

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM LAURENS COUNTY  
Court of Common Pleas  
Post Conviction Relief

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

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Case No.: 2009-CP-30-0725

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

vs.

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

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RETURN TO PETITION  
FOR WRIT OF CERTIORARI

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Under the any evidence standard of review, the lower court’s ruling should not be disturbed since the Petitioner-Respondent has mischaracterized the lower court’s ruling as a Brady violation and an error of law when the lower court granted relief due to fundament fairness and prosecutorial misconduct, claims cognizable and properly addressed by the lower court in a PCR Action.....6

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ISSUE PRESENTED

PETITIONER-RESPONDENT'S ISSUE PRESENTED:

- I. The PCR court erred in finding Respondent-Petitioner's trial was rendered fundamentally unfair by prosecutorial misconduct based upon trial court error and issues that were procedurally barred from consideration in a PCR action. In any event, there is no probative evidence, much less any legal authority, to support a finding of prosecutorial misconduct in this case.

RESPONDENT-PETITIONER'S COUNTER STATEMENT OF ISSUE PRESENTED:

- I. Under the any evidence standard of review, the lower court's ruling should not be disturbed since the Petitioner-Respondent has mischaracterized the lower court's ruling as a Brady violation and an error of law when the lower court granted relief due to fundamental fairness and prosecutorial misconduct, claims cognizable and properly addressed by the lower court in a PCR Action.

## STANDARD OF REVIEW

In a Post Conviction Relief Appeal, great deference is given to the lower court's findings of fact and conclusions of law. McCrary v. State, 317 S.C. 557, 455 S.E.2d 686 (1995). The existence of "any evidence" of probative value is sufficient to uphold the lower court's ruling. Webb v. State, 281 S.C. 237, 314 S.E.2d 839 (1984).

## STATEMENT OF THE CASE

Resp.-Pet. is presently confined in the South Department of Corrections pursuant to orders of commitment from the Laurens County Clerk of Court. Resp.-Pet. 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, Resp.-Pet. proceeded to trial in front of the Honorable James W. Johnson. Resp.-Pet. was represented by Chip Price, Esquire. The jury found Resp.-Pet. guilty as indicted. The Honorable James W. Johnson sentenced Resp.-Pet. 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. App. pp. 990-91.

A timely Notice of Appeal was filed, and an appeal was perfected by the Office of Appellate Defense. App. p. 624. On February 20, 2008, the South Carolina Court of Appeals affirmed the 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. App. pp. 667-73. A Petition for Writ of Certiorari was filed with the South Carolina Supreme Court, which was denied by Order dated March 5, 2009. App. pp. 675-713. The Remittitur was issued on March 11, 2009. App. p. 714.

An Application for Post Conviction Relief was filed on June 10, 2009. App. p. 715. The State submitted a Return on or about October 1, 2009. App. p. 739. Resp.-Pet., through counsel, submitted an Amendment to Application for Post Conviction Relief on March 25, 2011, which added eleven specific issues and several sub-issues. App. p. 744.

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. App. p. 749. Resp.-Pet. was present at the hearing and was represented by Tricia A. Blanchette, Esquire. Pet.-Resp. was represented by Harrison Brant, Assistant Attorney General, and David Spencer, Senior Assistant Attorney General.

At the beginning of the evidentiary hearing, PCR counsel explained that after speaking with trial counsel, who was subpoenaed by the State, “there may be an argument for a Brady violation” as to the issue raised in the Amendment regarding Kanae Ferguson. App. p. 753, Ins. 9-18. The State did not object to this general verbal amendment, which was accepted by the lower court. App. p. 753. During the evidentiary hearing, counsel called Kent Jones and Chip Price, Esquire, to the stand. Resp.-Pet. also testified on his own behalf.

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. App. p. 913. On July 22, 2011, Pet.-Resp. filed a Motion to Alter or Amend Pursuant to Rule 59(e), SCRCF, and/or Motion to Reopen the Record for Additional Testimony Pursuant to Rules 59(a) & 60(b), SCRCF. App. p. 942. On July 25, 2011, Resp.-Pet. submitted a Response to Respondent’s Post-Judgment Motion. App. p. 950. On August 2, 2011, the Honorable Eugene C. Griffith, Jr., issued an Order Denying Motion to Reconsider, which was filed on August 11, 2011. App. pp. 958-9.

On August 10, 2011, the State filed a Notice of Intent to Appeal. Thereafter, Resp.-Pet. filed a Notice of Cross Appeal on September 6, 2011. Resp.-Pet. also filed a Petition for Appellate Bond, which was denied. On March 5, 2012, Pet.-Resp. filed a Petition for Writ of Certiorari and Appendix from which this Return follows.

## ARGUMENT

I. Under the any evidence standard of review, the lower court's ruling should not be disturbed since the Petitioner-Respondent has mischaracterized the lower court's ruling as a Brady violation and an error of law when the lower court granted relief due to fundamental fairness and prosecutorial misconduct, claims cognizable and properly addressed by the lower court in a PCR Action.

A. Summary of the Pertinent Testimony Presented at the Evidentiary Hearing

1. Testimony of Nathaniel Ferguson (Respondent-Petitioner)

When Resp.-Pet. 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. Resp.-Pet. testified that he was arrested on May 13, 2004, and he retained Chip Price, Esquire, shortly after his arrest. App. p. 764.

Resp.-Pet. noted that his trial began with a Jackson v. Denno hearing. App. pp. 771-2. Officer Cutting took the stand during the Jackson v. Denno hearing and explained that he was dispatched and went to the scene. App. pp. 25-27, 771. Officer Cutting testified that he found Resp.-Pet. standing on the hedgerow, and Resp.-Pet. provided him with both guns and stated "I'm the one that did the shooting." App. pp. 27, lns. 13-23, 772-3. Resp.-Pet. explained that he was very surprised by Officer Cutting's testimony since he did not make the alleged statement and he had no notice that the officer was going to testify to it. App. p. 773, lns. 18-25.

Resp.-Pet. pointed out that Lt. Bolt testified that he arrived to the scene after about twenty minutes, he got Resp.-Pet. out of the patrol car and Resp.-Pet. was very cooperative. App. pp. 44-46. Resp.-Pet. explained that he was cooperative because he just wanted to tell the truth and it was the right thing to do. App. p. 774, lns. 19-21. Lt. Bolt testified that he asked Resp.-Pet. if he needed a lawyer to which he responded that "he needed to talk about it." App. p. 46, lns. 21-24. He also testified that Resp.-Pet. informed him that the victim's gun clicked. App. p. 50, lns. 18-

19. Lt. Bolt testified about obtaining two written statements from the Resp.-Pet., and he acknowledged on cross-examination that his report did not include the alleged verbal statement. App. pp. 58, 66, 69, 779. Regarding Lt. Bolt's testimony, Resp.-Pet. explained that he asked Lt. Bolt to check the victim's gun because she had pointed it at him, it clicked and did not fire. App. p. 775. Resp.-Pet. identified pictures of the victim's gun, along with a diagram, and he explained in detail that the picture and diagrams verified his version of events. App. pp. 776-8. He acknowledged that trial counsel argued that the State failed to provide proper notice of the verbal statements despite his specific requests. App. pp. 72-74, 779. The trial court suppressed the verbal statement purportedly given to Lt. Bolt but allowed the statement given to Officer Cutting as an excited utterance. App. pp. 74, 780.

Resp.-Pet. 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. App. pp. 782-3. He explained that Kim Wilson ("Kim") testified for the State at trial, and a copy of her written statement was introduced. App. p. 783. During 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. App. pp. 180, 181, ln. 12, 182, ln. 20. Resp.-Pet. noted her written statement indicated that she was on the porch during the entire shooting. App. pp. 785-6

Resp.-Pet. 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. App. pp. 792-3. On redirect, Kim testified that "He looked at me and told me that I was next." App. p. 198, lns. 4-5. Trial counsel moved to strike the "absurd" statement since he received no notice. App. 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. App. pp. 198-99. The trial court sustained counsel's objection finding that Kim's testimony was not responsive to the question presented on redirect. App. pp. 206, 207, Ins. 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. App. p. 207, Ins. 10-13, 19-25. 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. App. pp. 213, 216-17. Thereafter, the State indicated that they did not plan to ask the question correctly. App. p. 215, 792. Resp.-Pet. noted that the court failed to conduct a prejudice analysis and trial counsel did not bring the failure to the court's attention; therefore, the issue of prejudice was not addressed on appeal. App pp. 793-95.

Resp.-Pet. explained that his daughter Kanae Ferguson ("Kanae") was present during the incident at issue and provided a statement to law enforcement. App. pp. 795-6. Turning to the transcript, Resp.-Pet. noted that the Solicitor asked Kanae about inconsistencies in her statement and he asked her about a prior meeting at her high school. App. pp. 493, Ins. 17-20, 797-8. After Kanae acknowledged the meeting, the Solicitor stated that he went to her high school and met with her on April 12<sup>th</sup>, and he proceeded to ask her specific questions about that meeting. App. 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. App. pp. 506-7.

When the defense rested, the State called Investigator Davenport as a reply witness. Resp.-Pet. 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 Resp.-Pet. shot the victim after she was on the ground. App. pp. 518, 520, Ins. 4-6. Resp.-Pet. testified that it was clear that the

Solicitor's questioning and Investigator Davenport's testimony had a prejudicial effect on the jury since they requested a copy of the statement from the school interview, which did not exist, during deliberations. App. pp. 608, 805-6. Resp.-Pet. 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. App. p. 805. 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. App. pp. 799-800.

Resp.-Pet. candidly admitted that he chose to not testify, but he made his decision based upon the advice of his trial counsel. App. p. 806. 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. App. pp. 806-7, 841, 850. Resp.-Pet. noted that his statements were introduced, but he explained that his statements did not provide the full picture of the facts to the jury. App. p. 807. Thereafter, Resp.-Pet. testified to a detailed account of the facts surrounding the incident at issue and prior difficulties with the victim. App. pp. 808-816.

## 2. Chip Price, Esquire (Trial Counsel)

When Chip Price, Esquire, took the stand, he explained that he had practiced law for thirty-five years, primarily in the area of criminal defense. App. pp. 853-4. Despite his lengthy career, he said that he would never forget this case. App. p. 854, Ins. 5-7. When asked by the State if he just felt bad because "the jury didn't go the way you thought they should," counsel responded: "No, it is not that simple." App. p. 893, Ins. 19-21. He recalled receiving discovery from the Solicitor's Office "rather late," but he clearly recalled the trial being an "ambush" of non-disclosed information from the Solicitor's Office. App. pp. 854, 856.

Regarding the Jackson v. Denno hearing, Mr. Price recalled filing discovery motions requesting any statements attributed to Respondent-Petitioner. He also recalled that one of the verbal statements attributed to the Resp.-Pet. was not disclosed. App. p. 859.

Turning to the trial testimony of Kim Wilson and her statement, Mr. Price admitted that he must have missed the opportunity to further impeach her regarding the shot sequence, which was a mistake on his part. App. p. 861, lns. 18-21. Mr. Price explained that he had no notice of the alleged threat Kim Wilson received from the Respondent-Petitioner. App. p. 862. When asked about his motion for a mistrial, Mr. Price admitted that the prejudice was absolutely not “cured by the curative instruction” and he should have specifically requested that the trial court address the prejudice suffered by Respondent-Petitioner. App. pp. 862-3.

Mr. Price explained that Kanae Ferguson was the key witness for the defense since he advised the Resp.-Pet. to not take the stand. App. p. 868. When asked about the Solicitor’s use of his interview with Kanae at her high school and interjection of his recollection of that interview, Mr. Price recalled “I was stunned by the whole thing.” App. p. 864, ln. 9. After discussing the State’s use of Investigator Davenport as a reply witness to further address the interview of Kanae, Mr. Price stated: “Had we known that was coming then I would have done something different and probably would have called Nathaniel as a witness.” App. p. 865, lns. 20-22. He also recalled the jury asking for a copy of Kanae’s statement from the high school meeting, and their request confirmed his opinion that it had gutted their case. App. p. 868. When asked about the jury’s verdict, the following took place:

Mr. Price: I think the jury was influenced greatly by the investigators testimony on Kanae’s reply and of course at that point I have already presented my case, I am basically helpless. I don’t know if there is such a thing in South Carolina as surrebuttal testimony but if so it is very limited. I can’t put Mr. Ferguson back on the stand, I mean my whole case goes down the tubes then. In hindsight had

I known something like that is happening then we try the case differently.

PCR counsel: And without any notice from the Solicitor, how were you to know that your case was going to go down the tubes?

Mr. Price: Well, I had no notice. I didn't know this young guy (Solicitor), nothing more to say.

App. p. 878, lns. 2-14. After PCR counsel read a quote from Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555 (1995), regarding prosecutorial conduct, Mr. Price responded: "If you had asked me did his, Mr. Young's conduct violate Kyles v. Whitley I would have said absolutely, yes. Brady, I am a little , I am not so sure. Kyles v. Whitley, **absolutely**." App. p. 895-6, lns. 11-14 (emphasis added). Thereafter, PCR counsel admitted that she may have mischaracterized the matter as a Brady violation when it was "more of an issue of prosecutorial misconduct." App. p. 895, lns. 15-17. In response, trial counsel characterized the Solicitor's conduct as "cheap shots, ambushing and stuff that was just totally uncalled for." App. p. 895, lns. 19-20. He further explained:

I just didn't understand it, I never dealt with this man before, I have never dealt with a prosecutor who acted like that before. I am always up for, I can deal with one cheap shot at trial, I expect it but this was just one after another.

App. pp. 896-7, lns. 22-25, 1. He also explained that he was "stunned" by the use of Investigator Davenport, an undisclosed witness, at trial. App. p. 897, lns. 2-7.

The Pet.-Resp. did not call Frank Young, Esquire, to the stand at the evidentiary hearing.

## B. Argument

1. The issue addressed by the lower court was properly raised and ruled upon in a Post Conviction Relief Action.

At the beginning of the evidentiary hearing, PCR counsel explained that after speaking with trial counsel, who was subpoenaed by the State, "there may be an argument for a Brady

violation” as to the issue raised in the Amendment regarding Kanae Ferguson. App. p. 753, lns. 9-18. The State did not object to this general verbal amendment, which was accepted by the lower court. App. p. 753. Thereafter, the lower court heard the above detailed testimony of Resp.-Pet. and trial counsel. At the conclusion of the evidentiary hearing, the lower court indicated that he needed to further review the matters involving prosecutorial misconduct. App. pp. 910-911. At no time during the evidentiary hearing did the Pet.-Resp. request a continuance or call the Solicitor to testify. Even after the lower court stated that he wanted to further review the matters involving prosecutorial misconduct, the Pet.-Resp. did not ask that the record be left open to obtain the Solicitor’s testimony.

After the issuance of the Order Granting Application for Post Conviction Relief, the Pet.-Resp. filed 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) & 60(b), SCRCP. App. p. 942. In his response, Resp.-Pet. argued:

In the Motion at issue, the Respondent has argued that counsel did not properly state the Amendment on the record and the State did not have notice of said issue and requests that the record be re-opened for additional testimony. In making such a claim, the Respondent has failed to acknowledge that Mr. Price was present at the evidentiary under the State’s subpoena and as a witness for the State. It seems rather incredulous to argue that the Applicant should have had more notice of what the State’s witness would testify to at the evidentiary hearing than the party that had the witness under subpoena. The Applicant submits that the State’s Motion clearly establishes that the State failed to properly prepare and consult with their witness prior to the evidentiary hearing and is now asking this Court to allow the record to be re-opened due to lack of preparation.

App. p. 952. In conclusion, Resp.-Pet. further argued:

It is clear that the Respondent is alleging lack of notice on an issue that was derived from the testimony of their witness. The Applicant, through counsel, submitted a detailed Amendment, which does touch on several of the issues involved in the prosecutorial misconduct claim, and provided the State with all known exhibits prior to the evidentiary hearing. Applicant’s counsel also contacted Harrison Brant, Assistant Attorney General, upon speaking with Mr.

Price and finding out that there may be a matter of prosecutorial misconduct. It is unknown as to why the State chose not to have the Solicitor or Investigator present, why the State did not request a continuance once the issue developed at the evidentiary hearing, why the State did not request that this Court leave the record open when the issue was framed from the bench at the conclusion of the hearing, or why the State did not make such a request when this Court requested an Order on the issue of prosecutorial misconduct. The Applicant submits that the State has failed to account for such failure and is not prejudiced by the record as it stands.

App. p. 954. On August 2, 2011, the lower court denied Petitioner-Respondent's Motion. App. p. 959.

Despite Petitioner-Respondent's failure to prepare with their witness (trial counsel) or utilize the Solicitor at the evidentiary hearing, Resp.-Pet. submits that the lower court's ruling on prosecutorial misconduct was properly presented and considered by the lower court. Rule 15(b), SCRCP, provides:

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall upon motion grant a continuance reasonably necessary to enable the objecting party to meet such evidence. Upon allowing any such amendment or evidence the Court shall state in the record the reason or reasons for allowing the amendment or evidence. In the event the Court should try issues not raised by the pleadings, it shall state in the record all such issues tried and the reason therefor.

Pursuant to Rule 15(b), SCRCP, and the record before this Court, the Resp.-Pet. submits that the issue of prosecutorial misconduct was properly raised and ruled upon by the lower court, and Petitioner-Respondent's argument to the contrary is erroneous.

Even though Pet.-Resp. argues that the issue of prosecutorial misconduct is not cognizable in PCR and is procedurally barred; Pet.-Resp. also argues that the lower court failed to properly rule on the issue of a Brady violation. It appears that Petitioner-Respondent's arguments are inconsistent at best since a Brady violation is a recognized form of prosecutorial misconduct. See Gibson v. State, 334 S.C. 515, 528, 514 S.E.2d 320, 326 (1999). Essentially, the Pet.-Resp. is asking this Court to require the lower court to rule on an issue while arguing that the issue is not cognizable and procedurally barred. Therefore, it is best to look at the lower court's clear ruling.

Here, the lower court's ruling was simple: "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." App. p. 937. Similarly, in Riddle v. Ozmint, 369 S.C. 39, 48, 631 S.E.2d 70, 75 (2006), this Court reversed the lower court's denial of relief and held:

Petitioner's trial was rendered fundamentally unfair by prosecutorial misconduct. No probative evidence exists in this record to support the PCR judge's findings and conclusion. Accordingly, the PCR order denying petitioner relief is reversed.

Despite the similarities with the ruling in Riddle, Pet.-Resp. argues that pursuant to the Uniform Post Conviction Procedure Act and prevailing precedent the lower court was barred from ruling and granting relief on the issue of fundamental fairness and prosecutorial misconduct.

Under the Uniform Post Conviction Procedure Act, S.C. Code Ann. §§ 17-27-10 to 17-27-160, PCR is a proper avenue of relief only when the applicant mounts a collateral attack challenging the validity of his conviction or sentence as authorized by S.C. Code Ann. § 17-27-20(a). A typical PCR claim of ineffective assistance of counsel falls into this category because, if the applicant proves his case, his conviction or sentence will be overturned; however, a claim

regarding sentence-related credits or other condition of imprisonment does not fall into this category because a successful claim, while it may affect the duration of the sentence or the quality of life in prison, will not affect the validity of the underlying conviction or sentence. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (1999). Resp.-Pet. submits that the claims raised and ruled upon by the lower court amount to a proper collateral attack on his conviction and sentence.

As is argued by the State, Resp.-Pet. concedes that S.C. Code Ann. § 17-27-20(b) (1985) of the Uniform Post-Conviction Procedure Act provides that PCR "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." Additionally, PCR is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal. See Peeler v. State, 277 S.C. 70, 283 S.E.2d 826 (1981), Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973), Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993). Despite this concession, Resp.-Pet. submits that the State has failed to provide any precedent to establish that the issue of fundamental fairness and prosecutorial misconduct is not cognizable and procedurally barred in PCR. On the contrary, this Court has consistently recognized prosecutorial misconduct as a proper and viable claim in PCR. See Riddle v. Ozmint, 369 S.C. 39, 631 S.E.2d 70 (2006).

For example, in Washington v. State, 324 S.C. 232, 235-236, 478 S.E.2d 833, 834 (1996), this Court affirmed the granting of relief on the issue of prosecutorial misconduct and held:

Here, the PCR court found that Washington was entitled to a new trial because of the State's misconduct in failing to fully disclose the nature of its relationship with a witness. The United States Supreme Court in Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972) stated that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice; the same result obtains when the State, although

not soliciting false evidence, allows it to go uncorrected when it appears.

Under the present facts, the State allowed to go uncorrected false information about its relationship with one of its witnesses. Although it had entered into a plea agreement with this witness, the State, in its opening argument, told the jury that no such agreement existed. Furthermore, there was testimony that no deal existed between the State and the witness. The PCR court's findings are supported by competent evidence of probative value in the record. Accordingly, the granting of relief is affirmed.

Additionally, in Gibson v. State, 334 S.C. 515, 528-9, 514 S.E.2d 320, 327 (1999), this Court addressed prosecutorial misconduct in the form of a Brady violation and reasoned:

The prosecutor committed a Brady violation by not disclosing certain evidence to Gibson. A Brady violation is one type of prosecutorial misconduct. It is misconduct of a different type than, for instance, an attempt to introduce inadmissible evidence, tamper with the jury, or some other inappropriate action. E.g., United States v. Alderdyce, 787 F.2d 1365, 1370 (9th Cir. 1986) (finding no evidence of prosecutorial misconduct giving rise to a Brady violation); Buffington v. Copeland, 687 F. Supp. 1089, 1095-96 (W.D. Tex. 1988) (distinguishing Brady violations from other types of prosecutorial misconduct in which, for example, a prosecutor tries to inject prejudice into a trial by introducing inadmissible evidence or making inappropriate opening statements or closing arguments). We affirm the PCR judge's decision to set aside Gibson's guilty plea and grant him a new trial based on the Brady violation.

Furthermore, the lower court also held that the prosecutor's actions implicated fundamental fairness, which is a cognizable claim on collateral review. See Butler v. State, 302 S.C. 466, 397 S.E.2d 87 (1990).

Clearly, the precedent of this Court establishes that the lower court's ruling addresses an issue that is cognizable and not barred from consideration in Post Conviction Relief. If this Court chooses to brake from this clear precedent, Resp.-Pet. alternatively argues the case should be remanded and/or reversed on the issue of ineffective assistance counsel, which was clearly raised to the lower court and is addressed in Respondent-Petitioner's cross appeal.

2. The lower court's ruling satisfies the any evidence standard of review and does not amount to an error of law.

Primarily, Pet.-Resp. has argued that lower court erred in granting relief on prosecutorial misconduct since the prosecutor's conduct did not amount to a Brady violation. As is explained above, the lower court did not grant relief due to a Brady violation. Similarly to the ruling in Riddle, the lower court held: "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." App. p. 937. As was stated by the lower court, the Pet.-Resp. provided no evidence or testimony to rebut his finding, and the lower court's Order provided a detailed analysis of the evidence, testimony and law in support of his finding. Therefore, Resp.-Pet. submits that the lower court's ruling is not an error of law and must be upheld under the any evidence standard of review.

Turning to the Order, the lower court decision relied upon the following legal analysis:

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).

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 (4<sup>th</sup> Cir. 1999), United States v. Chorman, 910 F.2d 102, 113 (4<sup>th</sup> 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).

App. p. 937.

As to the evidence and facts before the lower court, the court found that the Solicitor failed to properly conduct and disclose an interview with the Respondent-Petitioner'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. App. p. 938. The Pet.-Resp. argued that the lower court errantly relied upon State v. Sierra, 337 S.C. 368, 523 S.E.2d 187 (Ct. App. 1999), since it is distinguishable from the instant case. In the Order, the lower court reasoned:

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.

App. p. 938. The lower court further reasoned:

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.

App. p.938-9.

Resp. Pet. submits that the lower court's reliance upon Sierra and above stated reasoning is not an erroneous application of the law and it is fully supported by the trial record and the testimony and evidence presented at the evidentiary hearing. On the other hand, the Pet.-Resp. failed to provide the lower court with any testimony or evidence beyond the trial record to refute a finding that the prosecutor engaged in misconduct. As is detailed above, trial counsel testified

that he had practiced law for thirty-five years and had never been subjected to such egregious conduct by a Solicitor. Furthermore, counsel explained that he was simply blind sighted and the culmination of the Solicitor's conduct was complete devastation of Respondent-Petitioner's case.

Turning to prejudice, the lower court held:

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.

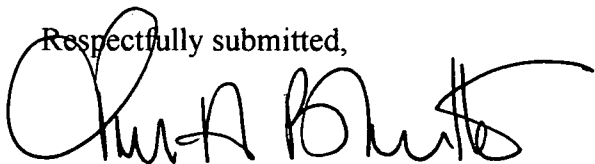
App. pp. 939-40.

This Court is bound by the any evidence standard of review, and there is probative evidence in the record, as detailed above, to support the lower court's ruling. Furthermore, the only evidence before the lower court supported his finding implicating fundamental fairness and prosecutorial misconduct. Therefore, Resp.-Pet. urges this Court to find that the record and testimony presented to the lower court implicated fundamental fairness and amounted to prosecutorial misconduct. Clearly, a finding to the contrary would require speculation and is not supported by the record since the Pet.-Resp. failed to call the Solicitor or present any evidence otherwise.

CONCLUSION

For the above stated reasons, the Respondent-Petitioner respectfully requests that this Court affirm the lower court's Order Granting Application for Post Conviction Relief and remand the Respondent-Petitioner's case to the lower court for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Tricia A. Blanchette', written over a horizontal line.

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ATTORNEY FOR RESPONDENT-PEITIONER

This 13 day of April, 2012.