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 WRIT OF CERTIORARI

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ISSUES PRESENTED

I. Trial counsel admitted that he rendered ineffective assistance of counsel and was unreasonable with his trial strategy; therefore, there is no evidence in the record to support the lower court's finding to the contrary.

A. Trial counsel rendered ineffective assistance of counsel when he advised Respondent-Petitioner to reject the plea offer, and Respondent-Petitioner's sentence reflects the prejudice suffered as a result.

B. The lower court erred by finding that trial counsel made a valid decision to not utilize Kent Jones when the testimony of trial counsel, Respondent-Petitioner and Kent Jones established ineffective assistance of counsel that was outcome determinative.

C. The lower court erred in finding that trial counsel was not ineffective for failing to utilize Respondent-Petitioner as a witness during the Jackson v. Denno hearing and at trial.

D. The lower court erred in finding that trial counsel's admissions regarding his failures in handling the testimony of Kim Wilson did not amount to ineffective assistance of counsel.

E. The lower court erred by excusing trial counsel's failure to make contemporaneous objections during the testimony of Kanae Ferguson.

F. The lower court erred in finding trial counsel was not ineffective regarding the use of evidence to establish possible defenses and his handling of the jury instructions.

G. The lower court erred in excusing trial counsel's admitted ineffective assistance of counsel for failure to enter a contemporaneous objection to the implied malice instruction.

H. The lower court erred in finding appellate counsel rendered effective assistance of counsel.

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. 667-673. 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 hearing, PCR counsel explained the testimony of trial counsel, who was subpoenaed by the State, may also establish a Brady violation as to the issue raised in the Amendment regarding Kanae Ferguson. App. p. 753. The State did not object to this verbal amendment. 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), SCRCP, and/or Motion to Reopen the Record for Additional Testimony Pursuant to Rules 59(a) & 60(b), SCRCP. 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. p. 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 Petition follows.

ARGUMENT

I. Trial counsel admitted that he rendered ineffective assistance of counsel and was unreasonable with his trial strategy; therefore, there is no evidence in the record to support the lower court's finding to the contrary.

In the Order Granting Application for Post Conviction Relief, the lower court found the testimony of Resp.-Pet., trial counsel, and Kent Jones to be credible. App. pp. 929-30. When matters of credibility are involved this Court has consistently given great deference to a post conviction relief court's findings. Smith v. State, 375 S.C. 507, 654 S.E.2d 523 (2007), McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995), Solomon v. State, 313 S.C. 526, 529, 443 S.E.2d 540, 542 (1994) (Stating the court gives great deference to a PCR court's findings when matters of credibility are involved.). Based upon the lower court's credibility findings, Resp.-Pet. submits that there is no evidence in the record to support the lower court's finding of effective assistance of trial counsel since Resp.-Pet. alleged and trial counsel repeatedly admitted regrettable actions of ineffectiveness and deemed his own trial strategy unreasonable.

A. Summary of the Testimony Presented at the Evidentiary Hearing

1. 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 retained Chip Price, Esquire, shortly after his arrest.

App. p. 764. Resp.-Pet. recalled reviewing "a little" of the discovery documents. App. pp. 764-5, lns. 2-4. He specifically recalled raising concerns about the photos contained in the discovery, and he utilized a map and photo to explain his concerns. App. pp. 765-68. Resp.-Pet. explained that he asked his attorney to speak with potential witnesses, specifically, to speak with Kent Jones regarding his first hand knowledge of the situation and prior problems with the victim. After identifying the witness list, Resp.-Pet. explained that he thought Jones would be called as witness. App. pp. 771-2. Resp.-Pet. testified that the trial strategy was self-defense and counsel had obtained a psychologist that he did not meet with before trial. App. pp. 764-5, 769.

As to plea offers, Resp.-Pet. recalled an offer to manslaughter, which carried a twenty year cap. App. p. 770. He explained that he did not fully understand the elements of murder and manslaughter nor had counsel fully explained his case when he rejected the plea offer. App. p. 770. Resp.-Pet. concluded that he lacked the knowledge and understanding needed to properly consider the plea offer. App. p. 770.

Turning to trial, 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 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. Resp.-Pet. was not sure why he was not used as a witness at the Jackson v. Denno hearing, but he noted that his attorney 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. alleged that trial counsel focused solely on Lt. Bolt and not on Officer Cutting. App. p.780, lns. 13-18.

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 that trial counsel failed to ask her about her written statement which indicated that she was on the porch during the entire shooting. App. pp. 785-6. Resp.-Pet. also noted that trial counsel failed to question Kim about the inconsistencies between her statement and her testimony about the victim being armed. App. pp. 786-88.

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. Immediately, 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, 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. App. p. 207, lns. 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 and gave a statement. App. pp. 795-6. Turning to the transcript, Resp.-Pet. noted that the Solicitor asked Kanae about inconsistencies with her statement in relation to a prior meeting at her high school. App. pp. 493, lns. 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 12th, and he proceeded to ask her questions about that meeting. App. pp. 493, 500. On redirect, Kanae explained that she was hauled out of her class with no notice to her or her parents. App. pp. 506-7. When the defense rested, the State requested to call Inv. Davenport as a reply witness, and trial counsel objected due to a violation of the sequestration order and lack of notice. App. pp. 511-13. Following argument from both sides, the court indicated concern as a parent, found a technical violation of the sequestration order but ruled that Inv. Davenport would be allowed to testify in reply. App. pp. 515-16.

Resp.-Pet. highlighted Inv. Davenport's testimony, which directly impeached the testimony of Kanae Ferguson. Specifically, Inv. 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, lns. 4-6. Resp.-Pet. explained that the jury was impacted by the testimony since they requested a copy of the statement from the high school interview, which did not exist, during deliberations. App. pp. 608, 805-6. Resp.-Pet. explained that Kanae was his key witness to help establish self-defense. If he would have known about the school interview and purported statement, then it would

have been a major factor in trial preparation. App. p. 805. He also 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. He stated that trial counsel did not object under the Confrontation Clause to the Solicitor's interjection of his testimony through his questions on cross-examination. App. pp. 800-1.

Resp.-Pet. candidly admitted that he chose not to testify, but he made his decision based upon the advice of 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.

As to closing arguments, Resp.-Pet. said he was shocked when trial counsel informed the jury that Resp.-Pet. had no problems with the victim in the ten years prior to the shooting since he had experienced problems with her for ten years. App. pp. 549, 825. Resp.-Pet. also noted that the State's reference to Kent Jones during closing argument demonstrated why he was needed at trial. App. pp. 825-6.

Turning to the jury instructions, a copy of written jury charges was introduced, and Resp.-Pet. explained that all the discussions regarding jury requests were held in chambers. App. p. 826. Through detailed testimony, Resp.-Pet. alleged that trial counsel failed to request a self-defense instruction that was narrowly tailored to the facts of

Respondent-Petitioner's case pursuant to State v. Day, 341 S.C. 410, 535 S.E.2d 431 (2000). App. pp. 827-8 Resp.-Pet. 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). App. pp. 595, 828-9. Resp.-Pet. also testified that trial counsel should have objected when the trial court improperly shifted the burden during the self-defense instruction. App. pp. 602, lns. 9-15, 830-1.

Finally, Resp.-Pet. 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. Resp.-Pet. testified that appellate counsel failed to raise any issues stemming from Kanae's trial testimony. App. p. 832. Resp.-Pet. 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. App. p. 832.

2. Kent Jones

When Kent Jones was called to the stand, he confirmed that he was a relative of the victim and he was conflicted but testifying pursuant to a subpoena. App. pp. 754, 758. 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. App. pp. 754, 756. He recalled that trial counsel came to his house and met with him prior to trial. App. p. 755. He further recalled playing one or two phone messages for Mr. Price that he had received from Resp.-Pet. on the day in question. App. pp. 755, 759. He confirmed that the Resp.-Pet. and his children had used his shower due to a situation with the water. App. p. 757. 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. App. pp. 756, 758. He

acknowledged that the Resp.-Pet. had experienced prior difficulty with the victim, but he never knew the Resp.-Pet. to resort to violence. App. p. 758. He confirmed that he was not subpoenaed to testify at trial. App. p. 755.

3. 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, lns. 5-7. He acknowledged that he did not hire a private investigator, but he did retain two experts. App. p. 855. 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.

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. App. p. 855. Upon consideration of his PCR testimony, Mr. Price explained that it would have been helpful to call Kent Jones as a witness. App. p. 856.

Regarding the plea offer, Mr. Price explained that he should have "leaned" on the Resp.-Pet. harder or pressed him to take the plea. App. p. 857. He further explained that the Resp.-Pet. relied upon his advice in deciding to reject the plea offer and he should have given him better advice. App. p. 883.

As to the Jackson v. Denno hearing, Mr. Price recalled filing discovery motions requesting any statements attributed to Resp.-Pet., and he was adamant that one of the verbal statements attributed to the Resp.-Pet. was not disclosed. App. p. 859. Mr. Price

questioned his decision to rely upon the Respondent-Petitioner's statements instead of calling him as a witness in order to establish self-defense. Specifically, he stated:

> You know, Ms. Blanchette, I said I have been doing this 35 years and I don't worry about cases, this one has bothered me continuously since it happened. Just due to the fact that he got convicted of murder rather than manslaughter I question whether my theme or whatever was overly rigid and I did not adjust. I question whether my theme or strategy was effective or ineffective based on the result. And I don't second guess myself, I don't do postmortems but on this one I have had a genuine and sincere problem with.

App. p. 858, lns. 10-19.

Mr. Price admitted that he was in error when he stated in closing that the Resp.-Pet. experienced no prior problems with the victim since Resp.-Pet. had told him otherwise. App. p. 874. He also admitted that he should have spoken with witnesses and fully explored the victim's character and the matter of prior difficulty. App. pp. 875-77. He stated: "I should have done more in that regard, I should not have been as rigid in my thought process about not putting Nathaniel up when Nathaniel could have testified to all of that." App. p. 877, lns. 20-23.

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 Resp.-Pet., and he was surprised that this lack of notice was not addressed by appellate counsel. 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 prong. 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 the interview with Kanae at her high school and interjection of his recollection of that interview, Mr. Price responded: "Number one I was stunned by the whole thing. Number two, I should have objected. And number three, I think it was error on my part for not objecting." App. p. 864, lns. 9-11. 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 for him confirmed his opinion that it had gutted their case. App. p. 868. When asked about the direct appeal, he thought that the impeachment of Kanae and the reply testimony of Investigator Davenport, which violated the sequestration order, would be presented on appeal. App. p. 867.

As to jury instructions, Mr. Price recalled that the trial court gave a "standard" self-defense instruction mostly impart because he did not ask for more. App. pp. 879-80. He admitted that he did not ask for a narrowly tailored self-defense instruction or an instruction on fear, and he failed to put any evidence in the record to have a legitimate request for an instruction on character. App. p. 880. 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. App. pp. 880-81.

Mr. Price stated that he was too locked in on his trial strategy and should have adjusted. App. pp. 882, 892. He said that he was too rigid. App. pp. 877, 882. 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, lines 19-21.

B. Argument

1. Trial counsel rendered ineffective assistance of counsel when he advised Respondent-Petitioner to reject the plea offer, and Respondent-Petitioner's sentence reflects the prejudice suffered as a result.

Through his Application and evidentiary hearing, Resp.-Pet claimed that trial counsel was ineffective for failure to ensure that Resp.-Pet. 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, Resp.-Pet. 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. App. p. 770. Resp.-Pet. also explained that he lacked the knowledge and understanding needed to properly consider the plea offer. App. p. 770. When trial counsel was asked about the advice he gave to Resp.-Pet. on the plea offer, the following took place:

> PCR counsel: Looking back at the advice that you gave Mr. Ferguson is there anything that you think you should have done differently?
>
> Trial counsel: Absolutely. I should have, I should have pressured Mr. Ferguson a lot, I should have pressured him period which I did not do. But I should have leaned on him to take a manslaughter plea. ...But to this day I believe I should have leaned on him further and gotten, pursued it more.

App. p. 857, lns. 12-25. On cross-examination, trial counsel explained that it was Respondent-Petitioner's decision to an extent to reject the plea offer but to a larger extent

he was relying on trial counsel. App. p. 883. Trial counsel further explained: "I was his attorney. I was suppose to know what I was doing, I was suppose to give him good advice." App. p. 883, lns. 5-7. Despite these clear admissions regarding the quality of his representation and failure to give Resp.-Pet. "good" advice, the lower court found that trial counsel rendered reasonably effective assistance in advising the Resp.-Pet. based upon the information he was provided by the State at the time the plea was offered. App. p. 931. Interestingly, the lower court found the testimony of both trial counsel and Resp.-Pet. was credible. Therefore, it appears that there is no evidence in the record support the lower court's finding that stands in complete contradiction to the testimony of trial counsel and Resp. Pet. As a result, Resp.-Pet. would urge this Court to find that there is no evidence in the record to uphold the lower court's finding that trial counsel rendered effective assistance when he assisting Resp.-Pet. to reject the plea offer.

Additionally, the lower court failed to conduct a prejudice analysis. Resp.-Pet. was offered a plea to manslaughter with a twenty year cap. At the conclusion of his trial, he was found guilty of the greater offense of murder and sentenced to a term of thirty years. As was found in Kolle, 386 S.C. 578, 592, 690 S.E.2d 73, 80, Resp.-Pet. would urge this Court to find that the prejudice suffered due to the rejection of the plea offer is apparent from the difference between the potential sentence under the plea offer and the sentence of thirty years with five years consecutive, which was imposed by the trial court.

2. The lower court erred by finding that trial counsel made a valid decision to not utilize Kent Jones when the testimony of trial counsel, Respondent-Petitioner and Kent Jones established ineffective assistance of counsel that was outcome determinative.

Resp.-Pet. also claimed that trial counsel was ineffective for failing to utilize Kent Jones as a witness at trial. In support of this allegation, Resp.-Pet. called Kent Jones to testify at the evidentiary hearing and his testimony is summarized above.

In Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998), this Court addressed whether trial counsel was ineffective for failing to call a witness at trial. This 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.

Here, Kent Jones testified that he lived adjacent to Resp.-Pet. and the victim where the shooting took place and he shared a driveway with the victim. App. pp. 754, 756. He recalled having to call the cops over issues with their shared driveway. App. p. 756. He further recalled Resp.-Pet. having prior difficulties with victim, and he never had known Resp.-Pet. to resort to violence. App. p. 758.

While on the stand, trial counsel admitted that Kent Jones "would have helped out." App. p. 856, lns. 3-7. Nevertheless, the trial court found that trial counsel was not ineffective for failing to utilize Kent Jones as a witness at trial. Clearly, Kent Jones could have provided testimony to corroborate Respondent-Petitioner's version of events, regarding prior difficulty with victim and regarding Respondent-Petitioner's likelihood to resort to violence. In light of Kent Jones testimony at the evidentiary hearing and counsel's admission that his testimony would have been helpful at trial, Resp.-Pet. submits that trial counsel was ineffective for failing to utilize Kent Jones. As is discussed below and in the Return to Petition for Writ of Certiorari, the State decimated Respondent-Petitioner's key witness (Kanae), and Respondent-Petitioner was advised not to testify by counsel. Additionally, the State emphasized the importance of Kent Jones by referencing him in closing argument. App. p. 571. Therefore, Resp.-Pet. submits that there is a reasonable probability that Mr. Jones testimony would have affected the outcome of the trial. Therefore, counsel's failure to utilize Kent Jones was prejudicial.

3. The lower court erred in finding that trial counsel was not ineffective for failing to utilize Respondent-Petitioner as a witness during the Jackson v. Denno hearing and at trial.

The Resp.-Pet also alleged and explained at the evidentiary hearing that trial counsel was ineffective for not having him testify during the Jackson v. Denno hearing and as a defense witness at trial. The lower court acknowledged trial counsel's admission that he should have utilized Resp.-Pet. but excused his failure due to the State's lack of disclosure. App. p. 933. In light of counsel's admission and Respondent-Petitioner's testimony, Resp.-Pet. submits that the lower court's finding regarding ineffective assistance was in error.

Turning to the record, Resp.-Pet. explained that he did not discuss testifying at the Jackson v. Denno hearing with counsel, but he would have been willing to testify. App. p. 779. Resp.-Pet. further explained that he was not aware of all the verbal statements the State planned to introduce and he could have specifically addressed the verbal statement reported by Officer Cutting. App. pp. 779-80. When asked about testifying at trial, Resp.-Pet. indicated that he would have testified at trial, but he was advised by counsel that his written statements were sufficient to establish his claim of self-defense. App. pp. 806-7, 816, 822, 833. Thereafter, Resp.-Pet. testified in detail to the events that took place and testified regarding counsel's failure to utilize his testimony to establish self-defense, defense of others and the lesser charge of voluntary manslaughter. App. pp. 807-16, 822-26. Resp.-Pet. also highlighted the trial testimony of Kim Wilson and Mr. Bryson that he could have refuted. App. pp. 816-17.

In response, trial counsel stated: "I felt between the statement that he gave and his daughter's testimony that would be in as good shape as we could be in as far as getting his story to a jury." App. p. 860, lns. 9-12.Trial counsel also explained the decision was made before Kanae's testimony was decimated by the State's cross-examination and reply witness. App. p. 860. Regarding the victim's character, the development t of defenses and an argument for the lesser charge of voluntary manslaughter, trial counsel concluded that he "should have done more." App. pp. 876-8. Specifically, he testified: "I should not have been so rigid in my thought process about not putting Nathaniel up when Nathaniel could have testified to all of that." App. p. 877.

Clearly, the lower court chose to ignore trial counsel's admission. The record, which contains counsel's admission, does not support the lower court's finding. Therefore, under the any evidence standard of review; the lower court must be reversed.

Additionally, Resp.-Pet. and trial counsel's testimony establishes the prejudice suffered by trial counsel's failure to utilize Resp.-Pet. as a witness. Both explained in detail the impact Respondent-Petitioner's testimony would have made in establishing his defense and how his statements failed to be the equivalent. As a result, Resp.-Pet. would urge this Court to agree with the evidentiary hearing testimony that the absence of Resp.-Pet. as a witness detrimentally affected the outcome of trial.

4. The lower court erred in finding that trial counsel's admissions regarding his failures in handling the testimony of Kim Wilson did not amount to ineffective assistance of counsel.

Resp.-Pet. claimed that trial counsel was ineffective for failing to properly impeach Kim Wilson and for failing to address the court's analysis of trial counsel's motion for a mistrial. While on the stand, Resp.-Pet. addressed how counsel should have impeached Kim Wilson and the major omissions that occurred during counsel's cross-examination of her. App. pp. 733-38. As is noted in the lower court's Order, trial counsel did not refute Resp.-Pet's explanation of his failures in this regard. App. p. 933. Specifically, trial counsel admitted that he must have missed the opportunity to properly impeach her with her statement. App. p. 861, lns. 11-20. He further admitted: "And if I did not do that then I made a mistake." App. p. 861, lns. 20-21. A review of the record establishes that two witnesses, which the trial court found to be credible, addressed trial counsel's failure to properly impeach Kim Wilson, yet the lower court errantly excused trial counsel's omissions as conduct that was reasonable under prevailing professional

norms. App. p. 934. It is true that "Counsel's performance is not deficient when the advice given, or the services rendered by the attorney, are within the range of competence demanded of attorneys in criminal cases." Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Nevertheless, the lower court failed to supply any reasoning to support his finding that trial counsel's admitted error was within the range of competence demanded.

Turning to counsel's failure to request a ruling on prejudice during his motion for a mistrial, counsel explained that he was not given notice of Kim Wilson's testimony that Resp.-Pet. threatened that she would be next. App. p. 862. Counsel further explained that he objected, moved for a mistrial, the trial court sustained his objection and "unfortunately" denied the motion for mistrial. App. p. 862, lns. 6-12. The trial court did give a curative instruction, but counsel stated that the prejudice was "absolutely not" cured by the instruction. App. p. 862, lns.13-18. Thereafter, the following testimony was elicited:

> PCR counsel: Now, is it your understanding in deciding on whether or not to grant a mistrial the Judge needs to make a decision regarding prejudice?
>
> Trial counsel: If the issue of prejudice is raised. Now, once the, as you brought out, once the Judge made the decision not to grant a mistrial but do a curative instruction I didn't go into prejudice after that. I don't know why I didn't think it was necessary. If I made a mistake then so be it but I did not do anything in that regard.

App. p. 863, lns. 5-13. Despite another admission to an error, the lower court found counsel was not ineffective. App. p. 934.

As a result, Resp.-Pet. submits that the lower court's ruling is not supported by the record, and the prejudice suffered is simply undeniable. Not only was Kim Wilson the grieving daughter of the victim, but she was also an eyewitness and the State's primary

witness against Resp.-Pet. If counsel would have fully attacked her version of events, impeached her with her statement, and ensured that the trial court addressed the issue of prejudice regarding her testimony about a threat, then, the jury's perception of her and the weight given to her highly damaging testimony would have been affected. In turn, the outcome of the trial would have been affected. Similarly to the trial court's failure on the motion for mistrial, the lower court failed to address the prejudice that was "absolutely" suffered by the Resp.-Pet. due to counsel's admitted errors, which requires reversal by this Court.

5. The lower court erred by excusing trial counsel's failure to make contemporaneous objections during the testimony of Kanae Ferguson.

Resp.-Pet. 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.[1] Specifically, the Resp.-Pet. 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 attorney and witness in violation of the Confrontation Clause with the Solicitor's interjection of his recollection of the meeting at Kanae's school during cross-examination. In response, trial counsel readily admitted that he failed to object to the Solicitor's questions, he specifically stated: "Number one I was stunned by the whole thing. Number two, I should have objected. And number three, I think it was error on my part for not objecting." App. p. 864, lns. 9-11.

In Holman v. State, 381 S.C. 491, 674 S.E.2d 171 (2009), this Court

[1] This issue is being argued **alternatively** to the issue of prosecutorial misconduct addressed in the Return to Petition for Writ of Certiorari. Therefore, Resp.-Pet. would request the opportunity to further address this issue under ineffective assistance of counsel if this Court finds the lower court erred in granting relief on this issue as a matter of prosecutorial misconduct.

reversed the lower court and granted relief finding that trial counsel was ineffective for failing to object to prejudicial evidence. Despite this Court's clear holding, the lower court found that trial counsel's failure to enter contemporaneous objections during Kanae's testimony did not amount to ineffective assistance of counsel as was found in Holman. App. p. 935.

Not only did trial counsel admit that he should have objected, but he also addressed the clear prejudice that Resp.-Pet. suffered as a result of the Solicitor's impeachment of Kanae through his own recollection of the interview at her high school and the use of reply witness to address that interview. Simply put, counsel concluded that it gutted their case, it turned the entire defense upside down. App. p. 865. Kanae was the primary witness called by the defense and counsel's failure to object allowed the State to decimate the credibility and overall effectiveness of Respondent-Petitioner's defense. Therefore, Resp.-Pet. submits that the lower court erred in finding that trial counsel was not ineffective and for failing to address the prejudice suffered by counsel's admitted failure to object.

6. The lower court erred in finding trial counsel was not ineffective regarding the use of evidence to establish possible defenses and his handling of the jury instructions.

Resp.-Pet. 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. Resp.-Pet. 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 Respondent-Petitioner's knowledge of her prescription drug usage pursuant to State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998).

Resp.-Pet. 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 Day, 341 S.C. 410, 535 S.E.2d 431 and failed to request instructions on fear, prior difficulty, duty to wait, and good character pursuant to Hill, 129 S.C. 166, 123 S.E. 817, 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). Additionally, Resp.-Pet. thoroughly explained that counsel should have objected to the reasonable doubt instruction since it improperly shifted the burden. App. pp. 602, lns. 9-15, 830-31.

At the evidentiary hearing, counsel testified: "As far as the character of Ms. Wilson, I should have worked a lot harder in that regard." App. p. 875, lns. 15-17. Counsel readily admitted that he should have done more on the issue of prior difficulties with the victim. App. p. 876. In addressing Respondent-Petitioner's claims in total, counsel concluded that he should have done more and he should not have been so rigid. App. p. 877. When asked, counsel agreed that the court would not give the instructions at issue without him putting any evidence in the record to support them. App. p. 880.

Despite counsel's testimony regarding his deficient performance, the lower court held that trial counsel was not ineffective nor was Resp.-Pet. prejudiced as a result. In Stone v. State, 294 S.C. 286, 288, 363 S.E.2d 903, 904 (1988), trial counsel testified that he did not request an instruction on self-defense because it "did not cross his mind." This Court held:

> The trial attorney's testimony itself precludes a finding that his failure to request the instruction was an informed tactical decision. See Marzullo v. Maryland, 561 F. (2d) 540 (4th Cir. 1977). The attorney made no decision at all, he stated he never considered requesting the charge. Further, because the State's case rested primarily on the testimony of the victim and police officers, petitioner was prejudiced by counsel's failure to request the instruction. The record does not support the PCR Judge's finding that trial counsel's performance was not constitutionally defective.

Id. Here, counsel testified that he failed to effectively utilize testimony, exhibits, and case law in the areas of self-defense, defense of others, and voluntary manslaughter, which directly contributed to the absence of specific jury instructions on those matters and the presentation of a proper defense. Therefore, Resp.-Pet. submits that the lower court's ruling is not supported by any evidence in the record and is inapposite to this Court's ruling in Stone. As a result, the lower court must be reversed.

7. The lower court erred in excusing trial counsel's admitted ineffective assistance of counsel for failure to enter a contemporaneous objection to the implied malice instruction.

Resp.-Pet. alleged that trial counsel should have objected as was done in State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), to the implied malice instruction. When asked by the State if he was required to argue the law set forth in Belcher at trial in 2005, trial counsel responded: "I am required to be an effective attorney and to do what I can to preserve a record." App. p. 899, lns. 22-24. As was eluded to by counsel, a simple review of this Court's ruling in Belcher shows that the law and reasoning relied upon in Belcher was decided and available to be argued to the trial court at Respondent-Petitioner's trial. Furthermore, on redirect the following testimony was elicited:

> PCR Counsel: Would you agree, Mr. Price, that the major way we can change or progress the law as attorneys is to continuously make new objections and make arguments so the law will progress and change with time?

Trial Counsel: That is the most excellent way to change the law.

PCR Counsel: And when the attorney made the objection in the Belcher case that wasn't the law at the time, is that correct?

Trial Counsel: That is correct.

PCR Counsel: So in your opinion is that an objection that you may have or should have entered in this case?

Trial Counsel: Could have, should have.

App. p. 900, lns. 10-21. Therefore, Resp.-Pet. acknowledges this Court's clear ruling in Belcher regarding Post Conviction Relief, but asks this Court to consider the testimony of trial counsel that the objection should have been made in this case involving self-defense that resulted in a murder conviction.

8. The lower court erred in finding appellate counsel rendered effective assistance of counsel.

To prevail on a claim of ineffective assistance of appellate counsel, the Resp.-Pet. 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 Resp.-Pet. See Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). Here, the lower court acknowledged that the Resp.-Pet. and counsel testified that appellate counsel failed to raise an argument regarding the testimony of Kanae Ferguson and Investigator Davenport on appeal, but the lower court found that it was not an issue of ineffective assistance of appellate counsel but is an issue of prosecutorial conduct, which is subject of the Return to Petition for Writ of Certiorari. Therefore, if this Court finds that it is not a matter of prosecutorial misconduct, Resp.-

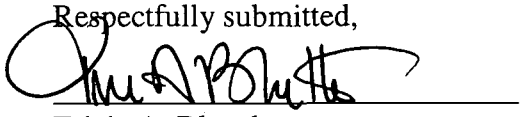
Pet. urges this Court to consider it a matter of ineffective assistance of appellate counsel and allow Resp.-Pet. to further brief the issue.

Additionally, Resp.-Pet. alleged that appellate counsel failed to argue that the trial court did not conduct a prejudice analysis in denying the Respondent-Petitioner's motion for a mistrial. The lower court held that appellate counsel raised the trial court's denial of the Respondent-Petitioner's motion for a mistrial and the issue was fully addressed by the appellate court. Resp.-Pet. submits that as to both matters of ineffective assistance of appellate counsel the court made its finding without testimony from appellate counsel. See Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008). Therefore, Resp.-Pet. urges this Court to reverse the finding of effective assistance of appellate counsel since there is not evidence in the record to support such a finding.

CONCLUSION

Alternatively, to the arguments set forth and relief request in the Return to Petition for Writ of Certiorari, the Resp.-Pet. would respectfully request that this Court grant this Petition for Writ of Certiorari and allow the Petitioner to brief the requested issues under Rule 243(j), SCACR, or reverse the lower court's findings argued above and uphold the Respondent-Petitioner's relief of a new trial.

Respectfully submitted,



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This 13 day of April, 2012.

RECEIVED
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S.C. Supreme Court

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,

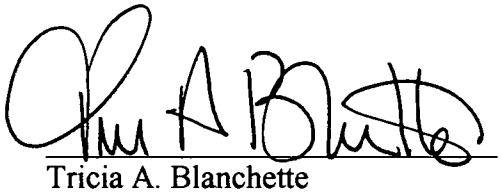
vs.

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

CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney for the Respondent-Petitioner, hereby certify that I hand delivered this 13th day of April 2012, a copy of a Petition for Writ of Certiorari and Return to Petition for Writ of Certiorari to Harrison D. Brant of the Attorney General's Office, at:

Office of the Attorney General
ATT: Harrison D. Brant, Ast. AG
1000 Assembly Street
Columbia, SC 29201



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April 13, 2012