ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from Dorchester County
James E. Lockemy, Circuit Court Judge
Appellate Case No. 2012-213468

MARION BOWMAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

BRIEF OF RESPONDENT

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THIS COURT SHOULD AFFIRM THE PCR COURT'S DENIAL OF RELIEF. THE PCR COURT CORRECTLY FOUND TRIAL COUNSEL WAS NOT INEFFECTIVE IN NOT OBJECTING TO THE SOLICITOR'S CROSS-EXAMINATION OF JAMES AIKEN AS IT RELATED TO PRISON CONDITIONS. TRIAL COUNSEL'S TESTIMONY AT THE PCR EVIDENTIARY HEARING CLEARLY REFLECTED THAT HE MADE A STRATEGIC DECISION TO PRESENT TESTIMONY THAT WOULD SHOW THAT LIFE WITHOUT PAROLE WOULD BE MORE HARSH THAN A DEATH SENTENCE. IN PRESENTING TESTIMONY IN SUPPORT OF THAT STRATEGY, COUNSEL OPENED THE DOOR FOR THE LIMITED RESPONSIVE QUESTIONING REGARDING CONDITIONS OF CONFINEMENT BY THE SOLICITOR, THUS LIMITING HIS ABILITY TO OBJECT. THIS STRATEGY WAS REASONABLE IN LIGHT OF THE STATE OF THE CASE LAW REGARDING THE ADMISSIBILITY OF EVIDENCE OF PRISON CONDITIONS AT THE TIME OF PETITIONER'S TRIAL, AND THE THEN NEW DEVELOPMENTS IN THE LAW REGARDING JURY INSTRUCTIONS DEFINING "LIFE" FOR A LIFE SENTENCE. THUS, PETITIONER CANNOT SHOW THAT TRIAL COUNSEL WAS DEFICIENT. FURTHER, PETITIONER CANNOT ESTABLISH THAT HE WAS PREJUDICED BY ANY ALLEGED ERROR OF COUNSEL IN HANDLING THE SOLICITOR'S CROSS-EXAMINATION REGARDING PRISON CONDITIONS. 17

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QUESTION PRESENTED

Defense counsel was ineffective for failing to object to the solicitor's examination of James Aiken regarding favorable prison conditions and recreational facilities available to inmates since this Court had long ago in State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984), held such evidence was impermissible because it did not relate to the character of the defendant or the nature of his crime. This evidence was highly prejudicial in the eyes of the jury, and the failure to object to it properly at trial also barred consideration of this winning issue on petitioner's direct appeal.

RESTATEMENT OF QUESTION PRESENTED

Whether the PCR Court's denial of relief upon Petitioner's claim that trial counsel was ineffective in not objecting to the State's elicitation of favorable prison conditions during James Aiken's testimony was supported by the record when counsel made a strategic decision to present testimony regarding harsh prison conditions, thus opening the door to responsive questioning, and the record supports the PCR Court's conclusion that Petitioner was not prejudiced?

STATEMENT OF THE CASE

Petitioner, Marion Bowman ("Bowman"), is confined in the Lieber Correctional Institution of the South Carolina Department of Corrections (SCDC) as the result of his Dorchester County convictions and death sentence for the murder of Kandee Martin and third-degree arson. The Dorchester County Grand Jury indicted Bowman during the June 18, 2001 Term of Court of General Sessions for Murder (2001-GS-18-0348) and Arson, Third Degree (2001-GS-18-0349). (App. 5254-57). On July 13, 2001, the State served Bowman with a Notice of Intent to Seek the Death Penalty and Notice of Evidence in Aggravation. (App. 1640-43; 4570-71; 5260-61).

Petitioner was tried by a jury before the Honorable Diane S. Goodstein, Circuit Court Judge, from May 13, 2002-May 23, 2002. (App. 2470-5068). Petitioner was present and was represented by Norbert E. Cummings, Jr. and Marva A. Hardee-Thomas. Id. The State was represented by Solicitor Walter M. Bailey, Jr. and Assistant Solicitor Benjamin Lafond, both of the First Judicial Circuit. Id. The guilt phase of the trial lasted from May 17 to May 20, 2002. (App. 3634-4569). Petitioner was convicted of both charges. (App. 4564).

Petitioner exercised his right to the twenty-four hour cooling-off period provided by S.C. Code Ann. § 16-3-20(B). (App. 4569). The sentencing phase was conducted on May 22 and 23, 2002. (App. 4587-5068). The jury found the existence of two of the four submitted aggravating factors: the murder was committed in the commission of a kidnapping and the murder was committed during the commission of a larceny with the use of a deadly weapon. (App. 5051). The jury recommended Petitioner be sentenced to death. (App. 5051). Judge Goodstein subsequently sentenced Petitioner to death for the murder conviction, and ten years confinement for the third degree arson conviction. (App. 5066).

A timely Notice of Appeal was served and filed on May 24, 2002. On appeal, Robert M. Dudek, Assistant Appellate Defender with the South Carolina Office of Appellate Defense, represented Bowman in his direct appeal. (See App. 5427-83; 5558-67). Assistant Attorney General S. Creighton Waters represented the State. (App. 5484-557). On July 6, 2005, Petitioner filed his Final Brief of Appellant. (App. 5427-83). In the Final Brief, Petitioner asserted as follows as one of his claims on appeal,

> The court abused its discretion by allowing the solicitor on re-cross examination of James Aiken to examine him about conditions in general population. Recreational facilities, watching movies, watching television and reading books were matters not raised by any relevant evidence, and the jury's sale concern was supposed to be whether appellant should be sentenced to death or life imprisonment without parole.

(App. 5451-55). Respondent filed its Final Brief of Respondent on July 7, 2005. (App. 5484-557). Petitioner also filed his Final Reply Brief of Appellant on July 6, 2005. Oral arguments were heard on October 6, 2005. This Court affirmed Petitioner's convictions in a published Opinion filed November 28, 2005. State v. Bowman, 366 S.C. 485, 489, 623 S.E.2d 378, 380 (2005). This Court found that the claim regarding the solicitor's cross-examination regarding prison conditions was not preserved for appellate review. Id. at 498, 623 S.E.2d at 385. Further, this Court stated,

> We take this opportunity, however, to caution the State and the defense that the evidence presented in a penalty phase of a capital trial is to be restricted to the individual defendant and the individual defendant's actions, behavior, and character. Generally, questions regarding escape and prison conditions are not relevant to the question of whether a defendant should be sentenced to death or life imprisonment without parole. We emphasize that how inmates, other than the defendant at trial, are treated in prison; and whether other inmates have escaped from prison, is inappropriate evidence in the penalty phase of a capital trial. We admonish both the State and the defense that the penalty phase should focus solely on the defendant and any evidence introduced in the penalty phase should be connected to that particular defendant.

Id. at 498–99, 623 S.E.2d at 385. A petition for rehearing was denied by this Court on January 6, 2006.

On February 1, 2006, this Court granted a stay of execution so that Petitioner could pursue certiorari review before the United States Supreme Court. Petitioner, through Mr. Dudek, filed a Petition for Writ of Certiorari with the United State Supreme Court dated April 5, 2006. A Brief in Opposition was filed by the State on May 12, 2006. The United States Supreme Court denied the certiorari petition by order dated June 12, 2006. (App. 5575).

Petitioner filed an Application for Post-Conviction Relief on April 7, 2006. (App. 5568-74). The State filed a Return, Motion to Dismiss, and Motion for Summary Judgment September 1, 2006. (App. 5578-615). This Court issued an Order dated September 7, 2006, in which it stayed the execution for the post-conviction relief action and appointed the Honorable James E. Lockemy, Circuit Court Judge to hear the case.

Judge Lockemy appointed James A. Brown, Jr. and Charlie Jay Johnson, Jr. to represent Petitioner during the post-conviction relief action. By Order filed February 6, 2008, Mr. Johnson was relieved and John Sinclaire, III was appointed to represent Petitioner with Mr. Brown during the PCR action. (App. 5674-75). Petitioner, through counsel, filed his First Amended Application on February 28, 2007. (App. 5676-84). The State filed an Amended Return, Motion to Dismiss, and Motion for Summary Judgment on March 15, 2007. (App. 5616-69). A second Amended Application was filed on May 19, 2008. (App. 5689-700). Petitioner filed his Third Amended Application on September 8, 2008, one week before the evidentiary hearing was set to begin. (App. 5710-26). In Ground H of the Third Amended Application, Petitioner asserted

> Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina Law including S.C. Code Sections 16-3-26(B)(1) and17-23-60 by trial counsels' failure

to object to the prosecution's introduction of evidence relevant to an arbitrary factor during the penalty phase of the trial. Strickland v. Washington, 466 U.S. 668 (1984) and State v. Burkhart. --- S.E.2d ----, 2007 WL 80036 (SC 2007).

Supporting Facts for Ground H

(1) During the- penalty phase of the trial, the state elicited information regarding "good prison conditions.".

(2) Trial counsel failed to object to this testimony.

(3) The Supreme Court of South Carolina failed to address this issue during the direct appeal because trial counsel did not preserve this issue for appeal.

(4) But for counsels' deficient performance, the outcome of the proceedings would have been different.

(App. 5715-16).

The evidentiary hearing was held on September 15-18, 2008; September 29-30, 2008; November 24, 2008; and December 18, 19, and 22, 2008. (App. 5729-7997). Petitioner filed a Fourth Amended Application on June 5 2009. (App. 9442-60). Petitioner also submitted an Amended Brief Supporting the Fourth Amended Application on June 10, 2009. (App. 9461-570). The State filed its Post-Trial Brief in Opposition to Application for Post-Conviction Relief on August 10, 2009. (App. 9571-772). Petitioner filed a Reply to Respondent's Brief in Opposition on September 16, 2009. (App. 9773-801).

On March 12, 2012, the PCR Court filed its Order of Dismissal. (Supp. App. III 5-149). Petitioner filed a Motion to Alter or Amend Judgment on March 19, 2012, and a memorandum in support of the motion on April 25, 2012. (App. 9951-68). The State filed a letter response to the motion on May 2, 2012. (App. 9969). The PCR Court filed its Order denying the motion to alter or amend judgment on October 31, 2012. (App. 9970).

Petitioner subsequently filed a Notice of Appeal. (App. 9971). Petitioner filed his Petition for Writ of Certiorari. Respondent filed a Return to the Petition for Writ of Certiorari.

Petitioner subsequently filed a Reply to the Return to Petition for Writ of Certiorari. By Order filed April 15, 2016, this Court granted the Petition for Writ of Certiorari as to Question 6, and denied certiorari upon all of the other questions presented. This briefing follows.

RESPONDENT'S STATEMENT OF FACTS

This case concerns the murder of 21-year old Kandee Martin, who was found off a country road shot to death and in the trunk of her completely burned out Ford Escort.

At about five minutes to eight on the Friday evening of February 16, 2001, Dorchester County resident Dennis Judy noticed a car on the side of the Nursery Road, with two of its wheels on the shoulder. Finding it odd that the car was parked with its lights off and windows down, Judy stopped briefly, but continued on. (App. 3782-85).

Bryan Newhouse managed the nearby nursery and was watching TV that Friday evening. Hearing something outside, he muted the TV, at which point three gunshots rang out within ten or fifteen seconds apart. Newhouse went outside, opened the gate, and drove down the road to see if anyone was illegally hunting at night on the nursery grounds. Finding nothing on the dark and unlit country road, Newhouse went home, and fell asleep about midnight. (App. 3798-3801; 3803-05). Newhouse was awakened from his sleep in the early morning hours by a loud exploding noise. He again drove down the road to the same location – but this time, he found a car engulfed in flames as high as twenty feet. Newhouse quickly went home and called police. (App. 3801-02).

On a path leading into a fallow field about 50 to 75 feet off Nursery Road, officers and firefighters found a small four-door car almost completely burned. They hosed the fire down, and opened the trunk. Inside was the charred body of Kandee Martin. (App. 3807-3810; 3814-16; 3819-22; 3875-78).

The Ford Escort's was registered to Kandee and her mother. (App. 3829-31). Kandee had been shot to death by two bullets, each equally fatal, with one to the back of the head, and another to the left back. (App. 3944-49). Her body was extremely burned and charred, and the

only skin remaining was on part of her back. (App. 3941-43). The lungs were clear, indicating that Kandee was dead before the fire started. (App. 3954-55).

Officers concluded the fire was intentionally set. (App. 3889-90). About 800 feet from the crime scene, SLED agent Edward Porter collected in the street or on its shoulder one fired bullet and six .380 shell casings. The officers found in the middle of the road a pool of blood containing some hair and an earring back. As they scanned the area, they noticed blood on pine straw and branches 18 and 29 feet off the roadway down a path towards the wood line. There, they found a woman's shoe belonging to Kandee. (App. 3853-3860; 3867-71; 3910-12; 4164-66; 4272; 4286). SLED DNA expert Matt Fitts later matched the blood samples to Kandee Martin. (App. 4366-67; 4377-79).

After receiving information that Petitioner had been with Kandee the night before, Branchville Chief Boom Walters, Dorchester County Lieutenant James Nettles, Dorchester detectives Terrence Van Doran and Alvin Coker, and other police arrived at Dorothy's trailer on Saturday morning, February 17, 2001. The officers asked Dorothy if they could enter to search for Petitioner, and she voluntarily agreed – eventually signing a consent to search form. Officers found Petitioner hiding alongside a bed in a child's room down the hall, and he was promptly arrested and Mirandized. (App. 4125-29; 4139-42; 4144-45; 4191-95; 4208).

Petitioner was wearing nothing but his boxer shorts, and officers asked him if he wanted his pants. When Detective Van Doran retrieved the back jeans from the sofa in the living room, he found a brown lady's watch in the pocket. (App. 4129-32; 4142; 4150-52; 4195-98; 4207-08). Kandee's mother identified at trial the watch as belonging to her daughter. (App. 4164-65). Moreover, SLED chemist Layton also found the presence of a heavy petroleum accelerant, but

not gasoline, on the black Levi's – and a number of Petitioner's friends testified at trial he was wearing black jeans the day before. (App. 3763; 4058; 4093; 4193; 4297-98).

Testimony regarding the prior day's activities

At a party the day Kandee disappeared, Petitioner took out from his waistband a grey and black High Point .380 semiautomatic pistol – which he had bought a couple of weeks earlier – wrapped it in a paper bag, and put it into the barrel in William Koger's yard. (App. 3675-77; 3683-84; 3700; 3750-51; 3983-89; 4031-32; 4057-59; 4077-78; 4101).

When Petitioner returned, a number of people, including trial witnesses William Koger, Joseph Fogle, and Carolyn Brown – saw Petitioner get upset at James Tywan Gadson because someone had taken his gun. However, Hiram Johnson interceded, and told Petitioner he had taken the gun back to Katrina West's apartment in the projects. Petitioner went across the street and got the gun, and put it back in his pants. (App. 3677-79; 3684-85; 3690-91; 3701; 3985-90; 4058-60; 4077-78). At another point later that afternoon, Petitioner asked Fogle to take him to Frankie Martin's house. Kandee's car was parked out front, and Petitioner mentioned to Fogle that Kandee owed him some money. (App. 3685-87).

Petitioner apparently also spent some time that afternoon with his sister Yolanda and Katrina West's apartment in the projects. The three of them left in Yolanda's little blue Volkswagen to go get medicine for Katrina's baby at the pharmacy, with Petitioner riding in the back seat and the girls in front. On the way, they saw Kandee's car parked out in front of Charlie Fralix's house, and Petitioner told Yolanda to stop. (App. 3701; 3721-24; 3736-40; 3763-65).

Petitioner told Yolanda to pull up alongside Kandee's car, and tried to get her attention through the open rear window of Yolanda's VW. However, Kandee held up her finger at Petitioner, saying "hold on a minute", and turned back to her conversation with Fralix. (App.

3724-35; 3740-42; 3764-66). Kandee's gesture angered Petitioner. Fralix heard Petitioner say "Fuck waiting a minute. I'm about to kill this bitch." (App. 3725-27). According to Katrina, Petitioner declared "fuck that ride, that bitch be dead by dark fall." Petitioner's sister Yolanda described his comments as "Fuck that bitch, that bitch be dead by dark." (App. 3765-66). Yolanda also told police Petitioner said "that bitch owed me some money and I want my money today." In any event, Yolanda drove off. (App. 3742-45; 3749).

Gadsden saw Petitioner around 7:00 or 7:30 that evening. Petitioner was riding with Kandee in her green Ford Escort, and he called Gadson over and told him to get in. (App. 3990-93; 4033). With Petitioner directing the way, Kandee drove out into the country, where they eventually ended up on Nursery Road. There, they stopped, turned the car off, and Petitioner and Gadson got out. (App. 3994-96; 4033-35). Petitioner and Gadson walked down the road a ways, as Petitioner whispered he was going to kill Kandee because she was wearing a wire. Kandee followed behind, grabbed Petitioner by the arm and said she was scared. A car came down the road, and the three jumped into the woods until it passed. (App. 3997-99; 4035-36).

Kandee then started back down the roadway with Petitioner following. As Gadson came out of the woods behind them, he saw Petitioner fire three times at Kandee. Kandee ran towards Gadson, but stopped and turned to face Petitioner. She begged, "Please Black, don't shoot me no more. I have a baby to take care of." Petitioner responded to her pleas by firing twice more, and Kandee fell to the ground. (App. 3997-4003; 4011-12; 4036-37). Gadson, who said he "messed in his pants a little bit," jumped in the car while Petitioner dragged Kandee into the woods by her feet. Petitioner then climbed in the driver's seat of Kandee's car, remarking: "I shot that bitch in the head. Heard her head hit the ground." They then headed back to Branchville. (App. 4012-14).

Eventually, they parked Kandee's car in a wooded area behind a coal plant. Before they got out, Petitioner threatened to blow Gadson's brains out if he ever told anyone. Petitioner then headed for the projects while Gadson walked back to Koger's house. Petitioner eventually came back with Yolanda's car, and he and Gadson went to the EZ shop for some beer. They then went to another friend's house where they talked to Travis Felder, before returning to Koger's. (App. 4015-17; 4033-35).

Around midnight, Petitioner and some friends decided to go to the Allen Murray nightclub outside of Bowman. Petitioner drove Kandee's car, with Hiram, Gadson, and Darrien Williams as passengers. Petitioner told the men he had stolen the car, and made them put on gloves. (App. 4017-20; 4063-65; 4081). At the club, Petitioner walked around the lot some, trying to sell Kandee's car. (App. 4067). After about an hour or so, Petitioner, Hiram, Gadson and Darrien headed back to Branchville in Kandee's car. As he drove the Escort with the pistol sitting in his lap, Petitioner remarked, "I killed Kandee, heh heh heh." Petitioner dropped Hiram off at the projects. (App. 4021-22; 4067-69).

About 3:00 a.m., Petitioner knocked on Travis Felder's door and asked him for help parking a car. (App. 4042-45; 4116-18; 4090-92; 4119-20). Felder testified that he got in his own car and followed Petitioner in the Ford Escort back to Nursery Road. Petitioner pulled over on the side of the road, cut his lights, and went into the woods for a minute. The next thing Felder saw was Petitioner pulling a body by its feet face down. As Petitioner opened the trunk and put the body inside, Felder could see by the trunk light it was Kandee. (App. 4093-97).

Petitioner looked back at Felder, and said, "You didn't think I would do it, did you? I killed Kandee Martin." Petitioner told Felder to go down the road and turn around, while Petitioner drove the Escort up into a field. Felder watched as Petitioner threw a light into the car,

which erupted in flames. Felder then took Petitioner back and returned to Valorna's, where he went to sleep. (App. 4098-4101; 4106).

Petitioner's murder weapon was found after police managed to get information in May and June 2001 from Petitioner's wife Dorothy and his sisters Yolanda and Kendra, all of whom testified at trial with plea agreements. (App. 3735-36; 4161; 4167-68). Dorothy located the gun, and with Yolanda, Kendra, and Petitioner's father, worked to dispose of the gun. (App. 4168-73; 4198-4204; 4210-12; 4358). Kendra and Yolanda threw the gun over the side into the Edisto River. (App. 4174-78; 4183-87). On May 28, 2001, diver Mark Sheetz recovered the black and grey High Point .380 semiautomatic in the river bottom about 25 to 30 feet from the bridge. (App. 4220-29). The gun was conclusively matched by SLED firearms examiner David Collins to five of the six Winchester .380 shell casings found at the Nursery Road scene. While the sixth casing and spent bullet could not be conclusively matched to Petitioner's .380, they were consistent. (App. 4315-20).

SLED DNA analyst Matthew Fitts found human blood and semen in the vaginal swabs taken from Kandee at autopsy. Agent Fitts was able to match Petitioner to a probability of 1 in 5300. (App. 4370-72; 4379-87).

State's case for sentencing

The State began its evidentiary presentation in the sentencing phase by reincorporating its evidence from the guilt phase. (App. 4650). It then introduced certified copies of Petitioner's March 1998 convictions from two incidents – with a third degree burglary charge and a petty larceny charge for each. (App. 4652).

The two victims from the March 1998 convictions testified. One noted that his house was robbed of a shotgun, of which the barrel was later sawed off. Stolen from the other's

residence was cash and a .357 pistol. Within 24 hours, Petitioner's cousin used the pistol to kill himself. (App. 4653-59; 4801-02).

The State introduced photographs of Kandee as she was found severely burned in the back of her trunk through the SLED arson agent. (App. 4660-68). The pathologist Dr. Janice Ross described autopsy photographs of the entrance and exit wounds to Kandee's back and behind her left ear. (App. 4669-91).

Kandee's mother Cordillia Martin and father Wayne Martin gave victim impact testimony about Kandee and the effect of her loss on them and Kandee's young son. (App. 4692-4708).

Defense case for sentencing

The defense case in mitigation began with Petitioner's older sister Kendra Bowman. She generally described good times growing up with Petitioner, but noted her biological father was abusive until he left when the children were babies. (App. 4742-48). Petitioner's mother Dorothy Bowman, related that Petitioner's father was abusive, but he left when the kids were very small. She theorized that Petitioner longed for fatherly involvement, and noted that her subsequent boyfriend Joseph Sims was a positive influence on the kids. Petitioner had trouble in school and only finished the ninth grade, but he would help his mother out after she became disabled. (App. 4750-59).

Margaret Baughman, an adult education teacher at the Dorchester County Detention Center, testified that during the pre-trial incarceration Petitioner took classes, and even became a reliable assistant to her teaching at the jail. (App. 4761-67). A forensic social worker named Jeffrey Youngman testified. He generally theorized Petitioner's functioning was negatively impacted by his upbringing. (App. 4791-4805).

Corrections consultant and former South Carolina prisons official James Aiken was qualified as an expert in future dangerousness and prison adaptability issues. Aiken noted that he had evaluated thousands of inmates for placement in prisons. According to Aiken, if Petitioner was given life, he would never leave again from a South Carolina prison for any reason whatsoever. He noted the South Carolina Department of Corrections could easily manage and incapacitate Petitioner for the rest of his life, with the prison's fences, gun towers, and trained guards. Aiken also opined that Petitioner would adapt well to prison life, given that during his three previous incarcerations, Petitioner had no significant incidents of violence to staff and inmates, and had assisted the adult education classes. (App. 4832-45).

Dorchester County Detention Center guard Sharon J. Branch testified that Petitioner has "attitude," and would often speak out to guards. While Petitioner never made her feel threatened or raised his hand, he would often refuse direct orders – depending on what kind of day he was having. For example, he would refuse to return to his cell when ordered, saying: "you want me to go in, put me in." As his death penalty trial approached, Petitioner started behaving "calmer" and "better," but had on a Sunday during the trial caused a problem requiring the intervention of ministers and prison staff, because he was not allowed to go to church when he wanted. (App. 4882-88). Another jail guard named Enrique Badillo testified that Petitioner was very polite, and presented no difficulty or threats to safety. (App. 4902-05).

Finally, Felder was shown a security videotape from the Horizon EZ store at approximately 3:00 a.m. on February 17, 2001. He admitted the tape showed him at the store – without Petitioner – buying gasoline in a small gas container. Felder admitted that after Petitioner came and got him from the girls' apartment in the Branchville Villas, Petitioner gave

him a gas jug and asked him to buy some fuel. Felder stated he thought Petitioner was just filling up the can to move the car. (App. 4911-28).

ARGUMENT

This Court should affirm the PCR Court's denial of relief. The PCR Court correctly found trial counsel was not ineffective in not objecting to the solicitor's cross-examination of James Aiken as it related to prison conditions. Trial counsel's testimony at the PCR evidentiary hearing clearly reflected that he made a strategic decision to present testimony that would show that life without parole would be more harsh than a death sentence. In presenting testimony in support of that strategy, counsel opened the door for the limited responsive questioning regarding conditions of confinement by the solicitor, thus limiting his ability to object. This strategy was reasonable in light of the state of the case law regarding the admissibility of evidence of prison conditions at the time of Petitioner's trial, and the then new developments in the law regarding jury instructions defining "life" for a life sentence. Thus, Petitioner cannot show that trial counsel was deficient. Further, Petitioner cannot establish that he was prejudiced by any alleged error of counsel in handling the solicitor's cross-examination regarding prison conditions.

Standard of Review

"This court gives great deference to the post-conviction relief (PCR) court's findings of fact and conclusions of law." Marlar v. State, 373 S.C. 275, 279, 644 S.E.2d 769, 771 (Ct.App.2007) (citing Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005)); McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995). An appellate court must affirm the PCR court's decision when its findings are supported by any evidence of probative value. Custodio v. State, 373 S.C. 4, 9, 644 S.E.2d 36, 38 (2007); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). However, an appellate court will not affirm the decision when it is not supported by any probative evidence. Edmond v. State, 341 S.C. 340, 347, 534 S.E.2d 682, 686 (2000); Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996).

It is well established that this "Court gives great deference to the PCR court's findings of fact and conclusions of law." Simpson v. Moore, 367 S.C. 587, 595, 627 S.E.2d 701, 705 (2006). It is equally well established that this "Court will sustain the PCR judge's findings regarding ineffective assistance of counsel if there is any probative evidence to support those findings." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002); Franklin v. Catoe, 346 S.C. 563, 568, 552 S.E.2d 718, 721 (2001).

To establish that counsel was ineffective, a PCR applicant must show that counsel's representation fell below an objective standard of reasonableness, and but for counsel's error(s), there is a reasonable probability that the outcome of the trial would have been different. Strickland v. Washington, 466 U.S. 668, 694 (1984); Simpson, 367 S.C. at 595-96, 627 S.E.2d at 706. "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. Id.

In order to prove deficient performance, the applicant must "show 'that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. '" Harrington v. Richter, 562 U.S. 86, 104 (2011), quoting Strickland, 466 U.S. at 687. "The standard for judging counsel's representation is a most deferential one." Id. at 104. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Butler v. State, 286 S.C. 441, 445, 334 S.E.2d 813, 815 (1985), quoting Strickland, [466 U.S. at 690]. As the Supreme Court made clear in Strickland:

> . . . the reasonableness of counsel's actions may be determined or substantially influenced by the defendants own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what

> investigations are reasonable depends upon such information . . . [W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

Strickland, 466 U.S. at 691. Barnes v. Thompson, 58 F.3d 971, 978 (4th Cir. 1995); Matthews v. Evatt, 105 F.3d 907, 919-920 (4th Cir. 1997). The mere fact that trial counsel's strategy was unsuccessful does not render counsel's assistance unconstitutionally ineffective. Strickland, 466 U.S. at 689. Bell v. Evatt, 72 F.3d 421, 429 (4th Cir. 1995).

Next, an applicant must also establish prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. It is insufficient to show only that the errors had some conceivable effect on the outcome of the proceeding, because virtually every act or omission of counsel would meet that test. Id. at 693. Applicant bears the "highly demanding" and "heavy burden" in establishing actual prejudice. Williams v. Taylor, 529 U.S. 362, 394 (2000).

In order to prove "prejudice" in regard to sentencing phase error, an applicant must show "there is a reasonable probability that, absent [counsel's] errors, the sentence - including an appellate court, to the extent it independently reweighs the evidence - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Jones v. State, 332 S.C. 329, 504 S.E.2d 822 (1998). Further, prejudice is evaluated by consideration of the trial evidence of mitigation, along with the PCR evidence, compared to the aggravating circumstance evidence. Wong v. Belmontes, 558 U.S.15, 130 S.Ct 383 (2009). "The likelihood of a different result must be substantial, not just conceivable." Richter, 562 U.S. at 112, citing Strickland, 466 U.S. at 693.

"[W]hile in some instances 'even an isolated error' can support an ineffective assistance claim if it is 'sufficiently egregious and prejudicial,' Murray v. Carrier, 477 U.S. 478, 496, 106 S.Ct 2639 (1986), it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." Richter, 562 U.S. at 111, 131 S.Ct. at 791.

Here, there is ample support for the PCR Court's factual findings and legal conclusions. The PCR Court's Order of Dismissal should be affirmed.

What Occurred At Trial

During its sentencing phase case the State incorporated the evidence presented during the guilt phase, and further presented the two victims of Petitioner's prior crimes, the SLED arson agent, the pathologist, and two victim impact witnesses. (App. 4652-4708). The State presented no witnesses or information as to any of Petitioner's misbehavior in or lack of adaptability to prison, or on conditions of confinement generally.

In contrast, the defense presented Margaret Baughman, an adult education teacher at the jail where Petitioner spent his pre-trial confinement. (App. 4761-69). Baughman stated that Petitioner had been taking her classes in jail for fourteen to fifteen months, and eventually became her reliable and trustworthy teacher's assistant. (App. 4761-65). On redirect, Petitioner elicited that there are limited educational opportunities available for inmates, and Petitioner made himself available for any class. (App. 4767).

Petitioner also called James Aiken, a former state corrections official and corrections consultant who was qualified as an expert in future danger and prison adjustment issues. (App. 4832-82). On direct, Aiken testified Petitioner would never leave prison until he was dead. (App. 4841). According to Aiken, Petitioner's institutional record of one fight and assistance to Baughman in the classroom indicated he could adapt to prison, but fundamentally Aiken noted

that SCDC could manage and incapacitate any inmate with its security measures. (App. 4842-4845). During cross-examination, Aiken testified without objection on the various security levels of custody an inmate can achieve. (App. 4849-57). Aiken stated that a LWOP inmate has the incentives of getting to go to work and "get[ting] an opportunity to live" - without objection from the defense. (App. 4854-4862).

On redirect, the defense elicited that Petitioner could not work outside the prison, that he would not be going to "kiddy camp" if he was given a life sentence, that he would not have "picnic lunches," and that he would be around a "predator, dangerous, violent inmate population." (App. 4864-65). The defense then elicited testimony regarding supermax cells. (App. 4865-66). The defense also asked Aiken about the productive endeavors available for Petitioner in prison, to which Aiken replied that Petitioner could "pay back to the society" and "do something for himself" by working in such areas as food service, maintenance, or painting. (App. 4866-67). The defense asked Aiken if Petitioner was going to be molly-coddled, and Aiken indicated Petitioner could get involved with the Scared Straight program. (App. 4867-68).

On re-cross, the prosecutor asked about escapes, to which the defense objected. (App. 4869). Outside the presence of the jury, the court sustained the defense objection to the questioning on escape, but declined the motion for a mistrial. (App. 4870-75). During the discussion, the prosecutor asked if he could explore "certain conditions of the general population, the work conditions he's already gotten into, that area," since the defense had established that Petitioner was not going to "kiddy camp" and would have work available. Id. The trial court agreed, to which the defense only stated, "We're on recross, Judge." Id. The judge replied that work situation was an issue certainly before the jury "at this point." (App. 4874).

Following a curative charge by the judge as to the escape question, Aiken indicated in response that (1) Petitioner would not be in supermax, (2) he would be able to work for a modest income of a few dollars per day, (3) he would have a daily routine that included eating times, work times, and recess, (4) he would be able to engage in Bible study, education, anger management, and "other things." (App. 4877-79). While Aiken again noted Petitioner would be around very dangerous people, he stated Petitioner could have access to libraries, television, football, and softball. (App. 4880-81). There was no defense objection to any of this testimony. (App. 4877-81).

Petitioner next called jail guard Sharon Branch, who stated that while Petitioner displayed some "attitude" and had a recent difficulty with authorities over going to church, he never made her feel physically threatened. (App. 4882-86). She also indicated Petitioner was allowed "one hour of rec per day." (App. 4887). Detention center guard Enrique Badillo testified that Petitioner displayed a very polite and cooperative attitude in jail. (App. 4902-05).

Discussion at the PCR evidentiary hearing

In his testimony on cross during PCR, counsel Cummings explained that his strategy was to portray life in prison without parole as a particularly horrible fate that it amounted to sufficient punishment for a young man like Petitioner. (App. 7607-13). He noted he wanted to "paint a picture, paint it nasty for [the jury]." (App. 7611). Counsel noted that he had successfully objected when the solicitor attempted to talk about escape, but knew that once he had questioned the witness on some of the harsh conditions of prison he fully expected the solicitor to ask Aiken about "whether or not they get to eat in prison." (App. 7612-13). Since Bowman, Bryant, and Burkhart were not out yet, he did not see a valid objection outside of the solicitor "talking about things that were outside the scope - that being escape." (App. 7613-14). Counsel added, "I

knew it was coming; I took a calculated risk; I made a decision," and agreed that he knew full well that "by going down the road of saying life in prison is so horrible that it's good enough punishment for Marion Bowman," the solicitor was going to try to show that it was not as bad as all that. (App. 7614-15). While counsel later stated he was not strategically trying to introduce what the law determined was an arbitrary factor, counsel did state he made a "calculated risk" eliciting the evidence on the toughness of prison from Aiken. (App. 7614-18). He noted he "made that choice to try to give the jury an alternative," asking rhetorically, "why do we give the jury a LWOP choice if we're not going to let them know what prison is like?" (App. 7615). Counsel agreed he was willing to take on the issue of prison conditions because he thought he could use it to his client's benefit (App. 7615-17). Finally, counsel agreed that at the time they were on the "frontier" of how to litigate a capital case with the mandatory LWOP charge, and he "did try to push the envelope." (App. 7616-17).

A. Counsel was not deficient.

In looking at counsel's handling of this testimony and evidence, it is important to understand the developments in both the areas of the introduction of prison condition evidence and the developments of the case law regarding the jury instruction on life without parole. In State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984), this Court declined to grant relief upon a claim that the solicitor improperly cross-examined a defense social worker on a letter she wrote to the solicitor in which she complained that serial killer Pee Wee Gaskins was allowed to move too freely about the prison. *This Court specifically rejected a claim that such an examination interjected an arbitrary factor*. In doing so, this Court in Plath noted the defense strategy on one part sought to show that the death penalty was an ineffective deterrent and counterproductive, and on the other part sought to show that life imprisonment was a "condition of irretrievable

loss". Id. at 13-14, 313 S.E.2d at 626. The court disapproved of such sentencing defenses, noting that policy and penology were not for the jury.

> A jury needs to know how a given defendant came to commit a given aggravated murder, to include aspects of his background, his character and the setting of the crime itself which may explain or even mitigate the conduct of which he has been found guilty. A jury does not need to know how often he will take a shower or whether or not he will be lonely and withdrawn during his tenure at CCI.

Plath, 281 S.C. at 15, 313 S.E.2d at 627.

Despite these admonitions, this Court in Plath returned to how the State's challenged questioning was only *proper response* to what the Court considered to be improper sentencing phase defenses on the utility of capital punishment or the conditions of capital punishment:

> In the case before us, defendants elected to enter the forbidden field of social policy and penology. It is neither surprising nor can it be deemed prejudicial that the State responded in kind, attempting to show through defendants' own witnesses that life imprisonment was not the total abyss which they portrayed it to be. . . . [The solicitor's] references [were] . . . merely reminders to the jury that life imprisonment was by no means as hopeless as defendants would have it believed. The State was entitled to make this response.

Plath, 281 S.C. at 15-16, 313 S.E.2d at 627-28. See also State v. Woomer, 278 S.C. 468, 299 S.E.2d 317 (1982) (evidence of defendant's prior escape was proper reply to defense evidence of good conduct while in prison). The Court in Plath did not call such evidence an "arbitrary factor." The Court simply held it was irrelevant. However, like any irrelevant evidence, the Court also held that since one party elected to introduce it, the other party had the right to respond.

Thus, Plath stands for three points of particular relevance as to the state of the law under which counsel here operated: (1) that defendants had even since the early 1980s attempted to show as a strategic matter that life imprisonment was so difficult as to be a sufficient alternative to death; (2) the court rejected a contention that the cross-examination interjected an arbitrary

factor; and (3) the State was entitled to respond in kind. Indeed, Plath ultimately affirmed the sentence despite the presence of conditions evidence and policy discussions.

In Kelly v. South Carolina, 534 U.S. 246 (2002), the United States Supreme Court broadly defined "future dangerousness," and in doing so effectively ended years of litigation in South Carolina regarding whether the prosecution had raised future dangerousness to the point that the jury needed to be charged that a life sentence meant life without parole.[1] Shortly after Kelly, the General Assembly passed a law requiring life without parole to be charged in all death penalty cases. 2002 Act. No. 278 § 1. Thus, counsel here were going to have the benefit of a judicial charge to support their contentions that Petitioner would never have another day outside of the stark reality of prison.

In 2005, the South Carolina Supreme Court issued the opinion in Petitioner's direct appeal, in which both sides presented some evidence that touched on conditions of confinement and escape. The South Carolina Supreme Court found the issue not to be preserved, but added a cautionary instruction to both sides that evidentiary presentations along these lines are improper:

> We take this opportunity, however, to caution the State and the defense that the evidence presented in a penalty phase of a capital trial is to be restricted to the individual defendant and the individual defendant's actions, behavior, and character. Generally, questions regarding escape and prison conditions are not relevant to the question of whether a defendant should be sentenced to death or life imprisonment without parole. We emphasize that how inmates, other than the defendant at trial, are treated in prison; and whether other inmates have escaped from prison, is inappropriate evidence in the penalty phase of a capital trial. We admonish both the State and the defense that the penalty phase should focus

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[1] For some of the cases addressing this issue, see, e.g. Shafer v. South Carolina, 532 U.S. 36, 46 n.3 (2001); Simmons v. South Carolina, 412 U.S. 154 (1994); State v. Starnes, 340 S.C. 312, 322, 531 S.E.2d 907, 913 (2000); State v. Byram, 326 S.C. 107, 483 S.E.2d 360 (1997) (defendant wanted charge on effect of finding of statutory aggravators on parole eligibility of life sentence; court held such a charge was properly denied because Simmons was not triggered); State v. Southerland, 316 S.C. 377, 447 S.E.2d 862 (1994) (holding that Simmons was not triggered because the solicitor did not argue future dangerousness).

> solely on the defendant and any evidence introduced in the penalty phase should be connected to that particular defendant.

State v. Bowman, 366 S.C. 485, 498-99, 623 S.E.2d 378, 384 (2005).

Subsequent to Bowman, the South Carolina Supreme Court addressed a case where the *solicitor* preemptively called a witness who extensively testified as to the conditions of confinement for a inmate serving life without parole. State v. Burkhart, 371 S.C. 482, 640 S.E.2d 450 (2007). The defense objected to the state's evidence, and later put in its own evidence of "bad" prison conditions. Justice Moore was joined by Justice Waller and wrote the opinion of the Court. Justice Moore cited Plath and other cases from the 80s and 90s for the proposition that evidence outside of the circumstances of the crime and the characteristics of the defendant was inadmissible in a sentencing phase. This included conditions of incarceration, the process of execution, or the deterrent effect of capital punishment. Burkhart, 371 S.C. at 487-88, 640 S.E.2d at 453. Justice Moore noted that while the case at issue was tried before the decision in Bowman, its result was consistent with the "long-standing rule that evidence in the sentencing phase of a capital trial . . . be relevant to the character of the defendant or the circumstances of the crime." Id. Thus, Justice Moore concluded that reversible error had occurred, since the evidence of conditions of confinement "invited the jury to speculate about irrelevant matters" and injected an arbitrary factor in the proceedings in violation of S.C. Code Ann. § 16-3-25(C)(1) (2003).

In concurrence, Justice Pleicones wrote that he did not believe the court should apply the normal harmless error standard for constitutional violations to this issue, concluding that "once improper evidence of any kind injects an arbitrary factor into the jury's consideration, [the] Court cannot uphold the death sentence under § 16-3-25(C)(1)." Burkhart, 371 S.C. at 489-90, 640 S.E.2d at 454.

In dissent, Chief Justice Toal, joined by Justice Burnett, applied the normal rule that the introduction of evidence will not result in reversal unless it prejudiced the defendant. Justice Toal concluded that the issue was fully joined by both sides and used by the defendant to his advantage. Id. at 490-95, 640 S.E.2d at 454-57.

Subsequent to Burkhart, this Court decided State v. Bryant, 372 S.C. 305, 642 S.E.2d 582 (2007). In Bryant, the *defense* called an expert that testified in great detail as to the "dismal conditions of prison life in general," including testimony about the mean guards, the bad food, the uncomfortable furniture, and the incessant noise, even though the solicitor called *no* witness on conditions of confinement. Like Bowman, the Court reiterated that *defense* evidence on conditions of confinement was just as improper as State evidence on the subject.

Given counsel's testimony, it was clear that counsel was not deficient when one considers the time period and the then-existing state of the law in which counsel operated. Kelly v. South Carolina, 534 U.S. 246 (2001), which ended the debate about charging LWOP and essentially required such charges in every case, had come out just a few months before Petitioner's trial. Knowing that he was going to get a LWOP charge, and given Petitioner's relatively young age, counsel decided to attempt to portray through Aiken the conditions of LWOP as so severe that it was a sufficient alternative to death for the conservative Dorchester County jury to choose. Like other defense lawyers in cases around this same time that have similar issues, such as in James Bryant[1] and John Richard Wood,[2] for example, defense counsel elected to focus the jury on the

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[1] In Bryant's case, the defense presented testimony of a witness who stated that some viewed the death penalty as more merciful than life without parole. Bryant, 372 S.C. at 316, 642 S.E.2d at 589. In his post-conviction relief action, Bryant asserted trial counsel was ineffective for introducing evidence of the conditions of confinement. The PCR Court denied relief, and certiorari was denied upon the claim in the appeal of the denial of relief on October 3, 2012.

[2] In Wood's case, the defense did not object to the presentation of a State's witness regarding the

severity of everyday life for one with a "no parole" life sentence, in an attempt to offer it as a sufficient punishment without need for the death penalty.

Since Bowman, Burkhart. or Bryant had not yet been issued, counsel's strategy was reasonable, including his (and the judge's) determination that the solicitor's responsive questioning was permissible given the evidence elicited by the defense. Respondent would note that Petitioner did not challenge counsel's strategy of eliciting bad prison conditions in the PCR action. (See App. 9447-48, 9546-50, 9795).

Since counsel had reasonably decided to elicit evidence that Petitioner was not going to "kiddy camp," that he was not going to be "molly-coddled," that he would be around a dangerous predatory population, and that he would be required to make something of himself through work and educational opportunities in prison, he expected that the solicitor would seek to respond with his own questioning about some of the less harsh conditions of confinement. Counsel testified he took the "calculated risk" that he would gain more with his stark portrayal of LWOP than he lost with any response. Given the testimony on the issue he elicited, counsel testified he did not see a valid objection to the solicitor's own limited questioning on conditions - except when the solicitor went outside the "scope" into questioning about escape, to which counsel successfully did object.

In light of the state of the law when this trial took place – and the fact that in Plath "the State was entitled to make this response" to defense evidence on conditions - counsel was correct that, based on his own questioning, he would not have had a valid objection to the solicitor's

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conditions of confinement. The defense also cross-examined that witness about conditions of confinement, and further presented testimony from another witness about the same topic. The PCR Court denied relief, and certiorari was denied upon the claim in the appeal of the denial of relief on November 16, 2012.

limited responsive questioning. See Plath, 281 S.C. at 15-16,313 S.E.2d at 627-28 (although defendants should not have entered the forbidden field of penology, once they did, State was entitled to respond and show "life imprisonment was not the total abyss which (the defendant] portrayed it to be"); State v. Johnson, 306 S.C. 119, 410 S.E.2d 547 (1991) (proper for solicitor to respond that victim's family could only visit him at the grave after defendant's sister testified she would visit him in prison at Christmas); State v. Thibodeaux, 750 So.2d 916 (La. 1999) (defendant opened the door to prosecution questioning of its corrections expert on recreational activities at prison).

Furthermore, Strickland plainly does not require counsel to anticipate changes and developments in the law, and thus counsel is not required to have foreseen that this Court would subsequently call general prison conditions evidence an "arbitrary factor." See Teamer v. State, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016) (finding trial counsel not ineffective for not foreseeing successful appellate challenges to novel questions of law); Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) ("We have never required an attorney to be clairvoyant or anticipate changes in the law which were not in existence at the time of trial.") (overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999)); see also Robinson v. State, 308 S.C. 74, 417 S.E.2d 88 (1992); United States v. Smith, 241 F.3d 546, 548 (7th Cir.2001) (holding that trial counsel was not ineffective, despite his failure to anticipate the Apprendi decision); Pitts v. Cook, 923 F.2d 1568 (11th Cir.1991) (holding that counsel's failure to recognize a reasonably available claim under the subsequently-decided Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), did not render counsel's assistance constitutionally ineffective); Pelmer v. White, 877 F.2d 1518 (11th Cir.1989) (citing Engle v. Isaac, 456 U.S. at 133-34, 102 S.Ct. 1558) ("because law is not an exact science, an ordinary,

reasonable lawyer may fail to recognize or to raise an issue, even when the issue is available, yet still provide constitutionally effective assistance"); Schneider v. Day, 73 F.3d 610 (5th Cir. 1996) (holding that while Victor is retroactive, counsel cannot be ineffective for failing to foresee changes in the law subsequent to the Petitioner's trial). Altogether, Petitioner fails to show counsel was not deficient. Thus, the PCR Court did not err in denying relief upon this claim.

B. Petitioner did not show that he was prejudiced.

Petitioner also cannot show that he was prejudiced by the fact trial counsel did not object to portions of the re-cross examination of James Aiken. First, as noted by the PCR Court, Petitioner presented a strong case for a life sentence, which included its presentation as to the harshness of life without parole. Indeed, the main thrust of the defense in the sentencing phase was the concept that the "without parole" portion of a life sentence in harsh conditions makes life without parole sufficiently severe enough punishment to be appropriate retribution for the crime, without the need to impose death. (See App. 4982) (defense derisively refers to prosecutor's argument as "reward-a-prison"); (App. 4991) (defense states its "easy to try to paint prison as a reward", and argues: "The line forms back there if anybody wants to spend the rest of their life behind bars."); (App. 4991) (defense argues it is "wrong" and an "injustice" if the jury thinks a life sentence is a "reward"); (App. 4996-97) (defense implies that a life sentence is worse than death for a person as young as Petitioner, and argues "Can you imagine spending from the years of the youngest person on the jury until the oldest person on the jury behind bars? That's a life sentence without the possibility of parole."); (App. 4997-98) (defense argues that jury should give Petitioner life so that he would have to remember what he did to Kandee for the rest of his

days); (App. 5005-06) (defense argues that prison is a dangerous place, and prison is appropriate punishment for Petitioner because it is a death sentence too).

Moreover, for the same reasons the examination could not have been prejudicial. Given the defense's extensive exploration of the harshness of prison, it cannot be said that a much smaller amount of fair and accurate comment the other way would create a reasonable probability of a different result. Indeed, given the extensive focus of the defense on the retributive sufficiency of the "without parole" aspect of a life sentence, it cannot be said that a little further accurate information about life without parole to complete the picture was so far out of bounds as to necessitate a new sentencing hearing. Petitioner cannot show prejudice based solely on a claim that his attempt was thwarted to create a blatantly one-sided and inaccurate perspective. As was the case in Plath, Petitioner here was not prejudiced by this limited testimony regarding general prison conditions.

Contrary to Petitioner's implicit assertions, prejudice cannot be presumed by way of this Court's determination in Burkhart that the State's presentation of general prison conditions evidence introduces an arbitrary factor. As already noted, this Court did not find that evidence regarding general prison conditions constituted an arbitrary factor under S.C. Code Ann. § 16-3-25(C)(1) until its decision in Burkhart, which was decided years after Petitioner's trial. Burkhart, 371 S.C. at 488-89, 640 S.E.2d at 453. A normal Strickland analysis necessarily still applies to a claim that counsel did not object to the introduction of evidence. Unlike Burkhart, Bowman, or Bryant, which were direct appeals, this case is in PCR, and on collateral attack Petitioner must establish his claims through the constitutional vehicle of ineffective assistance of counsel. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993) (issues that could have been raised at trial or on direct appeal cannot be raised in a PCR application absent a claim of

ineffective assistance of counsel). Unlike a case on direct appeal – where the conviction is not yet considered final – during collateral attack concerns of finality are of " profound importance". See generally Strickland, 466 U.S. at 693-94 (discussing concerns of finality when deciding the appropriate standard for prejudice). Hence, on collateral attack it is appropriate to filter claims through a prejudice analysis to ensure that the extreme social cost of reversing final convictions and sentences is only borne by society where the alleged error had a reasonable probability of affecting the result.

As noted by the PCR Court, an example of this principle is found in Franklin v. Catoe, 346 S.C. 563, 552 S.E.2d 718 (2001). There, this Court held that a prejudice analysis should be applied to claims that the defendant was not advised of and thus did not waive his right to personally give closing argument in the guilt phase of a capital trial – despite the fact that prior cases had not engaged in a prejudice analysis. Franklin noted the general rule that claims under Strickland include a prejudice analysis, and went on to conclude that since *in favorem vitae* review had been abolished and a PCR system of collateral attack established to explore such issues, a finding of *per se* reversible error was no longer warranted. Franklin, 346 S.C. at 571-74; 552 S.E.2d at 723-24. Finally, the Court noted that it and the United States Supreme Court have repeatedly held that "a harmless error analysis is appropriate where a capital defendant has suffered a deprivation of a *constitutional right*". Franklin, 346 S.C. 563 at 575 n.8, 552 S.E.2d at 725 n.8 (emphasis original). As Franklin specifically notes, this overriding constitutional claim upon which the statutory claim depends is subject to a harmless error analysis – – like any other constitutional claim.

It is clear that reversal is not warranted. Again, in the sentencing phase, Petitioner must show "there is a reasonable probability that, absent [counsel's] errors, the sentencer – including

an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Jones, 504 S.E.2d at 823-824 (citing Strickland). As to the evidence regarding prison conditions itself, as outlined above, the defense's presentation of this evidence was stronger than the prosecution's. Furthermore, given the overwhelming evidence in aggravation and the limited evidence in mitigation, had both the State's and defense evidence of conditions of confinement been excluded, Strickland prejudice still would not be established. Thus, the PCR Court did not err in denying relief upon this claim.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests this Court affirm the PCR Court's Order of Dismissal. Respondent further requests any other relief this Court deems appropriate.

Respectfully submitted,

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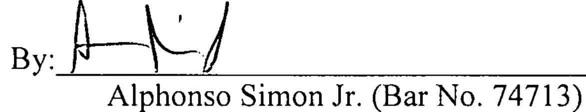

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December 16, 2016.

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Dorchester County
James E. Lockemy, Circuit Court Judge

Appellate Case No. 2012-213468

MARION BOWMAN,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

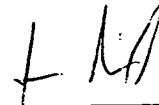
Respondent.

CERTIFICATE OF SERVICE

I, Alphonso Simon, Jr., counsel for the Respondent, certify that I have served the within Brief of Respondent on Petitioner by depositing two (2) copies of the same via U.S. mail, first class, postage prepaid to his attorneys of record, Robert M. Dudek, Esq., David Alexander, Esq., both with SCCID/Division of Appellate Defense, 1330 Lady Street, Suite #401, Columbia, South Carolina 29201-3332; and Michael J. Anzelmo, Esq., Nelson, Mullins, Riley & Scarborough, LLP, P.O. Box 11070, Columbia, South Carolina 29211.

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

This 16th day of December, 2016.



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