STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

IN THE ORIGINAL JURISDICTION

Appellate Case No. _____

MARION BOWMAN, JR., SK #6006,

Petitioner,

v.

BRYAN P. STIRLING, Commissioner, South Carolina Department of Corrections,

Respondent.

PETITION FOR A WRIT OF HABEAS CORPUS

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INTRODUCTION

Marion Bowman, Jr. seeks relief from his convictions and death sentence,[1] which were obtained on the basis of incentivized testimony from witnesses whose credibility could have been undermined but for the State's failure to turn over impeaching evidence as required by *Brady v. Maryland*, 373 U.S. 83 (1963), and trial counsel's injection of racial bias in the proceedings and failure to adequately represent Bowman in trial and sentencing due to his own racism and biases. Bowman's death sentence is also excessive under S.C. Code § 16-3-25(C)(3) evaluated in the context of this Court's original writ jurisdiction, which Bowman asserts should include consideration of the mitigation evidence available now after Bowman has spent more than 22 years on death row. Due to the finality and irrevocability of the penalty of death, the United States Supreme Court has stressed the "need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). Because Bowman has exhausted the regular course of appeals in his case, a writ of habeas corpus in this Court's original jurisdiction is appropriate to ensure reliability in this death penalty case, and ultimately to reverse Bowman's convictions and sentence that were obtained in violation of both the United States and South Carolina Constitutions.

I. RELEVANT FACTS AND PROCEDURAL HISTORY.

a. Trial Proceedings.

Marion Bowman, Jr. was convicted of murder and arson, third degree, in Dorchester County, South Carolina, for the death of Kandee Martin, who had been shot to death and—hours later—placed in the trunk of her car, which was set on fire. The primary witnesses implicating Bowman were James ("Tawain") Gadson and Travis Felder, both of whom were charged in the

[1] Bowman's execution has not yet been scheduled. According to this Court's prior orders, Bowman's execution is likely to be scheduled in January 2025.

case and testified in exchange for plea agreements to greatly reduced sentences, and Hiram Johnson, who attributed a cold-blooded confession to Bowman. The prosecution pointed to Johnson as the centerpiece of its case in closing arguments in both the guilt and sentencing phases.

i. *The Trial Evidence Not Adduced from Gadson, Felder, and Johnson.*

The State's evidence that was not reliant on Gadson, Felder, and Johnson was merely circumstantial. That evidence revealed Martin's body was recovered from the trunk of her burning car in a rural area alongside Nursery Road in the early morning hours of February 17, 2001. *State v. Bowman*, 366 S.C. 485, 489, 492, 623 S.E.2d 378, 380, 382 (2005). An autopsy established that she was shot to death and deceased prior to the fire. *Bowman v. Stirling*, 45 F.4th 740, 743 (4th Cir. 2022). Shell casings, a fired bullet, blood evidence, and the victim's shoe were recovered at the crime scene. *Id.* at 746. Bowman's DNA was identified from vaginal swabs taken during Martin's autopsy.[2] *Id.* at 744.

In the hours following the discovery of Martin's body, the police arrested Bowman on an outstanding warrant for an unrelated charge of receiving stolen goods. App. 350.[3] The police subsequently arrested Gadson, Bowman, Felder, and numerous others, including Bowman's wife, sisters, and father for principal or accessory involvement in the crimes against Martin. The state subsequently manipulated all these witnesses to change their pretrial statements and to testify

[2] A defense witness in sentencing testified that Bowman and Martin had been alone together in his bathroom for a while and then left his home together earlier that day. *Id.* at 746. Likewise, multiple witnesses testified that Bowman and Martin were friends, who were often seen together. App. 3748, 4033, 4079. The forensic pathologist for the state acknowledged that the seminal fluid from which the DNA evidence was taken could have been present for as much as 48 hours prior to Martin's death. App. 3954. The jury rejected the alleged aggravating factor of criminal sexual conduct during their sentencing deliberations. App. 5021, 5051.

[3] Citations to "App." refer to the PCR Appendix filed with this Court in *Bowman v. State*, No. 2012-213468 (S.C.).

against Bowman by entering into plea agreements to reduce their charges, or sentences in exchange for their testimony against Bowman.[4] *Bowman*, 45 F.4th at 756.

At trial, the state presented evidence that Bowman had a pistol at a party on the afternoon of the murder. Later that day, according to Bowman's sister – who was also testifying pursuant to a plea agreement after being charged – and several other state witnesses, Bowman saw Martin in conversation and attempted to speak with her because she owed him money. When she rebuffed him, Bowman cursed at her and said she would be dead that night. *Id.* at 743-44.

That evening, Bowman was seen after midnight in the parking lot of a rural nightclub where Felder and others had gathered. App. 4042. Around 3:00 a.m., after all had departed from the club and returned to town, Bowman asked Felder for a ride home. App. 4043, 4045. This request came thirty minutes before Martin's burning car was discovered, but seven hours after it was first seen on the side of the road and the neighbor who ultimately discovered it first heard gunshots. When arrested, Bowman had Martin's wristwatch in the pocket of the pants he had worn the previous night. *Bowman*, 45 F.4th at 745-46.

Some days later, after Johnson told Bowman's wife that the murder weapon was stuffed in a chair in her living room, she found the weapon and gave it to Bowman's sisters who, at the direction of their father, dropped the gun from a bridge over the Edisto River. The gun was

[4] The state's deliberate efforts to coerce statements and testimony by threat of charges is exemplified by the Solicitor's notes provided in discovery in PCR that reflect "interviews needed" and explicitly notes and encourages law enforcement to threaten both of Bowman's sisters and both of Bowman's parents with "prosecution to get statement[s]." Exh. 1, Solicitor's Interviews Needed Memo.

Citations to "Exh." refer to the combined exhibits filed with this petition. Pin citations with the Exh. citations are to the internal page numbers within each exhibit. An index appears that the beginning to the combined exhibit document for the location of each exhibit.

recovered by a team of divers and the shell casings recovered at the scene matched the pistol. *Id.* at 746.

ii. *The Testimony of Gadson, Felder, and Johnson.*

Given this circumstantial evidence, the State relied heavily on the testimony of Gadson, Felder, and Johnson, its primary witnesses. According to Gadson and Felder, two weeks before the murder, Bowman purchased a Hi-Point .380 pistol. *Id.* at 743. The murder weapon was a Hi-Point .380 pistol that was recovered from the Edisto River. *Id.* at 746; App. 4307-20.

Gadson testified pursuant to a plea agreement that dismissed a murder charge—for which he could have faced the death penalty or a minimum of 30 years confinement[5]—and allowed him to plead to accessory after the fact and misprision of a felony with a negotiated sentence of 20 years. App. 3981. He provided the only purported eyewitness account of Martin's shooting and the aggravating circumstances found by the jury in sentencing: kidnapping and larceny while armed with a weapon.

Gadson offered a lurid account of Martin driving up to the outdoor party with Bowman, who told Gadson to get in the car before directing Martin to a remote rural location. Gadson claimed that once out of the car Bowman announced his intention to kill Martin "because she was wearing a wire." *Bowman*, 45 F.4th at 744. According to Gadson, Martin approached them and told Bowman she was scared. Gadson described the three hiding in the woods as a car drove by and then, as they walked back towards her car, Bowman abruptly shot at Martin five times, hitting

[5] S.C. Code § 16-3-20(A). Through his plea agreement, Gadson avoided the death penalty by testifying against Bowman. At Bowman's PCR hearing, Gadson testified that he feared the death penalty and knew that he could receive the death penalty if he did not comply with the plea agreement to testify against Bowman. Trial counsel failed to cross examine Gadson on this fact, and instead, the jury was left with the impression that Gadson was not facing the death penalty. Exh. 2, Amended PCR Appeal Petition for Writ of Certiorari (hereinafter PCR Appeal) at 19-20.

her twice. Between the shots, Gadson claimed that Martin pleaded with Bowman not to shoot her anymore because she had a child to take care of. After Martin fell to the ground, Gadson claimed Bowman dragged Martin to the woods. As they drove back to town in Martin's car, Gadson claimed Bowman bragged about shooting Martin in the head and threatened to "blow [Gadson's] brains out" if he reported what he had seen.[6] *Bowman*, 45 F.4th at 744.

As another key witness for the state, Johnson testified that he had seen Bowman with a weapon before and after the shooting. Gadson and Johnson both testified that after Martin's shooting, Bowman drove Martin's car to the nightclub and distributed gloves for them to wear while in the vehicle. Johnson said Bowman told him the car was stolen and claimed Bowman tried to sell Martin's car to people in the parking lot of the club. *Id.* at 745.

Johnson also provided the only testimony that, after leaving the nightclub, Bowman had a pistol in his lap and laughed in a chilling manner saying "I killed Kandee, heh, heh heh."[7] *Bowman*, 45 F.4th at 745. The State relied heavily on this as evidenced in its closing, which repeated the statement Johnson attributed to Bowman. The State also sought to bolster Johnson's testimony by "highlight[ing] the absence of any deal with or charges against Johnson, [and] tell[ing] the jury that he did not have 'any reason to say something [that] wasn't true.'" *Id.* at 755 (quoting App. 4474).

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[6] Despite giving several statements to police before trial, the first time Gadson claimed Bowman "threatened to blow his brains out" was during his trial testimony. Trial counsel failed to cross examine Gadson on this point. Exh. 2, PCR Appeal at 20-22.

[7] The alleged confession was not included in Johnson's pretrial written statement to police, App. 2861, but trial counsel also failed to cross examine him on that and other inconsistencies in his testimony. Exh. 2, PCR Appeal at 47.

Felder, who initially told police he knew nothing about Martin's death but later testified pursuant to a plea agreement with the State,[8] provided the only purported eyewitness testimony for the events surrounding the arson. Felder claimed that after Bowman asked him to help park Martin's car around 3:00 a.m., they drove – with Bowman driving Martin's car and Felder following in his own car – to Nursery Road where Bowman dragged Martin's body from the woods, placed it in the trunk of her car, confessed to her murder, and lit the car on fire. During the guilt phase of the trial, Felder testified that he followed Bowman straight to the place where Martin's body was, but when confronted by a security video during sentencing, he admitted that on the way out of town, Felder stopped at the EZ Horizon Store and himself purchased the gasoline that was used to set fire to Martin's car and body. *Bowman*, 45 F.4th at 745; Exh. 2, PCR Appeal, at 33, 35.

At the close of the guilt phase, the jury found Bowman guilty of murder and arson, third degree. App. 4564.

iii. *Evidence Presented at Sentencing*.

The State's evidence in sentencing added little to its trial presentation. The state incorporated the evidence from the guilt phase and introduced evidence of Bowman's prior third-degree burglary and petit larceny convictions before presenting additional postmortem photos of Martin and testimony from the pathologist who performed her autopsy as to the condition of her body, followed by pictures of her celebrating family occasions, and victim-impact testimony from her mother and father. *Bowman*, 45 F.4th at 746-47.

[8] In accord with the agreement, the State dismissed Felder's accessory after the fact of murder and arson charges—for which he could have faced up to 30 years' confinement, App. 4085-86—and allowed him to plead guilty to accessory after the fact of arson in the third degree, for which he was sentenced to three years suspended to three years' probation. App. 6424; *see also* Exh. 2, PCR Appeal at 35-37.

Bowman presented significant mitigation evidence of trauma and neglect that permeated Bowman's childhood, including witnessing his father's violence towards his mother, his father's abandonment of the family, and then the poverty of the family and daily physical abuse of Bowman's mother with switches and belts. App. 4793-94.

Bowman also became the caregiver of his family when his mother began suffering from physical ailments when Bowman was barely out of elementary school. He began cooking and caring for her and his siblings. App. 4743, 4747-48. He would help his mother out of bed, change her when she wet or soiled herself, clean her, feed her, and do for the family what she was unable to do. App. 4754, 4796-97. Sometimes Bowman stayed home from school to care for the family. App. 4797.

Bowman's mother had a relationship with a man named Joseph Sims who became like a stepfather to Bowman, but Sims was often away driving trucks for a living and permanently left the Bowmans' lives when Bowman was about seventeen. App. 4744, 4757, 4802. A social worker, Jeffrey Yungman, testified that Sims leaving was one of several traumatic events Bowman suffered as a teenager, including being hit in the head with a baseball bat, losing a cousin who died after being administered the wrong medication at a hospital, losing another cousin to suicide, and losing his maternal grandfather. App. 4801-03.[9] Yungman concluded the trauma, neglect, and other difficulties Bowman suffered weakened his decision-making ability. App. 4804-08.

The defense also called witnesses to testify about Bowman's positive behavior in pretrial detention and presented an expert in prison adjustment and future dangerousness, who testified

[9] Yungman also testified that Bowman was flagged as handicapped in school and he suffered a head injury in a car accident as a child. App. 4794-95.

that Bowman would adjust well to prison life and would never be released. *Bowman*, 45 F.4th at 746-47.

Although they did not testify in sentencing, the State relied on Gadson and Johnson as the centerpiece of its case in aggravation. Specifically, the State argued in closing, based on their testimony, that this was a "cold-blooded murder" that called for the death penalty. The prosecutor argued that Bowman "enjoyed the act" of killing Martin, which was evidenced by Gadson's testimony that Bowman asked if he "hear[d] her head hit the pavement" and Johnson's testimony that Bowman laughed while confessing he had killed her, which the prosecutor interpreted as Bowman "thought it was funny." App. 4969. When the case was submitted to the jury, the State asked the jury to find four aggravating factors: kidnapping, criminal sexual conduct, armed robbery, and larceny with a deadly weapon. App. 5018. The jury rejected criminal sexual conduct and armed robbery but recommended a sentence of death, which the court imposed. App. 5051.

b. Direct Appeal and Proportionality Review.

This Court affirmed Bowman's convictions and death sentence on direct appeal. *State v. Bowman*, 366 S.C. 485, 623 S.E.2d 378 (2005). In conducting its mandatory proportionality review, the Court found Bowman's death sentence was not disproportionate under South Carolina Code section 16-3-25(C)(3) because death sentences had been imposed in similar cases. *Id.* at 503, 623 S.E.2d at 387. The Court cited two similar cases: Jonathan Binney, who was sentenced to death for breaking into a woman's house while she was at work and shooting and robbing her once she returned, *State v. Binney*, 362 S.C. 353, 608 S.E.2d 418 (2005), and Herman Von Dohlen, who was sentenced to death for shooting and killing a woman who he said mouthed off to him at a dry cleaners and then stealing the money in the cash register, *State v. Von Dohlen*, 322 S.C. 234, 471 S.E.2d 689 (1996). Both Binney and Von Dohlen's death sentences have since been overturned by

this Court, *Binney v. State*, No. 2015-MO-028, 2015 WL 2230848 (S.C. May 13, 2015); *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2004), and they received life sentences following remand.[10]

c. Post-Conviction Proceedings.

In state post-conviction proceedings, Bowman alleged:

- Trial counsel were ineffective in failing to cross examine the main witnesses (Gadson, Felder, and Johnson) against him using available impeachment evidence, Exh. 2, PCR Appeal at 14-49,
- The State suppressed additional impeachment evidence that undermined Gadson and Felder's credibility in violation of *Brady v. Maryland*, *id.* at 50–60,
- Trial counsel, Marva Hardee-Thomas, had a conflict of interest because she represented Bowman and a witness who reported that Gadson—not Bowman—had confessed to killing Martin, *id.* at 61–67, and
- Trial counsel were ineffective in failing to object to evidence of favorable prison conditions presented during Bowman's sentencing hearing, *id.* at 68–80.

The circuit court denied post-conviction relief. On appeal, this Court reviewed the merits of the prison conditions evidence claim, *Bowman v. State*, 422 S.C. 19, 809 S.E.2d 232 (2018), denying certiorari on all other claims, *Bowman v. State*, Appellate Case No. 2012-213468 (Order Apr. 15, 2016).

[10] *18 former death row inmates have been resentenced since 2011. Here's Why*, The Post and Courier (Nov. 2, 2023) (available at https://www.postandcourier.com/greenville/news/south-carolina-death-row-inmates-resentenced/article_0124710a-5d44-11ee-8774-3f2433fe1479.html); *Man on death row sentenced to life*, WISTV.com (Sep. 8, 2006) (available at https://www.wistv.com/story/5381993/man-on-death-row-sentenced-to-life/).

Relevant to this petition, Bowman continued to press the claims of ineffective assistance of counsel for failure to impeach the witnesses against Bowman and the *Brady* violations in federal habeas proceedings. The district court denied relief. On appeal, the Fourth Circuit Court of Appeals declined to address the ineffective assistance of counsel claims, but did address the *Brady* claims.[11] *Bowman v. Stirling*, 45 F.4th 740 (4th Cir. 2022). The Fourth Circuit's analysis focused on the impact of the *Brady* evidence in the guilt-or-innocence phase, finding the other evidence against Bowman to be "overwhelming," *id.* at 740, while ignoring the impeaching evidence trial counsel failed to present to the jury and the inherent unreliability of incentivized testimony. Further, the Fourth Circuit found the impact the *Brady* evidence would have on sentencing was not presented to the state PCR court, which would prevent the federal court from reviewing the issue. *Id.* at 758 n.7.[12] Without any analysis specific to materiality in sentencing, the Fourth Circuit then stated, that even assuming it could consider the materiality of the *Brady* evidence to sentencing, "we reject it for the reasons already explained." *Id.* Bowman sought review in the Supreme Court of the United States, which denied certiorari. *Bowman v. Stirling*, 143 S. Ct. 2498 (2023).

d. Current Procedural Status.

More than twenty-three years after his arrest, Bowman's appeals are now exhausted. Bowman now faces execution, despite the fact that the jury never heard evidence—because it was suppressed by the State—undermining the credibility of key witnesses against Bowman. Likewise, trial counsel injected racist arguments into the trial and sentencing proceedings and made decisions based on his own racist views rather than any valid strategic consideration not to present evidence

[11] *See Bowman v. Stirling*, Case No. 20-12 (4th Cir.), Doc. 26 (Bowman's Opening Brief) & Doc. 34 (Order Granting Certificate of Appealability only on the *Brady* claim).

[12] Undersigned counsel, Ms. Vann and Ms. Norris, were appointed for the first time after the federal habeas petition was filed and the federal statute of limitations expired.

in sentencing about Bowman's on-going relationship with the Martin. This calls into question the reliability of his conviction and sentence, and allowing his execution to be carried out would be a denial of fundamental fairness which, in the setting, is shocking to the universal sense of justice. This is especially true in light of Bowman's character development and maturity since he was sent to death row, where he has spent more than half his life.

II. THIS CASE IS APPROPRIATE FOR HABEAS CORPUS REVIEW IN THIS COURT'S ORIGINAL JURISDICTION.

Habeas corpus relief is available in this Court's original jurisdiction under the South Carolina Constitution. S.C. Const. art. I, § 18 & art. V, § 5; *see also* S.C. Code § 14-3-310 (1976). Specifically, "[n]otwithstanding the exhaustion of appellate review, including all direct appeals and PCR, habeas corpus relief remains available to prisoners in South Carolina." *Moore v. Stirling*, 436 S.C. 207, 218, 871 S.E.2d 423, 429 (2022) (quoting *Williams v. Ozmint*, 380 S.C. 473, 477, 671 S.E.2d 600, 602 (2008)). Habeas relief is appropriate when other potential avenues of relief have been exhausted and there is a constitutional violation and "the denial of fundamental fairness which, in the setting, is shocking to the universal sense of justice." *Moore*, 436 S.C. at 219, 871 S.E.2d at 429; *see also Tucker v. Catoe*, 346 S.C. 483, 552 S.E.2d 712 (2001); *Slack v. State*, 311 S.C. 415, 429 S.E.2d 801 (1993); *Butler v. State*, 302 S.C. 466, 468, 397 S.E.2d 87, 88 (1990). As this Court recognized in *State v. Torrence*, 305 S.C. 45, 69, 406 S.E.2d 315, 328 (1991), the Court's original jurisdiction gives it the "ability to provide relief to those who have, for whatever reason, been utterly failed by our criminal justice system."

Moreover, when fundamental fairness and equity demand a remedy, this Court has set aside procedural obstacles that may have prevented earlier review and proceeded directly to the merits of claims. In *Butler*, this Court concluded that the petitioner had "delay[ed] in calling this grave constitutional error to [its] attention," but nevertheless granted relief because of the "unique and

compelling circumstances" presented where the petitioner was seeking relief under constitutional principles recognized after his trial, appeal, and exhaustion of state post-conviction relief proceedings. 302 S.C. at 468, 397 S.E.2d at 88. In *Tucker*, the Court granted relief on a petition asserting a statutory claim that had never previously been presented and a constitutional claim that had been found procedurally defaulted on direct appeal and was later the subject of an unsuccessful claim of ineffective assistance of counsel. 346 S.C. at 489, 552 S.E.2d at 715.

III. REASONS THE WRIT SHOULD BE GRANTED.

a. The State Withheld Evidence Impeaching Key Witnesses Against Bowman in Violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

The state withheld three key pieces of evidence from the defense, which would have impeached the two witnesses the State presented to testify that Bowman committed the murder and the arson, third degree. The State failed to disclose (1) that it had an investigator interview Ricky Davis, who heard Gadson confess to the murder and that he had framed Bowman; (2) Gadson's mental health evaluation that revealed he heard voices, suffered from blackouts, heard beeping noises, and smoked six blunts of marijuana a day; and (3) charges pending in the same judicial circuit against Hiram Johnson at the time of his testimony against Bowman. Each of these pieces of evidence was material to the defense at both guilt and sentencing; their suppression resulted in Bowman not receiving a fair trial.

i. *Legal Standards*—Brady *and Progeny*

The Supreme Court of the United States held long ago that "[a] rule . . . declaring 'prosecutor may hide, defendant must seek' is not tenable in a system constitutionally bound to accord defendants due process." *Banks v. Dretke*, 540 U.S. 668, 696 (2004). Thus, "[t]he suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith

of the prosecution." *Brady*, 373 U.S. at 87; *see also Gibson v. State*, 334 S.C. 515, 528, 514 S.E.2d 320, 328 (1999) (holding the same). Both impeachment and exculpatory evidence is "favorable" evidence under *Brady*. *United States v. Bagley*, 473 U.S. 667, 676 (1985); *see also Giglio v. United States*, 405 U.S. 150, 154 (1972) ("When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within this general rule") (internal citations omitted); *Gibson*, 334 S.C. at 324, 514 S.E.2d. at 524 (citing *Bagley*, 473 U.S. at 676).

> A *Brady* claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment.

Gibson, 334 S.C. at 324, 514 S.E.2d. at 524 (citing *Kyles v. Whitley*, 514 U.S. 419, 432-42 (1995)); *see also Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). In gauging the prejudice or materiality of the withheld evidence, "the omission must be evaluated in the context of the entire record." *United States v. Agurs*, 427 U.S. 97, 112 (1976). If the evidence of guilt is strong, regardless of whether the withheld evidence is considered, there is no materiality. *Id.* at 112-13. "On the other hand, if the verdict is already of questionable validity," the withheld evidence, even though it may seem "of relatively minor importance might be sufficient" to establish materiality. *Id.* at 113; *see also State v. Osborne*, 289 S.C. 142, 145, 147, 345 S.E.2d 256, 258-59 (Ct. App. 1986) (suppressed evidence of a primary state witness's prior inconsistent statements was material where "the verdict is already of questionable validity" and "weak"). "Even if the jury—armed with all of th[e] new evidence—*could* have voted to convict," reversal is required if the Court has "'no confidence that it would have done so.'" *Wearry v. Cain*, 577 U.S. 385, 394 (2016) (per curiam) (emphasis in original) (quoting *Smith v. Cain*, 565 U.S. 73, 76 (2012)).

The Supreme Court has explicitly held that application of the "materiality" standard requires a court to consider the "net effect" of the evidence withheld by the prosecution. *Kyles,* 514 U.S. at 421-22. This Court has also recognized its duty to consider "the collective impact" of the suppression of evidence when there is more than one piece of evidence withheld by the State. *Riddle v. Ozmint*, 369 S.C. 39, 46, 631 S.E.2d 70, 74 (2006) (per curiam). This is particularly important where the state seeks the death penalty "[b]ecause 'our duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case.'" *Kyles,* 514 U.S. at 422 (quoting *Burger v. Kemp*, 483 U.S. 776, 785 (1987)).

In *Kyles,* the Court emphasized "[f]our aspects of materiality under *Bagley*." 514 U.S. at 434. First:

> [A] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal. . . . *Bagley*'s touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."

Id. (quoting *Bagley,* 473 U.S. at 678).

Second:

> [M]ateriality . . . is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

Id. at 434-35.

Third, "once a reviewing court applying *Bagley* has found constitutional error there is no need for further harmless-error review." *Id.* at 435.

"The fourth and final aspect of *Bagley* materiality" emphasized in *Kyles* is that "suppressed evidence" must be "considered collectively, not item by item." *Id.* at 436; *see also Wearry*, 577 U.S. at 394; *Riddle*, 369 S.C. at 46, 631 S.E.2d at 74.

In applying this analysis and finding "materiality" in *Kyles*, the Court observed:

> [T]he question is not whether the State would have had a case to go to the jury if it had disclosed the favorable evidence, but whether we can be confident that the jury's verdict would have been the same. Confidence that it would have been cannot survive a recap of the suppressed evidence and its significance for the prosecution.

514 U.S. at 453.

ii. *Withholding of the Sam Memo Violated* Brady.

In PCR proceedings, Bowman's counsel obtained the prosecutor's file and found notes written by an investigator from the solicitor's office, Sam Richardson, recounting a pretrial interview he conducted in which Ricky Davis told him that Tawain Gadson confessed to shooting Martin. At the time, Davis was housed at the Dorchester County Detention Center with Gadson. App. 5978. This memo, called "the Sam Memo," was not turned over to Bowman's counsel prior to trial. Instead, in advance of trial, Bowman's counsel was given only a handwritten note from Davis with the barebones assertion that Gadson "said that he was the one that shot the girl."[13]

[13] The full note stated:

> Augest 6
>
> I Rickie Davis was on A side with Gadson and he said that he was the one that shot the girl and gave Bowman back the gun that was used and He said that it didn't matter because Blak famile had got caught with the gun. He also that the police all he got to do is say Blak did it.
>
> Rick Davis

App. 8966 (errors in original).

The text of the Sam Memo confirmed Gadson's confession to Davis and provided additional details about the circumstances of the confession:

> Ricky Davis Interview
>
> Conducted by Sam at Lieber Correctional Institution.
>
> Ricky Davis states that he and James Taiwan [sic]Gadson along with 4 or 5 others were sitting at a table on the A-side. Gadson was talking to the group when he said something about killing a girl. He stated that they were going to rob someone. They thought she was wired and he shot her in the head with a .380.
>
> This conversation occurred about three weeks before he wrote the letter. (August 6, 2001).
>
> Afterwards, Davis was playing chess with Marion Bowman in cell 8. Davis told Marion Bowman about the conversation he had with James Gadson. Bowman said "if you heard all this, write it down." Bowman showed him a picture of the dead girl. He also showed him a file from his attorney.
>
> Bowman said he had been smoking dope that day. He said it was him, James Gadson and the girl at the scene. The girl was supposed to help them rob a house to get drugs and money. Bowman knew the intended victim.
>
> Bowman never admitted he shot anyone.
>
> Subsequent to this, Davis talked to James Gadson again. At this time, Gadson said that Bowman shot her.

App. 9122.

The prosecution's failure to turn over the Sam Memo violated *Brady*. There is no disputing that the Sam Memo was in the possession of the prosecution—Richardson was an investigator for the solicitor's office and provided the memo to the lead prosecutor in the case, *See* App. 6773, 7752, who failed to disclose the Sam Memo to defense counsel. Similarly, the memo was clearly favorable to Bowman as it indicated another person confessed to murdering Martin.

The State suppressed the Sam Memo by failing to provide it to defense counsel despite its duty to disclose impeachment evidence. *See Bagley*, 473 U.S. at 676. The handwritten note from

Davis given to trial counsel did not relieve the State of its burden to turn over the Sam Memo because Davis's note was not equivalent in form or substance. The Sam Memo would have held significant evidentiary weight to a juror. It was an official investigative memorandum documenting a co-defendant, who by his own admission was present at the crime scene, confessing to a group of people. One person in the group was confident enough in this confession to repeat it to a law enforcement officer, who then reported it to members of the prosecution team. The memorandum would have provided ample grounds for cross-examination of Davis and Gadson and for trial counsel to call Richardson as a witness to rebut Davis or Gadson if they denied Gadson's confession.

Davis's handwritten note did not suffice because it was less credible than a law enforcement interview with resulting work product and it failed to provide defense counsel with all the favorable information included in the Sam Memo. The handwritten note alone does not allow the defense to *effectively* cross examine Davis or Gadson or to confront their testimony by calling Richardson as a witness. Nor did (or could) it allow for further investigation into the additional details provided in the memorandum, such as the other people who heard Gadson's confession referenced in the Sam Memo but not the handwritten note. The Sam Memo is a valuable piece of impeachment evidence—above and beyond the handwritten note—that strengthens Bowman's case.

Finally, the Sam Memo was material. The Sam Memo recounts a co-defendant confessing to the crime for which Bowman was facing the death penalty, and provided evidentiary support to bolster that confession. It is hard to think of anything more material to guilt-or-innocence than another person confessing to the crime. Here, where the state's case was built largely on Gadson's testimony that he was at the crime scene and witnessed Bowman shoot the victim, impeaching

evidence that Gadson himself confessed to killing Martin would undermine Gadson's credibility and attempts to place the blame on Bowman. *See State v. Brown*, 441 S.C. 464, 470, 894 S.E.2d 525, 528 (2023) ("[A] key witness's reliability is always material."). This is especially true because Gadson, himself, was also initially charged with the murder and only avoided a murder charge and possible death sentence by agreeing to testify against Bowman. *Id.* at 473, 894 S.E.2d at 529 ("[T]he [*Brady*] analysis must focus on a witness's bias when he or she has a 'personal stake' in the conviction."). Had trial counsel been able to use the Sam memo, there is a reasonable probability that the result of trial would have been different.[14] *See Wearry*, 577 U.S. at 393 (finding evidence to be material when it "[p]erhaps" would have made the difference between the defendant being charged with capital murder and as an accessory after the fact).

iii. *Withholding of Gadson's Mental Health Records Violated* Brady.

In addition to withholding evidence that Gadson confessed to the murder, the State also withheld a report of Gadson's mental health evaluation in which he was diagnosed with cannabis dependence and a seizure disorder. App. 7377, 7851, 8957-61. The report details Gadson telling the doctors that he suffered from blackouts, and his tests showed memory problems. App. 8959-60. The report also reveals "he hears a voice and 'a little beeping noise.'" App. 8960.

[14] Though the PCR court addressed this claim, it incorrectly found the evidence was not material because Davis threatened to recant his statement regarding Gadson's confession. Davis's recantation would not render the Sam Memo immaterial: a second statement to law enforcement that Gadson had confessed to the murder would surely affect the way the jury perceived the strength of the State's case and would undermine star witness Gadson's credibility. *See Chambers v. Mississippi*, 410 U.S. 284 (1973) (holding that a defendant had a due process right to present the testimony of three people to whom a third party confessed to the murder before recanting his statements). Any confidence that Davis would not have been a helpful witness for Bowman is further undermined by the fact that Davis was represented by one of Bowman's trial attorneys, Marva Hardee-Thomas. While still counsel for Davis, Hardee-Thomas decided not to call Davis as a witness in Bowman's capital murder trial. With these divided loyalties, trial counsel's decision not to call Davis cannot be counted against Bowman. Exh. 2, PCR Appeal, at 61-67; *see also* Exh. 16, Jim Brown Affidavit.

The State was in possession of this report as part of its prosecution of Gadson, but never turned it over to the defense during trial. App. 7377, 7851. The report was favorable to Bowman because it could have been used to impeach Gadson, as the solicitor acknowledged during PCR proceedings. App. 7852. Because the impeachment evidence would undermine the credibility of the sole, alleged, eyewitness to the murder, the evidence is material to Bowman's trial. *See Brown*, 441 S.C. at 470, 894 S.E.2d at 528 ("[A] key witness's reliability is always material.").[15] Though the PCR and federal habeas courts found there was no *Brady* violation in regards to Gadson's mental health records, they made this finding based on the fundamentally flawed determination that the mental health records were not suppressed because defense counsel could have obtained the records from Gadson's file themselves. *See, e.g.*, *Bowman*, 2020 WL 1466005, at *18. Reliance on a due diligence exception to the due process requirement found in *Brady* is clearly erroneous. As this Court noted in *Riddle*, "that is not what *Brady* requires. The burden is on the solicitor to disclose material evidence which is exculpatory or impeaching." 369 S.C. at 44, 631 S.E.2d at 73. Likewise, the Supreme Court clearly rejected a due diligence exception in *Banks*, when it expressly stated the duty to disclose favorable, material information under *Brady* is "absolute" and "does not

[15] This case is analogous to the case of *Glossip v. Oklahoma*, No. 22-7466, *cert. granted*, 144 S.Ct. 691 (U.S. Jan. 22, 2024) (argued Oct. 9, 2024), which is currently pending decision by the United States Supreme Court. The similarity is that the state's primary witness, Sneed, committed the murder but – in order to avoid a death sentence – plead guilty, implicated Glossip as the person that planned the murder, and testified against him. Years later, the state disclosed that Sneed, a known methamphetamine addict, was evaluated by a psychiatrist after his arrest. The psychiatrist prescribed lithium for his untreated bipolar disorder. The State also permitted Sneed to testify falsely that he had never seen a psychiatrist. Additional evidence withheld by the state established that the prosecutor worked with Sneed's attorney to alter his testimony to better align with the other evidence in the case and then lied to the court by denying knowledge that Sneed would change his story in order to avoid a mistrial. Brief for Petitioner at 1-2. Unlike in this case, however, the State of Oklahoma conceded in the Oklahoma Supreme Court that Glossip's convictions should be set aside. Oklahoma has also argued in the United States Supreme Court that the Oklahoma Court's denial of relief for Glossip must be vacated. Brief of Respondent in Support of Petitioner at 1-3.

depend on defense counsel's actions." 540 U.S. at 696 ("A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process."); *see also Walker v. Kelley*, 195 F. App'x 169, 175 (4th Cir. 2006) (unpublished) (discussing the "well-settled law that the prosecutor had a duty to disclose *Brady* material" and holding that the *Brady* "analysis focuses on prosecutorial misconduct, not on the defendant's diligence").

Even if there were a due diligence requirement—and *Riddle* and *Banks* made clear there is not—it was unreasonable to invoke it on these facts because Bowman's trial counsel did not have knowledge of, or a realistic means to, obtain Gadson's mental health records.[16] Bowman's attorneys were unaware of Gadson's mental health evaluation to begin with, much less the contents of the report and how it could have benefitted their client's case. App. 7377. Moreover, this mental health evaluation was not in a public record and could not have been obtained by subpoena as it was the protected mental health information of a codefendant. *Cf. Chavis v. North Carolina*, 637 F.2d 213 (4th Cir. 1980) ("[A] court-ordered report as to the mental capacity of an accused does not become a public record"). Thus, this record clearly was not "available" to Bowman. It was, however, available and known to the prosecutor, who failed to turn it over even though he maintained, before, during, and after trial, that he had an open file policy for everything except his

[16] The facts here are distinguishable from Fourth Circuit cases where counsel failed to "search" for evidence already personally known by the defendant or failed to discover public and "publicly available" evidence. For example, in *Fullwood v. Lee*, 290 F.3d 663 (4th Cir. 2002), and *United States v. Catone*, 769 F.3d 866 (4th Cir. 2014), the alleged suppressed evidence was already known by the defendant, as it was his own drug use, *Fullwood*, 290 F.3d at 686, and his own tax forms, *Catone*, 769 F.3d at 872. In *United States v. Higgs*, 663 F.3d 726, 735 (4th Cir. 2011), the ballistics report requested by the defense was "in the public domain" at the time of trial because it had been "widely admitted into evidence in various courts.". In *United States v. Fagot-Maximo*, 795 F. App'x 213, 215 (4th Cir. 2020), the defense claimed that a letter describing jail calls of a third party was suppressed evidence, yet the defense was provided with the opportunity to listen to and make recordings of those same jail calls.

notes and impressions. App. 78, 118, 3793, 7862, 9426; *see Strickler*, 527 U.S. at 283 n. 23 ("[I]f a prosecutor asserts that he complies with *Brady* through an open file policy, defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under Brady."). "Even had a true 'open file' policy existed, the existence of such a policy does not negate the solicitor's *Brady* obligation." *Riddle*, 369 S.C. at 46-47, 631 S.E.2d at 74; *Banks*, 540 U.S. at 695 ("Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed.").

By applying the wrong standard to this impeaching evidence—of a witness already testifying to avoid a murder conviction and the death penalty and who, according to additional *Brady* evidence, confessed to committing the murder himself—the courts have left intact Bowman's murder conviction and death sentence where the jury did not have the full picture of the unreliability of the State's main witness and the only alleged eyewitness to the murder. Because the State is at fault for not turning over this evidence, Bowman's conviction is unreliable and should be reversed.

iv. *Withholding of Johnson's Criminal Charges Violated* Brady.

The State also suppressed evidence that witness Hiram Johnson, who testified that Bowman confessed to the murder, had prior unindicted charges for receiving stolen goods, second degree burglary, and grand larceny—all charges that were later dropped by the same office that prosecuted Bowman. App. 9129-35. Trial counsel was not aware of this information. App. 7100-01.

The solicitor also acknowledged that the pending charges had not been disclosed to the defense team since the pending charges were not on Johnson's rap sheet. App. 9228-31. The solicitor admitted this evidence would be relevant to Johnson's bias. App. 7832. Defense counsel agreed the pending charge could have been used to impeach Johnson for bias, App. 7103, and

testified he would have asked questions about Johnson's pending charges had he known about them. App. 7106-07. Defense counsel agreed that Johnson needed to be impeached because he claimed he heard Bowman confess to the killing and laugh about it. App. 7114.

From this testimony, it is clear that the State was in possession of the information about Johnson's pending charges, failed to turn that information over to defense counsel, and that it would have been favorable to Bowman as impeachment evidence against Johnson.[17] The prior courts to review this claim erred in finding the evidence was not material. Though there was no formal agreement between the prosecution and Johnson, this does not mean that there was no possibility of reward for Johnson's testimony. To the contrary, the "*possibility* of a reward" is an *even stronger* "incentive to testify" in a manner pleasing to the prosecutor than a known "*promise* or binding contract." *Bagley*, 473 U.S. at 683 (emphases added); *see also Boone v. Paderick*, 541 F.2d 447, 451 (4th Cir. 1976) (a promise without assurance may be interpreted as contingent "upon the quality of the evidence produced," increasing "the incentive to make the testimony pleasing to the promisor"). Consistent with *Bagley*, this Court recognized that a promise of a "possibility" of reward in exchange for testimony gives the "witness a personal stake in the defendant's conviction" and "incentive to testify falsely." *Brown*, 441 S.C. at 472, 894 S.E.2d at 529. This is so even where "the witnesses were not given firm promises or deals; rather, a mere possibility of favorable treatment was sufficient." *Id.* In short, "a formal agreement is not always necessary to warrant disclosure," *id.*, as a key focus of *Brady* and its progeny is "the disclosure of incentives to

[17] A witness in a South Carolina criminal trial may be impeached with evidence of pending criminal charges and the potential sentence faced in order to show "[b]ias, prejudice or any motive to misrepresent" per S.C.R.E. Rule 608(c). *See State v. Sims*, 348 S.C. 16, 26-27, 558 S.E.2d 518, 522-23 (2002); *State v. Mizzell*, 349 S.C. 326, 333, 563 S.E.2d 315, 318 (2002) ("The lack of a negotiated plea, if anything," makes a witness with pending charges "more likely to engage in biased testimony in order to obtain a future recommendation for leniency.").

give biased testimony," *Id.* at 475, 894 S.E.2d at 530; *see also State v. Mizzell*, 349 S.C. at 333, 563 S.E.2d at 318 ("The lack of a negotiated plea, if anything," makes a witness with pending charges "more likely to engage in biased testimony in order to obtain a future recommendation for leniency.")

Thus, it is reasonable to believe that a witness such as Johnson would "have felt that the quality of his cooperation would determine the degree of benefit he would later receive." *Mizzell*, 349 S.C. at 333, 563 S.E.2d at 318. Johnson supported the prosecution's theory of the case (and shifted suspicion away from his cousin Gadson), and all pending charges against Johnson in Orangeburg were ultimately dropped by the same office that prosecuted Bowman. App. 6276-77.

The charges against Johnson were particularly crucial impeachment information because of the weight the State put on Johnson's testimony, despite even law enforcement's concern that Johnson had "competency" issues. App. 8200. Taking full advantage of this informational void surrounding Johnson's charges, the solicitor told the jury that it could trust Johnson because they "hadn't heard any testimony about Hiram Johnson having any kind of charge against him or any kind of a deal with the state, any reason to say something wasn't true." App. 4474. This deliberately misleading statement bolstered Johnson's testimony and demonstrates the materiality of these unindicted charges and how they could have been used to undermine Johnson's credibility.[18] *See Brown*, 441 S.C. at 476, 894 S.E.2d at 531 (finding *Brady* materiality where "[Witness] Evans had a personal stake in Brown's conviction . . . when he anticipated leniency on the part of the State and his charges were actually reduced to nonviolent offenses"). Johnson's testimony that Bowman

[18] This is further evidenced by the fact that Johnson failed to tell the police of Bowman's alleged "confession" during his pretrial interviews and making of a written statement. Thus, Johnson's testimony against Bowman became more favorable to the State as trial approached and while charges were pending against him by the solicitor's office. Exh. 2, PCR Appeal, at 47.

confessed to the killing while laughing was indisputably damaging to the defense's case, and thus information undermining Johnson's credibility—i.e., that the prosecution had pending charges hanging over his head—is precisely the type of information courts have deemed material. *See Giglio*, 405 U.S. at 154; *Brown*, 441 S.C. at 476, 894 S.E.2d at 531; *Reutter v. Solem*, 888 F.2d 578, 580-82 (8th Cir. 1989) (finding a *Brady* violation where prosecutors failed to disclose that key witness had pending petition for commutation of his sentence).

v. *The Impact of the Multiple Undisclosed Impeachment Materials Must Be Considered Cumulatively, Demonstrating Materiality Under* Brady.

Courts addressing multiple pieces of undisclosed evidence must consider their materiality cumulatively. *Kyles*, 514 U.S. at 436-37. In other words, this Court must consider "the collective impact" of the withheld evidence. *Riddle*, 369 S.C. at 46, 631 S.E.2d at 74. Viewed through the correct legal lens, no confidence can be had that the verdict was reliable. The State suppressed the fact that its star witness had confessed to the murder and suffered blackouts, had memory problems, and heard voices and beeping noises. The State further suppressed the fact that another key witness—who the solicitor told the jury had no pending charges—was, in fact, being prosecuted by his office. Overall, the evidence shows a pattern of withholding favorable evidence, threatening witnesses, and claiming that it did not know about the untruths in its primary witnesses' testimonies. In a capital case, which demands heightened reliability, it would be shocking to the universal sense of justice to maintain a conviction in these circumstances. The Court should instead enforce the *Brady* rule in this case, which "will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations." *Kyles*, 514 U.S. at 440.

vi. *The Evidence Withheld by the State was Material to the Jury's Sentencing Decision and Warrants Remand for Resentencing*.

Even if the withheld evidence impeaching Gadson and Johnson would not undermine the jury's finding of guilt, the evidence is material to sentencing. The *Brady* materiality analysis is different in the sentencing phase of a capital trial, where the focus is not simply on whether the State has proven guilt or a statutory aggravating circumstance but on the appropriate sentence considering all aggravating and mitigating evidence.

> When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the 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.

Strickland v. Washington, 466 U.S. 668, 695 (1984).[19] A court makes a fundamental error in failing to "distinguish[] the materiality of the suppressed evidence with respect to [a defendant's] guilt from the materiality of the evidence with respect to his punishment." *Cone v. Bell*, 556 U.S. 449, 452 (2009).

In making the materiality determination in sentencing, the court must evaluate the "totality of the available . . . evidence – both that adduced at trial, and . . . in the habeas proceedings." *Williams v. Taylor*, 529 U.S. 362, 398 (2000). Suppressed evidence can be material to sentencing "even if it does not undermine or rebut the prosecution's death-eligibility case." *Id.* Materiality in the capital sentencing context is expressed as "a reasonable probability that at least one juror would have struck a difference balance." *Wiggins v. Smith*, 539 U.S. 510, 537 (2003); *Cone*, 556 U.S. at 452 (court must determine "whether there is a reasonable probability that the withheld evidence

[19] The Court applies this same test for determining "materiality" in the *Brady* context and "prejudice" in the context of claims of the denial of the effective assistance of counsel under the Sixth Amendment. *Strickland*, 466 U.S. at 694.

would have altered at least one juror's assessment of the appropriate penalty"). Alternatively, as the Court described the prejudice analysis in *Rompilla v. Beard*, 545 U.S. 374 (2005):

> [T]he undiscovered "mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [Rompilla's] culpability," *Wiggins v. Smith*, 539 U.S., at 538 (quoting *Williams v. Taylor*, 529 U.S., at 398, 120 S.Ct. 1495), and the likelihood of a different result if the evidence had gone in is "sufficient to undermine confidence in the outcome" actually reached at sentencing, *Strickland*, 466 U.S., at 694.

Id. at 393 (cleaned up).

The sentencing phase of a capital trial focuses on "the particularized consideration of relevant aspects of the character and record" of the individual defendant and the circumstances of the offense. *Woodson*, 428 U.S. at 303. In South Carolina, the death penalty is *never* required, regardless of the weight or even lack of mitigating circumstances. *See State v. Jenkins*, 436 S.C. 362, 872 S.E.2d 620 (2022) (permitting defense counsel to inform potential jurors in voir dire that "you are never required to vote for the death penalty"); *Williams v. Ozmint*, 380 S.C. 473, 479, 671 S.E.2d 600, 603 (2008) (trial court instructing the jury "you are never required to recommend the death penalty"). Instead, the jury is always permitted to give a "reasoned moral response," in light of the evidence before it. *Brewer v. Quarterman*, 550 U.S. 286, 289 (2007) ("[W]e have long recognized that a sentencing jury must be able to give a 'reasoned moral response' to a defendant's mitigating evidence—particularly that evidence which tends to diminish his culpability—when deciding whether to sentence him to death). A capital sentencing jury in South Carolina is appropriately instructed in a capital sentencing phase "that it may recommend a life sentence for any reason or no reason at all, including as an act of mercy." *Rosemond v. Catoe*, 383 S.C. 320, 330, 680 S.E.2d 5, 10 (2009); *State v. Atkins*, 303 S.C. 214, 221, 399 S.E.2d 760, 764 (1990). They

need not weigh the mitigating factors against the aggravating factors; they are instructed simply to "consider" them. *State v. Bellamy*, 293 S.C. 103, 107, 359 S.E.2d 63, 65 (1987)

Bowman's jury was charged in accordance with these precepts. App. 5020-21; App. 5030-31. Thus, prior judicial findings that the *Brady* evidence was not material at the guilt phase because the evidence of Bowman's *guilt* was "overwhelming" in no way addresses whether that evidence created "a reasonable probability that at least one juror would have struck a difference balance" as to *sentence*. *Wiggins*, 539 U.S. at 537; *see also Williams*, 529 U.S. at 398 ("Mitigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case.").

That is particularly true here, where the State offered little in aggravation save evidence of guilt dependent on dubious witnesses. The State presented evidence of non-violent prior offenses for which Bowman was given youthful offender sentences, App. 4960, "photographs of the victim's burned body and a pathologist's testimony about the autopsy," and victim impact evidence. *Bowman*, 45 F.4th at 747. Relying only on the guilt-innocence phase evidence, the jury found two aggravating circumstances (kidnapping and larceny with the use of a deadly weapon) and rejected two others (criminal sexual conduct and armed robbery). App. 5021-22, 5051. And, when arguing for death, the State relied once again on the testimony of *Gadson and Johnson*, whose impeachment material it suppressed. The Solicitor highlighted Gadson's claim that the victim "begged for her life" while "she was thinking about her baby" in her last moments. App. 4954. His testimony was also the sole evidence of the statutory aggravating circumstances found by the jury. App. 4958. Similarly, the solicitor's arguments that this was a "cold-blooded murder" that Bowman "enjoyed" relied on Gadson's testimony that Bowman had asked Gadson if he heard "her head hit the pavement" and Johnson's testimony that Bowman laughed about the murder

because "[h]e thought it was funny." App. 4969; *see also* App. 4974 ("he laughed about it"). The centrality of these compromised witnesses to the State's case for death cannot be ignored. *Kyles*, 514 U.S. at 444 (the likely materiality or "damage" of withholding impeachment evidence "is best understood by taking the word of the prosecutor" in his closing argument); *Monroe v. Angelone*, 323 F.2d 286, 314 (4th Cir. 2003) (considering, in determining materiality, the prosecution's closing argument emphasizing witness testimony that *Brady* evidence would have undermined); *see also Strickler v. Greene*, 527 U.S. 263, 295 (1999) (finding impeachment evidence was not material where the witness's testimony "was not relied upon by the prosecution at all during its closing argument at the penalty phase").

Because the suppressed impeachment evidence went directly to the individuals forming the basis of the State's case in the trial and the aggravating circumstances in sentencing, there is a reasonable probability the impeachment evidence would have convinced at least one juror vote for a life without parole sentence instead of death, even if they found there was sufficient evidence to find guilt beyond a reasonable doubt.[20] *Wiggins*, 539 U.S. at 537. With knowledge of the impeachment evidence withheld by the State, a reasonable juror would have harbored enough lingering doubt as to Bowman's guilt and relative culpability to reject a death sentence. Indeed, in a study based on interviews of former South Carolina capital jurors, the Capital Jury Project found that "'[r]esidual doubt' over the defendant's guilt is the most powerful 'mitigating' fact[or]," Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?*, 98 Colum. L. Rev. 1538, 1563 (1998), with 77.2% of jurors stating they would be less likely to impose a death sentence in the face of residual doubt of guilt or relative culpability, *id.* at 1559.

[20] The Solicitor was even willing to enter a plea agreement with Bowman for a life sentence and made this offer seven times prior to trial, App. 7033, 7505, including once on the record in a pretrial motions hearing, App. 11.

Impeachment evidence and evidence pointing to another trigger person is especially powerful when each juror explicitly has the option of rejecting a death sentence "for any reason or no reason at all" on a death-eligible defendant. *Atkins*, 303 S.C. at 221, 399 S.E.2d at 764. The materiality in sentencing has never been considered by this Court and this Court should do so now to ensure reliability in South Carolina's death sentencing system. [21]

b. Lead Trial Counsel Provided Ineffective Assistance of Counsel By Injecting Odious Racial Prejudice Into Bowman's Capital Trial And Sentencing Proceedings.

Bowman's convictions and death sentence must be vacated under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 3, 14, and 15 of the South Carolina Constitution due to the ineffective assistance of counsel inherent in trial counsel's insistence that Bowman plead guilty despite maintaining his innocence and counsel's racist arguments that injected odious racial prejudice into the case, as well as counsel's failure to make adequate, truthful, mitigating arguments on Bowman's behalf because counsel was infected by his own racism to the extent that he did not believe his black client and did not want to present credible evidence of Martin's drug addiction, history of pawning personal items for drugs, and

[21] The question of materiality to sentence was not presented to the PCR or federal district courts. When it was raised in the Fourth Circuit on appeal of federal habeas, the court failed to distinguish between the analysis for materiality in guilt and in sentencing, stating in a footnote only that: "Even assuming we may consider this [procedurally defaulted] argument, we reject it for the reasons already explained." *Bowman*, 45 F.4th at 758 n. 7. As noted, Bowman's current counsel were not appointed to represent him in PCR proceedings or in the filing of his federal habeas petition. Raising an issue for the first time in this Court's original jurisdiction after all other avenues have been exhausted is not, however, an impediment to this Court's jurisdiction and ability to grant relief. *Butler*, 302 S.C. at 468, 397 S.E.2d at 88 (granting relief on a "grave constitutional error" first asserted in original jurisdiction); *Tucker*, 346 S.C. at 489, 552 S.E.2d at 715 (granting review of a statutory claim that had never previously been presented and a constitutional claim that had been found procedurally defaulted on direct appeal and was later the subject of an unsuccessful claim of ineffective assistance of counsel in state and federal courts and granting relief based on the latter claim).

prostituting for drugs that counsel viewed as degrading and slandering the "little white girl" victim or pitting the white girl against the "black man" accused of killing her.

The United States Supreme Court has repeatedly emphasized the fundamental role of counsel in ensuring a defendant a fair trial. *See, e.g., Gideon v. Wainwright*, 372 U.S. 335, 343-44 (1963). Counsel, the Court has stated, is the means through which all other rights of the person on trial are secured. *United States v. Cronic*, 466 U.S. 648, 653 (1984); *see also United States v. Ash*, 413 U.S. 300, 307 (1973) (counsel serves as a "guide through complex legal technicalities"). This core component of our adversary system is meaningless, however, if counsel performs incompetently. Thus, the Court has held that the right to counsel necessarily encompasses "the right to the effective assistance of counsel." *Strickland*, 466 U.S. at 686 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.*

In determining whether trial counsel provided ineffective assistance of counsel, pursuant to the Sixth and Fourteenth Amendments, the courts must apply the standards set forth in *Strickland*. The *Strickland* standard is satisfied if a petitioner establishes both that his attorney's representation "fell below an objective standard of reasonableness," *id.* at 688, and that the petitioner was "prejudiced" by his attorney's substandard performance, *id.* at 692. *See also Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Porter v. McCollum*, 558 U.S. 30 (2009) (per curiam); *Sears v. Upton*, 561 U.S. 945 (2010) (per curiam); *Hinton v. Alabama*, 571 U.S. 263, 274 (2014) (per curiam); *Buck v. Davis*, 580 U.S. 100 (2017); *Andrus v. Texas*, 590 U.S. 806 (2020) (per curiam). The *Strickland* "standard is necessarily a general one," *Bobby v. Van Hook*, 558 U.S. 4, 7 (2009) (per

curiam), that requires a case-by-case examination of the facts, *Williams*, 529 U.S. at 391. At minimum, however, counsel has a duty to conduct an "independent examination of the facts, circumstances, pleadings and laws involved." *Strickland*, 466 U.S. at 693.

In advance of trial, the solicitor made multiple offers to allow Bowman to receive a life sentence in this case in exchange for Bowman's guilty plea. App. 11, 7033, 7505. Bowman's lead counsel was well-known for routinely trying to convince clients to plead guilty in criminal cases or settle in family court cases even when they had a triable case. Exh. 3, Investigator Robert Minter Affidavit. And, true to form, Bowman's counsel in this case focused the bulk of their energies on trying to force a plea from Bowman from their first meetings up until the time of trial.[22] Indeed, Bowman informed the trial court early in his case that counsel was advising him to plead guilty, even without significant aspects of discovery, because Bowman was black, and Martin was white, and white jurors would convict him solely based on the differences in their race as a matter of racial prejudice. Exh. 5, Undated Letter to Judge Goodstein.

Specifically, in a letter sent to trial judge Diane S. Goodstein, Bowman, who was only 20 years old at the time of his arrest, wrote:

> Dear Honorable Judge Goodstein:
>
> > I Marion Bowman Jr. am well aware of the offer Mr. Bailey has gave me. However, I'm so confused I don't what to do. Mr. Bailey is offering me a plea bargain of life without the possibility of parole, but is still giving me information concerning the case. And the fact that is an substantial amount of discovery I do not have it is very difficult to understand what is going on. My attorney is trying to convince me to accept this plea because he said and I quote "These white jurors whose skin is whiter than his is going to see a Black male verses, a white female victim, are going to convict me because of my skin color, and not based upon evidence."

[22] Although he was a very experienced investigator retained by counsel, Minter was never given any direction or "investigative tasks" on the case. Exh. 4, Robert Minter 2018 Affidavit. He was so underutilized that he did not recall meeting with Bowman or any fact witnesses. *Id.* Instead, he was tasked with "meet[ing] with Marion's mom about a plea offer." *Id.*

Id. (Errors in Original). Then on November 5, 2001, he again wrote to Judge Goodstein literally alerting her to his fear for his life, in part, because the witness statements kept expanding well after Bowman's arrest, as well as mentioning again that he was unwilling to plead guilty, even in exchange for a life sentence:

> Dear Judge Goodstein: Nov. 5, 2001
>
> I Marion Bowman Jr am writing to ask you may I see you while you are here in Dorchester County. Reason for this meeting is that I'm scared for my life and I'm aware of the offer Mr. Bailey has offered, which I refused to accept. I understand that Mr. Bailey has all of his facts to try this case, so I would like to request a evidential hearing AS SOON AS POSSIBLE, because the police getting people to change or add things to their statements months later.

Exh. 6, Letter to Judge Goodstein (Nov. 5, 2001). Judge Goodstein responded by informing Bowman that his counsel could request a hearing on the issue, which never happened. Exh. 7, Goodstein Response Letter. He also wrote to the Governor and the South Carolina Bar seeking assistance. Exh. 8, Governor & Bar Letters.

Despite Bowman's pleas for assistance, his case rolled on without the court addressing his concerns. And rather than attacking the State's case adequately during trial, his counsel provided minimal assistance. Specifically:

1) Counsel failed to adequately cross-examine Taiwan [sic] Gadson with available information that the state threatened Gadson with the death penalty in his plea agreement, Gadson made a number of prior inconsistent statements, and Gadson had access to the murder weapon.

2) Counsel failed to adequately cross-examine Travis Felder with a videotape that would have shown Felder lied to the jury during trial as he bought the gas to burn the decedent's car.

3) Counsel failed to adequately cross-examine Hiram Johnson about his prior inconsistent statement which, critically, did not include his allegation at trial that Bowman confessed to the murder.

4) Public defender counsel had a conflict of interest between two of her clients – Bowman and Ricky Davis – that caused counsel to fail to call Ricky Davis as a witness, despite

> Davis's statement that Gadson confessed he was the actual murderer rather than Bowman.

Exh. 2, PCR Appeal.

While Bowman will not repeat these arguments,[23] Bowman revisits these issues and incorporates them by reference because lead counsel's performance, which even his one testifying defense expert in sentencing rates as the worst performance by capital defense counsel in all of the 29-30 capital cases he's participated in, Exh. 9, Jeffrey Yungman, M.S.W., J.D., 2024 Affidavit,[24]

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[23] The arguments were previously denied review by this Court and the United States Court of Appeals for the Fourth Circuit. This Court should be mindful, however, that the standards of review in federal habeas corpus proceedings under the Antiterrorism and Effective Death Penalty Act ("AEDPA") are far more stringent than this Court's standards on PCR appeal simply applying *Strickland* and its progeny. Specifically, under 28 U.S.C. § 2254, "[j]udicial review of a defense attorney's" conduct "is highly deferential – and doubly deferential when it is conducted through the lens of federal habeas," which requires a showing that the state court judgment is "not only erroneous, but objectively unreasonable." *Yarborough v. Gentry*, 540 U.S. 1, 5-6 (2003) (per curiam). The "doubly deferential" review means (1) there is a "highly deferential" look at counsel's performance; and (2) this must be done through the "deferential lens of § 2254(d)." *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011). *See also Burt v. Titlow*, 571 U.S. 12, 15 (2013) (The "'doubly deferential' standard of review . . . gives both the state court and the defense attorney the benefit of the doubt.")

> Federal courts may not disturb the judgments of state courts unless "each ground supporting the state court decision is examined and found to be unreasonable." *Wetzel v. Lambert*, 565 U.S. 520, 525 (per curiam). Thus, if a fairminded jurist could agree with either [the state court's] deficiency or prejudice holding, the reasonableness of the other is "beside the point." *Id.* at 524.

Shinn v. Kayer, 592 U.S. 111, 120 (2020) (cleaned up). Under AEDPA, "the only question that matters" is whether the state court's adjudication was "so obviously wrong as to be 'beyond any possibility for fairminded disagreement.'" *Id.* at 124 (quoting *Harrington v. Richter*, 562 U.S. 86, 102-03 (2011)). In other words, an "unreasonable" state court adjudication refers only to "extreme malfunctions" in the state court adjudication. *Mays v. Hines*, 592 U.S. 385, 391 (2021) (per curiam) (quoting *Richter*, 562 U.S. at 102).

[24] Yungman was shocked by "the lack of communication and trial preparation" by counsel. Exh. 10. Jeffrey Yungman 2018 Affidavit. "From my experience in 30 death penalty cases, they neglected to do any of the routine tasks attorneys regularly performed throughout their representation of capital clients." *Id.* Investigator Robert Minter, who was retained by Bowman's counsel, also noted that counsel was "not aggressive in represent[ing] his clients" and "did not like

can only properly be viewed through the lens of his racial bias. Specifically, while trial counsel had warned Bowman that the jury might be racially biased against him, lead counsel was the one who inserted racist arguments into the case through his omissions and arguments.

As the United States Court of Appeals for the Fourth Circuit observed in *Bennett v. Stirling*, 842 F.3d 319 (4th Cir. 2016):

> [W]hile a prosecutor "may strike hard blows, he is not at liberty to strike foul ones." *Berger v. United States*, 295 U.S. 78, 88 (1935). It is beyond dispute that "[t]he Constitution prohibits racially biased prosecutorial arguments." *McCleskey v. Kemp*, 481 U.S. 279, 309 n.30 (1987). Racial prejudice, "odious in all aspects, is especially pernicious in the administration of justice." *Rose v. Mitchell*, 443 U.S. 545, 555 (1979). For this reason, the Supreme Court has "engaged in 'unceasing efforts' to eradicate racial prejudice from our criminal justice system." *McCleskey*, 481 U.S. at 309 (quoting *Batson v. Kentucky*, 476 U.S. 79, 85 (1986)).
>
> [W]e remain sensitive to the Court's judgment that "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *California v. Ramos*, 463 U.S. 992, 998–99 (1983). Courts cannot avert their eyes from the risk that "racial prejudice infect[ed] a capital sentencing proceeding ... in light of the complete finality of the death sentence." *Turner v. Murray*, 476 U.S. 28, 35 (1986) (plurality opinion).

Id. at 323 (cleaned up).

There can be no question in this case that racial bias infected Bowman's trial and sentencing proceedings. Indeed, even Richard Perez, one of the jurors that sentenced Bowman to death, "believe[s] that race played a role in this case." Exh. 11, Juror Richard Perez Affidavit. Perez now supports commutation of Bowman's sentence to a sentence of life in prison.

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to try cases." He was lackadaisical to the extent that he did not care if his investigators did not complete their assigned tasks. He was also deliberately obstructive to Bowman's mitigation investigator because counsel "strongly disliked" her and "considered her too pushy and headstrong." Rather than assist her by issuing subpoenas and assisting her with other tasks, counsel "refused and resented her for trying to do her job." Exh. 3, Investigator Robert Minter Affidavit.

To begin with, counsel failed to object to admission of evidence during trial of Bowman's DNA in seminal fluid from Martin's vaginal swabs taken during the autopsy, even though there was no evidence of criminal sexual conduct and Bowman was not charged with any sex offense. App. 3950, 4381, 4386. Because, as the pathologist conceded, the semen could have been several days old, App. 3954, this evidence could not serve to help identify the killer. Counsel clearly recognized that the State wanted to insert what was in his mind the racist, prejudicial argument about "a black man and white woman having sex."[25] App. 7712. Rather than object to its admission in trial evidence, however, counsel, calling Martin a "little girl," App. 4509,[26] and clearly recognizing the prejudicial potential of the sexual evidence, directly injected the racist argument in closing:

> [L]et's look at the DNA. It showed sometime that Miss Martin, who was friends with Mr. Bowman, Miss Martin who was friends with Mr. Gadson, Miss Martin who was friends with a lot of these folks in this community in Branchville, sometime Mr. Bowman and her had relations. Sometime. Do you think that was put there to try to poison you to get you angry? Do you think that was presented to want to get you to lash out? Do you think there was a reason? How can you tie that into this case? How?

App. 4505. During sentencing, the defense presented testimony that on the afternoon before her death, Bowman was alone with Martin in a bathroom for a while before leaving the home with

[25] This issue has never before been presented on Bowman's behalf, except in the very limited context that PCR counsel asserted that trial counsel failed to object to improper character and bad acts evidence during trial by failing to object to the DNA evidence of Bowman's semen in "the victim's vaginal cavity." App. 5712-13 (Third Amended PCR Application). Notably, undersigned counsel did not represent Bowman in PCR proceedings or when his federal habeas petition was filed. Raising an issue for the first time in this Court's original jurisdiction after all other avenues have been exhausted is not, however, an impediment to this Court's jurisdiction and ability to grant relief. *Butler*, 302 S.C. at 468, 397 S.E.2d at 88; *Tucker*, 346 S.C. at 489, 552 S.E.2d at 715.

[26] This is clearly how counsel viewed the victim as he continued calling her a "little girl" and a "little white girl" in his PCR testimony. *See, e.g.*, App. 7006, 7020, 7116-17, 7395, 7480, 7490.

her. App. 4830-31. Counsel implied during closing argument, without actually making the argument, that Bowman and Martin had sexual intercourse during this encounter. App. 4976.

> What was Miss Martin doing over at Frankie Martin's house? I don't know. Mr. Martin testified they were alone. Why is there an aggravating factor in here about criminal sexual conduct? Has anybody testified to you in here of nonconsensual relations between a human being and another human being? It doesn't matter whether Miss Martin who is shown in that picture, Mr. Bowman there as seated there happen to be friends.
>
> That is not to anger you, that's not for me to anger you and I apologize. And I raised my voice for a moment to point something out and that is this: You've got to prove, the State has to prove to you folks there was nonconsensual sex. Other than that we just muddy up the water.

App. 5001. The references to Martin's picture and Bowman, as he appeared in court, is clearly a head-nod to Martin being a "little [white] girl" with blonde hair, App. 4509, Exh. 12, Martin pictures from sentencing evidence, and Bowman being a very dark-skinned black man with a cornrow hairstyle at the time of arrest,[27] Exh. 13, News article from time of arrest with Bowman's picture. Bowman was picked on growing up "because his skin is so dark, darker than everyone else's." Exh. 14, Kendra Bowman Affidavit. People nicknamed him "Black" so much that he and his family finally just accepted it and started using "Black" as a nickname. *Id. See also* Exh. 15, Bowman (aka "Black") picture from sentencing; App. 3682, 3689, 3699, 3893; 4100.

Counsel's own racist thinking was even more clearly displayed during his PCR testimony. When asked why he did not present truthful evidence that Martin was known to prostitute for drugs with Bowman and with others during sentencing, even though counsel affirmatively presented evidence of Bowman dealing drugs to support his family, counsel said:

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[27] "[C]ornrows . . . are . . . most closely associated with Black people. NYC Commission on Human Rights, Legal Enforcement Guidance on Race Discrimination on the Basis of Hair, available at https://www.nyc.gov/site/cchr/law/hair-discrimination-legal-guidance.page#:~:text=While%20a%20range%20of%20hair,closely%20associated%20with%20Black%20people (last visited on December 14, 2024).

> I think I portrayed what I needed to portray. If I'm in error again I apologize, I apologize to Marion. What I'm saying is, it does no good, I tried that Gardner case up here where they tried to portray that white girl being with five African American men and, Mr. Brown, you slander a victim, you know the little girl is dead, they got those nasty pictures in there in this penalty phase with her burned body, the statement allegedly, "Black, please don't shoot me, I got a baby." Marion would have known she had a child, he grew up with her. I tried to stay away from hurting Miss Martin in any way because all the evidence and all the facts show she got shot in the back.

App. 7123-24. Even though Gadson's prior statement about events at the crime scene included information that Martin was smoking crack in the vehicle at the crime scene, App. 9237, counsel did not present that information in sentencing – when Bowman had already been convicted of the offenses. He said, "I'm not going to portray my guy as the reason why she's dead, dope, sex, drugs. I mean, I'm making, the State prove their case." App. 7125. While being questioned in this line, counsel spontaneously blurted out his racist thinking, speaking directly to Bowman:

> Marion, what are you doing on Nursery Road at that time of the morning with a white female and African American males in Dorchester County? Really. This is 2001 but what good are you doing out there on a dirt road? . . . I have read this file backward and forward. If he's there he's a principal, if he's in the car. If he's not there, how does all these facts get known, how are all these facts to be told?

App. 7126.[28] Contrary to trial counsel's implications, PCR counsel suggested that a reason for being out on that dirt road at that time of the morning, consistent with Bowman being innocent and Gadson being the killer, could be that Bowman's purpose for being out there was for the victim to "smoke crack," App. 7128, or potentially prostitute herself in exchange for crack. Trial counsel responded, however, with no basis in fact, by simply asserting that most people would use drugs by "stay[ing] inside," App. 7128-29. Trial counsel's view of the case, based on his personal

[28] According to Jim Brown, counsel was looking at Bowman and speaking directly to him. It was so shocking that everyone in the courtroom was stunned and there was a long silence before the questioning continued. Exh. 16, Jim Brown Affidavit, at 2.

opinion, was that Bowman and Gadson "planned to bring this girl out there and dispose of her." App. 7129.

Trial counsel recalled that the autopsy included information that the victim had cocaine in her system. App. 7362. Counsel testified that he wanted to keep that information from the jury, along with any information "about whether or not people had ever touched Miss Kandee Martin in a certain way, degrading, sexual way." App. 7363.[29] While counsel conceded he was aware that the victim's general reputation was as a drug user and a person that prostituted herself for drugs,[30] in addition to her actually having a conviction for drug possession and being involved in "an indecent exposure case involving sex on the town square of Branchville," App. 7446,[31] counsel explained that he viewed presenting that truthful evidence as "hurting the victim." App. 7363-64. He did not even want to suggest that Bowman had her watch because she pawned it for drugs, despite viewing Bowman's possession of the watch as "tremendously" hurting his innocence defense. App. 7442.[32]

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[29] Again, counsel clearly assumed that Martin was sexually assaulted while alive or dead rather than even considering the possibility that she engaged in consensual relations with Bowman. Thus, counsel's view was that he was simply trying to avoid argument by the solicitor that a "young African American male wanted to go play with a dead [white] girl, oh, my God, think about that." App. 7567.

[30] Counsel was also aware that she had at least two children (and possibly three) by the time she was 19 years old, App.7367, as her son, Tyler, was almost two years old at the time of her death at 21 years of age, App. 4701. *See also* App. 5670 (Mitigation Specialist Dale Davis Affidavit).

[31] Dale Davis, the mitigation specialist retained by counsel, also provided evidence that during her investigation, she learned that Martin "was known in the Branchville law enforcement community to have been involved in loitering/prostitution activities in the area of Highway 78." App. 5670.

[32] And, inexplicably, whether to present this imbalance of evidence, in counsel's brain, was also tied to the fact that Bowman's jury, in counsel's brain, was "twelve people . . . that don't look like him," App. 7449, presumably meaning that it would only be acceptable for counsel to argue that Bowman dealt drugs in mitigation in order to survive and to truthfully argue that Martin prostituted herself for drugs if the jurors were people of color.

> [H]urting the victim I think would have hurt Marion more, maybe helped him a little bit evidentiary wise that she did dope. What I was worried about, I guess, where she got her dope from, and everybody in the world knew, and it came out in the penalty phase also, that Marion lived on the street, he was self supporting, he tried to find ways to support himself and he sometimes delved into something he shouldn't have delved into.
>
> But I also had the horrible experience dealing with the Missy McLaughlin trial where that lady was also accused of using her body for drugs, and believe me, it didn't sit well with that jury.

App. 7364.[33] Although counsel affirmatively presented evidence in mitigation that Bowman "was basically kicked to the curb at a young age and he would do what he had to do to survive," *id.*, including dealing drugs,[34] trial counsel again did not want to "hurt" the victim more by presenting evidence that she was prostituting for drugs and sometimes getting those drugs from Bowman, App. 7364.

In short, counsel viewed presentation of this truthful evidence, including evidence of the victim's addiction to crack, as simply an "attack [on] the victim," *id.*,[35] or pitting "the white girl versus the black young man," App. 7370,[36] or "black versus white, white with a black man [sexual

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[33] McLaughlin was the murder victim in the Joseph Gardner case previously mentioned in counsel's testimony as one of his former clients. https://murderpedia.org/male.G/g1/gardner-joseph.htm; App. 7123-24. While counsel clearly disbelieved the evidence presented that McLaughlin initially was voluntarily engaging in sexual acts with multiple men at the same time, it is notable that this Court found that information as a matter of undisputed fact. *State v. Gardner*, 332 S.C. 389, 391, 505 S.E.2d 338, 339 (1998).

[34] He did this despite counsel's later admission that he viewed evidence of drug dealing, regardless of the reason, as evidence of Bowman's lack of "social redeeming value." App. 7447-48.

[35] PCR counsel was very clear that he was talking only about truthful evidence and not slanderous allegations. *See, e.g.*, App. 7369 ("I'm not talking about attacking her, I'm talking about being truthful.")

[36] Counsel's bias against his own client is evident even in counsel's references to Martin as a "little white girl," and Bowman as a "man" or a "young man" several times, App. 7480 ("I wanted to show that this man would not hurt that little girl); *see also* App. 7370, 7395-96; when Bowman was 20 years old, App. 4645, and Martin was 21 years old at the time of her death, App. 3647.

relations]," which counsel viewed as "dirty." App. 7480-81.[37] Likewise, counsel seemed to view presenting truthful evidence that the victim was a drug user as equivalent to an argument that she "should die for the use of dope." App. 7372. Counsel somehow believed that presenting evidence in sentencing that the victim prostituted herself for drugs and had cocaine in her system at the time of her death as somehow opening the door or admitting that it was true that Bowman killed her "because she was going to rat him out for selling dope." App. 7372-73.

Counsel essentially admitted in PCR that he held opinions that a white 21-year-old female would not voluntarily be with two similarly aged black males in a remote area in the early hours of the morning under any circumstances. *See* Exh. 16, Jim Brown Affidavit at 2. Thus, the black males must have been there to commit sexual and violent crimes against the "little white girl." Similarly, counsel believed that a truthful explanation that the victim was known to prostitute herself for drugs would simply be viewed as an attack on the victim, slandering her, pitting "the white girl versus the black young man," and saying that she deserved to die because of her drug use. And, worse, counsel imputed his racist views to the jurors.

While counsel did not make as many racist statements during the trial as he did during the PCR proceedings, he still clearly made the racist argument that the victim was "a little [white] girl" and that the jury would be angered by the suggestion that she had consensual sexual relations with Bowman, a 20-year-old black male, who was also known to be her friend. This argument was made during both the guilt phase and sentencing closing arguments with counsel even apologizing for suggesting that there was a consensual sexual relationship between the two. App. 5001 ("That

[37] Again, counsel clearly viewed the suggestion that Martin had consensual sex with black men as demeaning, dirty, and hurting her, even though Martin was known as a person that "did not see race" and who dated black guys. Exh. 14, Kendra Bowman Affidavit. Indeed, counsel, but perhaps not the jury, was aware that her son Tyler is biracial. App. 4695, 4708.

is not to anger you, that's not for me to anger you and I apologize."). There is no question that this argument was prejudicial during both the guilt phase and sentencing of Bowman's trial.

"Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected." *Turner v. Murray*, 476 U.S. 28, 35 (1986). Indeed, "[t]he risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence." *Id.* at 36. Specifically, in *Turner*, the Court noted a number of ways that racial prejudice could be in play in a capital sentencing proceeding.

> [A] juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved the aggravating factors specified . . . [of future dangerousness or a crime that was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim"]. Such a juror might also be less favorably inclined toward petitioner's evidence of mental disturbance as a mitigating circumstance. More subtle, less consciously held racial attitudes could also influence a juror's decision in this case. Fear of blacks, which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty.

Id. at 34-35. Because of these concerns, the Court held that "a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias" during voir dire. *Id.* at 36-37.[38]

The Supreme Court has also made it clear generally that racial arguments with no actual bearing on the crimes or the issues in a capital case are improper. *See Dawson v. Delaware*, 503 U.S. 159, 168 (1992) (admission of evidence in sentencing that the defendant was a member of a

[38] Notably, counsel's own bias was also on display during jury selection as he failed to avail himself on Bowman's behalf of the opportunity to conduct voir dire to determine whether any of Bowman's jurors were racially biased. Nonetheless, one honest juror disclosed upon simply being asked about "any bias or prejudice" without reference to race in the question that he didn't "get along with people of color too well" meaning both "[b]lacks, mixed." App. 2066-67.

white racist prison gang was erroneous where the victim in the case was white, the evidence was not relevant to any issue before the jury in sentencing, and the evidence could not "be viewed as relevant 'bad' character evidence in its own right"). Similarly, this Court has condemned racist arguments that "inflame the passions or prejudices' of the jury." *State v. Bennett*, 369 S.C. 219, 231, 632 S.E.2d 281, 288 (2006). The court explained in *Bennett*:

> As a general rule, inflammatory remarks which are calculated to appeal to the passions or prejudices of a jury should be affirmatively condemned. *South Carolina State Highway Dep't. v. Nasim*, 255 S.C. 406, 411, 179 S.E.2d 211, 213 (1971). "[W]hether or not the particular arguments are so prejudicial as to constitute reversible error depends upon the nature of the utterances and the circumstances under which they were made." *Id.*

Id. at 231, 632 S.E.2d at 288.

> As a starting point, we recognize that the terms "blond lady" and "King Kong" [used by the Solicitor to refer to the defendant's white girlfriend with blonde hair and the large black defendant, respectively,] could have racial connotations. However, this court's jurisprudence does not prohibit the use of terms with racial meanings, nor does our case law stand for the proposition that arguments or evidence in a case must be void of racial allusions. Instead, this court has recognized that it is impermissible to use race to "inflame the passions or prejudices" of the jury. Accordingly, our inquiry focuses on how these terms were used in Appellant's case.

Id. Based on the facts and context of the solicitor's use of these terms in *Bennett*, however, this Court did not find reversible error.[39]

[39] The federal courts disagreed. Both The Honorable Richard M. Gergel, United States District Court for the District of South Carolina, and a panel of the United States Court of Appeals for the Fourth Circuit found this Court unreasonably determined that the Solicitor's references to the defendant during closing arguments were not an appeal to racial prejudice or a violation of due process. *Bennett v. Stirling*, 170 F.Supp.3d 851 (D.S.C.), *aff'd*, 842 F.3d 319 (4th Cir. 2016). As the Fourth Circuit observed, the Solicitor did not just call Bennett "King Kong." Instead, the solicitor used "a slew of derogatory terms," that "also labeled Bennett a 'caveman,' a 'mountain man,' a 'monster,' a 'big old tiger,' and '[t]he beast of burden.'" *Bennett*, 842 F.3d at 321. This was in addition to the solicitor referring to Bennett's "sexual partner as 'the blonde-headed lady,' alerting the jury to the interracial nature of the relationship" and "intentionally elicit[ing] irrelevant, inflammatory testimony from one of the state's witnesses, who recounted a dream in which he was chased by murderous, black Indians. *Id.* The prosecutor's arguments "were poorly

In a similar context involving a solicitor's arguments based on religion, this Court condemned the "religious prejudice" inherent in a solicitor's "inflammatory" references to domestic terrorism and the 9/11 terror attacks in a capital case that did not involve terrorism but involved a Muslim defendant as these arguments "served only to inflame the passions and prejudice of the jury." *State v. Vasquez*, 388 S.C. 447, 460, 698 S.E.2d 561, 567 (2010). In *Vasquez*, while the facts of the case—an armed robbery and double homicide at a Burger King by a previously fired, disgruntled employee—were "horrific" and the evidence of guilt was "overwhelming," counsel's failure to object to the solicitor's argument was prejudicial in sentencing because "the sheer weight of the evidence in the instant case does not negate the prejudicial impact of the solicitor's improper comments." *Id.* at 463-64, 698 S.E.2d at 569.

Likewise, the Supreme Court has specifically held that it is improper and amounts to ineffective assistance of counsel for defense counsel in a capital sentencing to present expert evidence and arguments that rely simply on racist stereotypes that a black defendant is "predisposed" to violent conduct simply because of his race. *Buck*, 580 U.S. at 119. While "[i]t would be patently unconstitutional for a State to argue that a defendant is liable to be a future danger because of his race," it is also improper for defense counsel to present such evidence and argument about his own client. *Id.* Indeed, it is more harmful when defense counsel makes the

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disguised appeals to racial prejudice," that were "unmistakably calculated to inflame racial fears and apprehensions on the part of the jury," by "alternat[ing] between characterizing Bennett as a primitive, subhuman species and a wild, vicious animal." *Id.* at 324. The "coup de grace" was to warn that if Bennett were not sentenced to death, he would "come back" and it would "be like meeting King Kong on a bad day." *Id.* The court rejected this Court's findings that these were not racist arguments, finding that "[i]t is impossible to divorce the prosecutor's 'King Kong' remark, 'caveman label, and other descriptions of a black capital defendant from their odious historical context. And in context, the prosecutor's comments mined a vein of historical prejudice against African–Americans, who have been appallingly disparaged as primates or members of a subhuman species in some lesser state of evolution." *Id.* at 324-25.

racist arguments because jurors expect to evaluate and question the state's evidence, but "[w]hen a defendant's own lawyer puts in the offending evidence, it is in the nature of an admission against interest, more likely to be taken at face value." *Id.* at 122; *see also Ingle v. State*, 348 S.C. 467, 472, 560 S.E.2d 401, 403 (2002) (recognizing that the impact of prejudicial evidence is heightened when "it came as part of what was supposed to be petitioner's defense."). In short, "[n]o competent defense attorney would introduce such evidence about his own client." *Buck*, 580 U.S. at 119; *see also People v. Sanders*, 182 N.E.3d 151, 153-56 (Ill. Ct. App. 2020) (holding that defense counsel's racist arguments for a black client, including his own personal racial biases and arguments that a "black man belongs in a squad car" and he would be scared in an "all-black area," in an aggravated battery case involving a white victim was ineffective assistance of counsel as "[t]he introduction of race into an argument is not permissible" where "[n]one of the racial comments were based on the evidence"); *State v. Davis*, 872 So.2d 250, 252 (Fla. 2004) (emphasis omitted) (holding that defense counsel's explicitly racist arguments in a capital case involving the rape of a white woman by a black man that he was "a white southerner" and did not "like black people" who "make me mad just because they're black," even when made allegedly to get jurors to admit their own racism, were "racist . . . expressions of prejudice" that "cannot be tolerated" and amounted to ineffective assistance of counsel); *Miller v. State*, 728 S.W.2d 133, 135 (Tex. Ct. App. 1987) (holding that defense counsel's racist arguments that the state's primary witness and the burglary victim in the case were both from Nigeria and likened them to "a man swinging from limb to limb with a banana or coconut in one hand" was a "damag[ing]" argument that amounted to ineffective assistance of counsel).

Bowman's counsel clearly crossed the line in this case by permitting the State to present improper evidence during the trial and sentencing and injecting his own racial biases into argument

in the case. Likewise, as addressed above, counsel failed to adequately prepare and present a trial defense and mitigation case in sentencing because of counsel's own racial biases and prejudices. Bowman's convictions and death sentence must be set aside under these circumstances, which are shocking to the conscience and involve constitutional violations. *See* Exh. 15, Jim Brown Affidavit, at 2–3.

c. Carrying Out Bowman's Execution Would Be Shocking to The Universal Sense Of Justice In Light Of Bowman's Growth And Maturity In The 22 Years Since He Was Sentenced To Death.

As noted previously, this Court has reserved relief in its original jurisdiction for those cases where there is a constitutional violation, such as the violations in this case, in conjunction with "the denial of fundamental fairness which, in the setting, is shocking to the universal sense of justice." *Moore*, 436 S.C. at 219, 871 S.E.2d at 429; *see also Torrence*, 305 S.C. at 69, 406 S.E.2d at 328 (the Court's original jurisdiction gives it the "ability to provide relief to those who have, for whatever reason, been utterly failed by our criminal justice system").

Marion Bowman has been failed by this system. As addressed above, the State's case was built on the incentivized testimony of biased witnesses with a host of credibility issues while the State withheld much of the material impeachment evidence. The state did so despite the solicitor's belief that a life sentence would be appropriate, even assuming that Bowman was guilty as the State alleged.[40] In response, trial counsel pressured Bowman, who was only 20 years old at the time of his arrest, to plead guilty rather than actually prepare and present an adequate defense. Trial counsel then injected racist opinions and beliefs into his representation of Bowman and into both phases of Bowman's trial.

[40] *See supra* Note 20.

An argument could be made that "executing a prisoner who has already spent some [22] years on death row violates the Eighth Amendment's prohibition against cruel and unusual punishment." *Lackey v. Texas*, 514 U.S. 1045, 1045 (1995) (Stevens, J., memorandum respecting denial of certiorari); *see also Knight v. Florida*, 528 U.S. 990, 996 (1999) (Breyer, J., dissenting from denial of certiorari). The acceptable reasons for capital punishment recognized in *Gregg v. Georgia*, 428 U.S. 153, 183 (1976), of "retribution" and "deterrence" arguably no longer "retain[] any force for prisoners who have spent some [22] years under a sentence of death." *Id.* Likewise, it is arguable that the fault for Bowman's 22-year existence on death row primarily lies with the solicitor who deliberately withheld *Brady* evidence. *See Lackey*, 514 U.S. at 1047. Notably, "[a]s he awaits execution, petitioner has endured especially severe conditions of confinement, spending up to 23 hours per day in isolation in a 6-by 9-foot cell. . . . The dehumanizing effects of such treatment are undeniable." *Thompson v. McNeil*, 556 U.S. 1114, 1115 (2009) (statement of Stevens, J., respecting denial of certiorari). In sum, as Justice Stevens acknowledged, "our experience during the past three decades has demonstrated that delays in state-sponsored killings are inescapable and that executing defendants after such delays is unacceptably cruel." *Id.* at 1116.

Bowman is not making a *Lackey* argument under the Eighth and Fourteenth Amendments to the United States Constitution or under Article I, Sections 3 and 15 of the South Carolina Constitution. Instead Bowman asserts this Court can and should consider the length of time Bowman has spent on death row as part of its determination that Bowman's death sentence is "shocking to the universal sense of justice.," In short, this Court is permitted and, indeed, should be required to determine whether the death sentence is excessive considering the character of the defendant at the time of this Court's review in its original jurisdiction.

This Court can review this issue as a matter of due process under the state constitution, *Moore*, 436 S.C. at 223, 871 S.E.2d at 432 (quoting S.C. Const. art. I, §3) (no "person [shall] be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws"), and, as a statutory requirement, to determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime *and the defendant*." S.C. Code § 16-3-25(C)(3) (emphasis added).

In carrying out this Court's statutory duty, in light of its power to grant a writ of habeas corpus in this Court's original jurisdiction, it is appropriate for this Court to truly consider the defendant's character in its analysis. This should not just be limited to a defendant's character as it was depicted at a trial that occurred over two decades ago in a case that was infected by both the prosecutor deliberately withholding evidence from the defense and also defense counsel's racially biased arguments before the jury and strategy decisions that were actively harmful to Bowman's defense. While he seeks an appropriate remedy for the constitutional violations at his capital trial, Marion Bowman is a different man now than he was more than two decades ago and this growth and maturation is an essential character consideration. In short, this Court has reserved for itself the "ability to provide relief to those who have, for whatever reason, been utterly failed by our criminal justice system." *Torrence*, 305 S.C. at 69, 406 S.E.2d at 328. That power should be utilized in this case.

For almost 200 years, prior to the decision in *Torrence*, this Court assessed capital cases on appeal through the lens of *in favorem vitae* review, which literally means "in favor of life." *Id.* at 60 n.1, 406 S.E.2d at 324 n.1. Recognizing that "[t]he issue to the defendant is life and death" under *in favorem vitae* review, *State v. Thompson*, 122 S.C. 407, 434, 115 S.E.2d 326, 335 (1922), regardless of whether trial counsel objected, this Court reviewed "the entire record for legal error,

and assume[d] error when unobjected-to but technically improper arguments, evidence, jury charges, *etc.* are asserted by the defendant on appeal in a demand for reversal or a new trial." *Torrence*, 305 S.C. at 60-61, 406 S.E.2d at 324. Likewise, this Court reviewed the entire record for error regardless of whether the issue was briefed or argued on direct appeal. *State v. Boone*, 228 S.C. 438, 447, 90 S.E.2d 640, 644 (1955) ("[I]n keeping with our invariable rule of *in favorem vitae*, we have considered all the original exceptions, whether or not orally argued, and have combed the record for prejudicial error, disregarding whether or not it may have been made the basis of exception or question.") (citation omitted). This expanded review was conducted in capital cases from the beginning of this State's existence and continued even after the death penalty statute was amended, S.C. Code § 16-3-10 to 16-3-28, in accordance with the expanded protections required by *Furman v. Georgia*, 408 U.S. 238 (1972), and *Gregg*. *State v. Shaw*, 273 S.C. 194, 211, 255 S.E.2d 799, 807 (1979). It was used to grant relief in numerous capital cases both before and after *Shaw*. *See, e.g., State v. Diddlemeyer,* 296 S.C. 235, 238, 371 S.E.2d 793, 795 (1988) (trial court's failure to appoint counsel qualified under S.C. Code § 16-3-26(B) required a new trial where the record, reviewed under *in favorem vitae* analysis, "is replete with instances of improper testimony and unpreserved exceptions"); *State v. Scott*, 209 S.C. 61, 66-67, 38 S.E.2d 902, 904 (1946) (finding *in favorem vitae* that the trial court's instruction directing the jury to determine nature of defendant's alleged confession by inquiring as to whether it was made freely and voluntarily, without reward or hope of reward, without further directing jury to consider whether the alleged confession was extorted by fear and physical violence, constituted reversible error, especially where the defendant testified that he had been beaten, that his alleged confession was coerced, and that he made it in fear).

This Court abolished the practice in *Torrence*, reasoning it was no longer necessary "in light of advances in the quality of legal representation; in light of the many protections and avenues of relief available to criminal defendants; and in light of the modern day restricted use of capital punishment post *Furman* . . ." 305 S.C. at 58, 406 S.E.2d at 324.[41] The additional protections this Court listed as making the "conviction of an innocent person . . . unlikely" in modern times included state post-conviction review, federal habeas corpus procedure availability, and the sentence review required under S.C. Code § 16-3-25. *Id*. at 64, 406 S.E.2d at 326. Notably, however, to date none of these avenues actually take into account the defendant's character at the time of the offenses or his character as it develops over the years following sentencing.

State post-conviction relief proceedings allow only for consideration of legal claims involving a federal constitutional, state constitutional or statutory violation; lack of jurisdiction by the sentencing court; a sentence that exceeds the maximum authorized by law; evidence of new material facts that "require[] vacation of the conviction or sentence in the interest of justice"; unlawful detention or restraint; or any common law ground or error. S.C. Code § 17-27-20(A). The only one of these provisions that could even arguably allow for new evidence concerning the defendant's character based on its plain language is S.C. Code § 17-27-20(A)(4) ("That there exists evidence of material facts, not previously presented and heard, that requires vacation of the

[41] South Carolina is now among the most restrictive appellate courts in the country. It does not recognize or permit analysis of errors that are even plainly obvious on appeal, such as is permitted in federal courts and many other state jurisdictions. *See, e.g.,* Fed. R. Crim. Proc. 52(b) ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention"); *Rosales-Mirales v. United States*, 585 U.S. 129 (2018) (holding the Court of Appeals abused its discretion in failing to correct plain error in the District Court's miscalculation of the Sentencing Guidelines range). Even in capital cases, issues not properly preserved at trial may not be raised for the first time on appeal in South Carolina courts, *State v. Vanderbilt*, 287 S.C. 597, 340 S.E.2d 543 (1986), except in this Court's original jurisdiction, *see Butler*, *supra*; *Tucker*, *supra*.

conviction or sentence in the interest of justice"), which is limited by this Court's holdings to "after discovered evidence" that "would probably change the result if a new trial is had" and "is material to the issue of guilt or innocence." *Jamison v. State*, 410 S.C. 456, 467, 765 S.E.2d 123, 128 (2014). A PCR court is prohibited from commuting a sentence to life rather than simply affirming or vacating a death sentence. *Singleton v. State*, 313 S.C. 75, 85, 437 S.E.2d 53, 59 (1993).

Federal habeas corpus proceedings also do not allow for evaluation of the defendant's character in the context of the appropriateness of the sentence. First, generally speaking, federal courts may review an issue only if it has been exhausted – meaning it was fairly presented and litigated in accordance with state procedures – in state court. *Shinn v. Ramirez*, 596 U.S. 366, 378 (2022). If the claim has been exhausted and adjudicated in state court, a federal court reviewing the issue in habeas proceedings may only grant relief if the state court adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

"[C]learly established Federal law" under § 2254(d)(1) refers to "the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). Nothing in federal law is similar to S.C. Code § 16-3-25(C)(3) or otherwise requires a court to determine whether a sentence is excessive or proportional. *See Pulley v. Harris*, 465 U.S. 37, 43-44 (1984) (finding "no basis in [the United States Supreme Court's] cases for holding that comparative proportionality review by an appellate court is required in every case in which the death penalty is imposed and the defendant requests it."). Like state post-conviction courts, the federal courts are limited to legal remedies based on a

"violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3); 28 U.S.C. § 2254(a).

With no equitable remedy or analysis possible in state post-conviction or federal habeas proceedings, the only possible equitable remedy is left to this Court, which historically has not considered the character of the defendant at all, let alone at the time he is actually facing execution years after his arrest, conviction, and sentencing. Specifically, this Court, from its very first interpretation of the statutory requirement under S.C. Code §16-3-25(C)(3), has viewed its role as simply comparing the death sentence imposed in the case under review on direct appeal with death sentences imposed in "similar cases." *Shaw*, 273 S.C. at 211, 255 S.E.2d at 807. The Court has also at times considered whether the death penalty imposed in the case under review was "disproportionate to the severity of the offense" committed in the case. *State v. Hyman*, 276 S.C. 559, 570-71, 281 S.E.2d 209, 215 (1981). The Court noted – only three years after *Shaw* – its discomfort with the "profound tension between the requirement of individualized sentencing and the notion of comparative review" in the opinions of the United States Supreme Court following *Furman*. *State v. Copeland*, 278 S.C. 572, 587, 300 S.E.2d 63, 72 (1982). The Court noted, however, that the Supreme Court had not required the states to conduct any particular model of proportionality review. *Id.* Thus, that question was left to the states to resolve. And, this Court determined that its "search for 'similar cases' can only begin with an actual conviction and sentence of death rendered by a trier of fact in accordance with § 16-3-20 of the Code." *Id.* at 591, 300 S.E.2d at 74. Specifically, the Court declined to consider cases where a jury did not impose a death sentence because the "individualized sentencing" required by the U.S. Supreme Court resulted in "mercy." *Id.* Likewise, the Court declined to consider cases where a death sentence was imposed but set aside due to a finding of prejudicial trial error. *Id*. at 592, 300 S.E.2d at 75. For

the first time, however, in *Copeland*, the Court did at least suggest that it considered the mitigating evidence presented by the appellants during trial before finding no "similar" case that would permit a "meaningful comparative review," but nonetheless finding that the death sentences imposed were "appropriate and neither excessive nor disproportionate in light of their crimes and their respective characters." *Id.* at 595, 300 S.E.2d at 76-77. The Court concluded that going forward "proportionality review in South Carolina is first and foremost directed to the particular circumstances of a crime and the specific character of the defendant. Comparative review will be thereafter undertaken if possible." *Id.* at 595, 300 S.E.2d at 77.

Thereafter, in a few cases, the Court cited mitigating testimony presented during trial and sentencing before affirming the death sentences without any real discussion of the issue. *State v. Woomer*, 278 S.C. 468, 474-76, 299 S.E.2d 317, 320-22 (1982); *State v. Yates*, 280 S.C. 29, 41-45, 310 S.E.2d 805, 812-14 (1982). After those early cases, however, this Court either did not reference mitigating evidence or the character of the defendant, s*ee, e.g., State v. Adams*, 279 S.C. 228, 241-42, 306 S.E.2d 208, 215-16 (1983); *State v. Skipper*, 285 S.C. 42, 49-50, 328 S.E.2d 58, 62 (1985), or simply noted the mitigation presented during sentencing that was properly considered by the jury, *see, e.g., State v. Plath*, 281 S.C. 1, 19-20, 313 S.E.2d 619, 629-30 (1984); *State v. Koon*, 285 S.C. 1, 3-5, 328 S.E.2d 625, 626-27 (1984); *State v. Gaskins*, 284 S.C. 105, 130-31, 326 S.E.2d 132, 146-47 (1985). Thereafter, by 1984, in a number of cases, this Court simply stopped referencing mitigation, character of the defendant, or anything other than a cursory finding based on the facts of the crime alone. *See, e.g., State v. Truesdale*, 285 S.C. 13, 21, 328 S.E.2d 53, 57 (1984) ("The death penalty is fully justified by the brutal homicide, accompanied by rape, reflected in the evidence of this case. The crime was heinous."); *State v. Chaffee*, 285 S.C. 21, 35-36, 328 S.E.2d 464, 472 (1984) (noting, after summarizing the facts of the crime, that "[i]t would

be difficult to conceive of crimes more heinous"); *State v. Kornahrens*, 290 S.C. 281, 290-91, 350 S.E.2d 180, 186-87 (1986) (summarizing the crimes before affirming the death sentence).

By 1987, there was no mention of the facts relating to the crimes, the aggravation, the mitigation, or the "character" of the defendant at all – other than perhaps the broad categories of the aggravating factors – in this Court's affirmances under S.C. Code § 16-3-25(C)(3). *See, e.g. State v. Owens*, 293 S.C. 161, 169, 359 S.E.2d 275, 279 (1987); *State v. Bell*, 293 S.C. 391, 405, 360 S.E.2d 706, 714 (1987); *State v. Howard*, 295 S.C. 462, 473, 369 S.E.2d 132, 138 (1988); *State v. Jones*, 298 S.C. 118, 124, 378 S.E.2d 594, 597-98 (1989); *State v. Smith*, 298 S.C. 482, 488, 381 S.E.2d 724, 727 (1989); *State v. Elmore*, 300 S.C. 130, 134, 386 S.E.2d 769, 771 (1989). This continued for decades, even in cases where the appellant briefed and argued the proportionality issue at length. *See, e.g., State v. Patterson*, 324 S.C. 5, 22, 482 S.E.2d 760, 768 (1997). This cursory treatment was also applied in Bowman's direct appeal. *Bowman*, 366 S.C. at 502-03, 623 S.E.2d at 387.

In 2011, however, on direct appeal after a capital defendant argued before the trial court that the court's "current proportionality review is deficient because it fails to examine cases where death was not imposed and cases where death was not even sought," the Court still only conducted its cursory analysis, but did note "concern that restricting our statutorily-mandated proportionality review to only similar cases where death was actually imposed is largely a self-fulfilling prophecy as simply examining similar cases where the defendant was sentenced to death will almost always lead to the conclusion that the death sentence under review is proportional." *State v. Dickerson*, 395 S.C. 101, 125 n.8, 716 S.E.2d 895, 908 n.8 (2011). Despite this noted concern, however, this Court went right back to the business, as usual, of cursory statements of fulfilling the review required by S.C. Code § 16-3-25(C)(3).

Finally, in *Moore*, 436 S.C. at 211, 871 S.E.2d at 425, this Court ordered briefing and granted Moore's motion to argue against the precedent of *Copeland*. After reviewing the issue anew, this Court held that "the Court is not statutorily required to restrict its proportionality review of 'similar cases' to a comparison of only cases in which a sentence of death was imposed." *Id*. Nonetheless, the Court held that Moore was not entitled to habeas relief in its original jurisdiction on his claim that the Court's proportionality review was inadequate. *Id.* Again, Moore and this Court focused on the facts of the crime and cases involving the aggravating circumstance of armed robbery, which was the applicable aggravating circumstance in Moore's case. Moore also argued that the Court should "expand the relevant pool of cases to be reviewed beyond those in which a death sentence was imposed." *Id*. at 225, 871 S.E.2d at 433. The Court agreed that its comparative proportionality review statute "should not be so narrowly construed." *Id.*

> We agree with Moore . . . that the language of South Carolina's proportionality statute does not expressly limit the pool of cases to only those in which the death penalty was actually imposed. For convictions of murder, therefore, a review can ostensibly encompass a comparison of death-eligible cases for which a record is available for our review. This can include, for example, cases where a defendant's conduct was eligible for a capital sentence, but the State elected to seek only a life or lesser sentence, as well as cases where a jury considered but ultimately declined to impose a death sentence. The comparison cases must have a record because the General Assembly indicates in subsection 16-3-25(E) that this Court must include references in its opinion to the cases considered and transmit the records of those cases to the circuit court in the event resentencing is ordered. *See* S.C. Code Ann. § 16-3-25(E) (2015) ("The court shall include in its decision a reference to those similar cases which it took into consideration."); *id.* § 16-3-25(E)(2) ("The records of those similar cases referred to by the Supreme Court of South Carolina in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration."). Accordingly, we clarify *Copeland* and hold subsection 16-3-25(C)(3) does not limit the pool of comparison cases to only those in which the defendant actually received a sentence of death.

Id. at 226, 871 S.E.2d at 433. The Court then considered the additional cases Moore argued should be in the expanded pool of comparison cases "that would have been available at the time of Moore's

direct appeal and comparative proportionality review in 2004," but still determined that Moore's sentence was "not disproportionate to the penalties given in other similar cases." *Id.* Again, there was no discussion at all about mitigation presented during Moore's trial about the "character of the defendant" at the time of the offenses or at the time of this Court's original jurisdiction review approximately 21 years after the crimes. And, to be clear, Moore did not assert that evidence of his character at the time of review should be considered.

In *Moore*, the Court simply noted that the General Assembly designated the aggravating circumstances that "qualify a defendant for a capital sentence." *Id.* at 229, 871 S.E.2d at 435. Whether those aggravating circumstances have been established is "a determination for the jury, which must then decide whether to recommend a death sentence or a life sentence." *Id*. This Court thus claimed no responsibility for those decisions, just as the Court claimed "no control over the actions of a solicitor" in deciding when to seek a death penalty. *Id.* In short, this Court proclaimed:

> Whether this Court would impose a death sentence under the same circumstances is not within the permitted scope of this Court's appellate review. Rather, the Court's task in comparative proportionality review aims to ensure that a jury's decision was not the result of arbitrariness. . . . To the extent Moore urges the Court to find his sentence disproportionate because he did not bring a weapon to the scene and had no intent to commit the offenses for which he was convicted, we hold, as we must, that this assertion does not negate the jury's findings as to his intent, and a jury has found against him in that regard. This Court's scope of review does not allow it to disregard the factual findings in the case and pronounce an alternative sentence in these circumstances.

Id.

Following *Moore*, this Court essentially has returned to business as usual in considering only the facts of the crimes and the aggravating circumstances without any mention of mitigation or the "character of the defendant." *See, e.g.*, *State v. Jenkins*, 436 S.C. 362, 394-95, 872 S.E.2d 620, 637 (2022); *State v. Jones*, 440 S.C. 214, 264-65, 891 S.E.2d 347, 373-74 (2023). Most

recently, this Court addressed the issue of proportionality in *State v. Owens*, Appellate Case No. 2024-001397 (Sep. 12, 2024) (unpublished), Exh. 17, where Owens faced imminent execution and was, in fact, executed on September 20, 2024. In *Owens*, the Court noted that the death-sentenced inmate included "a belated claim of disproportionality," seeking a second proportionality review under the standards set forth in *Moore*. *Id.* at 10. In reviewing this claim, the Court held that, while the "similar cases" universe for comparison is not limited to only those cases in which the death penalty was imposed, nothing in *Moore* required the consideration of cases in which the death penalty was not imposed. *Id.* Likewise, the Court noted that "*Moore* did not set forth a retroactive rule requiring a new proportionality review that includes cases in which the death penalty was not imposed." *Id.* In short, *Moore* simply clarified the application of S.C. Code § 16-3-25(C)(3) for cases going forward. *Id.* And, this Court views its task under section 16-3-25(C)(3) "as an essential task for this Court to ensure the jury's decision was not the result of arbitrariness. *Id.* (citing *Moore*, 436 S.C. at 222-23, 871 S.E.2d at 431). Again, in applying its analysis, the Court discussed only the facts of the crimes and the aggravation evidence in affirming Owens' death sentence under 16-3-25. *Id.* at 10-11. But, again, Owens did not assert that evidence of his character at the time of review should be considered.

Bowman specifically asserts that this Court's role in original jurisdiction, in reviewing constitutional violations and determining whether there is a "denial of fundamental fairness which, in the setting, is shocking to the universal sense of justice," *Moore*, 436 S.C. at 219, 871 S.E.2d at 429, must include a materiality analysis under *Brady v. Maryland* and a prejudice analysis under *Strickland v. Washington* that also considers the mitigating evidence of the petitioner's character at the time of the original jurisdiction review. This renewed "*in favorem vitae*" analysis is urged only for use in capital cases in this Court's original jurisdiction. Part of this analysis should include

a renewed analysis under S.C. Code § 16-3-25(C)(3), which despite this Court's prior holdings, expressed in *Moore,* 436 S.C. at 229, 871 S.E.2d at 435, is not strictly limited to an "appellate review." Nothing in the plain language of the statute or the history of the statutory provision requires such a restricted interpretation. In short, this provision permits and indeed requires this Court to make its own judgment concerning whether the death penalty is an appropriate punishment or not. And, in circumstances where this Court's original jurisdiction review of a constitutional violation is delayed by more than 22 years, this Court should consider a broader analysis of the case and the mitigation evidence available now in determining the materiality and prejudice in sentencing rather than simply reviewing the mitigation presented during sentencing in 2002, when Bowman was only 21 years old, and represented by racist counsel in a trial proceeding infected by racist arguments and where the State withheld material evidence from the defense.

As discussed in more detail in the statement of facts, despite his racism and failure to adequately investigate the case, Bowman's defense counsel presented significant mitigation evidence of trauma and neglect that permeated Bowman's childhood, including witnessing his father's violence towards his mother, his father's abandonment of the family, and then the poverty of the family and daily physical abuse of Bowman's mother with switches and belts. App. 4793-94. Bowman, while still a child barely out of elementary school, became the caregiver for his mother and sisters when his mother began suffering from physical ailments App. 4743, 4747-48.

The defense also called witnesses to testify about Bowman's positive behavior in pretrial detention and presented an expert in prison adjustment and future dangerousness, who testified that Bowman would adjust well to prison life and would never be released. *Bowman v. State*, 422

S.C. 19, 809 S.E.2d 232 (2018). This evidence, although compelling, pales in comparison to the mitigating evidence available now.

i. Bowman's Age and Brain Development at the Time of the Offense.

Bowman was only 20 years old at the time of his arrest. The age at the time of offense is an important factor to consider when deciding whether a sentence is excessive or disproportionate, as seen in several Supreme Court cases which have relied on and cited to a comprehensive body of research on adolescent development in its opinions examining youth sentences, culpability, and custody. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 569-70 (2005); *Graham v. Florida*, 560 U.S. 48, 68 (2010); *Miller v. Alabama*, 567 U.S. 460, 471-73 (2012); *see also Aiken v. Byars* 410 S.C. 534, 765 S.E.2d 572 (2014). In *Roper*, the Court held that the Eight Amendment prohibited the execution of a person who was younger than 18 at the time of the offense, because their "lack of maturity" and "susceptib[ility] to influence and to psychological damage" foreclosed their classification "with reliability . . . among the worst offenders" for whom capital punishment is reversed. 543 U.S. at 571-73. The Court acknowledged that, "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18." *Id*. at 574. While the court in *Roper* decided to draw a definitive line, the research continues to show that "important neurobiological development is ongoing throughout the teenage years and continuing into the mid 20s." Exh. 18, Elizabeth Cauffman, Ph.D., Report at 2.

Bowman's brain development was also likely affected by substance abuse. "[T]he human brain does not reach its mature, adult form until after the adolescent years have passed and a person has entered young adulthood, which occurs at approximately age 25." *Id.* at 4. The majority of brain growth does occur prior to adolescence, but there is "considerable refinement within the brain that occurs across adolescence and through the transition period – particularly in the area of

prefrontal cortex, which is among the last to develop. *Id.* at 4. The pre-frontal cortex is "responsible for evaluation of future consequences, the ability to weigh risk and rewards, and general decision-making processes." *Id*. When an individual abuses substances the areas of the brain that are being refined during their adolescence years are affected. *Id*. at 6. Substance use has been "associated with heightened impulsivity, impaired affect regulation, poor judgment, and less successful decision making." *Id.* (citations omitted). While research suggests that substance use "may suppress age-typical growth in psychosocial maturity from adolescence to young adulthood" when the individual stops using substances they do regain psychosocial maturity. *Id*. at 7.

Forensic psychiatrist Donna Maddox, M.D., who completed a psychiatric evaluation of Bowman in 2023, concluded, consistent with the research discussed by Dr. Cauffman, that at the time of Bowman's charges, his "brain development was not yet complete." Exh. 19, Donna Maddox, M.D., Report at 12. She found that his cognition was additionally impaired by "his extensive use of alcohol." *Id.* Dr. Maddox also found that Bowman's cognitive function could have also been impacted by a "third close head injury." *Id.*

Susan Knight, Ph.D., also recognized that Bowman was 20 years old at the time of the offense, which, as noted by Dr. Cauffman and Dr. Maddox, was "a period of neurobiological immaturity." Exh. 20, Susan Knight, Ph.D., Report. She noted:

> [Y]outh are inherently more impulsive and reckless, without forethought or consideration of consequence. Such youthful traits reflect the immaturity of adolescent brain development, and is why violence spikes in late adolescence, and declines thereafter.

Id. at 18.

At trial, contrary what we now know about brain development, the state argued during sentencing that Bowman was an "adult," who could serve in the Army and vote. App. 4821; *see also* App. 4961. The defense social worker only responded that 21 years old was "pretty young."

Id. Likewise, in closing arguments in sentencing defense counsel barely made a handful of passing references to Bowman's age and mentality as mitigating. *See, e.g.*, App. at 4978, 4995, 5004, 5006.

ii. Bowman's Maturity, Prison Adaptability, and Lack of Dangerousness.

At trial, James E. Aiken, a former warden at the South Carolina Department of Corrections (SCDC), was qualified as an expert witness for the defense in the areas of prison adjustment and future dangerousness. Aiken opined that Bowman "adjusted relatively well" to incarceration in Orangeburg, Dorchester, and the South Carolina Department of Corrections while serving a prior sentence. While in pretrial confinement, Aiken testified that Bowman, "a fairly young individual" had done some "positive things" while in confinement. App. at 4843. Aiken had no concerns or reservations that Bowman would be able to adapt to prison life. App. at 4844-45.

Twenty years later, Dr. Maddox and Dr. Knight, both of whom are mental health experts with experience in correctional settings,[42] have evaluated Bowman and his records and determined that Aiken was correct. Beyond that, however, it is now clear that Bowman's death sentence is excessive in light of how he has matured and improved himself consistent with scientific research over the 22 years he has spent on death row. His brain has fully developed; he has matured; he has no mental illness, average intelligence, and no cognitive disorder; he has maintained position family relationships and mentally and emotionally supports many family members; he has had positive relations with correctional employees; he has assisted staff in carry out their duties; he has encouraged and assisted other death-sentenced inmates to adapt to confinement and cooperate with correctional staff; he is very religious/spiritual and relies on prayer and Bible Study daily to cope

[42] Exh. 20, Donna Maddox, M.D., Curriculum Vitae; Exh. 22 Susan Knight, Ph.D., Curriculum Vitae.

with confinement and maintain a positive attitude; and he has worked hard to improvement himself.

As summarized by Dr. Maddox:

> Bowman has spent 23 years in confinement. During this period of time, his brain completed maturation, he stopped drinking and using any illicit substances, and he has adapted to his incarceration.

Exh. 19 at 14. Bowman is "a model death row inmate," who "has not had any assaultive disciplinaries during his present incarceration. His only assaultive disciplinary occurred during his YOA sentence" served prior to his current offenses and "Bowman did not initiate th[at] fight." *Id.* Further, Bowman "has successfully adapted to long term incarceration.[43] He has developed a routine, maintains familial relationships and focuses on others as part of his coping. Mr. Bowman also writes poems to cope." *Id.* at 10.[44] Bowman's daily routine includes prayer, reading the Bible, checking on "inmates who are lower functioning" and writing in his journal or writing poetry. *Id.*; Exh. 19, (Knight) at 12.

Dr. Knight specifically evaluated "Bowman's risk of 'future dangerousness' or adaptability, if transferred from death row to SCDC's general population housing. Exh. 19 at 1. In conducting this evaluation, she "assessed pertinent historical factors; psychosocial and disciplinary functioning over his incarceration; mental health/medical status; and risk for future violence within a correctional setting." *Id.* Among other things, she interviewed Bowman and some of his family members and support network; "consult[ed] with evaluating and treating professionals"; and reviewed Bowman's "legal, academic, psychosocial, medical and correctional records." *Id.*

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[43] His prison records reflect "numerous citation[s] which demonstrate positive coping on Bowman's part." *Id.*

[44] Dr. Knight also noted that Bowman "copes through his writings" and drawings. Exh. 21 at 11.

Like Dr. Maddox, Dr. Knight found that Bowman has adapted well to confinement.

> [He] has had very few disciplinaries, all of minimal severity. He has a remote history of one minor assaultive infraction, at age 17, involving a fight with another inmate. He has kept very strong interpersonal relationships with family and others, and actively assists other inmates. He has heavily involved himself in spiritual and religious activities, through self-study of courses, and by meeting regularly with prison ministry staff.

Id. In conducting her Violence Risk Assessment, Dr. Knight noted:

> Mr. Bowman is of mature age; is clinically stable; has no substance use or violence over his incarceration; has excellent coping and interpersonal skills; and is heavily involved in prosocial pursuits. Such factors, in addition to an empirically validated risk measure, and assessment of known correlates to prison violence, indicate Mr. Bowman's risk of violence within a correctional setting is very low, with excellent adaptability to his environment.

Id.

Both Dr. Maddox and Dr. Knight also found a number of factors that contribute to Bowman's adaptability to confinement and his low risk of future violent behavior.

No Mental Illness and Average Intelligence

"Mr. Bowman has no history of mental illness. He is of average intelligence, with no cognitive disorder; and no personality disorder." Exh. 21 (Knight) at 1, 15; Exh. 19 (Maddox) at 7, 11-12. As Dr. Maddox explained, it is significant that "[t]here is no evidence he has any kind of cognitive disorder that would progress over time and change his cognitive capacity to adapt to incarceration." Exh. 19 at 14. Both experts also noted that it is also significant that Bowman does not abuse alcohol or other substances and has not touched either since his arrest in 2001. Exh. 19 at 14, Exh. 21 at 8.

Adaptability within SCDC

Both Dr. Maddox and Dr. Knight reviewed and discussed Bowman's incarceration records in their respective reports. Exh. 19, Maddox Report; Exh. 21 Knight Report. Dr. Maddox noted

generally that Bowman is respected by staff and other inmates. Exh. 19 at 14. Bowman was an Inmate Representative serving as a liaison between his fellow inmates and SCDC staff for twelve years (2008-2020). Exh. 21 at 3.

As Dr. Knight found, Bowman's SCDC records corroborate her findings, as well as Dr. Maddox's findings.

> *Collateral Data [SCDC Records]*: Due to his placement in death row housing, Mr. Bowman meets regularly with the unit counselor as a matter of protocol. Notes from these visits provide insight into his functioning. During the contacts, Mr. Bowman shares concerns about his family's wellbeing and the unit dynamics, discusses his interests and daily activities, and conversates easily with the counselor. The following notations by the counselor, from 2019 to 2022, are representative of Mr. Bowman's overall demeanor and functioning.
>
> Notes include multiple references to Mr. Bowman's *interpersonal functioning*, with the repeated documentation of "inmate relates well with staff and inmates." Additional notations include: "inmate discussed the importance of everybody getting along with each other…or maintaining some distance from difficult people;" "wants to communicate better…and not say the wrong thing;" "noted people can disagree about events in the news without being disagreeable;" "often observed playing cards and socializing with other inmates;" "was respectful toward other group members;" "he said the inmates look out for each other, encourage each other and discourage disruptive behavior;" "other inmates have been very helpful and supportive toward him;" and he "socializes with other inmates throughout the day…often talks to neighboring inmates."
>
> Notes include references to Mr. Bowman's *demeanor and character*, to include: repeatedly described as "calm" and "rational;" "positive and optimistic;" "he was very appreciative of my [counselor] efforts;" "thanked me several times for meeting with him;" "discussed an inmate he was concerned about;" "tries to set a positive example for other inmates;" "does take somewhat of a leadership role and sometimes counsels more impulsive inmates to think before they act;" "was very enthusiastic and positive that he was going to make some good changes;" "he discussed all the positive lessons he has learned over the years;" and "seems to examine situations with an open mind and sees various perspectives on the same news story." Specific to his work on the IRC, it was noted, "he advocated for two inmates on the restricted cell block to come to the unrestricted cell block…[he believed] it is the holiday season and it would great if one or both of them could have privileges restored before Christmas;" and Mr. Bowman "advocated for another inmate who is on the restricted side to stay on the restricted side."

> Notes also reflect his concern and attachment to his *family*, illustrated by the following: "He said he is very proud of his daughter;" "Inmate always asks about my family and my well-being. He seems to be genuinely concerned. I allowed inmate to call his father to check on him. He seemed very respectful and caring toward his father;" "Inmate has been wanting to get some sketches of rabbits so he could give his nieces and nephews Easter-themed pictures;" "wanting to color pictures to send to his nieces, nephews and children of friends;" and "was wearing a necklace with some tags…said the tags were for inspiration and had inspirational notes on them, one tag had his daughter's name on it."

Exh. 21 at 14.

The Chief SCDC Psychiatrist for Death Row, Robert Ellis, spoke to Dr. Maddox and Dr. Knight. Dr. Maddox noted that Bowman is known by Dr. Ellis as "the gentle giant" who "keeps the peace with his presence and calm demeanor." *Id.* at 11. Even though Bowman is no longer an inmate representative he continues to assist him by "persuad[ing] noncompliant mentally disordered offenders to cooperate with Dr. Ellis's treatment." Exh. 19 at 11. Dr. Knight reported that Bowman also talks to "a mentally ill inmate 'to get him out of his head because he hears voices;'" Exh. 21 at 11; he is assisting a new inmate "struggling with the new environment" to adapt to confinement, *id.* at 11; and he worked as an inmate representative, consistently working to assist other inmates, including getting two inmates moved from the restricted side of death row to the open side of the row for Christmas, Exh. 19 at 11.

Dr. Knight gave a more thorough summary of Dr. Ellis' statements:

> Dr. Robert Ellis, chief psychiatrist for death row, has known Mr. Bowman for the past five years. He confirmed he is not treating Mr. Bowman for a mental disorder, and does not prescribe him medication for psychiatric reasons. However, he speaks with him frequently, and is familiar with his functioning. He stated Mr. Bowman was previously the "head member of the IRC [Inmate Representative Council], he brought issues to the forefront" via communication with the prison administration, including the associate wardens. He described Mr. Bowman's work on the IRC as "excellent, proactive, he's a born leader, looks out for people, looks out for his fellow inmates, he's well respected from the staff's perspective, and he wants the community to get along." Several years ago, Mr. Bowman stepped down from the IRC, with Dr. Ellis noting, "it was his choice, he wanted to give someone else a

> turn, he wants to support and cultivate advocacy from his fellow inmates to take a role."
>
> Dr. Ellis has "never felt threatened" by Mr. Bowman, stating, "I've never seen him angry, he's nothing but personable. I feel very comfortable sitting down with him. I've never wanted a CO present." He "would have no concerns if he went to the yard, no threat, if anything, he would be an asset to others" referencing the GP [General Population] inmates. He stated Mr. Bowman has a "calming presence" and has "been invaluable in helping me with people who are non-compliant." Mr. Bowman will quietly speak with the mentally ill inmates who are not taking their medication, and is able to assist them with compliance. Dr. Ellis noted "he is sensitive to their perspective." Dr. Ellis described Mr. Bowman as possibly the "most respected" inmate on death row. He "is calming, speaks in a low tone, clear-headed, he's persuasive in a very mature way, can be very cool when talking about troubling things." He "has interpersonal skills and leadership ability, no psychopathic traits, he thinks thing[s] through…he's a very different man than the boy who came in many years ago." Dr. Ellis believes if there was ever a situation on death row, "I feel like Mr. Bowman would protect me, he would not want a bad situation to happen, in his home."
>
> Of note, prior to the consult, Dr. Ellis checked with the unit staff, including the Associate Warden, to ensure he was representing a consensus with his opinions. He stated "no one was apprehensive" and that he spoke for all who worked with Mr. Bowman.

Exh. 21 at 13. Former SCDC Officers and staff gave similar information.

Former death row Nurse David Chudd, R.N. was also interviewed by Dr. Knight and Dr. Maddox.

> He treated and interacted with Mr. Bowman for approximately five and one half years, from 2017 to July 2022, when death row transitioned to Kirkland CI and then again to Broad River CI. . . . [He] was very familiar with Mr. Bowman. He "always had pleasant interactions" with Mr. Bowman, and held a "positive opinion" about him. He believed Mr. Bowman "always tried to be helpful, and he had a calming influence on the unit, with the other guys." Mr. Chudd observed Mr. Bowman to "always have a positive attitude and willing to put the work in" to solve a problem. He also referenced Mr. Bowman's work on the IRC, in that "a lot of the other inmates would bring him concerns, he was very eloquent, and he kept the peace with the other inmates." . . .
>
> Mr. Chudd also directly observed Mr. Bowman's ability "work through things, and deal with things" in an effective manner. He "has seen Mr. Bowman face physical and psychological challenges, and put in the work" to improve. He cited Mr.

> Bowman's serious back condition, after which he "didn't give up, was positive, put in a lot of work to rehab himself."
>
> Overall, he "enjoyed dealing with Mr. Bowman, we had interesting conversation, he has a perspective I don't have. He was helpful in keeping the peace on the unit, he has a strong penchant for stepping up and keeping everyone stable, and taking on a peacemaking role…he was well received by the other inmates." He "never felt uncomfortable or threatened in any way" by Mr. Bowman and was "more at ease" when meeting with Mr. Bowman, than some of the other inmates. He believes Mr. Bowman would be able to "thrive and survive" in GP [General Population] as long as he is stepped down appropriately, from the environment on death row (close custody) to the more open environment of GP.

Exh. 21 at 13-14.

Former Associate Warden Ralph Hunter, who worked at SCDC from 1995 to 2011 and oversaw death row at Lieber Correctional Institution from 2009-2011, He stated:

> As an associate warden, I did not always interact with the death row inmates on a day-to-day basis, but I did develop professional relationships with some of the inmates. Marion Bowman was one of those inmates who I had a professional relationship with over the years. If I ran into Marion again, I would be excited to see him and would want to give him a hug.
>
> I made Marion a dorm keeper, which was a job where the inmate is allowed out of his cell to sweep, clean the shower, and collect the food trays. Death row was mostly locked down and all the inmates wanted out of their eells, so the job was coveted. Getting the job was a privilege and Marion Bowman earned the trust to be assigned the job.
>
> As a dorm keeper, Marion worked hard. He was always jovial. Not one person expressed concern about Marion being out of his cell. Even though Marion was a big man, no one was concerned about him causing trouble. Rather than cause trouble, Marion would help the officers interact with the inmates and explain the context of inmate concerns.
>
> While I was associate warden, I offered a character class to the officers and even the death row inmates to try to motivate people to model good behavior. The class only lasted for 2-3 months but Marion took the class and did well in it.
>
> Marion's behavior was already that of a model inmate before he took the class, but he always welcomed any means of filling his time constructively. He adjusted well to prison and helped others to adjust, as well. Marion was low key, easy going, and likeable by staff and inmates alike.

> Marion was selected to be a part of the Inmate Representative Committee (IRC). The purpose of the IRC was for the prison staff and the inmates to have an open line of communication about issues like safety, food, interactions with staff members, and conditions of the prison, among other issues. As a member of IRC, Marion was reasonable, fair, and someone I could trust.
>
> ****
>
> I support a conversion or commutation of Marion's sentence to a life sentence.

Exh. 23, Ralph Hunter Affidavit. Warden Hunter gave similar information in his interview by Dr. Knight. Exh. 21 at 6-7.

Former SCDC Lt. Darryl McGhee retired in 2018. He was a Lieutenant and worked on death row at Lieber for five years.

> I got to know all of the guys on death row during my 12-bour shifts. Marion Bowman was a nice, quiet guy, who liked playing basketball. Marion was no trouble. He followed the rules and got along with everyone. Marion also had a job cleaning up on the row.

Exh. 24, Darryl McGee Affidavit.

Per Dr. Knight:

> Former SCDC Officer Eddie Berry worked at SCDC from 2009 to 2014, spending two of those years on death row. He recalled Mr. Bowman well, stating he was “no trouble,” and did not remember any rule violations or disciplinary infractions associated with Mr. Bowman. He described Mr. Bowman as “very social,” having positive relationships with the other inmates, and with the officers. He recalled Mr. Bowman speaking about the Bible, as well as sports, and that he would “laugh and joke” in a good natured manner during their contacts.
>
> Former SCDC Warden Stan Burtt retired from SCDC in 2008. He “remembered that Marion was no trouble” and had no “memory” about an [alleged] escape attempt.
>
> Former SCDC Deputy Warden Vaughn Jackson recalled Mr. Bowman as a “model inmate,” with good behavior. He also recalled Mr. Bowman as an “inmate rep” and a “leader on death row” who did a good job, and who would “probably do fine in general population.” Former SCDC Major Fred Thompson worked at SCDC from 1970 to 2017. He recalled Mr. Bowman “didn’t give him any trouble.” He did not recall any [alleged] escape attempt from 2007, and did not recall Mr. Bowman

> associated with any escape attempt. He believes Mr. Bowman would do "fine" in general population.

Exh. 21 at 7. *See also* Exh. 38, Kimberly Fuhrmeister Affidavit (describing Vaughn Jackson interview); Exh. 39, Stacy Ferraro Affidavit (describing Eddie Berry interview); Exh. 40, Stacy Ferraro Affidavit (describing Stanley Burtt Jr. interview).

Family Stability & Support

> Dr. Maddox noted that Bowman has excellent family support. Exh. 19 at 7.
>
> Mr. Bowman married Dorothy Mae Williams (Dot) on 12/6/99. He was 19 and she was 23. They remain married and in communication and share a daughter Marissa. Marion Jr. and Marissa talk regularly. She also visits him. . . .
>
> Mr. Bowman has excellent family support. He speaks with his cousin, daughter, mother, father and aunt regularly. He continues to have visits from his mother and sister, Kendra. He reported he continues to speak with his father.

Id. Likewise, Dr. Knight noted that Bowman keeps very "close relationships" with family members and some of his prior attorneys. Exh. 21 at 8; Exh. 16, Jim Brown Affidavit at 1–2; Ex. 37 Shannon Brown Affidavit. Dr. Knight interviewed some of these collateral sources and they and additional family members provided affidavits for this Court's review.

Bowman's daughter Marissa spoke to Dr. Knight. As Dr. Knight summarized Marissa's interview:

> She described her father as "outgoing, sweet, loving, caring, honest, he will give you his honest opinion." During her childhood, Mr. Bowman, "made sure we had Christmas every year, gave our names to the Angel Tree, he does try…" When asked what she and Mr. Bowman discuss in their daily phone calls, she stated, "school, he's real big on school, big on me getting my education, wants me to go to college, he keeps me on the right path." He "tells me to stay out of trouble, stay away from people who are no good…we talk about a lot of stuff, he makes sure I'm alright with my mom, she has brain cancer, and he tells me not to look at every situation as a negative situation." She has a "great bond with dad, even though he's in prison, we got a bond, he's spiritually here, virtually, I feel real close to him…when I get depressed and upset and he talks to me, he calls to make sure I'm not depressed."

> He has also "sent me a Bible, helps me study the Bible, sent me a Bible with his name on it, put little notes in there. He is very spiritual, and he's an active dad, he's just not here physically, but he's active, I really appreciate him and love him very much."

Exh. 21 at 8-9. Marissa also provided an affidavit. She has "a very strong bond that I know most people with incarcerated dads don't have." Exh. 25, Marissa Bowman Affidavit at 1. "Growing up, [she has] strong memories of [her] dad always reminding [her] that doing well in school was totally up to [her] and that is where [she] should focus [her] efforts." *Id.* at 2. Marissa attributes successfully completing high school and college courses to her father's support. *Id.*

Bowman's mother, Dorothy Denise Bowman, also spoke with Dr. Knight and provided an affidavit. As Dr. Knight noted, Bowman calls his mother every day to check on her. He prays with her and tells her "scriptures to read" and also "quotes them from memory" to her. Exh. 21 at 9. Bowman's mother has relied on him since he was a child. Exh. 26, Dorothy Bowman Affidavit at 3. Incarceration has not prevented Bowman from providing support to his mother and other family members.

> Marion is someone who constantly uplifts everyone in our family. He sends cards and letters for the holidays. He has developed an impressive talent for art and is always sending us beautiful drawings with positive images to make us smile. He makes sure to remind us of when we have follow-up doctors' appointments and reminds us that we need to get flu and COVID vaccinations in order to protect ourselves. He does whatever he can to make sure that we can live long and happy lives. I do not know what I would do without his love and support.

Id. at 2.

Marion Bowman, Sr., Bowman's father, who has colon cancer and fears he does "not have long to live," Exh. 27, Marion Bowman, Sr., Affidavit, also spoke with Dr. Knight, Exh. 21 at 9, and provided an affidavit, Exh. 27. He has been supported by Bowman throughout his cancer diagnosis and states "[w]e all need somebody to lean on and Marion would be that person for me. He is always encouraging me not to give up, to stay strong." *Id.*

Quanisha Clark, Bowman's maternal cousin who was just four years old when Bowman went to jail, also spoke to Dr. Knight and provided an affidavit. Exh. 21 at 9; Exh. 28, Quanisha Clark Affidavit. She has developed a strong supportive relationship with Bowman over the last four years. Exh. 21 at 9. Clark struggles with "anxiety around people" and Bowman helps to calm her and reassures her. *Id.* He supports and encourages her in life and her career. *Id.* She describes him as having a strong belief in God that he shares with her by reading scripture and praying together. *Id.*

Other family members have also submitted affidavits on Bowman's behalf. Maternal aunt, Lorraine Johnson, describes Bowman as someone who is "always trying to uplift you. . . he is always asking about everyone else and encouraging them to be upbeat." Exh. 29, Lorraine Johnson Affidavit at 1. Marion provides his mother with a lot of support. . ." *Id.* Marissa, Bowman's daughter, recently gave birth to Bowman's granddaughter.[45] *Id.* Marissa is "very close with her father." Johnson described Bowman's close relationship with his daughter:

> Marissa relies on Marion a lot and frequently goes to him when she needs to talk through the things that happen in her life. Despite his incarceration, they have maintained a close father daughter relationship. Marissa visits her father regularly and he helps her maintain her mental health through those visits."

Id.

Francis Bruce, Bowman's maternal aunt, states that Bowman "still plays an important role in our family. He is always calling around to check on everyone." Exh. 31, Francis Bruce Affidavit, at 1. Frances has seen change in Marion and knows that religion is very important to him.

[45] Bowman has several other grandchildren through his stepsons that he has also treated and thought of as his own. Exh. 30, Dorothy Bowman Affidavit, at 1.

> Marion has changed for the better. I know that religion has become really important to Marion. He participates in the prison ministry and has talked to me about how God and religion gives him hope.[46] We always talk about the Lord together.

Id.

Yolanda Brown, Bowman's younger sister, who was coerced by the state to testify against him,[47] states that the family "need[s] Marion around as a male father figure. Even though Marion has never had the opportunity to meet my children, he has been influential in their lives." Exh. 32, Yolanda Bowman Affidavit at 1. Although they are now grown, her children always get excited to talk to Bowman on the phone. *Id.* Bowman always encouraged the children to do the right thing, go to school, continue their education, "and stay away from bad influences." *Id.* Yolanda has noticed that Bowman's attitude has changed a lot since he was confined in 2001. *Id.* at 2. He is a better person and more family oriented. *Id.* He also "talks about praying and the Lord all the time." *Id.* at 2. He even ends phone calls with "stay prayed up, keep your head up." *Id.* Yolanda has also noticed the effort that Bowman "has put into developing as a person and his dedication to continuing to learn and grow. His communication skills and vocabulary have improved so much over the years." *Id*.[48]

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[46] Notably, Bowman even frequently quotes the South Carolina motto "Dum Spiro Spero" which is on the State Seal and means "While I Breathe I Hope." *See* https://www.scstatehouse.gov/studentpage/coolstuff/seal.shtml#:~:text=The%20State's%20two%20mottos%20surround,While%20I%20Breathe%20I%20Hope (last visited December 15, 2024).

[47] In the Solicitor's Investigation Interviews Needed Memo, Exh. 1, the Solicitor noted, with reference to Yolanda, "May need to threaten her and mother with prosecutions to get statement," and that is exactly what happened as she testified pursuant to a plea agreement. App. 3735.

[48] As discussed below, Yolanda's observation about Bowman's improvement in learning, vocabulary, and communication skills has actually been confirmed by recent expert evaluations. Exh. 21, Knight Report, at 15.

Lena Clark, Bowman's second cousin and Quanisha's mother, writes Bowman and talks on the phone with him regularly. Exh. 33, Lena Clark Affidavit, at 1. "When we talk he often shares verses that he has read in the Bible and mentions how important God is to him." *Id.*

Religious/Spiritual

As noted by a number of family members, Bowman is very religious and spiritual. The experts noted, as part of finding his adaptability to confinement, that his daily routine includes prayer and reading the Bible. Exh. 19 (Maddox) at 10; Exh. 21 (Knight) at 10. His coping method of writing in his journal and writing poetry is also "spiritual in nature." *Id.* at 12. "He often cites scripture or references God, and details his gratitude, praise and relationship with God." *Id.* Dr. Knight also found that "[h]e is heavily involved in Bible study with volunteer chaplains. He 'reads the prayer or scripture of the day on the tablet' and reads inspirational spiritual material." *Id.* In addition to his activities in his alone time, with his family, and with volunteer prison ministers, Bowman has been involved long term with Christian Activities on death row and has completed "'course after course,' through various religious organizations." Exh. 21 at 10; *id.* at 11 (listing certificates received).

Three of those ministers spoke with Dr. Knight. Minister Gordon Manning, who visited death row between 2011 and 2016, told Dr. Knight that Bowman is "a delight of a person that Manning "befriended" and enjoys talking to. Exh. 21. At 10. Bowman is "eager, enthusiastic to learn" and "worked hard to complete Bible courses." *Id.* Bowman is a "spiritual guy" who inspires Manning with his "good spirit" and friendly nature. *Id.*

> Whenever I see Marion, he always jumps up and comes to the door eager to speak with me. We talk about the Bible, his life, and his workouts. He is always excited about reading and learning. Despite being on death row, Marion never appears to be angry or depressed, which differentiates him from the other men on the row.

> Marion stands out amongst his peers. While others tend to have a negative outlook when it comes to prison, Marion has always been a positive person. It is easy to connect with Marion and I always look forward to seeing him.
>
> Marion is a good guy. He is well behaved and kind to others. It is apparent to me that Marion is very proud of all of his accomplishments. He skips to his desk in order to get his work for our Bible Study sessions and then skips back to the door in order to share his work with me.

Exh. 34, Gordon Manning Affidavit.

Minister Larry Tyree, who has been a volunteer chaplain on death row and has been meeting with Mr. Bowman for 20 years, described Bowman to Dr. Knight as "affable, easy to talk to, we've become good friends." Exh. 21 (Knight) at 10.

> Early in Mr. Bowman's incarceration, Mr. Tyree established a book program on death row, "to make sure they were reading something of substance." He stated Mr. Bowman was very responsive to this program. Mr. Tyree saw "a radical change" in him, "Marion was reading a lot, he was enjoying what he was reading." Mr. Bowman appeared committed to learning new things, educating himself, and expanding his knowledge and viewpoint through the book program. Mr. Tyree also leads regular Bible study on death row "every other week." He described Mr. Bowman as committed and participatory, "asking lots of questions." Mr. Bowman "likes to be challenged," enjoys learning and "nothing is left unspoken."
>
> Mr. Tyree also observed that Mr. Bowman is "completely adjusted to prison" in that he "is a shadow of the man he was before prison." He "is good, and decent, gets along with everyone very well, and is focused." . . . He also "tries to see the positive and is very optimistic." Mr. Tyree gave the example of Mr. Bowman finding inspirational or spiritual quotes on the wall of every cell he has been in, as a means of "seeing the positive."

Id. Tyree also provided an affidavit adding: "I really enjoy talking to Marion. He is one of the funniest people I know. We talk about just everything without secrets." Exh. 35, Larry Tyree Affidavit, at 1.

> I consider Marion to be a good friend and a good person. He likes to talk about basketball and just about everything going on in his life. Marion is the first person to step in to break up a fight.
>
> I whole heartedly support a conversion or commutation of Mr. Bowman's sentence to a life sentence.

Id.

Bob McAlister, President of McAlister Communications and former Chief of Staff for Governor Carroll Campbell,[49] also spoke with Dr. Knight and provided an affidavit.

> Bob McAlister has had a death row ministry "on and off for the past 35 years." He has been working with Mr. Bowman since 2018 or 2019, after resuming his ministry. He is on death row "every other week" conducting Bible study, and religious discussions, as well as a "Christian worship service." He stated Mr. Bowman is "always there, every time, he's very quiet, and respectful, he doesn't complain about his plight, he's very polite." He believes Mr. Bowman is "dedicated to Christ, a born again Christian" who is "absolutely!" sincere and genuine in his beliefs. Given his many years of working in corrections, Mr. McAlister was asked if he saw any concerns with Mr. Bowman, should he be transferred to general population [GP]. He stated, "no risk at all, none whatsoever, and I would go so far as to say that if he had the right infrastructure on the street, he would not be a risk to society, but certainly no risk in GP." He sees characteristics in Mr. Bowman that would lend himself to "be successful" in a GP setting, such as Mr. Bowman's humbleness, politeness, quiet nature, and pleasant demeanor.

Exh. 21 (Knight) at 11. Some of this same information was included in McAlister's Affidavit.

Exh. 36, Bob McAlister Affidavit, at 1. Additional information in the affidavit reflects:

> Mr. Bowman is very dedicated to the worship service and is an active participant. He often leads us in singing at the end of the service. I regularly ask him to close the service by singing Amazing Grace.
>
> Talking to Mr. Bowman is like talking to anyone outside the Department of Corrections. I have not detected any major psychiatric problems or issues in my interactions with him.
>
> I do not believe Mr. Bowman would be a risk if he were transferred to the general population. I would go so far as to say that, if he had the right infrastructure on the street, he would not be a risk to society, but certainly no risk in the Department of Corrections general population. In fact, Mr. Bowman is one of the few people I've met in the Department of Corrections who, if he were released, I would invite over to spend time with my family.
>
> ****

[49] https://www.mcalistercommunications.com/team/ (last visited December 15, 2024).

> Overall, I would describe Mr. Bowman as a humble, sweet man. I believe he has characteristics that would lead to Mr. Bowman being successful in a general population setting, including humbleness, politeness, a quiet nature, and a pleasant demeanor.
>
> I support a conversion or commutation of Mr. Bowman's sentence to a life sentence.

Id.

Continuous Self-Improvement

Prior to his trial in 2002, Bowman's IQ testing fell in the "'low average' range of intellectual functioning" and neuropsychological testing was also mostly average "without obvious deficit[s]." Exh. 21 (Knight) at 15. Testing in 2022 by Joette James, Ph.D., revealed that Bowman's "overall intellectual functioning" now is "essentially 'average.'" *Id.* His language skills are now "great." *Id.* "Dr. James further noted that Mr. Bowman had improved his academic skills over time, in comparison to his testing from twenty-one years ago." *Id.* Test scores from 2002 compared with testing in 2022, indicated great improvement, which "is likely due to Mr. Bowman's heavy involvement in reading and writing over the years, both through his biblical studies, and through his own writings." *Id.* Bowman's sister also noted Bowman's work for improvement. Exh. 32 at 2.

iii. Conclusion.

As Dr. Knight found after full evaluation, "Mr. Bowman is at significantly low risk for future violence in a prison setting, with proven adaptability. Exh. 21 at 23, 21. His overall course of incarceration to date reflects his adaptability to confinement and his lack of violence.

> During his incarceration, Mr. Bowman has had very few disciplinaries, all of minimal severity. He has a remote history of one minor assaultive infraction, during a prior incarceration at age 17, involving a fight with another inmate. There were no injuries, or weapons used. He has maintained very strong interpersonal relationships with family and others, through daily calls, letters and in-person visits. For 12 years, he served on the Inmate Representative Counsel, acting as liaison between the administration and death row inmates. The Associate Warden who chose him for the

> "IRC" described him as "instrumental" in this role, by effecting positive change. He has heavily involved himself in spiritual and religious activities, through self-study courses, and by meeting regularly with prison ministry staff.

Exh. 21 at 22.

While much of this evidence was not available during trial and sentencing, again, it should be considered by this Court in determining whether Bowman's death sentence is "shocking to the conscience" and should be commuted to a life sentence or whether the death sentence should be affirmed by this Court and carried out despite the constitutional violations in the case and the 22 years Bowman has spent on death row, which is more than half of his life. Enough is enough. Even assuming this Court does not find reversible error under a pure *Brady* or *Strickland* analysis, Bowman's death sentence should be commuted to life imprisonment without parole.

CONCLUSION

Bowman faces execution based on trial and sentencing proceedings rendered unreliable because of the State's withholding of evidence impeaching the credibility of the main witnesses against Bowman and his own trial counsel's insertion of racist attitudes into the proceedings. The sentencing determination is further undermined because it is excessive in light of the evidence of Bowman's character and growth in the 22 years since his sentencing. This Court is the last judicial protection against such an unjust outcome and should grant the writ of habeas corpus and remand for a new trial or sentencing hearing. Bowman believes oral argument would be beneficial due to the complex nature of these issues, and he respectfully requests that the Court schedule the case for oral argument.

[*Signature block appears on the next page.*]

Respectfully submitted,

s/ Lindsey S. Vann

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