

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

Dec 30 2024

S.C. SUPREME COURT

Original Jurisdiction

MARION BOWMAN, JR., SK #6006,

PETITIONER,

v.

BRYAN P. STIRLING, COMMISSIONER, SOUTH CAROLINA
DEPARTMENT OF CORRECTIONS,

RESPONDENT.

Appellate Case No. _____

RETURN TO PETITION FOR WRIT OF HABEAS CORPUS

Pursuant to his joint “Motion to Modify Schedule for Issuance of Execution Notices,” which was sought on the grounds of honoring the holidays, because “[s]ix consecutive executions with virtually no respite will take a substantial toll on all involved, particularly during a time of year that is so important to families”¹ Petitioner Marion Bowman, Jr., (hereinafter “Bowman” or “Petitioner”) has not received a notice of execution in his case and will not receive one until January 3, 2025 or later.² (See November 14, 2024, Order, Appellate Case No. 2024-001373). Nevertheless, on December 16, 2024, Bowman filed his lengthy Petition for Writ of Habeas Corpus. Therein, he asserts that he is entitled to commutation of his sentence, a new trial, or a new

¹ Chief among those families for whom the toll is most substantial, are the families of the Victims that have had to be notified and educated on the purpose and prospectus of such filings.

² Inmates Brad Keith Sigmon, Mikal D. Mahdi, and Steven V. Bixby likewise have this temporary stay in place. Inmate Bixby moved for an additional stay from this Court so as to pursue a second PCR application on Tuesday, November 26, 2024.

sentencing proceeding on the meritless claims that 1) the State committed *Brady* violations relating to the “Sam Memo,” the mental health records of Gadson, and the unrelated pending charge against Hiram Johnson (all of which have been raised, litigated, considered, and ruled upon by multiple state and federal courts, including this Court, since 2006); 2) lead trial counsel was a “racist” who “injected his racist opinions and beliefs into his representation of Bowman” during trial; and 3) this Court should grant Bowman a new proportionality review³ or otherwise overrule the sentence handed down by the jury for the execution-style murder of Kandee Martin on the grounds of his good character, his time of incarceration, and Bowman’s own views of the interests of justice. Bowman has failed to show any such error, much less constitutional error, warranting the exercise of original jurisdiction in this matter. Habeas relief should therefore be denied.

STATEMENT OF THE CASE

Bowman is currently confined in the Broad River Correctional Institution Secure Facility of the South Carolina Department of Corrections as a result of his Dorchester County convictions and death sentence for the murder of victim, 21 year old Kandee Martin (hereinafter referred to as Victim), and third-degree arson. Bowman received a sentence of ten years for his arson conviction. Victim’s murder came as a result of an execution style shooting by Bowman while Victim pleaded for her life. The arson followed as a result of Bowman’s attempt to dispose of the body by setting Victim’s car on fire with her body in the trunk.

PROCEDURAL HISTORY

1. Trial Level Proceedings.

The Dorchester County Grand Jury indicted Bowman during the June 18, 2001 Term of Court of General Sessions for Murder and Arson, Third Degree. On July 13, 2001, the State served

³ Petitioner cites to *Moore v. Stirling*, 436 S.C. 207, 871 S.E.2d 423 (2022).

Bowman with a Notice of Intent to Seek the Death Penalty and Notice of Evidence in Aggravation. (JA 925-926; JA1334).⁴ Bowman was assigned counsel for his defense, and said attorneys were specially qualified to represent a defendant in a death penalty trial.

Bowman was tried by a jury before the Honorable Judge Diane S. Goodstein. At the trial, Bowman was represented by death penalty qualified counsel, Mr. Norbert E. Cummings (hereinafter “Mr. Cummings” or “counsel”) and Ms. Marva A. Hardee-Thomas. See S.C. Code Ann. § 16-3-26(B)(1). The State was represented by Solicitor Walter M. Bailey and Assistant Solicitor Benjamin Lafond. The guilt phase of the trial lasted from May 17 to May 20, 2002. Bowman was convicted of both charges. (JA 919).

Bowman exercised his right to the twenty-four hour cooling-off period provided by S.C. Code Ann. § 16-3-20(B). (JA 924). The sentencing phase was conducted on May 22 and 23, 2002. Judge Goodstein submitted the following aggravating factors to the jury:

- (1) The murder was committed while in the commission of a criminal sexual conduct;
- (2) The murder was committed while in the commission of kidnapping;
- (3) The murder was committed while in the commission of robbery with a deadly weapon; and
- (4) The murder was committed while in the commission of larceny with the use of a deadly weapon.

(JA 1375-1378). Regarding mitigation, the judge submitted that the Defendant had no significant history of prior criminal convictions involving the use of violence against another person, the age

⁴ Though often state court documents, references to “JA” pages numbers denote materials from the Joint Appendix filed with the Fourth Circuit Court of Appeals, and such will be provided for the convenience of this Court.

or mentality of the defendant at the time of the crime, as well as the concept of non-statutory mitigating circumstances. (JA 1384-1385).

The jury found the existence of two of the four submitted aggravating factors: the murder was committed in the commission of a kidnapping, and the murder was committed during the commission of a larceny with the use of a deadly weapon. (JA 1404). The jury recommended Bowman be sentenced to death. (JA 1404). Judge Goodstein subsequently sentenced Bowman to death for the murder conviction, and ten years confinement for the third-degree arson conviction.

2. *Direct Appeal Proceedings*

A timely Notice of Appeal was served and filed on May 24, 2002. On appeal, Robert M. Dudek, Esquire, Assistant Appellate Defender of the South Carolina Office of Appellate Defense, represented Bowman. (*See* JA 1410-1466; at 1541-1550). Assistant Attorney General S. Creighton Waters, Esquire, represented the State. (JA 1467-1540). The appeal was perfected and oral arguments were heard on October 6, 2005. This Court affirmed Bowman's convictions and sentences in a published Opinion that included the requisite proportionality review. *State v. Bowman*, 366 S.C. 485, 489, 623 S.E.2d 378 (2005). A petition for rehearing was denied by the Court on January 6, 2006.⁵

Bowman filed a Petition for Writ of Certiorari with the United State Supreme Court on April 5, 2006. The Supreme Court of the United States denied certiorari by Order dated June 12, 2006. (JA 1558).

3. *State Collateral Action Proceedings*

⁵ The substance of his direct appeal arguments is otherwise not pertinent to this matter.

Bowman next filed an Application for Post-Conviction Relief on April 7, 2006. (JA 1551-1557). The State filed a Return, Motion to Dismiss, and Motion for Summary Judgment on September 1, 2006. (JA 1561-1598). The Supreme Court of South Carolina stayed the execution for the post-conviction relief action and appointed the Honorable James E. Lockemy, Circuit Court Judge to hear the PCR case.

Judge Lockemy appointed James A. Brown, Jr., Esquire and Charlie Jay Johnson, Jr., Esquire to represent Bowman during the post-conviction relief action. By Order filed February 6, 2008, Mr. Johnson was relieved and John Sinclair, III, Esquire was appointed to represent Bowman with Mr. Brown during the PCR action.⁶ (JA 1657-1658). Bowman, through counsel, filed multiple amended applications, culminating in his Fourth Amended Application on June 5, 2009, after the evidentiary hearing.⁷ (JA 1659-1667; JA 1672-1683; JA 1693-1709; JA 2908; JA 2927-3035). The State filed an Amended Return, Motion to Dismiss, and Motion for Summary Judgment on March 15, 2007. (JA 1599-1652).

The evidentiary hearing was held on September 15-18, 2008; September 29-30, 2008; November 24, 2008; and December 18, 19, and 22, 2008. The court allowed post-hearing briefing. The State filed its Brief in Opposition to Application for Post-Conviction Relief on August 10, 2009. (JA 3036). Bowman filed a Reply to Respondent's Brief in Opposition on September 16, 2009. (JA 3238-3266).

⁶ Bowman has been represented by counsel at every stage of his direct and collateral proceedings. For indigent defendants seeking capital post-conviction relief, South Carolina provides for the appointment of two attorneys with a heightened qualification requirement: "at least one attorney appointed pursuant to section 17-27-160(B) must have either (1) prior experience in capital PCR proceedings, or (2) capital trial experience and capital PCR training or education." *Robertson v. State*, 795 S.E.2d 29, 36 (S.C. 2016); see also S.C. Code Ann. § 17-27-160 (B).

⁷ Under Rule 29(b), Bowman also filed a Motion for New Trial Based Upon After Discovered Evidence on September 8, 2008. The Motion was denied December 20, 2009.

On March 12, 2012, the PCR Court filed its Order of Dismissal. (JA 3267). The Order of Dismissal addressed more than *forty* (40) alleged claims for relief, including the *Brady* issues now raised as grounds for habeas relief.⁸ Bowman filed a Motion to Alter or Amend Judgment on March 19, 2012, and a memorandum in support of the motion on April 25, 2012. (JA 3398-3415). The State filed a letter response to the motion on May 2, 2012. (JA 3416). The PCR Court filed its Order to the Motion to Alter or Amend Judgment on October 31, 2012. (JA 3417).

Bowman appealed. Again, appellate counsel Dudek and Alexander filed his Petition for Writ of Certiorari to the South Carolina Supreme Court on October 18, 2013. (JA 3418-3504). The State made its Return to the initial Petition for Writ of Certiorari on March 24, 2014. Petitioner then submitted an Amended Petition for Writ of Certiorari on April 30, 2014. The State made its Return to the Amended Petition for Writ of Certiorari on May 6, 2014. (JA 3574). The Amended Petition set forth the following grounds for relief:

1.

Whether trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to investigate and prepare for the impeachment of Taiwan Gadson and by failing to impeach the testimony of Taiwan Gadson in any meaningful way, including, but not limited to, the fact that the state threatened Gadson with the death penalty in his plea agreement, how Gadson' s prior inconsistent statements showed that his story changed, and the fact Gadson had access to the murder weapon?

2.

Whether trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to investigate and prepare for the impeachment of Travis Felder and by failing to impeach the testimony of Travis Felder in any meaningful way, including impeaching Felder with a videotape that would have shown Felder

⁸ The only *Brady* argument that has not been presented to this Court before, but was nonetheless available to Petitioner had he wished to raise it in the appropriate manner, is the allegation that prejudice from these previously asserted *Brady* claims arises in relation to his sentencing. There is no logic or merit to this argument. (*Infra*).

lied to the jury about buying the gas to burn the decedent's car, impeaching Felder on bias with his original charges, and impeaching Felder with his prior inconsistent statements?

3.

Whether trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to investigate and prepare for the impeachment of Hiram Johnson and by failing to impeach the testimony of Hiram Johnson by cross-examining Johnson on his prior inconsistent statement which, critically, did not include his allegation at trial that petitioner confessed to the murder?

4.

Whether petitioner is entitled to a new trial because the state withheld information necessary for impeachment and necessary for defense in violation of petitioner's due process rights under the Fourteenth Amendment and under the rules of discovery, those items being a memorandum of a law enforcement interview with Ricky Davis who heard Gadson confess to the murder, Gadson's mental health evaluation, and the fact that Hiram Johnson had unindicted pending charges at the time of his testimony?

5.

Whether trial counsel rendered ineffective assistance of counsel because counsel had a conflict of interest between two of her clients -- Petitioner Bowman and Ricky Davis -- that caused counsel to fail to call Ricky Davis as a witness, despite Davis' statement that exculpated Petitioner Bowman and established Gadson shot the victim?

6.

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

7.

Whether petitioner's rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and under state law were violated because the trial judge failed to properly consider his application as evidenced by the PCR court's wholesale adoption of the state's proposed order?

Petitioner made its Reply to the Return on May 5, 2014.⁹

This Court issued an Order granting Certiorari as to Question 6, *but denied certiorari on the remaining questions presented*, including the *Brady* issues now before this Court. (JA 3600). The parties then submitted briefing as to Question 6. (JA 3612-3678). Oral argument was held on April 13, 2017. This Court then issued its published Opinion, *Bowman v. State*, 422 S.C. 19, 809 S.E.2d 232 (2018), filed January 10, 2018, wherein it affirmed Bowman's conviction and sentence. (JA 3679-3699).

4. *Section 2254 Habeas Action*

Bowman then turned to the federal courts. Bowman was represented by attorneys Elizabeth Franklin-Best and Laura Young in the litigation of his Petition for Federal Habeas Corpus Relief before the South Carolina District Court. Bowman filed his Petition for Writ of Habeas Corpus on January 10, 2019, along with corresponding memorandum and exhibits in support. (JA 3700-3807). In his Petition, Bowman sought federal habeas relief on the basis of the following grounds:

- Ground I. Trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to investigate and prepare for the impeachment of Taiwan Gadson and by failing to impeach the testimony of Taiwan Gadson in any meaningful way, including, but not limited to, the fact that the state threatened Gadson with the death penalty in his plea agreement, how Gadson's prior inconsistent statements showed that his story changed, and the fact Gadson had access to the murder weapon.
- Ground II. Trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to investigate and prepare for the impeachment of Travis Felder and by failing to impeach the testimony of Travis Felder in any meaningful way, including impeaching Felder with a videotape that would have shown Felder lied to the jury about buying the gas to burn the decedent's car, impeaching Felder on bias with his original charges, and impeaching Felder with his prior inconsistent statements.
- Ground III. Trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to investigate

⁹ Issue #4 encapsulates the three *Brady* claims now being reasserted.

and prepare for the impeachment of Hiram Johnson and by failing to impeach the testimony of Hiram Johnson by cross-examining Johnson on his prior inconsistent statement which, critically, did not include his allegation at trial that petitioner confessed to the murder.

- Ground IV. Petitioner is entitled to a new trial because the state withheld information necessary for impeachment and necessary for defense in violation of Petitioner's due process rights under the Fourteenth Amendment and under the rules of discovery, those items being a memorandum of a law enforcement interview with Ricky Davis who heard Gadson confess to the murder, Gadson's mental health evaluation, and the fact that Hiram Johnson had unindicted pending charges at the time of his testimony.
- Ground V. Trial counsel rendered ineffective assistance of counsel because counsel had a conflict of interest between two of her clients – Petitioner Bowman and Ricky Davis – that caused counsel to fail to call Ricky Davis as a witness, despite Davis' statement that exculpated Petitioner Bowman and established Gadson shot the victim.
- Ground VI. Defense counsel was ineffective for failing to object to the solicitor's examination of James Aiken regarding favorable prison conditions and recreational facilities available to inmates since this evidence interjected an arbitrary factor into Petitioner's trial and violated his right to due process.
- Ground VII. (no claim listed)
- Ground VIII. The trial court erred by refusing to instruct the jury on the statutory mitigating circumstances that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, since there was expert testimony of Petitioner's substance abuse problem, and evidence the parties were drinking alcohol throughout the day. The South Carolina Supreme Court's opinion, holding there was no evidence that Petitioner was intoxicated on the day of the murder, is based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.
- Ground IX. (no claim listed)
- Ground X. The court erred by refusing to grant a mistrial where the solicitor attempted to question James Aiken about the possibility of escape, since the solicitor injected an improper consideration and an arbitrary factor into the sentencing phase. The jury's attention is properly focused on the penalties of death and life without parole, and not speculative matters beyond Petitioner's control. Defense counsel correctly argued that the judge could not remove the taint through a curative instruction once escape was raised by the state as an issue.

(Roman numerals VII and IX were not listed in the Petition). Petitioner has also raised two additional grounds for relief as “unexhausted claims”. These claims alleged:

- A. Trial counsel rendered ineffective assistance of counsel for failing to object to the Solicitor’s arguing to discount Petitioner’s mitigation because there was no “nexus” between Petitioner’s proffered mitigation and the crime.
- B. Trial counsel rendered ineffective assistance of counsel by failing to call a number of witnesses who were available to trial counsel, and who would have provided the jury with highly mitigating evidence of Petitioner’s dysfunctional childhood that the jury did not otherwise hear.

Respondents filed their Motion for Summary Judgment, along with the Return and Memorandum in Support on May 10, 2019. (JA 3809-3925). Bowman filed his Petitioner’s Traverse and Response in Opposition to Respondents’ Motion for Summary Judgment on August 5, 2019. (JA 3926). Respondents then filed their Reply to Petitioner’s Response in Opposition on August 19, 2019. (JA 3965).

The Honorable Bristow Marchant, United States Magistrate Judge, issued a Report and Recommendation finding that Bowman had failed to satisfy his burden for federal habeas relief. The magistrate recommended that summary judgment be granted and the action denied. (JA 3984-4103). Counsel for Bowman filed his Objections to the Report and Recommendation on February 14, 2020. (JA 4105-4129). Respondents filed their Reply to Bowman’s Objections to the Report and Recommendation on February 28, 2020. (JA 4131-4137). The Honorable Terry L. Wooten, Senior United States District Judge, issued an Order accepting the Report and Recommendation, denying federal habeas relief, and denying a certificate of appealability on March 26, 2020. (JA 4138-4213).

Counsel for Bowman filed his Motion to Alter or Amend the Order of the District Court on April 22, 2020, along with a Memorandum in Support of Bowman’s Motion to Alter or Amend Judgment, filed May 14, 2020. (JA 4215-4229). Respondents filed a Response in Opposition to

the Motion to Alter or Amend Judgment on June 15, 2020. (JA 4231-4245). Counsel for Bowman followed by filing a Reply on June 30, 2020. (JA 4246-4250). On August 7, 2020, the District Court issued its Order denying the Motion to Amend. (JA 4252-4261).

Counsel for Bowman filed a Notice of Appeal on September 4, 2020. On February 5, 2021, Counsel for Bowman filed his opening brief raising his claims for relief to the United State Fourth Circuit Court of Appeals. Pursuant to 28 U.S.C. § 2553(c)(1)(A), the Fourth Circuit granted a Certificate of Appealability as to Bowman's *Brady* claims, but it denied appealability to the remaining issues. Respondents filed their Brief of Respondents on April 27, 2021, and Counsel for Bowman filed a Reply on May 24, 2021. Oral argument on these matters was conducted remotely. On August 16, 2022, the Fourth Circuit Court of Appeals issued its published Opinion and Judgment affirming the decision of the district court. The Mandate was stayed pending Bowman's Petitioner for Rehearing *En Banc*. The Fourth Circuit later denied Bowman's petition for rehearing *en banc* by Order filed September 13, 2022. The Mandate was issued on September 21, 2022.

Counsel for Bowman then filed his Petition for Writ of Certiorari with the Supreme Court of the United States on February 10, 2023. Respondents' filed their Brief in Opposition on April 17, 2023. On May 22, 2023, the Supreme Court of the United States denied certiorari. On May 22, 2023, Bowman notified this Court of the Supreme Court's denial of certiorari, and on May 23, 2023, Bowman sought a stay the notice of execution in his case. The State filed its Return to the Motion for Stay on June 2, 2023. This Court's Order issued June 8, 2023, granted the motion pending the resolution of matters concerning the constitutionality of South Carolina's methods of execution being litigated in *Owens v. Stirling*, Appellate Case No. 2022-001280. *Owens* was then resolved on July 31, 2024, permitting this case to likewise proceed. While under the protection of

their requested holiday stay, the above referenced Petition for Writ of Habeas Corpus was filed in the original jurisdiction of this Court and this Return now follows.

RELEVANT LAW

"Habeas relief' in this Court's original jurisdiction "'will be granted only for a constitutional claim," so great that "in the setting," it "constitutes a denial of fundamental fairness shocking to the universal sense of justice." *Green v. Maynard*, 349 S.C. 535, 564 S.E.2d 83 (2002) (citing *Gibson v. State*, 329 S.C. 37, 39, 495 S.E.2d 426,428 (1998) (citing *Butler v. State*, 302 S.C. 466, 468, 397 S.E.2d 87, 88 (1990)). "Habeas relief is seldom used and acts as an ultimate ensurer of fundamental constitutional rights." *Williams v. Ozmint*, 380 S.C. 473, 477, 671 S.E.2d 600, 602 (2008). The standard is high, and it is anticipated the need for such review will be accordingly rare. "At some juncture judicial review must stop, with only the very rarest of exceptions, when the system has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of justice." *Id.*, 380 S.C. at 480, 671 S.E.2d at 603.

CLAIMS IN THE PETITION FOR WRIT OF HABEAS CORPUS

In his newest filing, Bowman alleges:

- a. The State Withheld Evidence Impeaching Key Witnesses Against Bowman in Violation of *Brady v. Maryland*, 373 U.S. 83 (1963). (Pet., p. 12).
 - i. Legal Standards – *Brady* and Progeny (Pet., p. 12)
 - ii. Withholding the Sam Memo Violated *Brady* (Pet., p. 15)
 - iii. Withholding of Gadson's Medical Health Records Violated *Brady* (Pet., p. 17)
 - iv. Withholding Johnson's Criminal Charges Violated *Brady* (Pet., p. 21)
 - v. The Impact of the Multiple Undisclosed Impeachment Materials Must be Considered Cumulatively, Demonstrating Materiality Under *Brady* (Pet., p. 24)
 - vi. The Evidence Withheld by the State was Material to the Jury's Sentencing Decision and Warrants Remand for Resentencing (Pet., p. 25)
- b. Lead Trial Counsel Provided Ineffective Assistance of Counsel By Injecting Odious Racial Prejudice Into Bowman's Capital Trial And Sentencing Proceedings (Pet., p. 29)

- 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 (Pet., p. 45)
 - i. Bowman's Age and Brain Development at the Time of Offense (Pet., p. 58)
 - ii. Bowman's Maturity, Prison Adaptability, and Lack of Dangerousness (Pet., p. 60)

Bowman requests oral argument in relation to these claims, and argues for a commuted sentence, a new trial, or a new sentencing proceeding.

None are warranted.

ARGUMENTS THAT THE PETITION SHOULD BE DENIED

- I. Bowman's claims under *Brady* have been fully reviewed, denied certiorari or specifically found meritless, and he fails to demonstrate a constitutionally fundamental unfairness in their reassertion.**

The State did not commit *Brady* violations in this case, and Bowman has failed to demonstrate a denial of fundamental fairness under our state or federal constitutions. Bowman has had a full opportunity to litigate these claims during the course of his various collateral proceedings *and he has done so*. This Court, among many others, has not seen fit to deem this issue worthy of review and/or meriting relief. Bowman is not entitled to reassert well exhausted claims, denied on the merits, solely in the hope that this Court might change its mind.

Bowman's burden is one of showing a constitutional deprivation that results in the "denial of fundamental fairness shocking to the universal sense of justice." *Id.* However, despite this exceptionally difficult standard of review, Bowman's first and only "legal" argument in his Petition is that the State has committed *Brady* violations in relation to the "Sam Memo," Gadson's mental health records, and Hiram Johnson's unindicted pending criminal charge in a separate matter. These arguments are precisely the same *Brady* claims that were investigated in advance of Bowman's PCR hearing, raised for consideration on the merits, and denied relief by the PCR court. These are the same claims that were then unsuccessfully presented to this Court for certiorari.

These are the same claims that were raised and reviewed on the merits by the District Court and Fourth Circuit Court of Appeals for purposes of seeking federal habeas relief, and then unsuccessfully raised as a basis for a grant certiorari from the Supreme Court of the United States. In total, Petitioner has attempted to litigate these claims for nearly two full decades, and he has been turned away on this issue by twenty (20) different judges or justices over that timeframe.¹⁰ His ability to seek review with the aid of counsel for so long, from so many different legal avenues, is the gold-standard of “fundamental fairness.”

The only claim that Bowman raises, that is not a “complete” retread of prior litigation, is the argument that prejudice under *Brady* arises as it relates to sentencing, instead of prejudice relating to the jury’s finding of guilt.¹¹ This claim was not expressly asserted to the PCR court. However, the Fourth Circuit Court of Appeals included in its findings that “[h]aving granted every permissible assumption in Bowman's favor and having carefully considered all the undisclosed evidence in light of the entire record at trial, we conclude that Bowman has not carried his burden to prove a reasonable probability that, had he received the undisclosed evidence, the jury would not have convicted him of Martin's murder *or recommended a sentence of death.*” *Bowman v. Stirling*, 45 F.4th 740, 758–59 (4th Cir. 2022), cert. denied, 143 S. Ct. 2498, 216 L. Ed. 2d 457 (2023). Bowman has therefore already received consideration on a prejudice claim that he did not

¹⁰ Bowman’s collateral review has included 1 state circuit court judge, 5 South Carolina Supreme Court Justices, 1 United States Magistrate, 1 United States District Court Judge, 3 Fourth Circuit Court of Appeals Judges, and 9 Justices of the Supreme Court of the United States.

¹¹ Bowman also raises the issue of cumulative materiality. This was raised as a basis for certiorari to this Court for Petitioner’s PCR appeal, which was denied, and was later raised and ruled upon by the Fourth Circuit. As the PCR court found suppression for only one of the issues, “cumulative” analysis would not have been a logical analysis for the PCR court. In any case, the Fourth Circuit chose to assume without deciding the propriety of a *de novo* review, and undertook a cumulative materiality review. It found none. *Bowman v. Stirling*, 45 F.4th 740 (4th Cir. 2022), cert. denied, 143 S. Ct. 2498, 216 L. Ed. 2d 457 (2023).

explicitly set forth. In any case, this claim was wholly available to Bowman at the outset of his PCR litigation. He failed to pursue it, either at all or with sufficient specificity, and he is procedurally barred from doing so now under the guise of claiming a lack of fundamental fairness.

Second, even if such a claim were to be considered, the argument fails on two grounds *within the existing record*. The PCR court's denial of relief on the stated *Brady* claims was not solely reliant upon the absence of materiality and prejudice. The Sam Memo was found to lack suppression and materiality. (App., 9873).¹² The mental health report was otherwise available to defense counsel, thereby lacking suppression and was otherwise not favorable or impeaching evidence. (App., 9831-32). The Hiram Johnson charge was the only *Brady* claim denied solely on the basis of materiality, but the court noted that such stemmed not just from the state's overwhelming case against Bowman but also from the limited impeachment value of the evidence in question, and Hiram Johnson was not the centerpiece of State's case in comparison to the other testimonies offered at trial. (App., 9864-65). This highlights the second failure of Bowman's argument: impeachment evidence impacts the believability of the witness, not the justification of sentencing for the crime committed. It is clear that the jury believed Bowman murdered Victim, and the callousness and details of how the murder was carried out and the aggravating circumstances that were found to accompany the murder were well proven without Johnson's testimony. To suggest materiality as to sentencing, is to offer the shell of argument that contains no inner substance.

¹² References to "App.," page numbers denote the state court appendix that accompanied Bowman's Petition for Writ of Certiorari, and such will be filed as an attachment for the convenience of the Court.

As demonstrated above, Bowman's claims have been well considered by this Court and others for decades of litigation. Bowman has failed to demonstrate a denial of fundamental fairness shocking to the universal sense of justice. Habeas relief should therefore be denied.

II. Bowman's claim that Mr. Cummings was racist and that he injected racists beliefs and issues into Petitioner's trial are entirely baseless.

Bowman's second argument asserts that trial counsel Norb Cummings was a racist and that he injected his own racist beliefs and tensions into Bowman's trial to the jury. Apart from being a direful denunciation of trial counsel, both personally and professionally, it is a repetitious accusation that is entirely without merit.

Perhaps to assuage what is the more inflammatory of the two allegations against counsel, Bowman first begins this portion of the Petition with a general attack upon the quality of Mr. Cummings representation and the satisfaction of his duties to investigate. Petitioner has been litigating ineffective assistance of counsel claims for nearly twenty years; he has had ample time to speak with any individuals he wished, including those who only now, after exhaustion of all remedies, provide an affidavit of generalized disapproval. The PCR court addressed numerous claims of ineffective assistance of counsel and it found none meritorious and worthy of relief. This Court had the opportunity to review those decisions. It did so, and it granted certiorari as to one of the ineffective assistance claims raised. Nevertheless, in review, Bowman was properly denied relief. Likewise, the federal Magistrate, District Court, and Fourth Circuit all undertook a review of the ineffective assistance claims raised by Bowman and found none to warrant relief. To the extent Bowman relies upon ineffective assistance of counsel claims, his Petition fails to satisfy his high burden for relief. Petitioner's attempt to resurrect these claims for reconsideration in the original jurisdiction of this Court is without merit, procedurally barred, and starkly fails to demonstrate a denial of fundamental fairness.

Bowman's second argument veers toward the inflammatory. The lack of justifiable foundation to Bowman's claim that counsel was racist and inserted such racial bias into the trial is demonstrated in two ways. First, the Petition itself belies the credibility of the allegation. Specifically, Bowman asserts "[w]hile counsel did not make *as many* racist statements during trial as he did during the PCR proceeding. . .". (Pet., p. 40) (emphasis added). **Contrary to this assertion, in review of Bowman's entire argument Respondent cannot find *any* record citations by Bowman that demonstrate racist comments or biases during the trial.**¹³ The only citation to the trial made by the Petition, has Bowman inserting racial contrast by way of an unsubstantiated bracketed inference: "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." (Pet., p. 36).¹⁴ Moreover, the reference to "blonde hair" was not even bracketed by Petitioner. It is not uttered on page 4509 of the state court appendix, and after review, Respondent cannot find any place where such is uttered anywhere in the entirety of the closing arguments of counsel.

To the extent Bowman references conversations with counsel prior to trial about the potential for racial bias against him by the jury, the argument is a nonstarter. It is not racist to recognize and express concern *for the potential racism of others*. Such was not an injection of

¹³ *Bowman infers a racial element* by referencing the benign language of "little girl." The substance of the discussion is entirely *one relating to sexual relations* and the argument that the State was presenting an unrelated sexual/CSC aspect to the case to distract or enrage the jurors. (See Pet., p. 35-36). It is Bowman who assumes a racial element to this claim – not counsel. Petitioner then goes so far as to suggest that counsel apologized to the jury for inferring a sexual relationship between Petitioner and Victim, despite the fact that record evidence clearly established that there was sexual intercourse between Bowman and Victim. (See Pet., p. 40-41). Here, Bowman again omits clearly relevant portions of the record from his quotations, *because the very next portion of that quote demonstrates that counsel was apologizing for raising his voice during the trial.* (App. 5001; See Pet., p. 40-41).

¹⁴ Bowman does the same unsubstantiated bracketed inference for counsel's comments again in Footnote 29 of the Petition. (See Pet., p. 38).

racism into the trial, it was a warning to Bowman about the realities of our world and the potential pitfalls that may accompany his case beyond the substantial evidence the State was prepared to offer against him. In short, Bowman expressly calls Mr. Cummings a racist and pleads with this Court to grant relief on the basis that counsel injected his racial beliefs into the trial while failing to identify even one time where racist views were presented to the jury.

The second way in which Bowman’s claim lacks a substantiated foundation, is that the commentary relied upon from the PCR evidentiary hearing is taken entirely out of context, and the topic itself was being explored by PCR counsel as part of an evaluation of why counsel did not choose to attack the character and lifestyle habits of the Victim in a case where she was purposefully led to a secluded location and executed on a back country road – an ill-advised strategy that, in light of the record, is just as bad as it sounds. This did not happen once, or even twice. The Petition bears this out repeatedly, and this Court deserves to have the record presented properly.

- Bowman asserts that “[c]ounsel 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.” Bowman then adds by footnote Mr. Cummings’ reference to Victim as a “little girl” and asserts that “this is clearly how counsel viewed victim. . .” (Pet., p. 35, citing App., 7712 and App., 4509; FN 26).

- In context, page 4509 of the appendix reads:

You have no one to reward, no one to punish. Everybody feels bad about what happened here. . . Oh, ladies and gentlemen, someone has to pay for the loss of that little girl, but are you sure that the right one’s going to pay? . . . It’s obvious, it is so obvious to be angry, it is so obvious that you know that the price of justice is screaming out here to find somebody for this. What if the one who did [it] cut his deal and got a deal and will go on?”

There is nothing racist, provocative, or inflammatory about this argument or counsel's effort to demonstrate some sympathy for the victim to the jury. Regarding page 7712, the context surrounding the quotation demonstrates that Mr. Cummings believed the State had overstepped and had geared its portrayal of the circumstances concerning CSC to inflame the supposed racial prejudices of the jury. The State had already presented evidence of sexual intercourse between Victim and Bowman, and Mr. Cummings response during the PCR hearing demonstrated that he *wanted* to show that Victim and Bowman were friends and lovers in order to show that Bowman allegedly cared for Victim. (App., 7711-12). He goes on to add that "I think [the solicitor] stepped over the line. I know what he wanted, a black man and white woman having sex, we both know what that is. I cleared it up, in my humble opinion. . . I made the best of [him playing dirty]." (App., 7712). *Respondent vehemently asserts that there was no "dirty play" on the part of the solicitor.* But regardless, the record demonstrates that Mr. Cummings was attempting to *diffuse* the potential for racism, *not insert it.* Despite this, Bowman argues the opposite in brief.

- Bowman tries to link the above references to pages 4505 and 5001, excerpts that again have no racial content and certainly do not demonstrate racist opinions. Mr. Cummings' efforts sought to diffuse and contest the efforts of the State to present a CSC aggravating circumstance. (See Pet., p. 35-36).
- Bowman cites page 7006 wherein Mr. Cummings used the phrase "little girl." (Pet., p. 35). Bowman infers an emphasis on her race where none is presented.

- Bowman cites to page 7020, supposedly as another use of the phrase “little girl” or “little white girl”. (Pet., p. 35). Neither phrase appears on page 7020, nor does it appear on any neighboring pages.
- Bowman cites to pages 7116-17. (Pet., p. 35). Mr. Cummings used the phrase “little girl.” Bowman infers an emphasis on her race where none is presented.
- Bowman cites to page 7395. (Pet., p. 35). The surrounding context within the record, at most, demonstrates that Mr. Cummings believed that *the jury* might see her race as a potential factor, not that he personally expressed racist opinions or litigated the case in such a way as to make it a racial issue. Of note, there is no juxtaposition of race between Victim and any other individual by Mr. Cummings.

The text of the records reads as follows:

Q: But if Mr. Gadson says, “I’m just there,” but he did something that made him liable for murder, then the fact he says, “I was just there and didn’t participate,” that is not true, is it?

A: You’re asking me again in that arena whether or not the jury is going to believe him. No, you know what they believed, they believed that little white girl was dead and then burned and somebody did it and they wanted that somebody. (App., 7395).

- Bowman cites to page 7480. (Pet., p. 35). Mr. Cummings used the phrase “little girl.” Bowman again infers an emphasis on her race where none is presented.
 - Moreover, the portions of the record before and after page 7480 provide a clear indication that 1) counsel was referencing his previously discussed belief that the State was trying to bring race into the equation, 2) counsel was actively trying to prevent such subject matter, and 3) counsel provided a clear and well substantiated basis for his decisions regarding the CSC elements of the case. The record reads as follows in pertinent part:

Q: Why didn't you ask Tawain Gadson about the lack of sexual activity at Nursery Road?

A: I don't know. I didn't ask it.

Q: And if you had asked him it would have been good for him to say there was no sex on that road, wouldn't it?

A: But if he did say there was sex on the road it might have hurt my client more. I'm not going to ask a witness a question which I don't know the answer to, because the guy didn't decide to testify until he flipped in that courtroom.

...

Q: Okay. So, why didn't you ask about the lack of sex, why didn't you ask Mr. Gadson about there being no sex between Miss Martin and Mr. Bowman?

A: I will say I did not ask the question but here is my theory and this is what I want to show. Marion and Kandee were friends, they were intimate friends, if I can use the words. I wanted to show that this man would not hurt that little girl because he cared about her and that she was an intimate friend of Mr. Bowman's. So, anything that the State wanted to try to show dirty about their intimate relationship was that, again, black versus white, white with a black male, that Mr. Bailey was trying to get the ultimate penalty yet they were friends.

Q: Hold on a second.

A: That is what I did.

Q: Well, now, Mr. Bowman is married to someone else, isn't he?

Q: Oh, yes. We talked all about the adultery and all the other stuff, and you read the transcript.

...

Q: That would be fornication, too, wouldn't it, which is another crime in South Carolina?

...

Q: Okay. Here is what I'm trying to find out. So, when information about Mr. Bowman and Miss Martin having sex comes in it actually tells the jury, Dorchester County jury, which I would consider to be a small town jury –

A: It is.

Q: -- that this African American man and this white lady had been having sex while Mr. Bowman is married to another lady and also while he is not married to Miss Martin?

A: But they were intimate friends and the only way to show that he had no ill motive or reason to kill this lady was that they were intimate friends.

...

Q: . . . Why didn't you object to his testimony about the DNA coming in in relation to the murder?

A: Because I wanted to show he was with her, that he cared about Kandee, there was no rape, let the DNA come in, my man's DNA is inside her. I'm sorry, maybe we differ on this, but I wanted to show that they were friends, they were intimate friends.

...

A: I wanted that in as part of my strategy.

...

Q: The sex is relevant to what?

A: Intimate friendship. For the last time, Mr. Brown, I know what you're trying to say. I wanted to show the State was trying to do over kill here, they were trying to paint it dirty, I tried to clean it up.

(App., 7478-7484)

- Bowman cites to page 7490 wherein Mr. Cummings used the phrase "little girl." (Pet., p. 35). Bowman again infers an emphasis on her race where none is presented.
- Bowman cites to pages 7123-24. (Pet., p. 37). This was a clear reference to how certain facts played out *in a separate case*: the Gardner case where counsel believed the state tried to portray the white girl as being with 5 African American men. It was not a circumstance where he was actively making race the issue in that case. In reference to that case, Mr. Cummings made clear that slandering a victim is often a terrible strategy, and the circumstances of Bowman's case made such a strategy even more imprudent.
- The same applies to Bowman's allegations of "racist thinking" by counsel. The clear takeaway from the record testimony is not that counsel harbored racist opinions of his client or Victim, or that he wished to inject racism into the trial. He was articulating the very real concern that others might do so in the portrayal of the crime. This is in keeping with counsel's repeated testimony that he was trying to

prevent this issue being in the minds of the jury and avoiding the strategy of slandering the victim. (See Pet., p. 38-39, citing 7126, 7370, and 7449).

- Petitioner cites to pages 7567. (Pet., p. 38). Petitioner again brackets a racial element that is absent from the record.
- Petitioner even points to the Affidavit of Richard Perez to argue in support of Mr. Cummings being a racist. However, the affidavit demonstrates only that Mr. Perez, who by his own account would now be disqualified from serving on a death penalty jury, believed that “race played a role in this case.” Nowhere in his affidavit did he indicate that he believed trial counsel was racist, or that trial counsel’s arguments injected the issue of race.

Petitioner has utterly failed to substantiate the assertion that Mr. Cummings was a racist, and that his representation injected his racist views into the trial. He has instead repeatedly referenced small pieces of record testimony from the PCR evidentiary hearing in the hopes that reading them all together without context, and with the aid of improper bracketed text and editorialization, this Court might be swayed to grant relief to a meritless claim. The record does not support Petitioner’s assertions. In fact, *the record* supports the opposite conclusion and Bowman’s claim should be denied.

III. Bowman fails to demonstrate a deficiency in the structure of his proportionality review conducted on direct appeal. Proportionality is limited by statute to the direct appeal process and Bowman has received such review. His other claims for commuting his sentence on the basis of character or length of incarceration are without legal foundation.

Bowman’s third argument for relief seeks either commutation or resentencing on the basis of disproportionality, and he argues that his time served and display of good character whilst in prison are sufficient justification for resentencing. None of these

arguments present a basis for relief.

This Court is required to conduct a proportionality review pursuant to S.C. Code 16-3-25(C)(3). The Court fulfilled its duty and made a proportionality review as part of the 2005 direct appeal. *State v. Bowman*, 366 S.C. 485, 503, 623 S.E.2d 378, 387 (2005), abrogated by *State v. Evans*, 371 S.C. 27, 637 S.E.2d 313 (2006). Nevertheless, Bowman posits that he should receive a new S.C. Code § 16-3-25(C)(3) proportionality review pursuant to *Moore v. Stirling*, 436 S.C. 207, 871 S.E.2d 423 (2022). Bowman is wrong.

Moore v. Stirling

After exhaustion of ordinary state and federal remedies, Moore filed a petition in this Court's original jurisdiction claiming that "the proportionality review conducted at the time of his *direct appeal in 2004* was insufficient" and relied upon both "current precedent" and on his proposed "extension of that precedent." *Moore*, at 217, 871 S.E.2d at 428-29 (emphasis added). This Court ordered briefing on two issues: whether Moore's "death sentence" was "disproportionate to the penalty imposed in similar cases," and, when conducting a S.C. Code § 16-3-25 (C) proportionality review, "should similar cases in which the death penalty was not imposed be considered[.]" 436 S.C. at 214, 871 S.E.2d at 427.

In evaluating the argument on his particular sentence, the Court considered Moore's assertions that "since the time of his direct appeal, the death sentences in three of the four cases cited for comparison ... were overturned," that the facts in the listed comparison cases were "more severe than his own" with the similarity relying on merely showing the shared armed robbery aggravating circumstance; and, that the pool of cases for comparison should be expanded. *Id.*, at 224-225, 436 S.E.2d at 432-33. Moore asserted that the facts in his case show that "he did not enter the premises with a gun," thus, he did not initially intend to commit an armed robbery, and

he did not murder more than one person. *Id.*, at 227-28; 871 S.E.2d at 434-35.

As to jurisdiction, the initial question to answer, this Court found Moore's "petition alleging an inadequate comparative proportionality review" was, under the State Constitution right to due process, "a cognizable constitutional claim" for a "state habeas proceeding." *Id.*, at 223, 871 S.E.2d at 432.

In turning to the issues briefed, the Court modified *State v. Copeland*, 278 S.C. 572, 300 S.E.2d 63 (1982),¹⁵ and held that the statute did not require "comparison of only cases in which a sentence of death was imposed." *Moore*, at 211,436 S.C. at 425. However, on review of Moore's specific factual arguments, the Court rejected Moore's position and denied habeas relief. *Id.*

Moore did not establish that all allegations regarding proportionality review would warrant original jurisdiction habeas proceedings. This Court determined that the claim *that Moore's 2004 proportionality review* was "inadequate" implicated due process under the state constitution, therefore, his claim "present[ed] a cognizable constitutional claim in the contest of this state habeas proceeding." *Id.*, at 223, 871 S.E.2d at 432. Unlike Moore, Petitioner largely asks this court to undertake an entirely new review of Petitioner's case

¹⁵ In *Copeland*, this Court had previously determined:

In our view, the 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. We consider such findings by the trial court to be a threshold requirement for comparative study and indeed the only foundation of "similarity" consonant with our role as an appellate court.

State v. Copeland, 278 S.C. 572, 591, 300 S.E.2d 63, 74 (1982), *holding modified by Moore v. Stirling*, 436 S.C. 207, 871 S.E.2d 423 (2022).

for proportionality with consideration of his good behavior since beginning his incarceration. The law does not permit Petitioner to present a 20 years post-trial case in mitigation based upon his behavior in prison and this Court does not serve the role of a super-jury. Petitioner's requested relief does not fall under the narrow cognizable claim described in *Moore*. But even if generally cognizable, Petitioner cannot show a violation of a constitutional right that "in the setting" has resulted in "a denial of fundamental fairness shocking to the universal sense of justice." *Green., supra*.

In *Moore*, this Court considered the statute's wording - specifically, the meaning of "similar cases" for its proportionality review- and found that the Legislature's choice of the phrase "similar cases" alone does not *require* limiting the review to cases where the death penalty was imposed. Petitioner goes further than this Court in assuming that proportionality review now *requires* looking at cases other than ones where the death penalty was imposed. Petitioner's error rests in his assuming meaning that is not warranted by the text of the statute. The phrase "similar cases" does not command Petitioner's interpretation any more than it restricts the pool to other capital cases. That the Court now recognizes a permissive opportunity for a capital appellant to chum the records and provide additional cases is in no way an obligation to do so. The best evidence for this point is that this Court has not required non-death penalty cases - either chosen by the Court or submitted by the appellant - in either of the two proportionality reviews following the *Moore* decision.

In *State v. Jenkins*, 436 S.C. 362, 394-95, 872 S.E.2d 620, 637 (2022), a case issued the same day as *Moore*, this Court, directly referencing its holding in *Moore*, conducted the required review under 16-3-25(C)(3) as follows:

... we hold the death penalty is neither excessive nor disproportionate to the sentences imposed in similar capital

cases. We recently held that in conducting this proportionality review "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." *Moore v. Stirling*, 436 S.C. 207, 871 S.E.2d 423 (2022) (clarifying *State v. Copeland*, 278 S.C. 572, 591, 300 S.E.2d 63, 74 (1982)). Thus, we must consider "similar cases in which the sentence of death has been upheld," *State v. Inman*, 395 S.C. 539, 567, 720 S.E.2d 31, 46 (2011) (citing *Wise*, 359 S.C. at 28, 596 S.E.2d at 482), and other "death-eligible cases for which a record is available for our review," *Moore*, 436 S.C. at 226, 871 S.E.2d 423; *see also* S.C. Code Ann. § 16-3-25(E) ("The court shall include in its decision a reference to those similar cases which it took into consideration.").

In capital cases where the State proceeded on the same aggravating circumstances and in which there were similar circumstances, we have affirmed the sentence of death. In *State v. Moore*, 357 S.C. 458, 593 S.E.2d 608 (2004), the Court upheld Moore's death sentence in connection with an armed robbery of a convenience store in which Moore killed a store clerk and shot at a witness in the store. 357 S.C. at 460-61, 465, 593 S.E.2d at 609-10, 612, *affd*, *Moore*, 436 S.C. at 229, 871 S.E.2d 423 (reaffirming the holding from the direct appeal and finding, again, "Moore has not established that his capital sentence is disproportionate"). Moore entered the store without a gun, took the store clerk's gun away from him, shot and killed the store clerk, shot at a witness with the purpose of killing him, and robbed the store before he left. 357 S.C. at 460-61, 593 S.E.2d at 609-10. Moore's crimes are less egregious than those Jenkins admitted to committing in this case because Jenkins entered each convenience store with a gun.

In *State v. McWee*, 322 S.C. 387, 472 S.E.2d 235 (1996), the Court upheld McWee's death sentence under similar circumstances. McWee and an accomplice shot and killed a store clerk in a convenience store and robbed the store before they left. 322 S.C. at 390, 472 S.E.2d at 237. During the sentencing phase, the State introduced evidence McWee and his accomplice committed another murder one week after the first. *Id.* McWee admitted shooting the victim in the first robbery and denied killing the victim in the second robbery, *id.*, just as Jenkins did at his trial.

Jenkins admitted he entered the first Sunhouse convenience

store, shot and killed Paruchuri, shot at McZeke, and robbed the store before he left. The jury found him guilty of murder, attempted murder, and armed robbery. Jenkins' crimes are highly similar to the murder we reviewed in *McWee* and more egregious than the murder we reviewed in *Moore*. Jenkins' admission to those crimes coupled with the aggravating circumstances of Jenkins' future dangerousness and the evidence that Jenkins committed two more armed robberies and a murder just weeks later leads us to conclude the death sentence was neither excessive nor disproportionate.

436 S.C. at 394-95, 872 S.E.2d at 637.

Notably, while the review included introductory language that comparison would be conducted with death-sentence cases and others, it was not. This Court took care to consider the exact circumstances of the crime, then compared those circumstances to the facts in two other capital cases. That is precisely what the Legislature has tasked this Court with doing:

(C) With regard to the sentence, the court shall determine:

(3) Whether 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).

In *State v. Jones*, this Court conducted the required review under 16-3-25(C)(3), as follows:

With the possible exception of *State v. Wilson*, 306 S.C. 498, 413 S.E.2d 19 (1992) in which the defendant was sentenced to death for murdering two eight-year-old girls on an elementary school campus, there is not a comparable case to the one before us. Frankly, the horrific murders perpetrated by Jones are incapable of comparison in this state. *Cf. Kornahrens*, 290 S.C. at 283-84, 290-91, 350 S.E.2d at 182-83, 186-87; *Moore v. Stirling*, 436 S.C. 207, 229, 871 S.E.2d 423, 435 (2022); *State v. Bell*, 302 S.C. 18, 21-22, 39-40, 393 S.E.2d 364, 366-67, 376 (1990); *State v. Passaro*, 350 S.C. 499, 501-02, 508-10, 567 S.E.2d 862 -64, 867-68 (2002). Therefore, Jones's death sentence is neither excessive nor disproportionate.

State v. Jones, 440 S.C. 214, 264-65, 891 S.E.2d 347, 373-74 (2023), *cert. denied*, 144 S. Ct. 1012, 218 L. Ed. 2d 176 (2024).

The Court's one direct reference was to another capital case, *Wilson*. But the analysis is also telling in what is not necessary. It is not necessary to scour records and make a statistical evaluation of somewhat similar factual scenarios. The fact of "horrific murders" even if not given to "comparison" may still be found "neither excessive nor disproportionate." *Id.*; *See also State v. Passaro*, 350 S.C. 499, 509-510, 567 S.E.2d 862, 868 (2002) ("review of case law reveals no factually similar case, i.e., the murder of a person under eleven years of age by arson" but Passaro's crime was "no less gruesome" than others cases where death was imposed and "perhaps more so considering Passaro knowingly and intentionally started the fire, jumped from the van, and failed to inform rescuers that his child was still strapped to a safety seat in the vehicle" also noting "[t]he brutality of the murder [was] underscored by evidence the victim was alive during the fire, succumbing to death only after the intense heat caused her severe pain and suffering."); *State v. Shaw*, 273 S.C. 194, 211, 255 S.E.2d 799, 807 (1979), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) ("The inability of this Court to compare this case with any other similar cases does not require, however, that appellants' sentences be set aside."). This Court has demonstrated that it is not only the facts of the crime to be considered, but the individual as well. Proportionality review has touched upon both. *Passaro*, at 510, 567 S.E.2d at 868 (2002) (considering "Passaro's individual characteristics show he suffered slight mental or emotional disturbance at the time of the murder and did not have a substantial history of violent criminal conduct."); *Wilson*, at 513-14, 413 S.E.2d at 28 ("Wilson's argument that his death sentence is disproportionate because of his alleged diminished personal culpability is therefore rejected.").

Yet, proportionality review under S.C. Code § 16-3-25(C) remains, in scope, much more limited than Petitioner assumes. It "aims to ensure that a jury's decision was not the result of arbitrariness" *but does not vest the Court with authority to act on mere disagreement with the sentence. Moore*, 436 S.C. at 229, 871 S.E.2d at 435. *Accord State v. Deck*, 303 S.W.3d 527, 550 (Mo. 2010) ("This Court's proportionality review is designed to prevent freakish and wanton application of the death penalty."); *id.*, at 554 ("proportionality review is intended for this Court to identify and correct only the imposition of aberrant death sentences. I do not read the statute as requiring that the Court act as a super-juror by substituting its judgment of the appropriate punishment for that of the jury and the trial court.") (Breckenridge, J., concurring).

In *Moore*, this Court acknowledged not only that "severity and brutality of crimes may vary," but also that juries have the discretion to determine the appropriate sentence for the particular individual before them. *Moore*, at 229, 871 S.E.2d at 435. And it firmly resolved that the "[t]his Court's scope of review does not allow it to disregard the factual findings in the case and pronounce an alternative sentence" when nothing "negate[s] the jury's findings...." *Id.* The reality of that limitation greatly undercuts the entirety of Bowman's position.

Of further note is that this Court did not address retroactivity with the *Moore* opinion. *See generally Talley v. State*, 371 S.C. 535, 541, 640 S.E.2d 878, 881 (2007) ("In general, the question of whether a decision announcing a new rule should be given prospective or retroactive effect should be addressed at the time of the decision.") (citing *Teague v. Lane*, 489 U.S. 288, 300 (1989)). The most likely reason is because, as explained above, it did not create a new rule that must be followed. *See generally Teague*, 489 U.S. at 301 ("In general,

however, a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government."); *Griffith v. Kentucky*, 419 U.S. 314, 328 (1987) ("a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past"). Even where a state has altered its proportionality review, the court has found the change was not to be applied retroactively. *State v. Nunley*, 341 S.W.3d 611 (Mo. 2011). At any rate, this Court did not express that the statutory interpretation of "similar cases" required for the review created a new "right" or that such a right would be applied retroactively. This is not the first defendant to request a new review pursuant to *Moore*. In 2023, William Dickerson filed a petition for writ of habeas corpus in this Court's original jurisdiction and unsuccessfully attempted to secure the same review on the same broad argument. Appellate Case No. 2023-000526. Freddie Owens argued the same as well and was likewise denied on September 12, 2024. (Order, Appellate Case No., 2024-001397). Simply put, this Court has not accepted the interpretation of *Moore* as offered by Bowman in the multiple cases that have come before his. It should not do so now.

Bowman references this Court's reliance upon *Binney v. State*, No. 2015-MO-028, 2015 WL 2230848 (S.C. May 13, 2015) and *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2004), and notes that both of those inmates have since been resentenced to life in prison, instead of death. Petitioner offers little to no discussion, however, because there is no corollary between those inmates receiving resentencing proceedings and their proportionality. Both cases were reversed for claims sounding in ineffective assistance of counsel, and as such, their reference by this Court was an appropriate comparison for purposes of proportionality.

Bowman's next argument is that his display of good character while incarcerated warrants a reconsideration of the sentence is likewise without merit. Bowman was sentenced after the thoughtful consideration of aggravating circumstances and mitigating evidence by the jury and he has presented no legal basis to the contrary. Notwithstanding the fact that Respondent cannot find any indication within the Petition that Bowman has expressed *remorse* for the crime, the claim simply does not demonstrate a "a constitutional claim," so great that "in the setting," it "constitutes a denial of fundamental fairness shocking to the universal sense of justice." *Id.* And, the suggestion that this Court undertake such an endeavor greatly misjudges the role this Court and our juries serve in the administration of justice, as discussed in *Moore*, et al. Nothing permits this Court to take up Petitioner's case and certiorari should therefore be denied.

Law of the Case, Collateral Estoppel, Res Judicata

"Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court." *Judy v. Martin*, 381 S.C. 455,458,674 S.E.2d 151, 153 (2009). *See also Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997) ("The law of the case applies both to those issues explicitly decided and to those issues which were necessarily decided in the former case."). The doctrine should apply and Petitioner's request for additional review should be rejected. Additional review is also barred by collateral estoppel and *res judicata*. Indeed, the additional review is barred by a number of separate theories, each equally applicable, each underscoring the necessary principle that litigants simply cannot continue to litigate a claim that has been presented and ruled upon or could have been presented and ruled upon. *See also State v. Hewins*, 409 S.C. 93, 106 and 111-12, 760 S.E.2d 814, 821 and 823 (2014) ("Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent

lawsuits are the same,” and, though it is a civil doctrine, collateral estoppel may even be applied in general sessions in discrete circumstances)(quote *Carolina Renewal, Inc. v. S.C. Dep’t of Transp.* 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct.App.2009)); *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999)(“Res judicata bars *subsequent actions* by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties.”) (emphasis added). Respondent specifically asserts the separate theories of collateral estoppel and *res judicata*. The base reasoning remains the same: proportionality was previously determined, there has been no change in the facts, and the claim cannot be considered anew.

Commutation

Clemency is a power exercised, “from time immemorial, by the executive.” *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833). And exclusively so. *Schick v. Reed*, 419 U.S. 256, 266 (1974). The proceedings “are conducted by the executive branch, independent of direct appeal and collateral relief proceedings.” *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 284 (1998) (opinion of Rehnquist, C.J.). “[P]ardon and commutation decisions” therefore “have not traditionally been the business of courts.” *Conn. Bd. Of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981) (cleaned up).

The caveat in that “unbroken practice” of exclusive executive clemency power, *Schick*, 419 U.S. at 266, is the requirement that clemency decisions cannot be “arbitrar[ly],” *Woodard*, 523 U.S. at 289 (opinion of O’Connor, J.). An executive may not, for instance, “flip[] a coin to determine whether to grant clemency.” *Id.* This is a “minimal procedural safeguard[.]” *Id.* (emphasis in original). Courts have unsurprisingly recognized that this is a low bar.

Notwithstanding the separations of power, Petitioner has requested commutation of his sentence as part of the requested relief in his Petition for Writ of Habeas Corpus. He has not presented any basis for why this matter should deviate from the above referenced limitations of the judiciary. Indeed, no viable basis for deviation from well-established precedent exists.

CONCLUSION

Based on the foregoing, Respondent submits Bowman has failed to show a basis for habeas relief under the original jurisdiction of this Court. For all of the foregoing reasons, the State respectfully requests that the Petition be denied.

Respectfully submitted,

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December 30, 2024