Applicant,

Kent Jones, and Chip Price, Esquire, to be credible. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

A. Ineffective Assistance of Trial Counsel

Based upon the testimony, exhibits and arguments presented at the evidentiary hearing, this Court finds that trial counsel did not fail to render reasonably effective assistance under the prevailing professional norms since he properly prepared and investigated the Applicant's case prior to trial. In Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008), the Supreme Court of South Carolina reversed the lower court and granted PCR relief when counsel failed to conduct a reasonable investigation. The Court held that a reasonable investigation includes interviewing witnesses and conducting an independent investigation of the facts of the case. Lounds, 380 S.C. at 460, 670 S.E.2d at 649, See Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007). Even though trial counsel did not utilize a private investigator, this Court finds that counsel diligently investigated and prepared the case prior to trial, and this Court finds that the Applicant's testimony does not refute such a finding. Since this Court finds that trial counsel conducted a reasonable investigation and preparation of the Applicant's case, it is not necessary to analyze if the Applicant suffered prejudice on this claim.

The Applicant has claimed that trial counsel was ineffective for failure to ensure that the Applicant had full knowledge and understanding when he rejected the plea offered by the State. See Kolle v. State, 386 S.C. 578, 690 S.E.2d 73 (2010) (Finding counsel ineffective for advising defendant to reject the plea offered by the State.). While on the stand, the Applicant explained that he did not have a full understanding of the State's case against him, he did not understand the elements of manslaughter and murder

nor did he fully understand the elements of self-defense when he rejected the plea offer. On the contrary, trial counsel testified that he explained the discovery he received and explained the applicable laws to the Applicant, but he regretted not pressuring the Applicant to take the plea. He explained that he was ambushed with major evidentiary issues at trial, which are discussed in detail below, and if he would have known the extent of the withheld evidence he would advised the Applicant to take the plea. This Court finds that trial counsel cannot be held accountable for evidentiary issues that were not disclosed by the Solicitor. This Court further finds that trial counsel rendered reasonably effective assistance in advising the Applicant based upon the information he was provided by the State; therefore, this claim must fail.

The Applicant has also claimed that trial counsel was ineffective for failing to utilize witnesses on his behalf, and the Applicant called Kent Jones to testify at the evidentiary hearing. In Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1999), the South Carolina Supreme Court addressed whether trial counsel was ineffective for failing to call a witness at trial. The Court reasoned as follows:

> This Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998)(applicant established prejudice where nurse's notes presented at PCR hearing corroborated lack of penetration in sexual assault case); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995)(where witnesses applicant claimed could have provided an alibi defense did not testify at the PCR hearing, he could not establish any prejudice from counsel's failure to contact these witnesses); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992) (where applicant did not offer witnesses at PCR hearing but merely alleged they would have provided him with alibi defense and testified victims had recanted their trial testimony, he failed to establish prejudice); see also Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998) (applicant failed to establish prejudice from counsel's failure to investigate criminal backgrounds of

> victims and witnesses where he failed to substantiate at PCR hearing that victims and witnesses had criminal records). "The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice." Glover v. State, supra, S.C. at 498-99, S.E.2d at 540.

Bannister, 333 S.C. at 303, 509 S.E.2d at 809. At the evidentiary hearing, trial counsel concluded that he should have called Kent Jones as a witness, but trial counsel based this conclusion on the outcome of the trial. Trial counsel also testified that he met with Kent Jones and chose to not call him as a witness due to concerns over phone messages he received from the Applicant. This Court finds that trial counsel made an informed and valid decision to not utilize the testimony of Kent Jones. Therefore, this claim does not rise to the level of ineffective assistance of counsel and must fail.

Regarding the Jackson v. Denno hearing, the Applicant made the following claims:

1. Ineffective assistance of trial counsel for failure to present argument on the oral statement purportedly given to Officer Cutting at the scene during the Jackson v. Denno hearing.

2. Ineffective assistance of trial counsel for failure to properly advise and/or utilize the Applicant as a witness during the Jackson v. Denno hearing and/or trial.

At the evidentiary hearing, the Applicant testified in support of these claims. When asked, trial counsel explained that he received no notice from the State regarding the verbal statements attributed to the Applicant during the hearing, and he was successful in suppressing one of the statements. Again, this Court cannot find counsel ineffective when he filed specific discovery motions on which the State failed to comply.

The Applicant has also alleged and explained that trial counsel was ineffective for failing to utilize him as a witness at the Jackson v. Denno hearing and at trial. While on

the stand, the Applicant provided a detailed account of the events in question and explained that he relied upon counsel's advice that his statements provided a sufficient account of his version of events. In response, Mr. Price explained that he did not call the Applicant as a witness at the Jackson v. Denno hearing because he did not have notice of the verbal statements. He explained that he questioned his decision to rely upon the Applicant's statements instead of calling him as a witness in order to establish the primary defense theory of self-defense. Without his testimony, Mr. Price acknowledged that there was no evidence of prior difficulties, and he truly questioned whether he was ineffective and too rigid with his trial strategy. This Court finds that trial counsel made a decision to not utilize the Applicant as a witness based upon the information that was provided by the State prior to trial. It appears that trial counsel would have made a different decision if he had been the recipient of full disclosure. As was stated by trial counsel, the Applicant was subjected to trial by ambush. As a result, this Court cannot find trial counsel ineffective for choosing to not call the Applicant as a witness at the Jackson v. Denno hearing or at trial; therefore, this claim must fail.

Regarding the trial testimony of Kim Wilson, the Applicant has claimed that trial counsel was ineffective for failing for further impeach Kim Wilson and for failing to address the court's analysis of the motion for a mistrial. While on the stand, the Applicant addressed these claims, which were not refuted by trial counsel's testimony. Trial counsel readily admitted that he failed to use Kim's statement to impeach her despite the State introducing it on direct and pointing out several inconsistencies. Counsel explained that he was not given notice of the alleged threat testified to by Kim Wilson, so he immediately moved to strike it and requested a mistrial. When asked about

the trial court's analysis of his motion for a mistrial, Mr. Price agreed that he failed to request that the court specifically rule on prejudice. Despite counsel's acknowledgement of his failure, this court finds that such failure is reasonable under prevailing professional norms. The record establishes that trial counsel thoroughly cross-examined Kim Wilson and his cross-examination was not rendered ineffective due to his failure to utilize her statement. Counsel made it clear that he received absolutely no notice of the alleged threat and he tried his best to recover and argue for a mistrial. Even though counsel failed to specifically request that the trial court rule on prejudice, trial counsel vehemently argued for a mistrial and preserved the issue for appeal. Therefore, the Applicant's claims concerning the testimony of Kim Wilson must fail.

Furthermore, the Applicant has alleged that trial counsel was ineffective for his failure to properly address the interview of Kanae Ferguson at her high school and make contemporaneous objections during the State's cross examination of her. Specifically, the Applicant relied upon State v. Sierra, 337 S.C. 368, 523 S.E.2d 187 (Ct. App. 1999), to allege that the Solicitor blurred the lines between being attorney and witness in violation of the Confrontation Clause with his interjection of his recollection of the meeting at Kanae's high school during cross-examination. In response, trial counsel readily admitted that he failed to object to the Solicitor's questions, but he explained that he was not given notice of the meeting at Kanae's high school and had only been provided notes from it on the morning of Kanae's testimony. He further explained that he did not object because he was not prepared to respond to this information that was not disclosed by the Solicitor despite the filing of very specific discovery motions.

In Holman v. State, 381 S.C. 491, 674 S.E.2d 171 (2009), the Supreme Court of South Carolina reversed the lower court and granted relief finding that trial counsel was ineffective for failing to object to prejudicial evidence. This Court finds that trial counsel's failure to enter contemporaneous objections during Kanae's testimony does not amount to ineffective assistance of counsel as was found in Holman. Clearly, this Court cannot find trial counsel ineffective when he was blindsided by the Solicitor and was on the receiving end of prosecutorial misconduct, which is discussed in detail below.

Through his Amendment and testimony, the Applicant has alleged that trial counsel failed to effectively utilize testimony, exhibits, and case law in the areas of self-defense, defense of others, and voluntary manslaughter. The Applicant testified to and provided examples of how trial counsel failed to present evidence of character and prior difficulties pursuant to State v. Day, 341 S.C. 410, 535 S.E.2d 431 (2000) and State v. Hill, 129 S.C. 166, 123 S.E.817 (1924), failed to address fear in relation to voluntary manslaughter pursuant to State v. Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010), and failed to address the victim's toxicology results and the Applicant's knowledge of her prescription drug usage pursuant to State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998). While on the stand, counsel readily admitted that he was too rigid with his trial strategy and he admitted that he should have more fully addressed the victim's character at trial and more fully explored all aspects of self-defense and voluntary manslaughter. This Court has considered the testimony and the trial record and finds trial counsel's admissions that he should have done more does not amount to ineffective assistance of counsel nor has the Applicant shown resulting prejudice.

The Applicant has further alleged that trial counsel was ineffective for failing to request a self-defense instruction that was narrowly tailored to the facts of his case pursuant to State v. Day, 341 S.C. 410, 535 S.E.2d 431 (2000) and failed to request instructions on fear, prior difficulty, duty to wait, and good character pursuant to State v. Hill, 129 S.C. 166, 123 S.E. 817 (1924), State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997), and State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989). In response to these allegations, counsel recalled having a charging conference in chambers and identified the requests he submitted to the court. As a result, this Court cannot find that trial counsel was ineffective nor was the Applicant prejudiced since trial counsel made specific requests to charge and submitted those request for the court's review. Therefore, the Applicant's claims regarding counsel's request to charge must fail.

Regarding the jury instructions, the Applicant claimed that trial counsel failed to object when the trial court improperly shifted the burden during the self-defense instruction. This Court has thoroughly reviewed the instruction at issue and finds that trial counsel was not ineffective for failing to object to the instruction. As a result, this claim must fail. The Applicant also alleged that trial counsel should have objected similarly to State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), to the malice instruction. In response, trial counsel testified that he should have objected to the malice instruction. Despite counsel's admission, this Court finds that the clear ruling in Belcher is controlling. In Belcher, the South Carolina Supreme Court stated: "Our ruling, however, will not apply to convictions challenged on post-conviction relief." 385 S.C. at 613, 685 S.E.2d at 811. Therefore, the Applicant's claim is not a proper basis for granting post conviction relief and must fail.

B. Prosecutorial Misconduct

Our judicial system relies upon the integrity of the participants. State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000). With this in mind, the Constitution requires only that a defendant receive a fair not a perfect trial. U.S. Const. Am. VI; State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999), Riddle v. Ozmint, 369 S.C. 69, 631 S.E.2d 70 (2006). This Court finds that the Applicant's case was rendered fundamentally unfair by prosecutorial misconduct. This Court further finds that the Respondent failed to call any witnesses or submit any evidence to rebut this finding.

The general test for reversible prosecutorial misconduct has two prongs: 1) the prosecutor's remarks or conduct must have in fact been improper, and 2) such remarks or conduct must have prejudicially affected the Applicant's substantial rights as to deprive him of a fair trial. United States v. Golding, 168 F.3d 700, 702 (4th Cir. 1999), United States v. Chorman, 910 F.2d 102, 113 (4th Cir. 1990). In State v. Hutto, 356 S.C. 384, 387-88, 589 S.E.2d 202, 203-4, the South Carolina Court of Appeals, explained:

> Challenges alleging prosecutorial misconduct typically involve a prosecutor's improper efforts to collect evidence or unfair trial tactics. See, e.g., State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000) (assistant solicitor viewed the surreptitious videotaping of privileged attorney-client communication); State v. Huggins, 325 S.C. 103, 481 S.E.2d 114 (1997) (prosecutor discussed matters outside of the evidence during closing arguments); State v. Chisolm, 312 S.C. 235, 439 S.E.2d 850 (1994) (prosecutor improperly audiotaped telephone conversation with defendant, who was represented by counsel); State v. Robinson, 305 S.C. 469, 409 S.E.2d 404 (1991) (prosecutor allegedly used previously suppressed evidence at trial); State v. Atkins, 303 S.C. 214, 399 S.E.2d 760 (1990) (prosecutor allegedly obtained confidential medical records in violation of attorney-client privilege); State v. Pee Dee News Co., 286 S.C. 562, 336 S.E.2d 8 (1985) (prosecutor asked improper questions at trial); State v. Craig, 267 S.C. 262, 227 S.E.2d 306 (1976) (prosecutor's conduct at trial allegedly was calculated to arouse unfair prejudice against defendant).

Here, the Solicitor failed to properly conduct and disclose an interview with the Applicant's key witness despite counsel's specific discovery requests, blurred the lines between attorney and witness on cross-examination, failed to place a witness on the State's witness list and disclose the witness during jury selection, and failed to honor the sequestration order. In State v. Sierra, 337 S.C. 368, 378, 523 S.E.2d 187, 192 (Ct. App. 1999), the South Carolina Court of Appeals addressed the Solicitor's cross-examination of a defense witness and held that the "cross-examination allowed an unfair assault upon the credibility of his denial on this most critical issue, in violation of Sierra's Sixth and Fourteenth Amendment right of confrontation." The Court explained that there is an inherent danger when the cross examiner obtained the prior inconsistent statement since the cross examiner publishes his version of the prior inconsistent statement thus pitting his credibility against that of the witness and blurring the lines between attorney and witness. Id. at 373, 523 S.E.2d at 189. In the instant case, the Solicitor obtained the prior inconsistent statement from a minor (Kanae) during an interview at her high school without a parent present and failed to fully disclose the interview and the investigator's notes prior to the day of her testimony at trial. He further failed to lay the proper foundation before interjecting his version of the meeting through cross-examination during which he clearly pitted his credibility against that of Kanae Ferguson. Trial counsel explained that he was blindsided by the Solicitor's interview and use of it to impeach Kanae; therefore, he failed to object during the cross-examination and only realized the Solicitor's true intentions when he called Investigator Davenport in reply.

In Sierra, the Court of Appeals noted that the Solicitor's actions that blurred the lines between attorney and witness during cross-examination set the stage for an

improper closing argument; whereas, here, the Solicitor's actions set the stage for the use of a non-disclosed witness for which trial counsel was admittedly not prepared. It is clear from the record and the testimony at the evidentiary hearing that Investigator Davenport's testimony was highly damaging to the credibility of the Applicant's key witness. While on the stand, the Applicant explained that he would have testified at trial if he would have known that the State planned to utilize Investigator Davenport in that capacity at trial, and trial counsel also made it clear that disclosure would have completely changed his trial preparation and strategy. Due to the Solicitor's conduct, neither trial counsel nor the Applicant knew how the State intended to devastate his primary defense at trial through an undisclosed witness that sat through the trial despite a clear sequestration order from the trial court. Interestingly, Investigator Davenport was not present during the testimony of Kanae Ferguson, which further demonstrates that the State planned to call him as a witness but kept this information from counsel and the court. In Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633 (1935), the Supreme Court of the United States explained the importance of the prosecutor's role in the judicial process:

> The United States Attorney 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 innocence 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.

Here, the Solicitor violated this duty and the Applicant was prejudiced as a result. Not only was trial preparation and counsel's strategy affected by the Solicitor's conduct, but

the jury was also impacted. When asked, trial counsel explained that it appeared that the jury was greatly swayed by the Solicitor's cross-examination and Investigator Davenport's testimony, which culminated in the jury's request for a copy of the statement from the interview. Transcript p. 608. The jury was not provided a copy of the statement since a statement was not disclosed or produced by the State. As a result, the jury was left with the Solicitor's interjection of the facts through his questions on cross-examination and the improper reply testimony of Investigator Davenport on which to make their finding. For the foregoing reasons, this Court finds that the Solicitor's actions amounted to prosecutorial misconduct. This Court further finds that the Applicant's trial was rendered fundamentally unfair by the Solicitor's conduct and this finding was not refuted by evidence or testimony from the State at the evidentiary hearing. As a result, the Applicant must be granted a new trial.

C. Ineffective Assistance of Appellate Counsel

Based upon the testimony, exhibits and arguments presented at the evidentiary hearing, this Court finds that the Applicant has failed to show that appellate counsel's performance was deficient under prevailing professional norms and that he was prejudiced as a result of such deficient performance. To prevail on his claim of ineffective assistance of appellate counsel, the Applicant must establish that there is a reasonable probability that the result of the proceeding would have been different, the conviction and sentence would have been overturned, if appellate counsel raised the issues alleged by the Applicant. See Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). This Court acknowledges that the Applicant and counsel testified that appellate counsel failed to raise an argument regarding the testimony of Kanae Ferguson and

Investigator Davenport on appeal, but this Court finds that this is not an issue of ineffective assistance of appellate counsel but is an issue of prosecutorial conduct as discussed above. The Applicant also alleged that appellate counsel failed to argue that the trial court did not conduct a prejudice analysis in denying the Applicant's motion for a mistrial. This Court finds that appellate counsel raised the trial court's denial of the Applicant's motion for a mistrial and this issue was fully addressed by the appellate court. Therefore, this Court finds that this claim must fail.

Therefore, based upon the foregoing, this Court orders that the Application for Post Conviction Relief is hereby granted solely on the issue of prosecutorial misconduct. This Court further finds that no other allegations were raised at the PCR hearing that have not been addressed herein. Therefore, any additional allegations are deemed waived because no evidence was presented.

IT IS THERFORE ORDERED:

1. That Applicant has met his burden of proof as to his allegations of prosecutorial misconduct;

2. That the Application for Post Conviction Relief be granted;

3. That Applicant's convictions and sentences on Indictment No.: 2004-GS-30-628 be vacated and granted a new trial;

4. That Applicant be released from the custody of South Carolina Department of Corrections and transferred to the custody of the Laurens County Detention Center pending the disposition of Indictment No.: 2004-GS-30-628.

AND IT IS SO ORDERED this 5th day of July, 2011.

The Honorable Eugene C. Griffith, Jr.
Judge, Eighth Judicial Circuit

Newberry, South Carolina

A TRUE COPY OF ORIGINAL
Lynn W. Lancaster
Laurens County CCCP & GS