
NO. 20-12

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

RECEIVED**Jan 02 2025****MARION BOWMAN****S.C. SUPREME COURT***Petitioner-Appellant,***v.**

**BRYAN P. STIRLING, Commissioner of the South Carolina Department of Corrections;
MICHAEL STEPHAN, Warden of the Broad River Correctional Institution**

Respondent-Appellees.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA**

**APPENDIX
VOLUME 4 OF 9
PAGES 1501 – 2000**

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STATE COURT RECORD

Transcript Dated May 17, 2002 – Jury Selection/Jury Trial JA1

OPENING STATEMENT BY MR. BAILEY JA1

OPENING STATEMENT BY MR. CUMMINGS JA14

TESTIMONY**WILLIAM HENRY KOGER**

Direct Examination.....JA28

Cross Examination.....JA35

JOSEPH F. FOGLE

Direct Examination.....JA37

Cross Examination.....JA42

KEITH RIVERS

Direct Examination.....JA43

Cross Examination.....JA47

CAROLYN L. BROWN

Direct Examination.....JA53

Cross Examination.....JA57

Redirect Examination JA68

Recross Examination JA70

EDWARD WATERS

Direct Examination.....JA72

Cross Examination.....JA82

YOLAND S. BOWMAN

Direct Examination.....JA89

Cross Examination.....JA101

Transcript Dated May 18, 2002- Jury Trial JA112

KATRINA WEST

Direct Examination.....JA116

Cross Examination.....JA121

DENNIS JUDY

Direct Examination.....JA129

Cross Examination.....JA149

GORDON B. NEWHOUSE

Direct Examination.....JA153

Cross Examination.....JA158

PERRY CHINNERS

Direct Examination.....JA161

Cross Examination.....JA166

JAMES P. KICKLIGHTER

Direct Examination.....JA174

Cross Examination.....JA178

ALVIN COKER

Direct Examination.....JA184

Cross Examination.....JA197

EDWARD A. PORTER

Direct Examination.....JA202

Cross Examination.....JA216

Redirect Examination JA228

Recross Examination JA228

JAMES HELMS

Direct Examination.....JA229

Cross Examination.....JA268

Redirect Examination JA285

Recross Examination JA286

DENNIS JUDY

Direct Examination.....JA287

Cross Examination.....	JA289
JANICE E. ROSS	
Direct Examination.....	JA294
Cross Examination.....	JA307
JAMES J. GADSON	
Direct Examination.....	JA312
Cross Examination.....	JA316
LAURIE SHACKER	
Direct Examination.....	JA324
Cross Examination.....	JA326
SHEREE BROWN	
Direct Examination.....	JA327
Cross Examination.....	JA329
DANA FOWLER SHUTT	
Direct Examination.....	JA331
JAMES T. GADSON	
Direct Examination.....	JA335
Cross Examination.....	JA377
CAROLYN BROWN	
Direct Examination.....	JA394
Transcript Dated May 19, 2002- Jury Trial Direct Examination.....	JA406
HIRAM JOHNSON	
Direct Examination.....	JA411
Cross Examination.....	JA425
TRAVIS D. FELDER	
Direct Examination.....	JA439
Cross Examination.....	JA457
Redirect Examination	JA465

Recross Examination	JA466
VALORNA SMITH	
Direct Examination.....	JA467
Cross Examination.....	JA473
TERRENCE A. VAN DORAN	
Direct Examination.....	JA479
Cross Examination.....	JA487
JAMES A. NETTLES	
Direct Examination.....	JA494
Cross Examination.....	JA498
ALVIN COKER	
Direct Examination.....	JA504
Cross Examination.....	JA509
DOROTHY M. BOWMAN	
Direct Examination.....	JA515
CORDELLIA D. MARTIN	
Direct Examination.....	JA518
Cross Examination.....	JA521
KENDRA BOWMAN	
Direct Examination.....	JA522
Cross Examination.....	JA533
YOLAND BOWMAN	
Direct Examination.....	JA537
Cross Examination.....	JA542
Redirect Examination	JA545
DOROTHY M. BOWMAN	
Direct Examination.....	JA546
Cross Examination.....	JA560

MARK SHEETZ

Direct Examination.....	JA575
Cross Examination.....	JA577

CATHERINE M. SALLEY

Direct Examination.....	JA578
Cross Examination.....	JA580

ALVIN COKER

Direct Examination.....	JA581
Cross Examination.....	JA585
Redirect Examination	JA587
Recross Examination	JA588

ALLYSON GREER

Direct Examination.....	JA590
Cross Examination.....	JA593

SALLY M. BOOKHART

Direct Examination.....	JA599
Cross Examination.....	JA605

JAMES HELMS

Direct Examination.....	JA614
Cross Examination.....	JA618

EDWARD PORTER

Direct Examination.....	JA622
Cross Examination.....	JA631
Redirect Examination	JA643
Recross Examination	JA645

GRADY A. LAYTON

Direct Examination.....	JA647
Cross Examination.....	JA655

DAVID J. COLLINS

Direct Examination.....	JA662

Cross Examination.....	JA675
Redirect Examination	JA685
Recross Examination	JA687
CAROL GOODIER	
Direct Examination.....	JA689
Cross Examination.....	JA691
EARL V. ASBELL	
Direct Examination.....	JA692
Cross Examination.....	JA695
BETHANY CROOKS	
Direct Examination.....	JA696
Cross Examination.....	JA699
Transcript Dated May 20, 2002- Jury Trial	JA710
DOROTHY M. BOWMAN	
Direct Examination.....	JA713
Cross Examination.....	JA714
Redirect Examination	JA718
Recross Examination	JA718
MATTHEW G. FITTS	
Direct Examination.....	JA719
Cross Examination.....	JA742
Redirect Examination	JA765
MARION BOWMAN, JR.	
Examination by The Court	JA793
CLOSING ARGUMENTS BY MR. BAILEY.....	JA811
CLOSING ARGUMENTS BY MR. CUMMINGS	JA836
JURY CHARGE	JA869

VERDICT	JA919
Transcript Dated May 22, 2003- Sentencing Phase.....	JA942
OPENING STATEMENT BY MR. BAILEY.....	JA991
OPENING STATEMENT BY MR. CUMMINGS	JA999
JOSEPH W. WIMBERLY, III	
Direct Examination.....	JA1008
Cross Examination.....	JA1009
DAVID L. THOMPSON	
Direct Examination.....	JA1012
Cross Examination.....	JA1013
JAMES HELMS	
Direct Examination.....	JA1015
Cross Examination.....	JA1020
JANICE E. ROSS	
Direct Examination.....	JA1024
Cross Examination.....	JA1029
Redirect Examination	JA1031
Recross Examination	JA1033
Redirect Examination	JA1044
Recross Examination	JA1046
CORDILLIA MARTIN	
Direct Examination.....	JA1047
WAYNE MARTIN	
Direct Examination.....	JA1058
Cross Examination.....	JA1062
MARION BOWMAN, JR.	
Examination by The Court	JA1089

KENDRA BROWN

Direct Examination.....	JA1097
Cross Examination.....	JA1103

DOROTHY BOWMAN

Direct Examination.....	JA1105

MARGARET A. BAUGHMAN

Direct Examination.....	JA1116
Cross Examination.....	JA1120
Redirect Examination	JA1122

JEFFERY J. YUNGMAN

Direct Examination.....	JA1124
Voir Dire Examination	JA1132
Direct Examination.....	JA1143
Cross Examination.....	JA1166
Redirect Examination	JA1181

FRANKIE MARTIN

Direct Examination.....	JA1185

JAMES E. AIKEN

Direct Examination.....	JA1187
Cross Examination.....	JA1201
Redirect Examination	JA1219
Recross Examination	JA1224

SHARON J. BRANCH

Direct Examination.....	JA1237
Cross Examination.....	JA1243
Redirect Examination	JA1244

Transcript Dated May 23, 2002- Sentencing Phase.....	JA1248

ENRIQUE BADILLO

Direct Examination.....	JA1256
Cross Examination.....	JA1258

TRAVIS D. FELDER

Direct Examination.....	JA1265
Cross Examination.....	JA1276
Redirect Examination	JA1280
 CLOSING ARGUMENTS BY MR. BAILEY.....	 JA1303
 CLOSING ARGUMENTS BY MS. HARDEE-THOMAS	 JA1329
 CLOSING ARGUMENTS BY MR. CUMMINGS	 JA1333
 JURY CHARGE.....	 JA1368
 VERDICT	 JA1404
 NOTICE OF INTENT TO SEE DEATH PENALTY	 JA1408
 NOTICE OF EVIDENCE IN AGGRAVATION.....	 JA1409
 FINAL BRIEF OF APPELLANT (July 6, 2005).....	 JA1410
 FINAL BRIEF OF RESPONDENT (July 7, 2005).....	 JA1467
 FINAL REPLY BRIEF OF APPELLANT (July 6, 2005)	 JA1541
 <u>POST CONVICTION RELIEF</u>	
 APPLICATION FOR POST-CONVICTION RELIEF (April 7, 2006).....	 JA1551
 ORDER OF THE UNITED STATES SUPREME COURT DENYING PETITION FOR WRIT OF CERTIORARI (June 12, 2006)	 JA1558
 PRELIMINARY PROTECTIVE RETURN UNTIL POST-CONVICTION COUNSEL IS APPOINTED TO STATE’S RETURN, MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT (October 2, 2006)	 JA1559
 RETURN, MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT (September 1, 2006)	 JA1561

AMENDED RETURN, MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT (March 15, 2007)	JA1599
AFFIDAVIT OF DALE DAVIS (June 20, 2007)	JA1653
AFFIDAVIT OF MARION BOWMAN (June 20, 2007)	JA1655
AFFIDAVIT OF DOROTHY BOWMAN (June 20, 2007)	JA1656
ORDER RELIEVING CO-COUNSEL, APPOINTING NEW CO-COUNSEL, AND SCHEDULING FURTHER MATTERS (February 6, 2008)	JA1657
FIRST AMENDED APPLICATION FOR POST-CONVICTION RELIEF (February 28, 2007)	JA1659
MOTION FOR CONTINUANCE (March 25, 2008)	JA1668
SECOND AMENDED APPLICATION FOR POST-CONVICTION RELIEF (May 19, 2008)	JA1672
ORDER REQUIRING DEPARTMENT OF SOCIAL SERVICES TO PRODUCE DOCUMENTS (August 27, 2008)	JA1684
RESPONDENT’S OBJECTION TO AMENDMENTS, MOTION TO STRIKE, AND MOTION TO COMPEL DISCOVERY (September 5, 2008)	JA1686
THIRD AMENDED APPICATION FOR POST-CONVICTION RELIEF (September 8, 2008)	JA1693
NOTICE OF INTENT TO RELY UPON AFFIDAVITS AND OTHER DOCUMENTARY EVIDENCE (September 15, 2008)	JA1710
Post-Conviction Relief Hearing Transcript Excerpts (September 15, 2008) ..	JA1712
JAMES TAWAIN GADSON	
Direct Examination by Mr. Brown	JA1713
Cross Examination by Mr. Waters	JA1775

Redirect Examination by Mr. Brown	JA1797
Recross Examination by Mr. Waters	JA1822
Redirect Examination by Mr. Brown	JA1829
Recross Examination by Mr. Waters	JA1830

RICKY DAVIS

Direct Examination by Mr. Brown	JA1831
Cross Examination by Mr. Waters	JA1845
Redirect Examination by Mr. Brown	JA1852
Recross Examination by Mr. Waters	JA1857
Redirect Examination by Mr. Brown	JA1862

DAVID COLLINS (Excerpt)

Direct Examination by Mr. Brown	JA1874

HIRAM JOHNSON

Direct Examination by Mr. Sinclair	JA1875
Cross Examination by Mr. Waters	JA1918
Redirect Examination by Mr. Sinclair	JA1922
Recross Examination by Mr. Waters	JA1925

TRAVIS FELDER

Direct Examination by Mr. Sinclair	JA1926
Cross Examination by Mr. Waters	JA1971
Redirect Examination by Mr. Sinclair	JA1988
Recross Examination by Mr. Waters	JA2003
Redirect Examination by Mr. Sinclair	JA2007
Recross Examination by Mr. Waters	JA2018
Redirect Examination by Mr. Sinclair	JA2022
Recross Examination by Mr. Waters	JA2023

ALVIN COKER (Excerpt)

Direct Examination by Mr. Brown	JA2028
Cross Examination by Mr. Waters	JA2040

NORBERT CUMMINGS

Direct Examination by Mr. Brown	JA2042

MARVA HARDEE-THOMAS (Excerpt)

Direct Examination by Mr. Brown	JA2172
Cross Examination by Mr. Waters	JA2237

NORBERT CUMMINGS (con't)

Further Direct Examination by Mr. Brown	JA2258
Cross Examination by Mr. Waters	JA2396
Redirect Examination by Mr. Brown	JA2580
Recross Examination by Mr. Waters	JA2626

WALTER BAILEY (Excerpt)

Direct Examination by Mr. Brown	JA2636
Cross Examination by Mr. Waters	JA2742
Redirect Examination by Mr. Brown	JA2764
Recross Examination by Mr. Waters	JA2776

PCR EXHIBITS

Court's Exhibit 2- Coker File (Excerpt)	JA2790
Applicant's Exhibit 1- James Taiwan Gadson's Indictment for Murder	JA2791
Applicant's Exhibit 2- James Taiwan Gadson's Motion	JA2792
Applicant's Exhibit 3- James Taiwan Gadson's Plea Agreement	JA2793
Applicant's Exhibit 4- James Taiwan Gadson's Arrest Warrant	JA2797
Applicant's Exhibit 5- James Taiwan Gadson's Statement	JA2798
Applicant's Exhibit 6- James Taiwan Gadson's Second Statement	JA2802
Applicant's Exhibit 7- James Taiwan Gadson's Polygraph Report	JA2804
Applicant's Exhibit 8- James Taiwan Gadson's Mental Evaluation Report ..	JA2805
Applicant's Exhibit 9- James Taiwan Gadson's Sentencing Sheet	JA2810

Applicant’s Exhibit 10- James Taiwan Gadson’s Amended Sentencing Sheet	JA2811
Applicant’s Exhibit 11- Ricky Davis Handwritten Note	JA2812
Applicant’s Exhibit 12- Ricky Davis’ Appointment Order (April 23, 2001)..	JA2813
Applicant’s Exhibit 14- Travis Felder’s Plea Agreement.....	JA2814
Applicant’s Exhibit 15- Travis Felder’s Polygraph Report	JA2818
Applicant’s Exhibit 17- Travis Felder’s Warrant for Accessory to Murder/Arson	JA2819
Applicant’s Exhibit 18- Travis Felder’s Warrant for Arson	JA2820
Applicant’s Exhibit 19- Ricky Davis’ Indictment for Armed Robbery	JA2821
Applicant’s Exhibit 20- Ricky Davis’ Sentencing Sheet.....	JA2822
Applicant’s Exhibit 21- Ricky Davis’ Indictment for Armed Robbery	JA2823
Applicant’s Exhibit 22- Ricky Davis’ Docket Sheet.....	JA2824
Applicant’s Exhibit 24- Ricky Davis Deposition	JA2825
Applicant’s Exhibit 29- Margaret Hawkins Statement.....	JA2853
Applicant’s Exhibit 30- Tiara Coleman Statement.....	JA2854
Applicant’s Exhibit 31- Dr. Frierson’s Report on James Taiwan Gadson	JA2849
Applicant’s Exhibit 32- Hiram Johnson Miranda Rights Form.....	JA2860
Applicant’s Exhibit 33- Hiram Johnson Statement	JA2861
Applicant’s Exhibit 43- Travis Felder’s Indictment for Arson	JA2862

Applicant’s Exhibit 44- Travis Felder’s Indictment for Accessory.....	JA2864
Applicant’s Exhibit 48- Hiram Johnson’s Warrant for Receiving Stolen Goods	JA2866
Applicant’s Exhibit 49- Hiram Johnson’s Indictment for Receiving Stolen Goods	JA2868
Applicant’s Exhibit 64- Charles Williams Letter	JA2871
Applicant’s Exhibit 67- Sam Richardson Interview with Ricky Davis (The ‘Sam Memo’)	JA2873
Applicant’s Exhibit 68- Walter Bailey Letter.....	JA2874
Applicant’s Exhibit 71- Hiram Johnson’s Indictments Burglary 2 nd Degree .	JA2875
Respondent’s Exhibit 4- Marion Bowman Statement	JA2882
Respondent’s Exhibit 5- Marion Bowman Statement	JA2885
Respondent’s Exhibit 6- Marion Bowman Statement	JA2888
Respondent’s Exhibit 9- Hiram Johnson RAP Sheet	JA2890
Respondent’s Exhibit 17- Ricky Davis Docket Sheet	JA2894
Respondent’s Exhibit 29- Bowman’s Mental Evaluation	JA2895
Respondent’s Exhibit 30- Ricky Davis Handwritten Note.....	JA2904
Respondent’s Exhibit 34- Letter from Norbert Cummings to Walter Bailey	JA2905
Respondent’s Exhibit 35- Letter from Walter Bailey to Norbert Cummings.	JA2906
Respondent’s Exhibit 36- Letter from Walter Bailey to Norbert Cummings.	JA2907
FOURTH AMENDED APPLICATION FOR POST-CONVICTION RELIEF	

(June 5, 2009)	JA2908
APPLICANT’S AMENDED BRIEF SUPPORTING THE FOURTH AMENDED APPLICATION FOR STATE POST-CONVICTION RELIEF (June 12, 2009)	JA2927
POST TRIAL BRIEF IN OPPOSITION TO APPLICATION FOR STATE POST-CONVICTION RELIEF (August 10, 2009).....	JA3036
APPLICANT’S REPLY TO RESPONDENT’S BRIEF IN OPPOSITION (September 16, 2009).....	JA3238
ORDER DENYING APPLICATION FOR POST-CONVICTION RELIEF (March 12, 2012)	JA3267
MOTION TO ALTER OR AMEND JUDGMENT PURSUANT TO RULE 59(e) (March 19, 2012)	JA3398
ATTORNEY GENERAL’S LETTER IN RESPONSE TO MOTION TO ALTER OR AMEND JUDGMENT PURSUANT TO RULE 59(e) (April 30, 2012)	JA3416
ORDER DENYING MOTION TO ALTER OR AMEND JUDGMENT PURSUANT TO RULE 59(e) (November 5, 2012)	JA3417
AMENDED PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA (April 30, 2014).....	JA3418
RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA (March 24, 2014).....	JA3505
REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA (May 5, 2014)	JA 3574
ORDER GRANTING WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA (April 15, 2016)	JA3600
BRIEF OF PETITIONER (August 8, 2016).....	JA 3601

BREIF OF RESPONDENT (December 16, 2016).....	JA3629
REPLY BRIEF OF PETITIONER (January 30, 2017).....	JA3668
ORDER OF SOUTH CAROLINA SUPREME COURT AFFIRMING DENIAL OF POST-CONVICTION RELIEF (January 10, 2018).....	JA3679
PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY AND MEMORANDUM IN SUPPORT OF PETITION (January 10, 2019).....	JA3700
PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY AND MEMORANDUM IN SUPPORT OF PETITION – EXHIBIT E: AFFIDAVIT OF ORETTA MILLER (January 10, 2019)	JA3798
PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY AND MEMORANDUM IN SUPPORT OF PETITION – EXHIBIT K: AFFIDAVIT OF TRIAL FACT INVESTIGATOR ROBERT MINTER (January 10, 2019).....	JA3804
PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY AND MEMORANDUM IN SUPPORT OF PETITION- EXHIBIT L: AFFIDAVIT OF PCR COUNSEL JAMES ARTHUR BROWN, JR. (January 10, 2019).....	JA3807
RESPONDENTS’ MOTION FOR SUMMARY JUDGMENT (May 10, 2019)	JA3809
RESPONDENTS’ RETURN AND MEMORNDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT (May 10, 2019)	JA3810
PETITIONER’S TRAVERSE AND RESPONSE IN OPPOSITION TO RESPONDENT’S MOTION FOR SUMMARY JUDGMENT (August 5, 2019)	JA3926
RESPONDENTS’ REPLY TO PETITIONER’S RESPONSE IN OPPOSITION (August 19, 2019)	JA3965

REPORT AND RECOMMENDATION OF MAGISTATE JUDGE (December 10, 2019)	JA3984
PETITIONER’S OBJECTIONS TO REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE BY MARION BOWMAN (February 14, 2020)	JA4105
RESPONDENTS’ REPLY TO OBJECTION TO THE REPORT AND RECOMMENDATION (February 28, 2020)	JA4131
ORDER GRANTING SUMMARY JUDGMENT AND DENYING PETITIONER’S AMENDED PETITION (March 26, 2020)	JA4138
SUMMARY JUDGMENT ENTERED IN FAVOR OF RESPONDENT (March 26, 2020)	JA4214
MOTION TO ALTER OR AMEND JUDGMENT (April 22, 2020)	JA4215
MEMORANDUM IN SUPPORT OF MOTION TO ALTER OR AMEND JUDGMENT (May 14, 2020)	JA4218
RESPONDENTS’ RESPONSE IN OPPOSITION TO PETITIONER’S RULE 59(e) MOTION TO ALTER OR AMEND (June 15, 2020)	JA4231
REPLY TO RESPONDENTS’ RESPONSE IN OPPOSITION TO PETITIONER’S RULE 59 (e) MOTION TO ALTER OR AMEND (June 30, 2020)	JA4246
ORDER DENYING PETITIONER’S MOTION TO ALTER OR AMEND JUDGMENT (August 7, 2020)	JA4252

5518

generally that the usage was extremely heavy or specifically that the defendant was intoxicated. See State v. Young (evidence that defendant and his companions were drinking heavily on the night of the murder); State v. Pierce, 289 S.C. 430, 346 S.E.2d 707 (1986) (defendant was extremely intoxicated, smoking marijuana, and injecting drugs during the crimes).

Here, not one person testified Appellant was intoxicated at the time of the crime or any other time. Indeed, no one even specifically testified that Appellant drank as much as one beer. While Appellant relies much on the fact that Tywan testified *he* was drinking all day at Koger's house – and “near about” drunk by the time he went with Appellant to the Allen Murray club a few hours *after* the murder, at no time did Tywan actually describe Appellant actually drinking anything, much less acting or behaving in an intoxicated manner. The most Tywan stated was that Appellant had a beer in a bag at some point early in the afternoon, and that Appellant went to get some unspecified quantity of beer at the EZ shop *after* he had killed Kandee. {R. 3985; 4016}.

Further, Tywan stated that he was not even around Appellant during most of the afternoon – as following the spat over Appellant's gun, Appellant left, and Tywan did not see him again until 7:00 or 7:30 p.m. {R. 3990-91}. This is confirmed by the testimony of Yolanda, Katrina, and Eddie Waters, who described the event that afternoon where Appellant threatened Kandee from the back seat of Yolanda's car as they rode to the pharmacy. Neither Yolanda, Katrina, or Eddie described Appellant doing any drinking during this time.

Moreover, while Appellant bought some beer and later went to the Allen Murray club

after the murder had been committed, by all accounts he remained outside in the parking lot the entire time – and no one described him as either drinking or intoxicated. Aside from the fact that this was after the crime was committed, and thus hardly relevant to the mitigator anyway, there is nothing to indicate either heavy consumption or intoxicated behavior or characteristics. Similarly, Travis Felder never described any intoxicated behavior or drinking by Appellant when they went to fire Kandee's car.

Since there was no evidence that Appellant was engaging in heavy consumption or was actually intoxicated at the time of the murder, there was no reversible error even though the mitigators were not charged.

5520

II. THERE WAS NO REVERSIBLE ERROR FROM THE SOLICITOR'S BRIEF AND LIMITED QUESTIONING AS TO RECREATION AVAILABLE IN PRISON, WHERE THE ISSUE IS NOT PRESERVED. IN ANY EVENT, THE QUESTIONING WAS APPROPRIATE RESPONSE TO DEFENSE EVIDENCE ABOUT THE HARSHNESS OF LIFE IN PRISON AND EMPLOYMENT REQUIREMENTS THEREIN, AS WELL AS INDEPENDENTLY RELEVANT AS SPECIFICS TO CHALLENGE THE DEFENSE EXPERT'S GENERAL ADAPTABILITY OPINION AND TO PLACE PERMISSIBLE RETRIBUTIVE CONCEPTS BEFORE THE JURY.

Appellant next contends the trial court erred in allowing the solicitor to briefly question defense prison adaptability expert James Aiken on educational and recreational activities available to a prisoner in general population. He asserts that this Court has repeatedly held in older cases that conditions of confinement are irrelevant to the jury's determination, and further argues that because conditions of confinement are beyond his control, he had no opportunity to explain or deny this information. However, the issue is not preserved as it was never raised to the trial court. In any event, the defense opened the door to such questioning by eliciting testimony about the harshness of life in prison without parole, as well as evidence of employment opportunities in prison. Moreover, limited questioning about conditions of confinement is independently relevant as permissible specifics the State needs to be able to explore in order to effectively cross-examine the defense expert's general opinion on adaptability. Finally, given that the United States Supreme Court and the state legislature have made future events relevant in a sentencing proceeding, and capital defendants fundamentally argue life without parole not in response to future dangerousness but solely as the proper retribution, it is only fair that the State be allowed limited information on conditions of confinement to aid the jury's determination of retributive concepts as to the appropriate punishment for the defendant's crimes.

A. Events at trial

As noted before, during its sentencing phase case the State only presented the two victims of Appellant's prior crimes, the SLED arson agent, the pathologist, and two victim impact witnesses. {R. 4652-4708}. The State presented no witnesses or information as to any of Appellant's misbehavior in or lack of adaptability to prison.

On the other hand, the defense's third witness was Margaret Baughman, an adult education teacher at the jail where Appellant spent his pre-trial confinement. This teacher stated that Appellant had been taking her classes in jail for fourteen to fifteen months, and eventually became her reliable and trustworthy teacher's assistant. {R. 4761-65}. On redirect, Appellant elicited that there are limited educational opportunities available for inmates, and Appellant made him self available for any class. {R. 4767}.

Appellant next called James Aiken, a former state corrections official and corrections consultant, who was qualified as an expert in future danger and prison adjustment issues. On direct, Aiken testified Appellant would *never* leave prison until he was dead. According to Aiken, Appellant's institutional record of one fight and assistance to Baughman in the classroom indicated he could adapt to prison, but fundamentally Aiken noted that SCDC could manage and incapacitate any inmate with its security measures. {R. 4838-4845}.

On cross, Aiken testified extensively without objection relevant to this issue on the various security levels of custody an inmate can achieve. Aiken stated that a LWOP inmate has the incentives of getting to go to work and "get[ting] an opportunity to live" – without objection from the defense. {R. 4854-4862}.

On redirect, *the defense* elicited that Appellant could not work outside the prison,

5522

that he would not be going to "kiddy camp" if he was given a life sentence, that he would not have "picnic lunches", and that he would be around a "predator, dangerous violent inmate population". *The defense* then elicited the dimensions of a supermax cell. *The defense* then asked Aiken what productive endeavors were available for Appellant in prison, to which Aiken replied that Appellant could "pay back society" and "do something for himself" by working in such areas as food service, maintenance, or painting. *The defense* asked Aiken if Appellant was going to be "molly-coddled", and elicited that Appellant could get involved with the Scared Straight program. **{R. 4864-68}**.

On re-cross, the prosecutor asked about escapes, to which the defense objected. Outside the presence of the jury, the court sustained the defense objection to the questioning on escape, but declined the motion for a mistrial. During the discussion, the prosecutor asked if he could explore "certain conditions of the general population, the work conditions he's already gotten into, that area", since the defense had established that Appellant was not going to "kiddy camp" and would have work available. The trial court agreed, to which the defense only stated, "We're on recross, Judge". The judge replied that work situations was an issue certainly before the jury "at this point". **{R. 4869-76}**.

Following a curative charge by the judge as to the escape question, the prosecutor elicited from Aiken that (1) Appellant would not be in supermax, (2) he would be able to work for a modest income of a few dollars per day, (3) he would have a daily routine that included eating times, work times, and recess, (4) he would be able to engage in Bible study, education, anger management, and "other things". While Aiken again noted Appellant would be around very dangerous people, he stated Appellant could have access

to libraries, television, football, and softball. There was no defense objection to any of this testimony. {R. 4877-81}.

Appellant next called jail guard Sharon Branch, who stated that while Appellant displayed some "attitude" and had a recent difficulty with authorities over going to church, he never made her feel physically threatened. The defense elicited that Appellant was allowed "one hour of rec per day", but that sometimes the guards extended that. {R. 4882-88}.

Finally, jail guard Enrique Badillo testified that Appellant displayed a very polite and cooperative attitude in jail. {R. 4902-05}.

B. The issue is not preserved.

On appeal, Appellant argues that the solicitor's questioning about movies, television, and books was irrelevant under this Court's decision in State v. Plath, 281 S.C. 1, 313 S.E.2d 619, 627 (1984), and violative of the constitutional due process mandate in Gardner v. Florida, 430 U.S. 349 (1977) that a death sentence cannot be based "on information the defendant had no opportunity to deny or explain".

However, the present issue is not preserved as it was never raised to the trial court. While Plath was discussed, the *solicitor* only mentioned Plath, and only in the context of *supporting* his questioning of Aiken on inmate escapes. After the judge ruled the escape question was inadmissible, the solicitor requested to go into "certain conditions of the general population, the work conditions [Appellant has] already gotten into". The defense never once made any argument or objection on this "conditions of confinement" issue other than to say "we're on recross, Judge". {R. 4873-74}. Moreover, the defense never made

5524

one objection when the answers were actually elicited before the jury.

Of course, a party cannot argue one ground below and another on appeal, and any argument, even constitutional, must be specified to the trial court in order to be preserved for appeal. See, e.g. State v. Byram, 326 S.C. 107, 485 S.E.2d 360 (1997) (party cannot argue one ground at trial and then another on appeal); State v. Ivey, 325 S.C. 137, 481 S.E.2d 125 (1997) (failure to specify grounds waives issue on appeal); State v. McWee, 322 S.C. 387, 472 S.E.2d 235 (1996) (8th Amendment claim that parole eligibility should have been charged was not preserved because that constitutional basis was not asserted at trial); Hubbard v. Rowe, 192 S.C. 12, 5 S.E.2d 187 (1939) (issue must be raised to and ruled upon by trial judge to be preserved for appeal).

Here, the present grounds for relief on appeal were not specified to the trial court. Indeed, the only argument made was “we’re on recross, Judge”, which at best can only be construed as a procedural objection that the solicitor was impermissibly attempting to introduce new matter on a re-cross examination. It certainly is not an objection or argument that such questioning was not relevant under Plath, or was a constitutional due process violation under Gardner. As such, the issue is not preserved.

Moreover, while the solicitor requested to go into “certain conditions of the general population, the work conditions he’s already gotten into, that area” {R. 4874}, he ultimately asked questions about recreation outside the subject of in-prison employment. There was no contemporaneous objection. As such, any contention with regard to subject matter outside of work is not preserved.

C. State v. Plath in view of modern developments in capital sentencing phase law on future adaptability to prison and life without parole.

As will be seen, the solicitor's limited questioning was permissible under the precedent of this Court. Indeed, the case Appellant refers to as most supporting his position in fact most supports admission of the challenged questioning due to Appellant's opening of the door – State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984). However, changes in the law since Plath make the questioning no longer prohibited under the general principles expressed within it.

Plath first found no error in the State's examination of defense expert witnesses on cases in which they testified but the jury still found the death penalty. The Court noted that the experts were there to testify about the declining acceptance of and international trends away from capital punishment, which it ruled was entirely impermissible. However, it concluded that since the trial court allowed the defense testimony, the State was permitted to respond with the challenged cross-examination. 281 S.C. 1, 313 S.E.2d 619.

Next, Plath addressed state's cross-examination of a professor who generally testified that life imprisonment was a punishment superior to the death penalty. During his direct examination, the professor testified about conditions of life imprisonment at CCI, and called life imprisonment "a form of slavery" – which this Court concluded was "to demonstrate the permanence and deprivation entailed in life imprisonment". On cross, the State asked about another inmate's escape, which the Court ultimately held was permissible:

Since the witness claimed an intimate knowledge of CCI, and based his testimony upon that knowledge, it was not amiss for the State to pursue his claim more closely.

5526

Plath, 281 S.C. at 12, 313 S.E.2d at 626.

After also rejecting a claim that the State was improperly was allowed to cross a prison social worker on a complaint letter she wrote about an inmate's freedom of movement, the Court very strongly rebuked sentencing phase defenses which "sought to portray life imprisonment as preferable to capital punishment as a matter of social policy", or "drew a picture of life imprisonment as slavery, a condition of irretrievable loss". Plath, 281 S.C. at 14, 313 S.E.2d at 626-27. The Court stated that such defenses improperly "invite[d] the jury to intrude upon the strictly legislative function of determining the nature of crime and punishment", and concluded:

In the sentencing phase of a capital case, the function of the jury is not to legislate a plan of punishment but to make the "either/or" selection Such determinations as the time, place, manner, and conditions of execution or incarceration, as well as the matter of parole are reserved by statute and our cases to agencies other than the jury.

Plath, 281 S.C. at 14-15, 313 S.E.2d at 627.

The Plath Court went on to note that while psychiatric testimony of future dangerousness was permissible, it had held that future adaptability to prison evidence was not – a conclusion subsequently overruled by the United States Supreme Court in Skipper v. South Carolina. Only in the context of justifying this distinction, Plath stated:

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

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

Despite these admonitions, the Plath Court returned to how the State's challenged

questioning was only proper response to what that Court considered at the time to be improper sentencing phase defenses on the utility of capital punishment or the conditions of capital punishment:

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

Plath, 281 S.C. at 15-16, 313 S.E.2d at 627-28 (emphasis added). See also State v. Woomer, 278 S.C. 468, 299 S.E.2d 317 (1982) (evidence of defendant's prior escape was proper reply to defense evidence of good conduct while in prison).

Plath thus addressed a number of issues arguably relevant to the case at bar – but Plath also was issued prior to the United States Supreme Court's decisions in Skipper v. South Carolina, 476 U.S. 1 (1986), which essentially held that due process required admission of prison adaptability evidence, and the line of cases following Simmons v. South Carolina, 512 U.S. 154 (1994), which has ultimately led to the point where every capital jury is now informed a life sentence is without the possibility of parole. Indeed, in 2002, the Legislature provided that upon request of a party any capital jury should be informed a life sentence is without the possibility of parole, which this Court has stated should be charged in every case regardless of request. State v. Shafer, 352 S.C. 191, 573 S.E.2d 796 (2002) (discussing S.C. Code Ann. § 16-3-20 (Supp. 2001) and Kelly v. South Carolina, 534 U.S. 246 (2002)).

With these developments in mind, it is clear that not only was the State's

5528

questioning proper response to defense testimony on the harshness of life in prison under Plath itself, but it is now also independently relevant and admissible to explore the adaptability case, as well as to rebut it with retributive themes, under the present state of the law.

D. The defense opened the door to the solicitor's limited questioning about conditions of confinement by first eliciting testimony about the harshness of life in prison as well as presenting evidence about employment opportunities in jail.

As an initial matter, the defense opened the door to the solicitor's questioning – consistent with Plath – by eliciting testimony about the harshness of life in prison as well as bringing out employment opportunities available to Appellant.

During James Aiken's direct testimony, he stated Appellant would be "incapacitated" and "lock[ed] up" for the rest of his life, with guards "that know how to use weapons", and behind fences, gun towers, concrete, and bars. {R. 4842; 4845}. After the solicitor's cross, in which he did not specifically ask about conditions of confinement other than various security classifications, the defense elicited that the guards could use "lethal force", and Appellant could be further prosecuted for any violations in prison. At this point, the defense asked whether a life sentence would be "kiddy camp", whether Appellant would get "picnic lunches", that he would live the rest of his days amidst a predatory and dangerous community of inmates, and that he would not be "molly-coddled" by the prison authorities. {R. 4864-66}.

Given this defense-elicited evidence of the harshness of prison, in which Appellant not only starkly discussed the severe security regime as well as very pointedly used terms as "kiddy camp", "picnic lunches", and "molly-coddled", it was only appropriate that the

State be entitled to respond by showing that Appellant would have opportunities for recreation if sentenced to life – that “life imprisonment was not the total abyss which [the defendant] portrayed it to be”. Plath, 281 S.C. at 15-16, 313 S.E.2d at 627-28. As this Court has stated, “[b]oth the accused and the State are entitled to a fair trial.” State v. Woome, 278 S.C. 468, 472, 299 S.E.2d 317, 319 (1982). It is simply not consistent with a level and fair adversary system for the defense to be able to freely display all the negative consequences or aspects of a lifetime behind bars, without the State being able to respond in a limited fashion by eliciting some of the small comforts or enjoyments even a LWOP defendant will experience – such as TV, reading, or even a point not brought up by the solicitor in this case – visitation by family or friends.

Moreover, the defense elicited prior to the solicitor’s examination from both Baughman as well as Aiken that employment and educational opportunities available to a defendant behind bars. Like recreation, these opportunities undoubtedly can be a source of distraction from the rigors of prison life as well as a source of personal fulfillment; thus, it was only fair – and indeed certainly not prejudicial given the work evidence already elicited – that the State be allowed to also bring out in a limited fashion some other recreational activities available to inmates aside from work and education.³ Further, Aiken also very pointedly stated on cross that every inmate would be required to work, and that an inmate would be put in “supermax” if he refused. This was followed up on by the

³ See generally State v. Johnson, 306 S.C. 119, 410 S.E.2d 547 (1991) (proper for solicitor to respond that victim’s family could only visit him at the grave after defendant’s sister testified she would visit him in prison at Christmas); State v. Thibodeaux, 750 So.2d 916 (La. 1999) (defendant opened the door to prosecution questioning of its corrections expert on recreational activities at prison).

5530

defense in redirect. {Tr.4862-63; 4866-67}. It was only appropriate that the State point out an inmate would have time for recreation, too – not that he would be breaking rocks all day every day “at hard labor”.

Finally, on cross when asked what motivation a life without parole inmate had to comply with the rules, Aiken stated that SCDC’s only business was incapacitation of life without parole inmates, because they are not preparing such an inmate for release. {R. 4861}. It is only fair for the State to be able to rebut the obvious inferences from these statements by showing that SCDC does not merely incapacitate – it does allow life without parole inmates recreation and education.

There was no error.

E. Limited questioning on conditions of confinement is warranted for the solicitor to effectively explore details and specifics behind the general opinion of adaptability offered by the defense expert.

As noted before, at the time of Plath, this Court excluded evidence of the defendant’s future adaptability to prison. However, after Skipper, that issue is central to virtually every modern capital sentencing proceeding – especially in this case, where Appellant specifically called a former senior corrections official to testify Appellant could be safely and easily maintained by the prison system.

However, the defense should not be entitled to simply present an expert to generally testify to a defendant’s purported adaptability in our prison system without specific inquiry into the details behind such an opinion. Along these lines, relevant to future adaptability are limited questions as to with whom the defendant will be interacting, and what exactly he will be doing during the course of his incarceration. Consistent with Plath – inasmuch

as the Court held inquiry into another's escape attempt was "proper as a test of the information upon which the witness based his opinion" – the State should be entitled to explore the expert's opinion of adaptability by asking in a limited fashion about the various conditions the inmate will experience. Plath, 281 S.C. at 13, 313 S.E.2d at 626. See also State v. Plath 277 S.C. 126, 284 S.E.2d 221 (1981) (Plath I) (proper for solicitor to "inquire into the source of information upon which [the expert's opinion against the death penalty] was based").

Without the ability to explore the specific aspects of an inmate's future experiences within prison, cross-examination to challenge the expert's opinion about adaptability would be essentially meaningless. See generally Rule 705, SCORE (permitting the disclosure and exploration during cross-examination of the facts and data relied upon by an expert in reaching his ultimate conclusion). Indeed, the whole question of a determination of adaptability to prison specifically involves what exactly an inmate will be doing during his incarceration, and with whom he will be doing it with. A general opinion of adaptability unchallengeable by those specifics is not consistent with the level playing field contemplated by our adversary system.

Such questioning does not need to include "how often [an] inmate will take a shower" – and of course the solicitor here never approached such irrelevant detail. But once the defendant asserts he will easily adapt to the realities of life in prison, the state should be entitled to explore exactly what those realities are – whether they be security, educational, vocational, or recreational.

5532

F. Limited information on the conditions of confinement in a life without parole sentence is necessarily and inevitably relevant to the jury's consideration of retributive concepts in its sentencing determination.

Appellant of course relies heavily on Plath's express preference for a simple "either/or" choice between life and death, independent of any consideration of "time, place, manner, and conditions of execution or incarceration". Plath, 281 S.C. at 14-15, 313 S.E.2d at 627. However, as noted before, Plath also noted it believed evidence of future adaptability should be excluded as part of the simple "either/or" choice, but that restriction was abolished by the United States Supreme Court in Skipper. Further, while the State and this Court used the simple "either/or" argument to justify plain and ordinary meaning charges in the Simmons line of cases culminating with Kelly v. South Carolina, 534 U.S. 246 (2002), the United States Supreme Court nullified that restriction as well. Finally, by mandating an instruction, the legislature has made the actual length of sentence a relevant consideration in every case regardless of considerations of future dangerousness. See State v. Shafer, 352 S.C. 191, 573 S.E.2d 796 (2002) (discussing S.C. Code Ann. § 16-3-20 (Supp. 2001)).

Thus, the simple "either/or" choice contemplated by Plath and its language has been entirely shattered, as juries already now consider aspects of the defendant's future life after trial with issues of adaptability in prison and the actual indeterminate length of sentence.⁴

⁴ Given that during litigation of the Simmons/Kelly lines of cases before the United States Supreme Court the State relied on this Court's express preference for a simple "either/or" choice in which the jury is not to be concerned with what happens after sentence, it is interesting that the defense bar apparently wanted to abandon Plath when it benefitted them in the life without parole litigation, but invoke and revive the *very same passage and principle* today when it suits them.

Moreover, it is a fallacy to think that capital defendants argue the actual indeterminate length of life without parole sentence to the jury only in the context of a Simmons-style rebuttal to prosecution claims of future dangerousness. Like this case, *far more often* the defense simply argues that the "without parole" portion of a life sentence makes it sufficiently severe enough punishment to be appropriate retribution for the crimes, without the need to impose death. See {R. 4982} (defense derisively refers to prosecutor's argument as "reward-a-prison"); {R. 4991} (defense states its "easy to try to paint prison as a reward", and argues: "The line forms back there if anybody wants to spend the rest of their life behind bars."); {R. 4991} (defense argues it is "wrong" and an "injustice" if the jury thinks a life sentence is a "reward"); {R. 4996-97} (defense implies that a life sentence is worse than death for a person as young as Appellant, and argues "Can you imagine spending from the years of the youngest person on the jury until the oldest person on the jury behind bars? That's a life sentence without the possibility of parole."); {R. 4997-98} (defense argues that jury should give Appellant life so that he would have to remember what he did to Kandee for the rest of his days); {R. 5005-06} (defense argues that prison is a dangerous place, and prison is appropriate punishment for Appellant because it is a death sentence too).

Given that this is really how life without parole is used by the defense, how could it possibly be fair that the State then not be allowed to rebut this argument with accurate but limited information about the positive things Appellant will be able to enjoy in general population? Retribution is of course one of the two primary justifications for the death penalty, see generally Gregg v. Georgia, 428 U.S. 153, 183 (1976), and the State should

5534

not be precluded from offering rebuttal evidence *directly* relevant to that most important and legitimate consideration.

Moreover, this Court has approved as relevant victim impact evidence argument that the victim's family could only see him at the grave, made after the defendant's sister testified she would visit him in prison at Christmas. State v. Johnson, 306 S.C. 119, 410 S.E.2d 547 (1991). While this ruling was based in application of the approval of victim impact evidence in Payne v. Tennessee, 501 U.S. 808 (1991), there is no question that such permissible argument at least implicitly also speaks to the insufficient retribution of a life sentence.

The whole point of Simmons and its progeny was that the jury be given accurate information to make its choice between life and death. Given the predominant relevance of retributive considerations to this determination, the jury should also be given limited and reasonable information towards the issue that is necessarily part of every jury's capital sentencing determination – whether a life sentence is in fact sufficient retribution for the grave crimes that the jury has already determined the defendant committed. If we are no longer to indulge in the fiction that juries do not consider the actual length of confinement when assessing a life sentence, we should also no longer tolerate the fiction that juries do not expressly consider the retributive sufficiency of a life sentence in deciding whether or not it is appropriate punishment. Indeed, the defense expressly asks them to – but Appellant wants to be able to do so without fair and equal time on the issue for the State.

Along these lines, and especially when a defendant calls a witness like Aiken to testify to the severe incapacitation of a life sentence in the South Carolina Department of Corrections, the State should be able to simply point out in limited evidence and argument

that while life imprisonment may be bleak, a defendant will still get to enjoy recreation, employment, education, and visitation. It is nothing but the truth, and we all know juries think about this anyway.⁵

⁵ Nor would there be any due process problem under Gardner v. Florida, 430 U.S. 349 (1977), that a death sentence cannot be based "on information the defendant had no opportunity to deny or explain". Within reason, Petitioner could explain anything about prisons he wanted – indeed, it was *his* expert on prison management that first broached the subjects, and his expert who kept painting life imprisonment harshly. Neither would there be an issue under State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000), inasmuch as Appellant has no control over the circumstances of his incarceration. The system is the system, and now that the United States Supreme Court and the state legislature have made future events pertinent in a sentencing proceeding, the system is relevant as to what is appropriate retribution for the crimes. Appellant simply cannot be allowed to make his arguments about future events without allowing limited fair response by the State.

5536

III. THE TRIAL COURT'S CURATIVE INSTRUCTION WAS MORE THAN SUFFICIENT TO CURE ANY PREJUDICE FROM THE SOLICITOR'S ONE UNANSWERED QUESTION ABOUT ESCAPE, ESPECIALLY WHERE THE QUESTION WAS PROPER ANYWAY GIVEN THAT ONE OF THE DEFENSE EXPERT'S MAIN POINTS WAS THAT SCDC COULD SAFELY AND EASILY INCAPACITATE APPELLANT FOR THE REST OF HIS LIFE.

Appellant next contends that the trial court erred in refusing to grant a mistrial when the solicitor asked defense corrections expert about escape from prison. He asserts that escape is a speculative matter beyond his control, and that there was no evidence linking him personally to any escape. He further contends the trial court's curative instruction was insufficient to cure any prejudice. However, not only was the curative instruction sufficient, but there can be no reversible error as the questioning on escape was admissible and proper anyway.

A. Events at trial

Much of James Aiken's testimony has already been described in the preceding section. He testified that as a former senior corrections official, he had classified "thousands" of inmates, placing them "in the right level of security and the right level of management". {R. 4835}. Aiken continued that the nature of Appellant's offense gave him no pause in classification, because he has dealt with people who have committed heinous crimes for 30 years, and he puts "a very high level of priority on that person's community behavior in relationship to protection of the public". {R. 4839-40}.

Aiken then stated without equivocation that Appellant would never leave prison if given life without parole. He then testified that Appellant could be easily and adequately maintained and incapacitated by SCDC for the rest of his life, as SCDC has "fences", "gun towers", "people who know how to use weapons". According to Aiken, SCDC knows "how

to lock people up and keep them there for extended periods of time". {R. 4842}. Aiken stated he "no reservations whatsoever" in saying that Appellant would "adapt to future prison", even knowing his sentence was without parole. {R. 4844}.

Finally, Aiken very strongly and without reservation concluded:

[Appellant] would be kept behind bars, behind fences, behind bars, behind concrete, and he would be adequately managed in a security setting for the remainder of his life because of his behavior in the community. And that the system can adequately manage him. And that I have classified thousands on inmates in this type of situation where they have inflicted violence upon people, the have violated the laws of this jurisdiction.

{R. 4845}.

On cross, Aiken asserted no matter what custody assignment an inmate works into he will still be watched by gun towers, that lethal force could be used against the inmate, that an inmate "can't beat the system", and that the system could manage any type off conduct the individual demonstrates. {R. 4857-58; 4863-64}.

On redirect, Aiken stated that a life without parole inmate could not work outside the prison, and is subject to lethal force and prosecution for any misbehavior. {R. 4864-66}.

On recross, Aiken reasserted that Appellant would never get out prison. The prosecutor then asked how many inmates escaped during Aiken's tenure with SCDC, at which point the defense objected, stating that the jury has been told all he will receive is life without parole.

After the jury was excused, the prosecutor argued that since Aiken had testified Appellant would never get out of prison, cross-examination on escape was permissible under State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984) – which allowed questioning on another inmate's escape attempt was relevant to test the credibility of a social scientist who

5538

testified about conditions of life imprisonment. The solicitor noted that the door was opened when the defense mentioned "kiddy camp" and "supermax". {R. 4870-71}.

The trial court reviewed the Plath case, and concluded – wrongly – that the inquiry on escape was allowed only because Plath himself was an escapee when he committed the offenses in that case.⁶ {R. 4870-72}.

The defense then argued that a curative instruction would only reemphasize the issue to the jury, and that inquiry into the possibility of escape would violate the United States Supreme Court's and this Court's ruling that a jury should only consider life without parole as meaning exactly what it says. The prosecution again responded that the Alken repeatedly referred to the security measures of SCDC and gave the impression no one escapes – when in fact people escape "on a halfway frequent basis" from every prison in the state. The trial court ruled the questioning on escape was simply not going to be allowed. {R. 4872-74}.

The defense then moved for a mistrial, arguing that a curative instruction was insufficient to remove the supposed taint. The court proposed a curative instruction, and offered to let the defense add anything to it, which it declined. The jury then returned, to which the trial court gave the following instruction:

⁶ The challenged questioning in Plath was when the solicitor there asked a professor, who had testified about the superiority of life imprisonment to the death penalty, about "a particular inmate who had escaped while serving a life term". The Court held the question was permissible to test the credibility and sources of information upon which the professor had based his opinion. Plath, 281 S.C. at 12-13; 313 S.E.2d 619 at 626. As the first Plath decision makes clear, though, this incident involved one Lewis Bostick, a person entirely unrelated and unconnected with the Plath and Arnold. State v. Plath, 277 S.C. 126, 140, 284 S.E.2d 221, 228-29 (1981) (Plath I).

Ladies and gentlemen, there was a question that was asked before you left and I have ruled that question was not proper and I'm going to ask you to disavow it from your minds for this reason: There are two sentences that you will concern yourselves and we're going to have an opportunity during my charge to talk about them at great length, but for this moment I will tell you, and I think I am reminding you based on the instructions that you have received even preliminarily, but there are two sentences that you will concern yourselves. One, the death penalty, and the other is life imprisonment without the possibility of parole. The Statute says until the death of the defendant. Those would be the two sentences that you will concern yourselves.

{R. 4874-77}.

B. Given that the witness did not even answer the question and the jury knew a lawyer's questions were not evidence, the trial court's sustaining of the objection and immediate and thorough curative instruction was more than enough to prevent any reversible error.

As an initial matter, there was no reversible error as the trial court sustained the defense objection and immediately gave a curative instruction directed right at the issue.

Generally, a trial court's curative instruction is deemed to have cured any error. State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998). An instruction to disregard incompetent evidence is usually deemed to have cured the error unless on the facts of the particular case it is probable that, notwithstanding the instruction, the accused was prejudiced. State v. Smith, 290 S.C. 393, 350 S.E.2d 923 (1986). Moreover, a mistrial should only be granted when absolutely necessary, and the defendant must show both error and resulting prejudice. State v. Harris, 340 S.C. 59, 530 S.E.2d 626 (2000).

In applying these rules, this Court has repeatedly found curative instructions sufficient to cure any prejudice from improper admission of evidence or improper argument, including in an analogous situation where the time period for parole eligibility was mentioned in a capital sentencing phase. See State v. Plath, 277 S.C. 126, 140, 284

5540

S.E.2d 221, 228-29 (1981) (Plath I) (finding no prejudicial error where trial court told jury not to consider parole after the twenty year eligibility requirement was mentioned in a codefendant's argument). See also Gill v. State, 346 S.C. 209, 552 S.E.2d 26 (2001) (curative instruction cured any possible prejudice from prosecutor's statement that "there is no defense to this case", where the jury was instructed that the defendant did not have to demonstrate his innocence and the failure to testify could not be considered); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997) (question regarding post-arrest silence was nullified by curative instruction to disregard the evidence and not consider it for any purpose); State v. Simmons, 352 S.C. 342, 573 S.E.2d 856 (Ct. App. 2002) (curative instruction sufficed where trial court granted directed verdict as to one crime and instructed jury not to consider it any longer).

Here, the curative instruction was more than sufficient. First, the witness *never* answered the question, as the objection came quickly and the issue was resolved against the State. Thus, there was no actual admission of any incompetent evidence. Moreover, the jury was repeatedly informed that what the lawyers said in argument or questioning was not evidence. {R. 3636; 3641}.

Second, the challenged question only mention other inmates in SCDC – it did not in any way refer to Appellant *specifically*. Thus, any negative aspersions as to him were muted, and any possibility of prejudice is remote.

Third, the curative instruction was given immediately after the jury returned – so the temporal connection of the instruction to the question certainly assures it had the desired effect. Cf. State v. Reid, 324 S.C. 74, 79, 476 S.E.2d 695, 696 (1995) (curative instruction

insufficient in part because it was given at the end of the case), overruled on other grounds by State v. Watson, 349 S.C. 372, 563 S.E.2d 336 (2002)

Fourth, the instruction was thoroughly complete and aimed directly at the heart of the matter. It: (1) told the jury the question was improper, (2) told them to remove it from their minds, and (3) the only things they could consider were death and life without parole. {R. 4877}. This was not just some "general remark". See State v. Smith, 290 S.C. 393, 350 S.E.2d 923 (1986) (casual remark to "forget" the evidence was insufficient).

C. Given that life without parole is now an issue in every case, the possibility of escape is independently relevant to explain the realities of such a sentence.

In any event, there can be no reversible error because the trial court erred in ruling that the solicitor's questioning about escape was no proper.

As noted before, the United States Supreme Court, this Court, and the state legislature have opened every capital sentencing proceeding to information that the defendant will never receive the possibility of parole if sentenced to life. State v. Shafer, 352 S.C. 191, 573 S.E.2d 796 (2002) (discussing S.C. Code Ann. § 16-3-20 (Supp. 2001) and Kelly v. South Carolina, 534 U.S. 246 (2002)).

However, the United States Supreme Court has also noted that a life without parole instruction may be of "uncertain materiality, as it may be overcome if a jury concludes the defendant . . . may escape to murder again". Ramdass v. Angelone, 530 U.S. 156, 170 (2000).

These changes in the law have gradually made future events a central focus of a sentencing proceeding – and thus the possibility of escape is now independently relevant

5542

as at least a subject of argument in any case. Moreover, there need not be any "nexus" of prior escape attempts by the particular defendant before the issue is broached – since the future length of confinement is now a relevant and mandatory issue in every capital case, then the very real possibilities that might happen during those future years are also relevant. Of course we do not know exactly what any particular defendant will do during that time – but that is no reason to hamstring the State in merely pointing out the truth – that life in prison is not an absolute be-all-to-end-all, and that people can and do escape. It is simply to explain to the jury the realities of what they are being charged. The whole point of the Simmons/Kelly case law is no longer to indulge fictions before the jury, and there is no reason to indulge ones where the truth would benefit the State or rebut defense points, simply because that is what it happens to do. See Gregg v. Georgia, 428 U.S. 153, 204 (1976) ("It is desirable for the jury have as much information as possible when it makes its sentencing determination.").⁷

D. Even if the possibility of escape is not independently relevant in every case, the defense certainly opened the door here during the adaptability case by extensive testimony from its expert as to the incapacitive capabilities of SCDC.

The defense's adaptability case more than opened the door to questioning about past escapes from SCDC. As noted before, defense corrections expert Aiken confidently

⁷ In his brief, Appellant contends that this Court mandated that the possibility of escape is only admissible when it has a direct nexus to the defendant's conduct in State v. Woomer, 278 S.C. 468, 299 S.E.2d 317 (1982). This is incorrect. Woomer merely held that evidence of the defendant's prior escape was admissible to rebut defense evidence of good conduct in prison. Nothing was said about a required nexus, and, of course in modern practice actual escape evidence would be flatly admissible in the prosecution's case in chief without question not as rebuttal evidence but evidence of the defendant's character and characteristics.

stated *without any qualification whatsoever* that SCDC could completely incapacitate and secure Appellant for the rest of his life. No problem at all – he repeatedly referred to fences, bars, concrete, gun towers, lethal force, and guards. Aiken stated this conclusion was expressly based on his experience doing security classifications of “thousands” of prior inmates, and his long prior service with various prison systems, which of course also involved inmates other than Appellant. {R. 4833-36}.

It seems only fair that the State could quite reasonably challenge this confident and unqualified opinion by asking how many of Mr. Aiken’s inmates escaped – or also how many have escaped from the particular system in which he already placed such unequivocal confidence before the jury. Moreover, since Mr. Aiken based his assessment on his past experiences with other inmates, the State can legitimately ask about these other inmates.

Like in the preceding ground, the State is entitled to ask the expert about specific facts and data that might challenge or undermine his general conclusion. Otherwise, cross-examination is meaningless. Appellant through his expert brought up prison security, and the *main point* of Aiken’s testimony was to assure the jury that Appellant would in fact be safely contained until he died of natural causes. It is only fair that the State be able to respond by pointing out the truth – that despite best efforts, inmates can and do escape. This is entirely consistent with this Court’s prior precedent. See State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984) (permissible to ask expert witness, who testified regarding conditions of life imprisonment, about a prior escape attempt by another inmate as a test of the sufficiency of the information upon which the witness based his opinion, as well as

5544

his credibility as a social scientist).

Appellant wants his life without parole charge, but does not want to allow the State to go into things that the United States Supreme Court has said are directly relevant to the materiality of such a charge. Appellant wants to present evidence on SCDC's incapacitative capabilities, but does not want the State to be able to simply point out that these capabilities are not absolute and foolproof. For each of these points, one is part and parcel of the other.

The State is entitled to a level playing field and equal time, too.

IV. THIS COURT HAS ALREADY RULED THREE TIMES THAT *RING v. ARIZONA* DOES NOT DEPRIVE A TRIAL COURT OF SUBJECT MATTER JURISDICTION EVEN THOUGH THE AGGRAVATING FACTORS WERE NOT ALLEGED WITHIN THE INDICTMENT.

Appellant next contends the trial court lacked subject matter jurisdiction to sentence him to death because the murder indictment did not also allege aggravating circumstances. He asserts that following the United States Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), aggravating factors are now "elements" of the crime of capital murder.

This Court has already rejected this contention or similar ones in three recent cases, and the State would incorporate those its results and its arguments therein here. *State v. Crisp*, 362 S.C. 412, 608 S.E.2d 429 (2005); *State v. Downs*, 361 S.C. 141, 604 S.E.2d 377 (2004); *State v. Wood*, 362 S.C. 135, 607 S.E.2d 57 (2004).

Appellant's aggravators were found beyond a reasonable doubt by his jury. There is no state subject matter jurisdiction problem from something that would not even be a federal constitutional problem under *Ring* anyway.

5546

V. THERE WAS NO REVERSIBLE ERROR IN ADMISSION OF APPELLANT'S PANTS AND THE VICTIM'S WATCH FOUND WITHIN THEM AT THE TIME OF HIS ARREST, WHERE THE ISSUE IS NOT PRESERVED, THE PANTS WERE SEARCHED INCIDENT TO A LAWFUL ARREST PURSUANT TO A VALID WARRANT, AND THE SEARCH WAS IN ANY EVENT JUSTIFIED BY CONSENT FROM APPELLANT'S WIFE.

Appellant next contends that the trial court erred in admitting his pants and the victim's watch found within when he was arrested at his wife's trailer on the morning after the murder. He asserts that his wife did not consent for police to enter, that he had an expectation of privacy, and that he was illegally arrested. However, the issue is not preserved inasmuch as the objection was not renewed upon introduction of the evidence. In any event, the pants were searched incident to a lawful arrest based on an outstanding arrest warrant, and in any event the search was justified by the consent of Appellant's wife.

A. Events at trial

Extensive pre-trial hearings were held in this case not only on this issue but also the admissibility of Appellant's statements to police.

It first should be noted that while the town of Branchville where Appellant was arrested is in Orangeburg County, the body was found in Dorchester County. {R. 979; 5076-77}.

At the pre-trial hearings, Dorchester County Sheriff's Deputy Terrence Van Doran testified about accompanying other officers to the trailer of Ms. Dorothy Bowman. He testified he had spoken to the Chief of the Branchville Police and was told there was an outstanding Orangeburg County arrest warrant on Appellant. Van Doran stated that after they found Appellant hiding behind a bed, he was Mirandized and Appellant asked for his pants. Dorothy went into the other room and got the pants, but before she could give them

to Appellant, Van Doren searched them. Inside he found a lady's wrist watch identified at trial as belonging to the victim. {R. 5076-81; 5085-88; 5177; 5187}.

Dorchester County officer Alvin Coker similarly testified that after they received information Appellant was with the victim the previous afternoon, they found out from Orangeburg County that there was a warrant on Appellant. He never saw the warrant physically, but Branchville Chief Walters told Coker he was aware of it. {R. 5124-25}. Coker also noted they had a signed consent to search form from Dorothy. {R. 5127}.

Chief Walters of the Branchville Police testified that he was aware of and had a copy – but not the original – of Appellant's Orangeburg arrest warrant for receiving stolen goods. He stated he went with the other officers to Dorothy's trailer, and knocked on the door. They told Dorothy they had a warrant for Appellant, and she invited them inside. Dorothy said she did not know where Appellant was but the officers could look around. Once they found Appellant, he was told he was under arrest for receiving stolen goods. {R. 320-23; 325-31}.

Willie Bamberg of the Orangeburg-Calhoun Regional Detention Center testified that Appellant was booked in that night on a receiving stolen goods warrant. {R. 665-66}.

Major Walters of the Orangeburg County Sheriff's Office testified she went to the trailer and talked with Dorothy. She noted she had been told there were charges on the defendant. {R. 683-85}.

Appellant testified at the pre-trial hearing, and stated that he was at his wife's trailer at the point of his arrest but did not live there. He claimed he told his wife not to let the police in when they arrived, but they told her they had a *search* warrant to see if Appellant

5548

was in her house. Supposedly the police told him he needed to put something on his lower body, and only brought him a pair of his wife's jogging pants. {R. 729-37}. Appellant admitted being presented the warrant for receiving stolen goods once he reached the Orangeburg County Jail that night. {R. 796-97; 935; 987}.

On cross, Appellant admitted knowing Kandee's watch was in his pocket. He claimed he did not know a warrant was out for him even though he went and hid in a child's bedroom. {R. 910-13}.

Dorothy Bowman also testified. She stated Appellant was not living with her, although some of his clothes were at her house. According to Dorothy, the police came to her door and said "something about JR [Appellant] and a warrant". They asked if they could come in and look for him, and she agreed. After they found Appellant, one of the officers asked her for Appellant's clothes. She went and got them, including the black pants. Dorothy stated that after Appellant was taken out she signed the consent to search form. {R. 1039-43}.

On cross, Dorothy again stated that the police requested to come in, and she let them in voluntarily. She was not afraid of Chief Walters at all. She noted police only said they had a warrant for his arrest, and noted police did not have a warrant to search her house. {R. 1050-53; 1056}.

The defense moved to suppress the evidence, arguing (1) Appellant was not informed of the nature of his arrest; (2) there was no proof the Branchville chief had knowledge of an outstanding felony or warrant; (3) even if he did, only having a copy of a warrant is insufficient, and (4) Appellant never received a bail or bond hearing on that

offense, which violates the state statute. Thus, the defense stated that the fruits of the illegal arrest should be suppressed. Appellant also argued that Dorothy did not consent until after the fact of the search, and that she could not consent to search Appellant's pants anyway. Finally, Appellant argued that since the pants were outside of Appellant's wingspan, a warrant was needed. {R. 1255-66; 1271-73}.

The trial court denied the motion to suppress, finding that the arrest was made on a valid warrant, that Appellant had no expectation of privacy in the pants as Appellant asked for them, the wife retrieved them and they were examined incident to arrest. Finally, the court ruled Dorothy consented to a search of the home before the watch and pants were removed. {R. 1275-76}.

When the pants and watch were entered into evidence, there was no objection. {R. 4129-30; 4164}.

B. The issue is not preserved.

In most cases, making a motion *in limine* does not preserve an issue for review unless the objection is renewed upon introduction of the evidence in question. However, if the evidence is admitted immediately after the ruling, there is no need to renew the objection. See, e.g. State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001).

Here, almost three thousand pages of transcript separate the judge's ruling and the introduction of the evidence at trial without objection. {R. 1275-76; 4129-30; 4164}. Since the objection was not renewed, the issue on appeal is not preserved.

C. There can be no possible prejudice with regard admission of the pants.

As Appellant notes, while there was a heavy accelerant on Appellant's pants, it was

5550

not gasoline, and there is a difference. {R. 4297-98; 4301-05}. Thus, there was really nothing that incriminating about the pants themselves (other than the mere fact they were black, and Appellant was described as wearing similar pants the night before). Indeed, the solicitor in argument never mentioned the accelerant on the pants as indicative of anything. {R. 4461; 4476}.

Thus, the only possible issue of consequence deals with admission of the watch found within the pants, not the pants themselves.

D. Appellant was properly arrested pursuant to a valid warrant.

The first point in the analysis is that Appellant was legally arrested pursuant to a valid warrant. Appellant really only argues that the state's witnesses were very "vague" about the warrant, and that they could have taken the time to obtain a murder warrant if they wanted.

However, a true attested copy of the warrant was admitted into evidence, Appellant admitted he was served a copy of the warrant when he was booked in the Orangeburg-Calhoun Regional Detention Center the night of his arrest, and an officer testified about serving the warrant on Appellant at the jail that night. {R. 796-97; 935; 987; 5420-22}. There is no legitimate issue as to whether there was a valid warrant in existence justifying Appellant's arrest.

Second, this Court has already held on two occasions that no challenge can be made to arrest based merely on the fact that the arresting officers were *aware* of an outstanding valid warrant but in fact did not have the original on them when they apprehended the suspect. State v. Holmes, 320 S.C. 259, 464 S.E.2d 334 (1995)

(defendant's clothes admissible where officer was acting pursuant to a valid warrant event though he was not in actual possession of it); State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991) (where officers knew of FBI warrant and California warrant, and there were also South Carolina warrants, arrest was properly conducted and evidence was admissible) (both citing Payton v. New York, 445 U.S. 573 (1980)).

Third, as long as the warrant was valid, the subjective motivations of the officers in making the arrest – such as to inquire about another crime – are of no consequence to the legality of the arrest. Indeed, since there was a valid arrest warrant, a judge had already made a probable cause determination irrespective of the subjective considerations of the officers who made the arrest. And, ultimately, Appellant has raised no challenge to the probable cause determination of the warrant itself. As such, the arrest was proper. See Whren v. United States, 517 U.S. 806, 813 (1996) (“subjective intentions play no role in ordinary, probable cause Fourth Amendment analysis”); Painter v. Robertson, 185 F.3d 557 (6th Cir. 1999) (if circumstances support finding of probable cause, officer's actual motives are irrelevant); United States v. Dela Pena, 62 Fed. Appx. 754 (9th Cir. 2003) (search of car properly admitted, as officers had probable cause since there was a valid arrest warrant, and their subjective motivations are irrelevant).

Fourth, it is true that officers must have a separate search warrant for a home of a third party when executing an arrest warrant for the subject there. Steagald v. United States, 451 U.S. 204 (1981). However, consent or exigent circumstances will allow officers to execute the arrest warrant in the home of the third party. Id.

Here, Dorothy testified repeatedly that she voluntarily let the officers inside after they told her they had an arrest warrant for Appellant and asked to come in to search for him.

5552

She stated she was not at all afraid of the police. {R. 1039-43; 1050-53; 1056}. As noted before in the description of events at trial, Chief Walters and Deputy Van Doran also described a consensual entry, and Dorothy ultimately signed a written consent to search form. There was more than enough evidence to support the trial court's determination that the arrest was validly made pursuant to a warrant in this case.

E. Seizure of the watch was valid as a search incident to arrest.

Of course, police may make a search incident to a lawful arrest of a defendant, and this may include the "wingspan" – anywhere the person might reach to destroy evidence or obtain weapons. Chimel v. California, 395 U.S. 752 (1969). However, this wingspan can "move" – as in Washington v. Chrisman, 455 U.S. 1 (1982), the Court found no violation where an officer accompanied an arrested person back to his dorm room and saw contraband in plain view. The Court noted:

It is not unreasonable under the Fourth Amendment for a police officer, as a matter of routine, to monitor the movements of an arrested person, as his judgment dictates, following the arrest.

455 U.S. at 7.

This case is simply Chrisman in reverse inasmuch as the pants came to Appellant at his request and out of necessity. Obviously Appellant needed pants to go to jail, and he asked for them. Obviously, then, the officers were entitled to search those pants incident to arrest before Appellant was allowed to put them on to be transported in custody. See People v. Jones, 767 P.2d 236 (Colo. 1989) (en banc) (marked bill found in wallet of defendant's pants admissible; even though they were not within his reach, they were in the nearby area, and appellant asked for his pants). Indeed, police are entitled to search a

person's personal belongings before incarceration; thus, even if Appellant had put on the pants, officers would have eventually found the watch. Illinois v. Lafayette, 459 U.S. 986 (1983).

F. In any event, the search of the pants was permissible based on Dorothy's consent to search the house.

Dorothy's consent also justifies the search of the pants. This Court has held that a third party can consent to a search if they have common authority or other sufficient relationship to consent to a search of the effects. State v. Middleton, 266 S.C. 251, 222 S.E.2d 763 (1976) (father could consent to search of son's bedroom in father's house).

Here, Dorothy's husband's pants here were laying on her couch in her living room. As Dorothy testified, she was voluntarily cooperating with police. The pants and watch were not removed from the house until after Dorothy even went as far as to sign a written consent to search. Under these circumstances, Dorothy had sufficient nexus to the pants to consent to a search of them when she consented to a search of her premises. {R. 1043; 1054-55}. See also State v. Laux, 344 S.C. 374, 544 S.E.2d 276 (2001) (defendant's girlfriend had authority to consent to search of apartment, where she answered in her nightclothes, said she lived there, had a key, and personal effects in the bathroom). Cf. State v. Bailey, 276 S.C. 32, 274 S.E.2d 913 (1981) (officer's had reasonable belief of resident's authority to consent to search of truck parked behind residence, as the truck was left unlocked with keys in the cab); United States v. Diggs, 544 F.2d 116 (3rd Cir. 1976) ("bailee consent" case noting that the right of a bailee to exculpate herself and explain or disclose property of another's in her possession outweighs any privacy interest of the defendant).

5554

The pants were properly admitted into evidence.

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CONCLUSION

For the foregoing reasons, this Court should affirm Appellant's convictions and sentences.

Respectfully submitted,

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Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

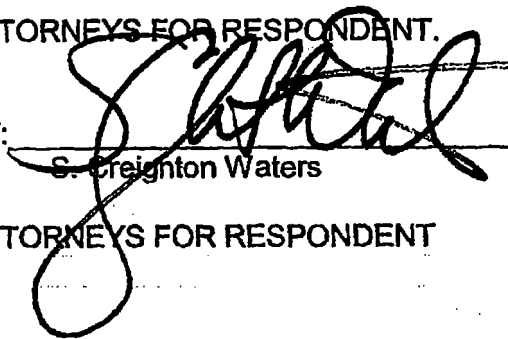
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BY:


S. Creighton Waters

ATTORNEYS FOR RESPONDENT

July 7, 2005

5556

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Appeal from Dorchester County
Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

Respondent,

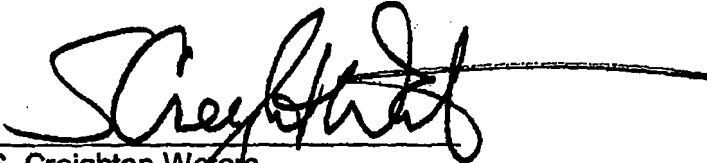
v.

MARION BOWMAN, JR.,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.


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July 7, 2005

JA 1539

5557

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Appeal from Dorchester County
Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

Respondent,

v.

MARION BOWMAN, JR.,

Appellant.

PROOF OF SERVICE

I, S. Creighton Waters, Counsel for Respondent, certify that I have this date served the ***Final Brief of Respondent***, dated July 7, 2005, on Appellant by depositing three (3) copies of the same in the United States mail, first class postage prepaid, addressed to his attorney of record:

Robert M. Dudek, Esquire
South Carolina Office of Appellate Defense
1205 Pendleton Street, Room 306
Columbia, South Carolina 29201

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

This 7th day of July, 2005.



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ATTORNEY FOR RESPONDENT

JA 1540

5558

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Dorchester County

Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARION BOWMAN, JR.,

APPELLANT

FINAL REPLY BRIEF OF APPELLANT

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JA 1541

TABLE OF CONTENTS

TABLE OF CONTENTS.....	1
TABLE OF AUTHORITIES	2
ARGUMENT IN REPLY	
1.	
Defense counsel requested that the judge charge the statutory mitigating circumstance contained in S.C. Code § 16-3-20 (C)(b)(6) on the capacity of the defendant to appreciate the criminality of his conduct or that his ability to conform his conduct to the requirements of the law was substantially impaired. The trial judge refused to charge this mitigating circumstance. The issue is therefore preserved, and this statutory mitigating circumstance has widely been accepted to include evidence of intoxication	3
2.	
The state argues that information about the conditions of confinement in prison is necessary. The state's argument is a request for this Court to open the door for both the defense and the prosecution to offer evidence about the time, place, manner, and conditions of incarceration or execution. This Court clearly stated in <i>State v. Plath</i> that such matters were not proper for the jury's consideration. (Issues 2 and 3)	5
CONCLUSION.....	7

5560

TABLE OF AUTHORITIES

CASES

<u>State v. Kelley</u> , 343 S.C. 350, 540 S.E.2d 851 (2001).....	6
<u>State v. Caldwell</u> , 300 S.C. 494, 388 S.E.2d 816 (1990).....	4
<u>State v. Hughey</u> , 339 S.C. 439, 529 S.E.2d 721 (2000).....	3
<u>State v. Johnson</u> , 333 S.C. 62, 508 S.E.2d 29	4
<u>State v. Pierce</u> , 289 S.C. 430, 346 S.E.2d 707 (1986).....	4
<u>State v. Plath</u> , 281 S.C. 1, 313 S.E.2d 619 (1984).....	5
<u>State v. Quattlebaum</u> , 338 S.C. 441, 527 S.E.2d 105 (2000).....	6
<u>State v. Stone</u> , 350 S.C. 442, 567 S.E.2d 244 (2002).....	4
<u>State v. Young</u> , 305 S.C. 380, 409 S.E.2d 352 (1991).....	4

STATUTES

S.C. Code § 16-3-20(C)(b)(6).....	3

ARGUMENT IN REPLY

1.

Defense counsel requested that the judge charge the statutory mitigating circumstance contained in S.C. Code § 16-3-20 (C)(b)(6) on the capacity of the defendant to appreciate the criminality of his conduct or that his ability to conform his conduct to the requirements of the law was substantially impaired. The trial judge refused to charge this mitigating circumstance. The issue is therefore preserved, and this statutory mitigating circumstance has widely been accepted to include evidence of intoxication.

Defense counsel requested the statutory mitigating circumstance on “the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law [being] substantially impaired.” ROA p. 4937, l. 4 – p. 4938, l. 16. The judge ruled the record was “void of any evidence” of the capacity to conform his conduct mitigating circumstance contained in S.C. Code § 16-3-20(C)(b)(6). ROA p. 4938, ll. 7 – 21.

The state attempts to create a procedural bar even though defense counsel requested that this statutory mitigating circumstance be charged, and despite the fact the court has a duty to review all statutory mitigating circumstances, and then to instruct the jury as to any circumstance that may be supported by the evidence, and not merely those requested by the defendant. State v. Hughey, 339 S.C. 439, 529 S.E.2d 721, 730 (2000). Appellant’s Brief at 17.

Further, the state appears to argue that evidence of intoxication or hard drinking was greater in other cases, and therefore the failure to charge this mitigating circumstance was not error. However, a judge is only concerned with the existence of evidence of the

5562

mitigating circumstance, and not its weight. There clearly was evidence in this case of a “party atmosphere” throughout the day, and evidence that appellant had been drinking with his friends.. He also had a history of substance abuse.

Further, the state’s assertion that by all accounts appellant “remained outside in the parking lot [of the Allen Murray Club]” ignores the fact that drinking outside such a rural club is the rule and not the exception. It ignores evidence that appellant had been drinking, and that one man he was partying with essentially admitted being grossly intoxicated.

The state further argues that the issue is procedurally barred because appellant did not take exception to the penalty phase jury instruction on mitigating evidence. However, this argument ignores State v. Johnson, 333 S.C. 62, 508 S.E.2d 29, 31, n.1 (2000) wherein this Court held that once a party requests a jury instruction on the record, and the Court rejects the request, there is not any need to object again to preserve the issue.

This Court has consistently held that the trial judge must instruct the jury on statutory mitigating circumstances two, six, and seven where there is evidence of intoxication or drug use. See State v. Stone, 350 S.C. 442, 567 S.E.2d 244, 248 (2002); State v. Pierce, 289 S.C. 430, 435, 346 S.E.2d 707, 711 (1986); State v. Young, 305 S.C. 380, 409 S.E.2d 352, 356 (1991); State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990). This case should not be any exception.

Defense counsel preserved the issue by asking that the judge charge this mitigating circumstance. The judge had an independent duty to review the record for proper mitigating circumstances even if defense counsel in this case had not made the request. There was evidence supporting this mitigating circumstance and the court erred by refusing to charge it. Appellant is entitled to a new sentencing hearing.

2.

The state argues that information about the conditions of confinement in prison is necessary. The state's argument is a request for this Court to open the door to both the defense and the prosecution to offer evidence about the time, place, manner, and conditions of incarceration or execution. This Court clearly stated in *State v. Plath* that such matters were not proper for the jury's consideration, and there is not any reason to revisit its logic (Issues 2 and 3)

Defense counsel objected and moved for a mistrial when the solicitor asked defense expert James Aiken about inmates escaping. ROA pp. 4869 – 4873. It unfortunately is not unusual when the state is prohibited from pursuing a line of questioning that the solicitor then requests permission to travel into another line of questioning that on its face seems less objectionable. That was what happened in this case. The solicitor then requested permission to question Aiken about the conditions of prison in the general population. Defense counsel objected, and the judge stated that she understood the solicitor was on re-cross, but ruled "I will let him go into those areas." ROA. pp. 4873 – 4874. That was clearly error under the reasoning of *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619, 627 (1984).

The solicitor, armed with the judge's permission, then elicited testimony on recreational activities in prison such as playing basketball, exercising, watching movies, watching television, and other recreational activities such as playing softball. ROA pp. 4881 – 4882.

The state in essence argues that this Court should overrule its holding in *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619, 627 (1984), wherein this Court noted that the Department of Corrections controls the conditions of imprisonment and not the defendant. The manner

5564

of execution and the conditions of imprisonment are not proper during the penalty phase of a death penalty case. The penalty phase of a death penalty case is not a sociology course. Respectfully, there is not any reason for this Court to depart from its holding that the defense is not allowed to offer evidence on the horrors of the death penalty, and that neither the state nor the defendant should be allowed to introduce evidence on prison conditions that are totally out of the defendant's ability to control.

Prison conditions, good or bad, are not relevant to the consideration of the proper penalty to jury should impose on the defendant since they are matters beyond the defendant's control, and because this Court has clearly stated that sociological evidence on the propriety of the death sentence and conditions within the prison walls are improper. Respectfully, there is not principled reason for this Court to depart from those precedents.

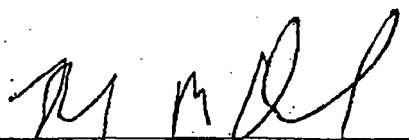
Similarly, the possibility of prisoners escaping from prison is irrelevant where there is not evidence the defendant on trial attempted to escape. See State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105, 111 (2000). Cf. State v. Kelley, 343 S.C. 350, 540 S.E.2d 851, 855 – 857 (2001).

Appellant respectfully submits this Court should reiterate that evidence about escape, prison conditions and the manner of execution are not proper during a capital sentencing hearing. Rather than depart from this Court's precedents on the subject, appellant's submits, respectfully, that it is time for this Court to reiterate them for the consideration of the Bench and Bar.

CONCLUSION

Based on the arguments made in appellant's initial brief, and the arguments in this reply brief, this Court should reverse appellant's convictions and remand this case to the Dorchester County Court of General Sessions for a new trial. In the alternative, appellant should be granted a new sentencing trial.

Respectfully submitted,



Robert M. Dudek
Assistant Appellate Defender

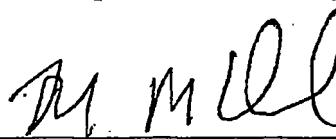
ATTORNEY FOR APPELLANT.

July 6, 2005

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule 211(b), SCACR.



Robert M. Dudek
Assistant Appellate Defender

ATTORNEY FOR APPELLANT.

July 6, 2005

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Dorchester County

Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARION BOWMAN, JR.,

APPELLANT

CERTIFICATE OF SERVICE

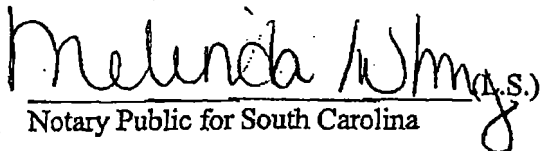
The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon S. Creighton Waters, Esquire, this 6th day of July, 2005.



Robert M. Dudek
Assistant Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 6th day of July, 2005.



Melinda Whiting, (S.)
Notary Public for South Carolina

My Commission Expires: November 16, 2008

5568

STATE OF SOUTH CAROLINA

COUNTY OF

MARION Bowman, Jr.

IN THE COURT OF COMMON PLEAS

FILED - RECORDED
Plaintiff(s)
2006 APR - 7 PM 12:13

CIVIL ACTION COVERSHEET

De-CP-18-569

vs.

CLERK OF COURT
DOUGHERTY COUNTY
Defendant(s)(Please Print)
Submitted By:
Address:SC Bar #:
Telephone #:
Fax #:
Other:
E-mail:

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR (certificate attached).

NATURE OF ACTION (Check One Box Below)

Contracts ☐ Constructions (100) ☐ Debt Collection (110) ☐ Employment (120) ☐ General (130) ☐ Breach of Contract (140) ☐ Other (199)	Torts - Professional Malpractice ☐ Dental Malpractice (200) ☐ Legal Malpractice (210) ☐ Medical Malpractice (220) ☐ Other (299)	Torts - Personal Injury ☐ Assault/Slander/Libel (300) ☐ Conversion (310) ☐ Motor Vehicle Accident (320) ☐ Premises Liability (330) ☐ Products Liability (340) ☐ Personal Injury (350) ☐ Other (399)	Real Property ☐ Claim & Delivery (400) ☐ Condemnation (410) ☐ Foreclosure (420) ☐ Mechanic's Lien (430) ☐ Partition (440) ☐ Possession (450) ☐ Building Code Violation (460) ☐ Other (499)
Inmate Petitions ☒ PCR (500) ☐ Sexual Predator (510) ☐ Mandamus (520) ☐ Habeas Corpus (530) ☐ Other (599)	Judgments/Settlements ☐ Death Settlement (700) ☐ Foreign Judgment (710) ☐ Magistrate's Judgment (720) ☐ Minor Settlement (730) ☐ Transcript Judgment (740) ☐ Lis Pendens (750) ☐ Other (799)	Administrative Law/Relief ☐ Reinstate Driver's License (800) ☐ Judicial Review (810) ☐ Relief (820) ☐ Permanent Injunction (830) ☐ Forfeiture (840) ☐ Other (899)	Appeals ☐ Arbitration (900) ☐ Magistrate-Civil (910) ☐ Magistrate-Criminal (920) ☐ Municipal (930) ☐ Probate Court (940) ☐ SCDOT (950) ☐ Worker's Comp (960) ☐ Zoning Board (970) ☐ Administrative Law Judge (980) ☐ Public Service Commission (990) ☐ Employment Security Comm (991) ☐ Other (999)
Special/Complex /Other ☐ Environmental (600) ☐ Automobile Arb. (610) ☐ Medical (620) ☐ Other (699)	☐ Pharmaceuticals (630) ☐ Unfair Trade Practices (640) ☐ Out-of State Depositions (650)		

Submitting Party Signature:

Robert Duckak by [Signature] Date: 4/7/06

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

5569

STATE OF SOUTH CAROLINA)
)
 County of Dorchester)
)
Marion Bowman, Jr. #6006)
 Full name and prison number, if any, of applicant.)
)
 v.)
)
The State of South Carolina)
 Name of Respondent)
)

In the Court of Common Pleas

2006-CP-18-569

APPLICATION FOR
 POST-CONVICTION RELIEF

FILED-RECORDED
 2006 APR -7 PM 12:13
 JAMES L. ABRAHAM
 CLERK OF COURT
 DORCHESTER COUNTY

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly, handwritten, or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make it clear to which question any such continued answer refers.

Since every application must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicant should, therefore, exercise care to assure that all answers are true and correct.

If the applicant is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which applicant was convicted.

1. Place of detention Lieber Correctional Institution
2. Name and location of Court which imposed sentence Dorchester County Court of General Sessions
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
 (a) 01-GS-18-348-349
 (b) _____
 (c) _____
4. The date upon which sentence was imposed and the terms of the sentence:
 (a) May 23, 2002 - Death Sentence
 (b) _____
 (c) _____

5570

5. Check whether a finding of guilty was made
- (a) after a plea of guilty _____
 - (b) after a plea of not guilty X _____
 - (c) after a plea of nolo contendere _____
6. Did you appeal from the judgment of conviction or the imposition of sentence? Yes _____
7. If you answered "yes" to (6), list
- (a) the name of each Court to which you appealed:
 - i. Supreme Court _____
 - ii. _____
 - iii. _____
 - (b) the result in each such Court to which you appealed:
 - i. Affirmed conviction and sentence _____
 - ii. _____
 - iii. _____
 - (c) the date of each such result:
 - i. November 28, 2005 _____
 - ii. _____
 - iii. _____
 - (d) if known, citations of any written opinion or orders entered pursuant to such results:
 - i. State v. Bowman, S.C., 623 S.E.2d 378 (2005) _____
 - ii. _____
 - iii. _____
8. If you answered "no" to (6), state your reasons for not so appealing:
- (a) N/A _____
 - (b) _____
 - (c) _____
9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective assistance of counsel (see attached) _____
 - (b) _____
 - (c) _____

10. State concisely and in the same order the facts which support each of the grounds set out in (9)

- (a) Trial counsel was ineffective for failing to preserve for appellate review the issue of the state cross-examining witness Aiken about "good prison conditions," since this evidence was misleading, was highly prejudicial and inadmissible. The Supreme Court refused to address this winning issue because counsel failed to make the correct legal argument. This violated my right to effective assistance of counsel under the Sixth Amendment. Counsel also should have argued that this "good prison conditions" evidence introduced an arbitrary factor into the case in violation of the Eighth Amendment.
- (b) Counsel did not offer available evidence and argument that my arrest and the seizure of property violated the Fourth Amendment to the United States Constitution. The police entered based on a subterfuge and without a proper warrant to arrest or seize property.
- (c) Counsel failed to do an adequate background check for evidence in mitigation. This information included evidence regarding mental state, intoxication, and evidence to rebut the state's victim impact evidence. These deficiencies constituted ineffective assistance of counsel in violation of the Sixth Amendment.

11. Prior to this application have you filed with respect to this conviction

- (a) any petition in a State Court under South Carolina Law ?
None other than the mandatory appeal to the State Supreme Court
- (b) any petitions in State or Federal Courts for habeas corpus or post-conviction relief?
No
- (c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7) No
- (d) any other petitions, motions or applications in this or any other Court?
No

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:

- (a) the specific nature thereof:
 - i. N/A
 - ii. _____
- (b) the name and location of the Court in which each was filed:
 - i. N/A
 - ii. _____
 - iii. _____
 - iv. _____

5572

(c) the disposition thereof:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? No

14. If you answered "yes" to (13), identify:

(a) which grounds have been presented:

- i. N/A
- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. N/A
- ii. _____
- iii. _____

15. If any ground set forth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented:

- (a) This is the first PCR
- (b) _____
- (c) _____

16. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? Yes
- (b) your trial, if any? Yes

5573

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence?

Yes

(e) preparation, presentation or consideration of any petitions, motions, or application with respect to this conviction, which you filed? Yes

17. If you answered "yes" to one or more parts of (16), list:

(a) the name and address of each attorney who represented you

i. Robert M. Dudek, Assistant Appellate Defender, S.C. Office of Appellate Defense, 1205 Pendleton Street, Room 306, Columbia, SC 29201

ii. Norbert E. Cummings, Jr., Cummings Law Firm, 100 S. Main Street, Suite B, Summerville, SC 29483

iii. Marva Ann Hardee-Thomas, 130 E. Richardson Ave., Summerville, SC 29483

(b) the proceedings at which each such attorney represented you:

i. Trial and Direct Appeal

ii. _____

iii. _____

18. State clearly the relief you seek in filing this application.

New trial

19. Are you now under sentence from any other court that you have not challenged?

No

5574

STATE OF SOUTH CAROLINA)

COUNTY OF Dorchester)

VERIFICATION

I, Marion Bowman, Jr., being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Marion Bowman, Jr.

Sworn to and subscribed before me

This 7th day of April, 2016.

Waven J. Flynn L.S.
Notary Public for South Carolina

My Commission Expires Sept. 22, 2008.

FILED - RECORDED
2006 APR - 7 PM 12:13
CLERK OF COURT
DORCHESTER COUNTY

**APPLICATION TO PROCEED WITHOUT PREPAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Marion Bowman, Jr., hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty or perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of proceeding or give security therefor.

Marion Bowman, Jr.
Applicant

Sworn to and subscribed before me

This 7th day of April, 2016.

Waven J. Flynn L.S.
Notary Public for South Carolina

My Commission Expires: Sept. 22, '08.

5575

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

June 12, 2006

Mr. Robert M. Dudek
Assistant Appellate Defender
1205 Pendleton Street
Room 306
Columbia, SC 29201

Re: Marion Bowman, Jr.
v. South Carolina
No. 05-10282

Dear Mr. Dudek:

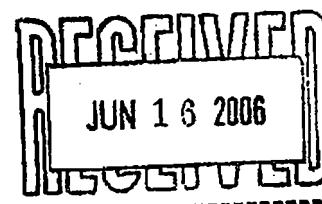
The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

William K. Suter

William K. Suter, Clerk



JA 1558

5576

ORIGINAL

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

Marion Bowman, Jr., #6006)
C/A No. 2006-CP-18-569

Applicant,)
v.)
The State of South Carolina,)
Respondent.)

PRELIMINARY PROTECTIVE RETURN
UNTIL POST-CONVICTION COUNSEL
IS APPOINTED TO STATE'S RETURN,
MOTION TO DISMISS AND MOTION
FOR SUMMARY JUDGMENT
(Capital Case)

The undersigned represented petitioner on direct appeal and on a writ of certiorari to the United States Supreme Court in this death penalty case. On September 7, 2006 the Supreme Court granted petitioner a stay of execution to pursue an action for post-conviction relief in this court finding pursuant to In Re Stays of Execution in Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996), that petitioner has shown he has proper grounds to pursue in post-conviction relief. Respectfully, that finding of proper PCR grounds is binding on this Court, and proving those grounds by a preponderance of the evidence requires the taking of evidence before this Court.

The Supreme Court in that same order appointed Judge Lockemy, and has given Judge Lockemy thirty days from the date of the order, September 7, 2006, to hold a hearing and appoint PCR counsel for petitioner. Out of an abundance of caution, undersigned former direct appeal counsel is filing this return for petitioner until PCR attorneys are appointed for petitioner, and they can file an official and more detailed return with any supporting material those attorneys deem advisable.

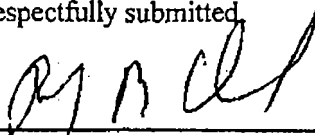
Petitioner's grounds for post-conviction relief are easily understandable and undersigned counsel would assert there is not any reason at this time to make them more definite and certain.

5577

When counsel is appointed for petitioner they undoubtedly will amend the application for post-conviction relief after investigating the case.

As for the motion for discovery and any other matters the state is seeking, undersigned counsel respectfully submits those matter should be left open until PCR counsel can be appointed for petitioner. Petitioner is not an attorney, and he is unable to respond to the state's motions at this time since he has not yet been made an offer of counsel.

Respectfully submitted



Robert M. Dudek
Appellate Defender

Attorney for Petitioner

September 29th, 2006

5578

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Marion Bowman, Jr., #6006

Applicant,

v.

The State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

C/A No. 2006-CP-18-569

RETURN, MOTION TO DISMISS AND
MOTION FOR SUMMARY JUDGMENT
(Capital Case)

FILED-RECORDED
2006 SEP -1 AM 9:27
CLERK OF COURT
DORCHESTER COUNTY

Respondent, above-named, here by make a Return to the application for post-conviction relief ("APCR"), filed by Marion Bowman, Jr. ("Applicant") on April 7th, 2006. This APCR stems from a murder conviction and death sentence.

If and when Applicant does in fact secure a stay of execution and the South Carolina Supreme Court appoints a judge to handle this capital PCR action, Respondents respectfully request pursuant to South Carolina Code of Laws, Section 17-27-160(C), that the assigned judge set a scheduling hearing with the parties within thirty (30) days to set any evidentiary hearing that may be necessary within one-hundred and eighty (180) days from that date. Respondents would also request that a hearing regarding Applicant's desires regarding counsel be held as soon as possible. Respondents also would request a hearing on the motions to dismiss and for summary judgment in the instant action. **At present, however, there is no stay of execution in place.**

I.

Procedural History

During the August 2001 term, the Dorchester County Grand Jury indicted Applicant, Marion Bowman, Jr., for murder and third degree arson (01-GS-18-0348 & -0349). {R.

5254-57}. The state gave notice of intent to seek the death penalty, and served notice of evidence in aggravation. **{R. 1640-43; 4570-71; 5260-61}**.

The trial judge in this case was the Honorable Diane S. Goodstein. Applicant was represented at the trial level by Norbert E. Cummings, Jr. and Marva A. Hardee-Thomas; First Circuit Solicitor Walter M. Bailey, Jr. and Assistant Solicitor Benjamin Lafond prosecuted the case for the State.

A pretrial Jackson v. Denno hearing was held before Judge Goodstein during various days between April 5th, 2002 and May 2nd, 2002. Jury selection began in Dorchester County on May 13th, 2002, and was completed on May 17th, 2002. Judge Goodstein conducted the guilt phase of Applicant's jury trial from May 17th until May 20th, 2002. Applicant's jury convicted him of both charges. **{R. 4564}**.

Applicant exercised his right to the 24-hour cooling-off period in subsection 16-3-20(B) of the Code of Laws for South Carolina. **{R. 4569}**. The sentencing phase of the trial began on May 22nd, 2002. Judge Goodstein submitted the following aggravating factors to the jury:

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

{R. 5018}. The following mitigating factors were charged:

- (1) The defendant has no significant history of prior criminal convictions

5580

involving the use of violence against another person.

(2) The age or mentality at the time of the crime.

(3) Any other mitigating factors that the jury may find. [The jury] may also consider any nonstatutory mitigating factors.

{R. 5032}.

On May 23rd, 2002, Applicant's jury found the existence of two of the four aggravating factors: the murder was committed in the commission of kidnapping, and larceny with the use of a deadly weapon. It recommended a sentence of death. {R. 5051}. After finding that the verdict was not the result of prejudice, passion, or any arbitrary factor, Judge Goodstein sentenced Applicant to death for murder and ten years for third degree arson.

A timely Notice of Appeal was filed and served with the South Carolina Supreme Court on May 24th, 2002. Assistant Appellate Defender Robert M. Dudek, of the South Carolina Office of Appellate Defense, was appointed to represent Applicant during his direct appeal. On July 6th, 2005, Dudek filed with the state supreme court a Final Brief of Appellant, in which he asserted the following issues on behalf of Applicant:

(1) The court erred by refusing to instruct the jury on the statutory mitigating circumstance 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 appellant's substance abuse problem, and evidence the parties were heavily drinking throughout the day.

(2) The court abused its discretion by allowing the solicitor on re-cross examination of James Aiken to examine him about conditions in general population. Recreational facilities, watching movies, watching television and reading books were matters not raised by any relevant evidence, and the jury's sole concern was supposed to be with whether appellant

should be sentenced to death or life imprisonment without parole.

(3) The court erred by refusing to grant a mistrial where the solicitor attempted to question James Alken about the possibility of escape, since the solicitor raised an improper consideration or arbitrary factor. The jury's attention is properly focused on the penalties of death and life without parole. Defense counsel correctly argued that the judge could not remove the taint once escape was raised by the state as an issue.

(4) The trial court lacked subject matter jurisdiction to sentence appellant to death since the murder indictment did not allege any aggravating circumstances.

(5) The court erred by ruling appellant did not have an expectation of privacy in the pants he wore to his wife's house, and by refusing to suppress the watch and liquid material found in and on those pants. The pants were seized during an illegal warrantless arrest, and the court erred by ruling the arrest was pursuant to a valid Orangeburg warrant for another minor offense.

The State, through Assistant Attorney General S. Creighton Waters, filed its Final Brief of Respondent on July 7th, 2005. Dudek followed with a Final Reply Brief of Appellant also dated July 6th, 2005.

Oral argument in the case was held before the state supreme court on October 6th, 2005. The South Carolina Supreme Court issued an opinion affirming the convictions and death sentence on November 28th, 2004. State v. Bowman, 623 S.E.2d 378 (S.C. 2005).. A petition for rehearing was denied by that court on January 6th, 2006.

On February 1st, 2006, the South Carolina Supreme Court granted a stay of execution so that Applicant could pursue certiorari review before the United States Supreme Court. Applicant through Mr. Dudek filed a Petition for Writ of Certiorari with the United State Supreme Court dated April 5th, 2006; the State through AAG Waters filed a

5582

Brief in Opposition on May 12th, 2006. The United States Supreme Court denied the certiorari petition by order dated June 12th, 2006.

While his certiorari petition before the United States Supreme Court was pending, Applicant filed this APCR. On August 4th, 2006, Applicant filed with the state supreme court a Petition to Appoint Post-Conviction Relief Judge. The State filed a Return on August 18th, 2006, and a Motion to Set Execution Date on August 22nd, 2006. Those motions are currently pending before the South Carolina Supreme Court as of the writing of this document.

Attached herewith and incorporated herein by reference are the following documents:¹

- (1) Record on Appeal, containing eleven (11) volumes;
- (2) Final Brief of Appellant;
- (3) Final Brief of Respondent;
- (4) Final Reply Brief of Appellant;
- (5) State v. Marion Bowman, SC S.Ct. Opinion No. 26071, filed November 28, 2005;
- (6) Petition for Writ of Certiorari to the South Carolina Supreme Court;
- (7) Brief in Opposition to the Petition for Writ of Certiorari to the Supreme Court of South Carolina;
- (8) Order Denying the Petition for Writ of Certiorari.

¹ As of the date of this Return, Applicant does not have counsel appointed. Respondent is only sending the attachments to the Clerk of Court until counsel is appointed or Applicant indicates his desire regarding counsel. Of course, Applicant's present appellate defender Robert Dudek is already in possession of the attachments.

II.

Statement of Facts

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

A. Friday evening, 2/16/01: a suspiciously abandoned car and gunshots in the night

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

Bryan Newhouse managed the nearby nursery and was watching TV that Friday evening. Hearing something outside, he muted the TV, at which point three gunshots rang out within ten or fifteen seconds apart. Newhouse went outside, opened the gate, and drove down the road to see if anyone was illegally hunting at night on the nursery grounds. Finding nothing on the dark and unlit country road, Newhouse went home, and fell asleep about midnight. {R. 3798-3801; 3803-05}.

B. Early morning Saturday, 2/17/01: the car found ablaze

Newhouse was awakened from his sleep in the early morning hours by a loud exploding noise. He again drove down the road to the same location – but this time, he found a car engulfed in flames as high as twenty feet. Newhouse quickly went home and called police. {R. 3801-02}.

On a path leading into a fallow field about 50 to 75 feet off Nursery Road, officers and firefighters found a small four-door car almost completely burned. They hosed the fire

5584

down, and opened the trunk. Inside was the charred body of Kandee Martin. {R. 3807-3810; 3814-16; 3819-22; 3875-78}.

C. 2/17/01: the crime scene evidence at Nursery Road

The Ford Escort's license tag was still readable, and it was registered to Kandee and her mother. {R. 3829-31}. Kandee had been shot to death by two bullets, each equally fatal, with one to the back of the head, and another to the left back. {R. 3944-49}. Her body was extremely burned and charred, and the only skin remaining was on part of her back. {R. 3941-43}. The lungs were clear, indicating that Kandee was dead before the fire started. {R. 3954-55}.

Most everything that could burn did burn in the passenger area and trunk of Kandee's Ford Escort. {R. 3879-83}. The fire began in the passenger compartment rather than by an engine fire. {R. 3883-84}. On a pocketbook, chemists identified a medium petroleum accelerant; on the shirt, paper material, belt, and miscellaneous debris, Layton was able to conclusively identify the presence of gasoline. {R. 4298-4399}. Thus, officers concluded the fire was intentionally set. {R. 3889-90}.

About 800 feet from the crime scene, SLED agent Edward Porter collected in the street or on its shoulder one fired bullet and six .380 shell casings. The officers found in the middle of the road a pool of blood containing some hair and a earring back. As they scanned the area, they noticed blood on pine straw and branches 18 and 29 feet off the roadway down a path towards the wood line. There, they found a woman's shoe identified as Kandee's by her mother. {R. 3853-3860; 3867-71; 3910-12; 4164-66; 4272; 4286}. SLED DNA expert Matt Fitts later matched the blood samples to Kandee Martin. {R. 4366-

67; 4377-79}.

D. Saturday morning, 2/17/01: Applicant's arrest, his pants, and Kandee's watch

After receiving information that Applicant had been with Kandee the night before, Branchville Chief Boom Walters, Dorchester County Lieutenant James Nettles, Dorchester detectives Terrence Van Doran and Alvin Coker, and other police arrived at Dorothy's trailer on the Saturday morning of February 17th, 2001. The officers asked Dorothy if they could enter to search for Applicant, and she voluntarily agreed – eventually signing a consent to search form. Officers found Applicant hiding alongside a bed in a child's room down the hall, and he was promptly arrested and Mirandized.² {R. 4125-29; 4139-42; 4144-45; 4191-95; 4208; State's Exhibit #27}.

Applicant was wearing nothing but his boxer shorts, and officers asked him if he wanted his pants. When Detective Van Doran retrieved the back jeans from the sofa in the living room, he found a brown lady's watch in the pocket. {R. 4129-32; 4142; 4150-52; 4195-98; 4207-08}. Kandee's mother identified at trial the watch as belonging to her daughter. {R. 4164-65}. Moreover, SLED chemist Layton also found the presence of a heavy petroleum accelerant, but not gasoline, on the black Levi's – and a number of Applicant's friends testified at trial he was wearing black jeans the day before. {R. 3763; 4058; 4093; 4193; 4297-98}.

E. Applicant's friends and relatives come clean about Kandee's murder

² During the Jackson v. Denno hearing (but not in the guilt phase), it was brought out that officers arrested Applicant at Dorothy's trailer that morning based on an outstanding Orangeburg County arrest warrant for receiving stolen goods. {R. 321-22; 331, 648, 665; 797, 935; 5420-22}.

5586

As the investigation progressed, it began to center around a number of people who had known each other for years and lived in or hung out at Branchville Villas Apartments, or "the projects". Of these people, Applicant's sisters Yolanda and Kendra, his first cousin (and codefendant) James Tywan Gadson, and his lifelong friend Travis Felder all testified for the State after securing plea agreements. {R. 3735-36; 3981; 4085-86; 4167-68}.

1. The argument over the gun

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

When Applicant returned, a number of people, including trial witnesses Koger, Fogle, and Carolyn Brown – saw Applicant get upset at Tywan because someone had taken his gun. However, Hiram Johnson interceded, and told Applicant he had taken the gun back to Katrina West's apartment in the projects. Applicant went across the street and got the gun, and put it back in his pants. {R. 3677-79; 3684-85; 3690-91; 3701; 3985-90; 4058-60; 4077-78}.

2. Unpaid debts and threats to kill

At another point later that afternoon, Applicant asked Fogle to take him to Frankie Martin's house. Kandee's car was parked out front, and Applicant mentioned to Fogle that Kandee owed him some money. {R. 3685-87}.

Applicant apparently also spent some time that afternoon with his sister Yolanda and Katrina West's apartment in the projects. The three of them left in Yolanda's little blue

Volkswagen to go get medicine for Katrina's baby at the pharmacy, with Applicant riding in the back seat and the girls in front. On the way, they saw Kandee's car parked out in front of Charlie Fralix's house, and Applicant told Yolanda to stop. {R. 3701; 3721-24; 3736-40; 3763-65}.

Applicant told Yolanda to pull up alongside Kandee's car, and tried to get her attention through the open rear window of Yolanda's VW. However, Kandee held up her finger at Applicant, saying "hold on a minute", and turned back to her conversation with Eddie. {R. 3724-35; 3740-42; 3764-66}.

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

3. Tywan Gadsden describes Kandee's murder

Applicant made true on his threat later that night. Tywan Gadsden saw Applicant around 7:00 or 7:30 that evening. Applicant was riding with Kandee in her green Ford Escort, and he called Tywan over and told him to get in. {R. 3990-93; 4033}. With Applicant directing the way, Kandee drove out into the country, where they eventually ended up on Nursery Road. There, they stopped, turned the car off, and Applicant and Tywan got out. {R. 3994-96; 4033-35}.

Applicant and Tywan walked down the road a ways, as Applicant whispered he was

5588

going to kill Kandee because she was wearing a wire. Kandee followed behind, grabbed Applicant by the arm and said she was scared. A car came down the road, and the three jumped into the woods until it passed. {R. 3997-99; 4035-36}.

Kandee then started back down the roadway with Applicant following. As Tywan came out of the woods behind them, he saw Applicant fire three times at Kandee. Kandee ran towards Tywan, but stopped and turned to face Applicant. She begged, "Please Black, don't shoot me no more. I have a baby to take care of." Applicant responded to her pleas by firing twice more, and Kandee fell to the ground. {R. 3997-4003; 4011-12; 4036-37}.

Tywan, who said he "messed in his pants a little bit", jumped in the car while Applicant dragged Kandee into the woods by her feet. Applicant then climbed in the driver's seat of Kandee's car, remarking: "I shot that bitch in the head. Heard her head hit the ground." They then headed back to Branchville. {R. 4012-14}.

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

4. The trip to the club in Kandee's car: admissions of guilt

Around midnight, Applicant and some friends decided to go to the Allen Murray nightclub outside of Bowman. Applicant drove Kandee's car, with Hiram, Tywan, and Darrien Williams as passengers. Applicant told the men he had stolen the car, and made

them put on gloves. {R. 4017-20; 4063-65; 4081}. At the club, Applicant walked around the lot some, trying to sell Kandee's car. {R. 4067}.

After about an hour or so, Applicant, Hiram, Tywan and Darrien headed back to Branchville in Kandee's car. As he drove the Escort with the pistol sitting in his lap, Applicant remarked, "I killed Kandee, heh heh heh". Applicant dropped Hiram off at the projects. {R. 4021-22; 4067-69}.

5. Travis Felder describes the car fire

About 3:00 a.m., Applicant knocked on Travis's door and asked him for help parking a car. {R. 4042-45; 4116-18; 4090-92; 4119-20}.

Travis testified that he got in his own car and followed Applicant in the Ford Escort back to Nursery Road. Applicant pulled over on the side of the road, cut his lights, and went into the woods for a minute. The next thing Travis saw was Applicant pulling a body by its feet face down. As Applicant opened the trunk and put the body inside, Travis could see by the trunk light it was Kandee. {R. 4093-97}.

Applicant looked back at Travis, and said, "You didn't think I would do it, did you? I killed Kandee Martin." Applicant told Travis to go down the road and turn around, while Applicant drove the Escort up into a field. Travis watched as Applicant threw a light into the car, which erupted in flames. Travis then took Applicant back and returned to Valorna's, where he went to sleep. {R. 4098-4101; 4106}.

F. May and June 2001: a pistol found in the Edisto river – and bullets found in the couch

Applicant's murder weapon was found after police managed to get information in May and June 2001 from Applicant's wife Dorothy and his sisters Yolanda and Kendra, all

5590

of whom, as mentioned before, testified at trial with plea agreements. {R. 3735-36; 4161; 4167-68}. Dorothy stated that a few days after the murder Hiram Johnson told her the gun was hidden in the sleeper sofa at her trailer on Lockett Street. She found the pistol hidden a "cuff" or "sleeve" of the couch, put it in her pocketbook, and went over to see Kendra at Applicant's grandmother's. {R. 4198-4202; 4210-12}.

While Dorothy claimed she talked with Kendra and then left the gun at Kendra's in the clothes hamper, Kendra testified that she and Dorothy went to meet Applicant's father Marion Bowman, Sr. at the EZ shop. Marion Sr. took the gun and put it in the middle console of his truck. {R. 4168-73; 4203-04; 4211-12; 4358}.

The next day, Kendra and Yolanda met with Marion Sr., and then followed him out to the graveyard at the Zion AME church. Applicant's father brought the pistol from out of the nearby woods, and they wrapped it in a towel and put it in Yolanda's trunk. Kendra and Yolanda drove out to the Old Cope Road bridge and threw the gun over the side into the Edisto River. {R. 4174-78; 4183-87}. On May 28th, 2001, diver Mark Sheetz recovered the black and grey High Point .380 semiautomatic in the river bottom about 25 to 30 feet from the bridge. {R. 4220-29}. The gun was conclusively matched by SLED firearms examiner David Collins to five of the six Winchester .380 shell casings found at the Nursery Road scene. While the sixth casing and spent bullet could not be conclusively matched to Applicant's .380, they were of course consistent. {R. 4315-20}.

Following Dorothy's statement to police in June 2001, officers visited the residence of her sister Sally Bookhart, Dorothy had moved from her trailer on Lockett Street within a week or so after Applicant's arrest, and she gave the sofa back to Sally. When the

officers arrived, Sally willingly agreed to their requests to search the sofa. In a little "pocket" of the sofa's fabric, SLED agent James Helms discovered a box of Winchester .380 ammunition, consistent with the shell casings found at the Nursery Road scene. {R. 4205; 4244-49; 4259-62}.

G. The DNA match

Finally, SLED DNA analyst Fitts found human blood and semen in the vaginal swabs taken from Kandee at autopsy. While the mixture of female and male secretions in the vaginal swabs complicated identification, Agent Fitts was able to match Applicant to a probability of 1 in 5300. {R. 4370-72; 4379-87}.

H. The State's sentencing phase case

Following the 24-hour "cool down" period, the State began its evidentiary presentation in the sentencing phase by reincorporating its evidence from the guilt phase. {R. 4650}. It then introduced certified copies of Applicant's March 1998 convictions from two incidents – with a third degree burglary charge and a petty larceny charge for each. {R. 4652}.

Next to testify were Joseph Wimberly and David Thompson – the two victims from the March 1998 convictions. Wimberly noted that his house was robbed of a shotgun, of which the barrel was later sawed off. Stolen from Thompson's residence was cash and a .357 pistol. Within 24 hours, Applicant's cousin used the pistol to kill himself. {R. 4653-59; 4801-02}.

Next was SLED arson agent James Helms, through which the State introduced photographs of Kandee as she was found severely burned in the back of her trunk. {R.

5592

4660-68}.

The pathologist Dr. Janice Ross described autopsy photographs of the entrance and exit wounds to Kandee's back and behind her left ear. The trial court excluded the general autopsy photographs in view of the pictures introduced through Helms. {R. 4669-91}.

Finally, Kandee's mother Cordillia Martin and father Wayne Martin gave victim impact testimony about Kandee and the effect of her loss on them and Kandee's young son. {R. 4692-4708}.

I. The defense's sentencing case

The defense case in mitigation began with Applicant's older sister Kendra Bowman. She generally described good times growing up with Applicant, but noted her biological father was abusive until he left when the children were babies. {R. 4742-48}.

Next to testify was Applicant mother Dorothy Bowman (his wife, who testified during the guilt phase, is also named Dorothy). Dorothy related that Applicant's father was abusive, but he left when the kids were very small. She theorized that Applicant longed for fatherly involvement, and noted that her subsequent boyfriend Joseph Sims was a positive influence on the kids. Applicant had trouble in school and only finished the ninth grade, but he would help his mother out after she became disabled. {R. 4750-59}.

Applicant called Margaret Baughman, an adult education teacher at the Dorchester County Detention Center. She testified that during he pre-trial incarceration Applicant took classes, and even became a reliable assistant to her teaching at the jail. {R. 4761-67}.

A forensic social worker named Jeffrey Youngman also testified in Applicant's mitigation presentation. Generally, Youngman theorized Applicant's functioning was

negatively impacted by his upbringing. {R. 4791-4805}.

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

Dorchester County Detention Center guard Sharon J. Branch testified that Applicant has "attitude", and would often speak out to guards. While Applicant never made her feel threatened or raised his hand, he would often refuse direct orders – depending on what kind of day he was having. For example, he would refuse to return to his cell when ordered, saying: "you want me to go in, put me in". As his death penalty trial approached, Applicant started behaving "calmer" and "better", but had on a Sunday during the trial caused a problem requiring the intervention of ministers and prison staff, because he was not allowed to go to church when he wanted. {R. 4882-88}.

On the other hand, another jail guard named Enrique Badillo testified that Applicant was very polite, and presented no difficulty or threats to safety. {R. 4902-05}.

Finally, guilt phase witness Travis Felder was shown a security videotape from the

5594

Horizon EZ store at approximately 3:00 a.m. on February 17th, 2001. He admitted the tape showed him at the store – without Applicant – buying gasoline in a small gas container. Felder admitted that after Applicant came and got him from the girls' apartment in the Branchville Villas, Applicant gave him a gas jug and asked him to buy some fuel. Travis stated he thought Applicant was just filling up the can to move the car. {R. 4911-28}.

III.

Allegations In Initial Application

Applicant makes three (3) allegations in his APCR. All of these involve ineffective assistance of counsel. As will be seen, all of the allegations should be dismissed or denied as a matter of law, and the petition dismissed with prejudice.

A. General Law on Ineffective Assistance Of Counsel.

Pursuant to the familiar doctrine in Strickland v. Washington, Petitioner must first demonstrate that his trial counsel's performance fell below an objective standard of reasonableness. 466 U.S. 668 (1984). Judicial scrutiny of counsel's performance is highly deferential and not subject to the distorting effects of hindsight, and counsel may reasonably choose from a wide range of acceptable strategies. Strickland, 466 U.S. at 689; Burket v. Angelone, 208 F.3d 172 (4th Cir. 2000).

Competency is measured against what an objectively reasonable attorney would have done under circumstances existing at the time of the representation. Savino v. Murray, 82 F.3d 593, 598 (4th Cir. 1996). The Court should "decline to allow an ineffective assistance of counsel claim to create a situation where post-conviction attorneys stroll in with the full benefit of hindsight to second-guess trial lawyers who professionally discharge

their duties to their clients under the manifold pressures of a state trial.” Mazzell v. Evatt, 88 F.3d 263, 269 (4th Cir. 1996).

As the Supreme Court made clear in Strickland:

... the reasonableness of counsel's actions may be determined or substantially influenced by the defendants own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigations are reasonable depends upon such information . . . [W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

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

Next, Petitioner must also establish prejudice by showing “a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Strickland, 466 U.S. 668, 694 (1984). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id. It is insufficient to show only that the errors had some conceivable effect on the outcome of the proceeding, because virtually every act or omission of counsel would meet that test. Id. at 693. “The Petitioner bears the ‘highly demanding’ and ‘heavy burden’ in establishing actual prejudice. Williams v. Taylor, 120 S.Ct. 1495, 1513-14 (2000).

Recently in Jones v. State, 332 S.C. 329, 504 S.E.2d.822 (1998) , the South Carolina Supreme Court restated the “prejudice” prong in a capital sentencing proceeding as being established when “there is a reasonable probability that, absent [counsel's] errors,

5596

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,” citing Strickland. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Jones, 504 S.E.2d at 823-824. Accord, Plath v. Moore, 130 F.3d 595 (4th Cir. 1997) (“given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and hence, the sentence imposed.” Thus, in weighing the omitted evidence against that actually used to convict and sentence Plath, the mitigating evidence seems insufficient to shift the balance in Plath’s favor.”).

Finally, the Supreme Court of South Carolina has held that a hearing on an allegation is only required when factual allegations that lead to a Sixth Amendment deprivation are not conclusively refuted by the record. Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981).

As a general matter, Respondent submits that the Record on Appeal from Applicant’s trial and sentencing hearing conclusively demonstrate that appointed counsel were not deficient in their performance nor was Applicant prejudiced in any way by their performance. To the contrary, the Record from each proceeding demonstrates that Applicant’s attorneys were diligent in their representation of Applicant, performed well within the wide range of competence and reasonable professional assistance demanded of attorneys in criminal matters. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Marzullo v. Maryland, *supra*; Butler v. State, 286 S.C. 441, 34 S.E.2d 813 (1985); Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

B. Motion to Dismiss Ground One as a Matter of Law

Applicant's first ground for relief is as follows:

Trial counsel was ineffective for failing to preserve for appellate review the issue of the state cross-examining witness Aiken about "good prison conditions", since this evidence was misleading, was highly prejudicial and inadmissible. The Supreme Court refused to address this winning issue because counsel failed to make the correct legal argument. This violated my right to effective assistance of counsel under the Sixth Amendment. Counsel also should have argued that this "good prison conditions" evidence introduced an arbitrary factor into the case in violation of the Eighth Amendment.

Applicant contends his counsel failed to argue at trial that the solicitor's cross-examination on "good prison conditions" was "highly prejudicial and inadmissible", as well as improper under the Eighth Amendment. As will be seen, since even if counsel had made these arguments the questioning would still have been permissible as a matter of law, counsel could not have been deficient nor Applicant prejudiced. See Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001) (ineffective assistance claims based on failure to object is tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the complaint falls *both* prongs of the Strickland test, as it was neither deficient nor prejudicial). Thus, the issue should be rejected and dismissed as a matter of law.

1. Events at trial and on appeal

As noted before, during its sentencing phase case the State only presented the two victims of Applicant's prior crimes, the SLED arson agent, the pathologist, and two victim impact witnesses. {R. 4652-4708}. The State presented no witnesses or information as

5598

to any of Applicant's misbehavior in or lack of adaptability to prison.

On the other hand, the defense's third witness was Margaret Baughman, an adult education teacher at the jail where Applicant spent his pre-trial confinement. This teacher stated that Applicant had been taking her classes in jail for fourteen to fifteen months, and eventually became her reliable and trustworthy teacher's assistant. {R. 4761-65}. On redirect, Applicant elicited that there are limited educational opportunities available for inmates, and Applicant made him self available for any class. {R. 4767}.

Applicant next called James Aiken, a former state corrections official and corrections consultant, who was qualified as an expert in future danger and prison adjustment issues. On direct, Aiken testified Applicant would *never* leave prison until he was dead. According to Aiken, Applicant's institutional record of one fight and assistance to Baughman in the classroom indicated he could adapt to prison, but fundamentally Aiken noted that SCDC could manage and incapacitate any inmate with its security measures. {R. 4838-4845}.

On cross, Aiken testified extensively without objection relevant to this issue on the various security levels of custody an inmate can achieve. Aiken stated that a LWOP inmate has the incentives of getting to go to work and "get[ting] an opportunity to live" – without objection from the defense. {R. 4854-4862}.

On redirect, *the defense* elicited that Applicant could not work outside the prison, that he would not be going to "kiddy camp" if he was given a life sentence, that he would not have "picnic lunches", and that he would be around a "predator, dangerous violent inmate population". *The defense* then elicited the dimensions of a supermax cell. *The defense* then asked Aiken what productive endeavors were available for Applicant in

prison, to which Aiken replied that Applicant could "pay back society" and "do something for himself" by working in such areas as food service, maintenance, or painting. *The defense* asked Aiken if Applicant was going to be "molly-coddled", and elicited that Applicant could get involved with the Scared Straight program. {R. 4864-68}.

On re-cross, the prosecutor asked about escapes, to which the defense objected. Outside the presence of the jury, the court sustained the defense objection to the questioning on escape, but declined the motion for a mistrial. During the discussion, the prosecutor asked if he could explore "certain conditions of the general population, the work conditions he's already gotten into, that area", since the defense had established that Applicant was not going to "kiddy camp" and would have work available. The trial court agreed, to which the defense only stated, "We're on recross, Judge". The judge replied that work situations was an issue certainly before the jury "at this point". {R. 4869-76}.

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

Applicant next called jail guard Sharon Branch, who stated that while Applicant displayed some "attitude" and had a recent difficulty with authorities over going to church,

5600

he never made her feel physically threatened. The defense elicited that Applicant was allowed "one hour of rec per day", but that sometimes the guards extended that. {R. 4882-88}.

Finally, jail guard Enrique Badillo testified that Applicant displayed a very polite and cooperative attitude in jail. {R. 4902-05}.

On appeal, Applicant contended that the solicitor's questioning about movies, television, and books was irrelevant under the South Carolina Supreme Court's decision in State v. Plath, 281 S.C. 1, 313 S.E.2d 619, 627 (1984), and violative of the constitutional due process mandate in Gardner v. Florida, 430 U.S. 349 (1977), that a death sentence cannot be based "on information the defendant had no opportunity to deny or explain". The State argued, *inter alia*, that the issue was not preserved as the arguments made on appeal were not made to the trial court. The South Carolina Supreme Court agreed the issue was not preserved, but added a cautionary instruction to both sides that evidentiary presentations along these lines are improper:

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

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

2. Since the defense opened the door to the solicitor's

limited questioning about conditions of confinement by first eliciting testimony about the harshness of life in prison as well as presenting evidence about employment opportunities in jail, then the evidence was admissible and counsel could not have been deficient for failing to object.

As an initial matter, the defense opened the door to the solicitor's questioning – consistent with Plath – by eliciting testimony about the harshness of life in prison as well as bringing out employment opportunities available to Applicant. Since the evidence was admissible, counsel could not have been deficient nor Applicant prejudiced from the failure to object. See Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001) (ineffective assistance claims based on failure to object is tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the complaint fails *both* prongs of the Strickland test, as it was neither deficient nor prejudicial).

During James Aiken's direct testimony, he stated Applicant would be "incapacitated" and "lock[ed] up" for the rest of his life, with guards "that know how to use weapons", and behind fences, gun towers, concrete, and bars. {R. 4842; 4845}. After the solicitor's cross, in which he did not specifically ask about conditions of confinement other than various security classifications, the defense elicited that the guards could use "lethal force", and Applicant could be further prosecuted for any violations in prison. At this point, the defense asked whether a life sentence would be "kiddy camp", whether Applicant would get "picnic lunches", that he would live the rest of his days amidst a predatory and dangerous community of inmates, and that he would not be "molly-coddled" by the prison authorities. {R. 4864-66}.

Given this defense-elicited evidence of the harshness of prison, in which Applicant not only starkly discussed the severe security regime as well as very pointedly used terms

5602

as “kiddy camp”, “picnic lunches”, and “molly-coddled”, it was only appropriate that the State be entitled to respond by showing that Applicant would have opportunities for recreation if sentenced to life – that “life imprisonment was not the total abyss which [the defendant] portrayed it to be”. Plath, 281 S.C. at 15-16, 313 S.E.2d at 627-28. As this Court has stated, “[b]oth the accused and the State are entitled to a fair trial.” State v. Woomey, 278 S.C. 468, 472, 299 S.E.2d 317, 319 (1982). Consistent with a level and fair adversary system, after defense counsel scored effective “points” by freely displaying all the negative consequences or aspects of a lifetime behind bars, the State was then able to respond in a limited fashion by eliciting some of the small comforts or enjoyments even a LWOP defendant will experience.

Moreover, the defense elicited prior to the solicitor’s examination from both Baughman as well as Aiken that employment and educational opportunities available to a defendant behind bars. Like recreation, these opportunities undoubtedly can be a source of distraction from the rigors of prison life as well as a source of personal fulfillment; thus, it was only fair – and indeed certainly not prejudicial given the work evidence already elicited – that the State be allowed to also bring out in a limited fashion some other recreational activities available to inmates aside from work and education.³ Further, Aiken also very pointedly stated on cross that every inmate would be required to work, and that an inmate would be put in “supermax” if he refused. This was followed up on by the defense in redirect. {Tr.4862-63; 4866-67}. It was only appropriate that the State point

³ See generally State v. Johnson, 306 S.C. 119, 410 S.E.2d 547 (1991) (proper for solicitor to respond that victim’s family could only visit him at the grave after defendant’s sister testified she would visit him in prison at Christmas); State v. Thibodeaux, 750 So.2d 916 (La. 1999) (defendant opened the door to prosecution questioning of its corrections expert on recreational activities at prison).

out an inmate would have time for recreation, too – not that he would be breaking rocks all day every day "at hard labor".

Finally, when asked what motivation a life without parole inmate had to comply with the rules, Aiken stated that SCDC's only business was incapacitation of life without parole inmates, because they are not preparing such an inmate for release. {R. 4861}. It is only fair for the State to be able to rebut the obvious inferences from these statements by showing that SCDC does not merely incapacitate – it does allow life without parole inmates recreation and education.

The defense was able to score a lot of points with its presentation as to the harshness of life without parole. Indeed, the main thrust of the defense in the sentencing phase was the concept that the "without parole" portion of a life sentence in harsh conditions makes life without parole sufficiently severe enough punishment to be appropriate retribution for the crime, without the need to impose death. See {R. 4982} (defense derisively refers to prosecutor's argument as "reward-a-prison"); {R. 4991} (defense states its "easy to try to paint prison as a reward", and argues: "The line forms back there if anybody wants to spend the rest of their life behind bars."); {R. 4991} (defense argues it is "wrong" and an "injustice" if the jury thinks a life sentence is a "reward"); {R. 4996-97} (defense implies that a life sentence is worse than death for a person as young as Applicant, and argues "Can you imagine spending from the years of the youngest person on the jury until the oldest person on the jury behind bars? That's a life sentence without the possibility of parole."); {R. 4997-98} (defense argues that jury should give Applicant life so that he would have to remember what he did to Kandee for the rest of his days); {R. 5005-06} (defense argues that prison is a dangerous place, and

5604

prison is appropriate punishment for Applicant because it is a death sentence too).

Simply because the State was then able to score a few points back on cross – as is the case for any party during almost any examination – does not mean that counsel was somehow ineffective for opening the door. Trial counsel has to take the good with the bad, and in almost every case a prosecutor will be able to score points off of the defense's presentations. The fact of such an inevitable response does not make counsel deficient for eliciting it for his beneficial purposes. To find deficiency would be precisely the type of hindsight Strickland forbids. Cf. Bunch v. Thompson, 949 F.2d 1354 (4th Cir. 1991) (reviewing court should filter from its analysis the distorting effects of hindsight); See generally Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995) (standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel).

Since the door was opened for the prosecutor's limited response as to conditions of confinement, then counsel could not have been deficient nor Applicant prejudiced from the failure to object. See Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001) (ineffective assistance claims based on failure to object is tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the complaint fails both prongs of the Strickland test, as it was neither deficient nor prejudicial).

Moreover, for the same reasons the examination could not have been prejudicial. Given the defense's extensive exploration of the harshness of prison, it cannot be said that a much smaller amount of fair and accurate comment the other way would create a reasonable probability of a different result. Indeed, given the extensive focus of the defense on the retributive sufficiency of the "without parole" aspect of a life sentence, it cannot be said that a little further accurate information about life without parole to complete

the picture was so far out of bounds as to necessitate a new sentencing hearing. Applicant cannot show prejudice based solely on a claim that his attempt was thwarted to create a blatantly one-sided and inaccurate perspective.

Accordingly, this allegation should be dismissed as a matter of law or summary judgment granted, as the face of the record disproves Applicant's contention that counsel was deficient or Applicant prejudiced by these issues. See, e.g. Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005) (summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law); Rule 12(b)(6), SCRCP (dismissal for failure to state facts sufficient to state a cause of action); S.C. Code Ann. §§ 17-27-40 & -50 (2003) (requiring that a PCR application specifically set forth the grounds for relief, stating that allegations of facts within the applicant's knowledge be verified, and requiring that affidavits, records, or other evidence of the allegations be attached or the application shall recite why they are not attached); S.C. Code Ann. §§ 17-27-70(b) (2003) (stating that after return by the State the PCR court may give notice of its intent to dismiss if it is clear on the basis of the pleadings and the record that the applicant is not entitled to relief).

In the event this Court disagrees the issue should be dismissed as a matter of law, Respondents request an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

B. Motion to Dismiss as to Ground Two

Petitioner's second ground for relief is as follows:

Counsel did not offer available evidence and argument that my arrest and the seizure of property violated the Fourth Amendment to the United States Constitution.

5606

The police entered based on a subterfuge and without a proper warrant to arrest or seize property.

This issue should also be dismissed as a matter of law.

Extensive pre-trial hearings were held in this case not only on this issue but also the admissibility of Applicant's statements to police.

It first should be noted that while the town of Branchville where Applicant was arrested is in Orangeburg County, the body was found in Dorchester County. {R. 979; 5076-77}.

At the pre-trial hearings, Dorchester County Sheriff's Deputy Terrence Van Doran testified about accompanying other officers to the trailer of Ms. Dorothy Bowman. He testified he had spoken to the Chief of the Branchville Police and was told there was an outstanding Orangeburg County arrest warrant on Applicant. Van Doran stated that after they found Applicant hiding behind a bed, he was Mirandized and Applicant asked for his pants. Dorothy went into the other room and got the pants, but before she could give them to Applicant, Van Doren searched them. Inside he found a lady's wrist watch identified at trial as belonging to the victim. {R. 5076-81; 5085-88; 5177; 5187}.

Dorchester County officer Alvin Coker similarly testified that after they received information Applicant was with the victim the previous afternoon, they found out from Orangeburg County that there was a warrant on Applicant. He never saw the warrant physically, but Branchville Chief Walters told Coker he was aware of it. {R. 5124-25}. Coker also noted they had a signed consent to search form from Dorothy. {R. 5127}.

Chief Walters of the Branchville Police testified that he was aware of and had a copy – but not the original – of Applicant's Orangeburg arrest warrant for receiving stolen goods.

He stated he went with the other officers to Dorothy's trailer, and knocked on the door. They told Dorothy they had a warrant for Applicant, and she invited them inside. Dorothy said she did not know where Applicant was but the officers could look around. Once they found Applicant, he was told he was under arrest for receiving stolen goods. {R. 320-23; 325-31}.

Willie Bamberg of the Orangeburg-Calhoun Regional Detention Center testified that Applicant was booked in that night on a receiving stolen goods warrant. {R. 665-66}.

Major Walters of the Orangeburg County Sheriff's Office testified she went to the trailer and talked with Dorothy. She noted she had been told there were charges on the defendant. {R. 683-85}.

Applicant testified at the pre-trial hearing, and stated that he was at his wife's trailer at the point of his arrest but did not live there. He claimed he told his wife not to let the police in when they arrived, but they told her they had a search warrant to see if Applicant was in her house. Supposedly the police told him he needed to put something on his lower body, and only brought him a pair of his wife's jogging pants. {R. 729-37}. Applicant admitted being presented the warrant for receiving stolen goods once he reached the Orangeburg County Jail that night. {R. 796-97; 935; 987}.

On cross, Applicant admitted knowing Kandee's watch was in his pocket. He claimed he did not know a warrant was out for him even though he went and hid in a child's bedroom. {R. 910-13}.

Dorothy Bowman also testified. She stated Applicant was not living with her, although some of his clothes were at her house. According to Dorothy, the police came

5608

to her door and said "something about JR [Applicant] and a warrant". They asked if they could come in and look for him, and she agreed. After they found Applicant, one of the officers asked her for Applicant's clothes. She went and got them, including the black pants. Dorothy stated that after Applicant was taken out she signed the consent to search form. {R. 1039-43}.

On cross, Dorothy again stated that the police requested to come in, and she let them in voluntarily. She was not afraid of Chief Walters at all. She noted police only said they had a warrant for his arrest, and noted police did not have a warrant to search her house. {R. 1050-53; 1056}.

The defense moved to suppress the evidence, arguing (1) Applicant was not informed of the nature of his arrest; (2) there was no proof the Branchville chief had knowledge of an outstanding felony or warrant; (3) even if he did, only having a copy of a warrant is insufficient, and (4) Applicant never received a bail or bond hearing on that offense, which violates the state statute. Thus, the defense stated that the fruits of the illegal arrest should be suppressed. Applicant also argued that Dorothy did not consent until after the fact of the search, and that she could not consent to search Applicant's pants anyway. Finally, Applicant argued that since the pants were outside of Applicant's wingspan, a warrant was needed. {R. 1255-66; 1271-73}.

The trial court denied the motion to suppress, finding that the arrest was made on a valid warrant, that Applicant had no expectation of privacy in the pants as Applicant asked for them, the wife retrieved them and they were examined incident to arrest. Finally, the court ruled Dorothy consented to a search of the home before the watch and pants

were removed. {R. 1275-76}.

When the pants and watch were entered into evidence, there was no objection. {R. 4129-30; 4164}.

On appeal, Applicant contended that his arrest was illegal, and thus the trial court should have suppressed the pants and Kandee's watch and the flammable liquid found within them. The South Carolina Supreme Court first held the issue was not preserved as the objection was not renewed when the evidence was offered at trial. State v. Bowman, 366 S.C. 485, 500-01, 623 S.E.2d 378, 386 (2005). However, the Court addressed the merits in the alternative, and concluded that Applicant "was legally arrested pursuant to a valid warrant". The Court found that a valid warrant for receiving stolen goods was issued, and "while [the officer was] possibly not in possession of the warrant itself, [the officer] was acting pursuant to the warrant when the arrest was made". Bowman, 366 S.C. at 501, 623 S.E.2d at 386-87. The court also rejected any contention that Applicant's wife did not consent to the search, noting that she specifically testified to the contrary. Finally, the Court concluded that the search of the pants was permissible as a search incident to arrest, since Applicant asked to put on those pants before he was led from the residence. Id. at 502, 623 S.E.2d at 387.

Thus, the South Carolina Supreme Court has already ruled that not only was the arrest valid, but also the evidence was properly admitted for multiple reasons. Obviously, this Court does not have the authority in PCR to overrule an evidentiary and constitutional decision of the South Carolina Supreme Court. Since the arrest was valid and the evidence was admissible, counsel could not have been deficient nor Applicant prejudiced. See Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001) (ineffective assistance claims based

5610

on failure to object is tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the complaint fails *both* prongs of the Strickland test, as it was neither deficient nor prejudicial).

Moreover, Applicant does not identify any new *and different* facts or issues that would supposedly necessitate revisitation of the issue; thus, his allegation fails to allege sufficient facts and is insufficient to survive dismissal as a matter of law. The issue should be dismissed as a matter of law or summary judgment granted. See, e.g. Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005) (summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law); Rule 12(b)(6), SCRCP (dismissal for failure to state facts sufficient to state a cause of action); S.C. Code Ann. §§ 17-27-40 & -50 (2003) (requiring that a PCR application specifically set forth the grounds for relief, stating that allegations of facts within the applicant's knowledge be verified, and requiring that affidavits, records, or other evidence of the allegations be attached or the application shall recite why they are not attached); S.C. Code Ann. §§ 17-27-70(b) (2003) (stating that after return by the State the PCR court may give notice of its intent to dismiss if it is clear on the basis of the pleadings and the record that the applicant is not entitled to relief).

In the event this Court disagrees the issue should be dismissed as a matter of law, Respondent requests an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

D. Ground Three

Applicant's third ground for relief is as follows:

Counsel failed to do an adequate background check for evidence in mitigation. This information included

evidence regarding mental state, intoxication, and evidence to rebut the state's victim impact evidence. These deficiencies constituted ineffective assistance of counsel in violation of the Sixth Amendment.

Again, this allegation must be dismissed as a matter of law.

First, Applicant's claim is insufficient as he does not set forth with particularity exactly what "evidence regarding mental state, intoxication, and evidence to rebut the state's victim impact evidence" counsel failed to uncover. As such, this assertion lacks sufficient specificity on which to respond because it fails to set forth any facts to support the claim. This matter must be dismissed pursuant to S.C. Code § 17-27-70(b) (1976) by the failure to allege facts to support his legal conclusion. Alternatively, this allegation is subject to dismissal pursuant to S.C. Rules of Civil Procedure, Rule 12(b)(6) ("failure to state facts to constitute a cause of action").⁴

Second, the record reflects that counsel hired and called in mitigation family, jail guards, jail education teachers, and corrections consultants. {R. 4742-4928}. Most importantly, counsel hired and called a forensic social worker who testified in detail during the mitigation case about the psychosocial assessment he conducted of Applicant's life. A number of courts have rejected similar claims where counsel actually hired experts, conducted an investigation, and presented a case in mitigation on the issues. See Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006) (Trial counsel did not render deficient performance by failing to fully investigate defendant's medical, mental, social, and

⁴ Rule 12(e), SCRPC, provides that if a pleading is "so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading", a motion for a more definite statement can be made. In the alternative to the grounds expressed in the preceding section, Respondent would move for a more definite statement of the allegations in Applicant's APCR.

5612

familial history for purposes of penalty phase of capital murder trial, as element of ineffective assistance claim; counsel interviewed a number of witnesses about defendant's childhood and life, counsel hired a private investigator to go and gather background information on defendant, counsel called several witnesses, including three experts, to offer mitigating evidence, and counsel testified that information gathered about defendant's background was available to the experts). See also, e.g. Tucker v. Ozmint, 350 F.3d 433 (4th Cir. 2003) (where defendant claimed that counsel failed to submit early reports of sexual abuse to the trial expert, the case was unlike Wiggins in that there was no deficiency, as counsel presented a substantial mitigation case including lay witnesses and expert testimony on abuse and ASPD issues); Byram v. Ozmint, 339 F.3d 203 (4th Cir. 2003) (where counsel hired a psychologist, psychiatrist, social worker, and investigator for mitigation, and prepared extensively, investigation was reasonable despite claim counsel failed to present evidence of background, fetal alcohol syndrome, and brain damage; moreover, case was different from Wiggins on the prejudice prong in that here the jury did hear testimony about the background, and this was not a case where the jury was "completely in the dark as to the defendant's alleged mental problems"); Wilson v. Ozmint, 352 F.3d 847 (4th Cir. 2004) (counsel not deficient in investigating family members, given their substantial investigation into the defendant's family life and the large amount of evidence introduced at the plea hearing); Davis v. State, 875 So.2d 359 (Fla. 2004) (rejecting claim that counsel was ineffective for failure to present a "qualified" expert on the relationship between sexual abuse and PTSD, where, unlike Wiggins, counsel conducted an investigation into background and presented three mental health experts, with a number of diagnoses; relief is not warranted simply because PCR counsel can later find a "more

favorable" expert report); Ringo v. State, 120 S.W.3d 743 (Mo. 2003) (en banc) (no deficiency in investigation where counsel hired four experts; while one trial expert merely noted a high score on the PTSD scale but did not diagnose it, and a PCR expert later actually diagnosed PTSD, counsel's hiring of four experts was sufficient and reasonable investigation, making this case different from Wiggins).

Indeed, if the qualified experts counsel hired failed to identify every possible malady or issue, that is not an actionable basis for ineffective assistance of counsel. Poyner v. Murray, 964 F.2d 1404, 1419 (4th Cir. 1992). Lawyers are entitled to reasonably rely on their experts, and they are not required to second-guess their expert's conclusions. See Wilson v. Greene, 155 F.3d 396 (4th Cir. 1998) (to be reasonably effective, counsel is not required to second-guess the contents of an expert's report). While many of the cases cited here conducted evidentiary hearings as to counsel's investigation, the trial record in this case reflects that counsel hired and called the typically appropriate experts, and Applicant has not identified with specificity what experts or what of consequence was not only missed but also was not within the bailiwick of the experts counsel did retain and call. Thus, Applicant's claim should be dismissed as a matter of law or summary judgment granted. See, e.g., Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005) (summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law); Rule 12(b)(6), SCRCP (dismissal for failure to state facts sufficient to state a cause of action); S.C. Code Ann. §§ 17-27-40 & -50 (2003) (requiring that a PCR application specifically set forth the grounds for relief, stating that allegations of facts within the applicant's knowledge be verified, and requiring that affidavits, records, or other evidence of the allegations be attached or the application shall recite

5614

why they are not attached); S.C. Code Ann. §§ 17-27-70(b) (2003) (stating that after return by the State the PCR court may give notice of its intent to dismiss if it is clear on the basis of the pleadings and the record that the applicant is not entitled to relief).

In the event this Court disagrees the issue should be dismissed as a matter of law, Respondent requests an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

CONCLUSION

Each and every allegation in the Application not hereinabove either expressly admitted, denied, qualified or explained is hereby denied.

WHEREFORE, Respondent submits that the Application for Post-Conviction Relief should be dismissed, or in the alternative that its motions for a more definite statement be granted. Further, Respondent requests that its motion for discovery be granted.

Respectfully submitted,

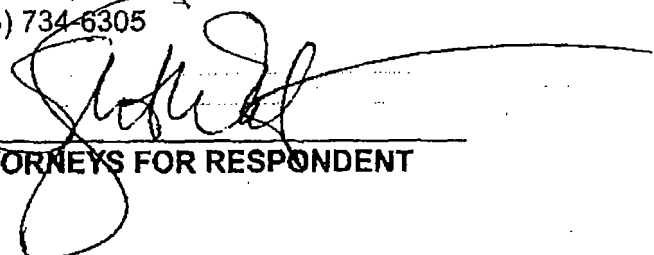
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August 31, 2006

5616

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)
Marion Bowman, Jr., #6006)
Applicant,)
v.)
The State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
C/A No. 2006-CP-18-569
**AMENDED
RETURN, MOTION TO DISMISS AND
MOTION FOR SUMMARY JUDGMENT
(Capital Case)**

3/15/07
Per Carolyn
file. mjb

Respondent, above-named, hereby make an Amended Return to the Amended Application for Post-Conviction Relief ("APCR"), filed by Marion Bowman, Jr. ("Applicant") and dated February 16th, 2007. This APCR stems from a murder conviction and death sentence.

I.

Procedural History

During the August 2001 term, the Dorchester County Grand Jury indicted Applicant, Marion Bowman, Jr., for murder and third degree arson (01-GS-18-0348 & -0349). {R. 5254-57}. The state gave notice of intent to seek the death penalty, and served notice of evidence in aggravation. {R. 1640-43; 4570-71; 5260-61}.

The trial judge in this case was the Honorable Diane S. Goodstein. Applicant was represented at the trial level by Norbert E. Cummings, Jr. and Marva A. Hardee-Thomas; First Circuit Solicitor Walter M. Bailey, Jr. and Assistant Solicitor Benjamin Lafond prosecuted the case for the State.

A pretrial Jackson v. Denno hearing was held before Judge Goodstein during various days between April 5th, 2002 and May 2nd, 2002. Jury selection began in

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DORCHESTER COUNTY

Dorchester County on May 13th, 2002, and was completed on May 17th, 2002. Judge Goodstein conducted the guilt phase of Applicant's jury trial from May 17th until May 20th, 2002. Applicant's jury convicted him of both charges. **{R. 4564}**.

Applicant exercised his right to the 24-hour cooling-off period in subsection 16-3-20(B) of the Code of Laws for South Carolina. **{R. 4569}**. The sentencing phase of the trial began on May 22nd, 2002. Judge Goodstein submitted the following aggravating factors to the jury:

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

{R. 5018}. The following mitigating factors were charged:

- (1) The defendant has no significant history of prior criminal convictions involving the use of violence against another person.
- (2) The age or mentality at the time of the crime.
- (3) Any other mitigating factors that the jury may find. [The jury] may also consider any nonstatutory mitigating factors.

{R. 5032}.

On May 23rd, 2002, Applicant's jury found the existence of two of the four aggravating factors: the murder was committed in the commission of kidnapping, and larceny with the use of a deadly weapon. It recommended a sentence of death. **{R. 5051}**. After finding that the verdict was not the result of prejudice, passion, or any arbitrary factor,

5618

Judge Goodstein sentenced Applicant to death for murder and ten years for third degree arson.

A timely Notice of Appeal was filed and served with the South Carolina Supreme Court on May 24th, 2002. Assistant Appellate Defender Robert M. Dudek, of the South Carolina Office of Appellate Defense, was appointed to represent Applicant during his direct appeal. On July 6th, 2005, Dudek filed with the state supreme court a Final Brief of Appellant, in which he asserted the following issues on behalf of Applicant:

- (1) The court erred by refusing to instruct the jury on the statutory mitigating circumstance 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 appellant's substance abuse problem, and evidence the parties were heavily drinking throughout the day.
- (2) The court abused its discretion by allowing the solicitor on re-cross examination of James Aiken to examine him about conditions in general population. Recreational facilities, watching movies, watching television and reading books were matters not raised by any relevant evidence, and the jury's sole concern was supposed to be with whether appellant should be sentenced to death or life imprisonment without parole.
- (3) 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 raised an improper consideration or arbitrary factor. The jury's attention is properly focused on the penalties of death and life without parole. Defense counsel correctly argued that the judge could not remove the taint once escape was raised by the state as an issue.
- (4) The trial court lacked subject matter jurisdiction to sentence appellant to death since the murder indictment did not allege any aggravating circumstances.
- (5) The court erred by ruling appellant did not have an

expectation of privacy in the pants he wore to his wife's house, and by refusing to suppress the watch and liquid material found in and on those pants. The pants were seized during an illegal warrantless arrest, and the court erred by ruling the arrest was pursuant to a valid Orangeburg warrant for another minor offense.

The State, through Assistant Attorney General S. Creighton Waters, filed its Final Brief of Respondent on July 7th, 2005. Dudek followed with a Final Reply Brief of Appellant also dated July 6th, 2005.

Oral argument in the case was held before the state supreme court on October 6th, 2005. The South Carolina Supreme Court issued an opinion affirming the convictions and death sentence on November 28th, 2004. State v. Bowman, 623 S.E.2d 378 (S.C. 2005).. A petition for rehearing was denied by that court on January 6th, 2006.

On February 1st, 2006, the South Carolina Supreme Court granted a stay of execution so that Applicant could pursue certiorari review before the United States Supreme Court. Applicant through Mr. Dudek filed a Petition for Writ of Certiorari with the United State Supreme Court dated April 5th, 2006; the State through AAG Waters filed a Brief in Opposition on May 12th, 2006. The United States Supreme Court denied the certiorari petition by order dated June 12th, 2006.

While his certiorari petition before the United States Supreme Court was pending, Applicant filed this APCR on April 7th, 2006. On August 4th, 2006, Applicant filed with the state supreme court a Petition to Appoint Post-Conviction Relief Judge. The State filed a Return on August 18th, 2006, and a Motion to Set Execution Date on August 22nd, 2006. On August 28th, 2006, Petitioner filed a Motion for a Stay of Execution, or, in the Alternative to Appoint a Post-Conviction Relief Judge. The State filed a Return to the latest motion

5620

on August 29th, 2006. The State filed its initial Return, Motion to Dismiss, and Motion for Summary Judgment dated August 31st, 2006. The South Carolina Supreme Court issued an Order dated September 7th, 2006, in which it stayed the execution for this PCR and appointed this Court.

Applicant filed his First Amended Application dated February 16th, 2007. This Amended Return follows.

The relevant state court documents were attached to the original return.

II.

Statement of Facts

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

A. Friday evening, 2/16/01: a suspiciously abandoned car and gunshots in the night

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

Bryan Newhouse managed the nearby nursery and was watching TV that Friday evening. Hearing something outside, he muted the TV, at which point three gunshots rang out within ten or fifteen seconds apart. Newhouse went outside, opened the gate, and drove down the road to see if anyone was illegally hunting at night on the nursery grounds. Finding nothing on the dark and unlit country road, Newhouse went home, and fell asleep about midnight. {R. 3798-3801; 3803-05}.

B. Early morning Saturday, 2/17/01: the car found ablaze

Newhouse was awakened from his sleep in the early morning hours by a loud exploding noise. He again drove down the road to the same location – but this time, he found a car engulfed in flames as high as twenty feet. Newhouse quickly went home and called police. {R. 3801-02}.

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

C. 2/17/01: the crime scene evidence at Nursery Road

The Ford Escort's license tag was still readable, and it was registered to Kandee and her mother. {R. 3829-31}. Kandee had been shot to death by two bullets, each equally fatal, with one to the back of the head, and another to the left back. {R. 3944-49}. Her body was extremely burned and charred, and the only skin remaining was on part of her back. {R. 3941-43}. The lungs were clear, indicating that Kandee was dead before the fire started. {R. 3954-55}.

Most everything that could burn did burn in the passenger area and trunk of Kandee's Ford Escort. {R. 3879-83}. The fire began in the passenger compartment rather than by an engine fire. {R. 3883-84}. On a pocketbook, chemists identified a medium petroleum accelerant; on the shirt, paper material, belt, and miscellaneous debris, Layton was able to conclusively identify the presence of gasoline. {R. 4298-4399}. Thus, officers concluded the fire was intentionally set. {R. 3889-90}.

5622

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

D. Saturday morning, 2/17/01: Applicant's arrest, his pants, and Kandee's watch

After receiving information that Applicant had been with Kandee the night before, Branchville Chief Boom Walters, Dorchester County Lieutenant James Nettles, Dorchester detectives Terrence Van Doran and Alvin Coker, and other police arrived at Dorothy's trailer on the Saturday morning of February 17th, 2001. The officers asked Dorothy if they could enter to search for Applicant, and she voluntarily agreed – eventually signing a consent to search form. Officers found Applicant hiding alongside a bed in a child's room down the hall, and he was promptly arrested and Mirandized.¹ {R. 4125-29; 4139-42; 4144-45; 4191-95; 4208; State's Exhibit #27}.

Applicant was wearing nothing but his boxer shorts, and officers asked him if he wanted his pants. When Detective Van Doran retrieved the back jeans from the sofa in

¹ During the Jackson v. Denno hearing (but not in the guilt phase), it was brought out that officers arrested Applicant at Dorothy's trailer that morning based on an outstanding Orangeburg County arrest warrant for receiving stolen goods. {R. 321-22; 331, 648, 665, 797, 935; 5420-22}.

the living room, he found a brown lady's watch in the pocket. {R. 4129-32; 4142; 4150-52; 4195-98; 4207-08}. Kandee's mother identified at trial the watch as belonging to her daughter. {R. 4164-65}. Moreover, SLED chemist Layton also found the presence of a heavy petroleum accelerant, but not gasoline, on the black Levi's – and a number of Applicant's friends testified at trial he was wearing black jeans the day before. {R. 3763; 4058; 4093; 4193; 4297-98}.

E. Applicant's friends and relatives come clean about Kandee's murder

As the investigation progressed, it began to center around a number of people who had known each other for years and lived in or hung out at Branchville Villas Apartments, or "the projects". Of these people, Applicant's sisters Yolanda and Kendra, his first cousin (and codefendant) James Tywan Gadson, and his lifelong friend Travis Felder all testified for the State after securing plea agreements. {R. 3735-36; 3981; 4085-86; 4167-68}.

1. The argument over the gun

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

When Applicant returned, a number of people, including trial witnesses Koger, Fogle, and Carolyn Brown – saw Applicant get upset at Tywan because someone had taken his gun. However, Hiram Johnson interceded, and told Applicant he had taken the gun back to Katrina West's apartment in the projects. Applicant went across the street and got the gun, and put it back in his pants. {R. 3677-79; 3684-85; 3690-91; 3701; 3985-90;}

5624

4058-60; 4077-78}.

2. Unpaid debts and threats to kill

At another point later that afternoon, Applicant asked Fogle to take him to Frankie Martin's house. Kande's car was parked out front, and Applicant mentioned to Fogle that Kande owed him some money. {R. 3685-87}.

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

Applicant told Yolanda to pull up alongside Kande's car, and tried to get her attention through the open rear window of Yolanda's VW. However, Kande held up her finger at Applicant, saying "hold on a minute", and turned back to her conversation with Eddie. {R. 3724-35; 3740-42; 3764-66}.

Kande's gesture angered Applicant, Eddie heard Applicant say "Fuck waiting a minute. I'm about to kill this bitch." {R. 3725-27}. According to Katrina, Applicant declared "fuck that ride, that bitch be dead by dark fall". Applicant's sister Yolanda described his comments as "Fuck that bitch, that bitch be dead by dark". {R. 3765-66}. Yolanda also told police Applicant said "that bitch owed me some money and I want my money today". In any event, Yolanda drove off. {R. 3742-45; 3749}.

3. Tywan Gadsden describes Kande's murder

Applicant made true on his threat later that night. Tywan Gadsden saw Applicant around 7:00 or 7:30 that evening. Applicant was riding with Kandee in her green Ford Escort, and he called Tywan over and told him to get in. {R. 3990-93; 4033}. With Applicant directing the way, Kandee drove out into the country, where they eventually ended up on Nursery Road. There, they stopped, turned the car off, and Applicant and Tywan got out. {R. 3994-96; 4033-35}.

Applicant and Tywan walked down the road a ways, as Applicant whispered he was going to kill Kandee because she was wearing a wire. Kandee followed behind, grabbed Applicant by the arm and said she was scared. A car came down the road, and the three jumped into the woods until it passed. {R. 3997-99; 4035-36}.

Kandee then started back down the roadway with Applicant following. As Tywan came out of the woods behind them, he saw Applicant fire three times at Kandee. Kandee ran towards Tywan, but stopped and turned to face Applicant. She begged, "Please Black, don't shoot me no more. I have a baby to take care of." Applicant responded to her pleas by firing twice more, and Kandee fell to the ground. {R. 3997-4003; 4011-12; 4036-37}.

Tywan, who said he "messed in his pants a little bit", jumped in the car while Applicant dragged Kandee into the woods by her feet. Applicant then climbed in the driver's seat of Kandee's car, remarking: "I shot that bitch in the head. Heard her head hit the ground." They then headed back to Branchville. {R. 4012-14}.

Eventually, they parked Kandee's car in a wooded area behind a coal plant. Before they got out, Applicant threatened to blow Tywan's brains out if he ever told anyone. Applicant then headed for the projects while Tywan walked back to Koger's house.

5626

Applicant eventually came back with Yolanda's car, and he and Tywan went to the EZ shop for some beer. They then went to another friend's house where they talked to Travis Felder, before returning to Koger's. {R. 4015-17; 4033-35}.

4. The trip to the club in Kandee's car: admissions of guilt

Around midnight, Applicant and some friends decided to go to the Allen Murray nightclub outside of Bowman. Applicant drove Kandee's car, with Hiram, Tywan, and Darrien Williams as passengers. Applicant told the men he had stolen the car, and made them put on gloves. {R. 4017-20; 4063-65; 4081}. At the club, Applicant walked around the lot some, trying to sell Kandee's car. {R. 4067}.

After about an hour or so, Applicant, Hiram, Tywan and Darrien headed back to Branchville in Kandee's car. As he drove the Escort with the pistol sitting in his lap, Applicant remarked, "I killed Kandee, heh heh heh". Applicant dropped Hiram off at the projects. {R. 4021-22; 4067-69}.

5. Travis Felder describes the car fire

About 3:00 a.m., Applicant knocked on Travis's door and asked him for help parking a car. {R. 4042-45; 4116-18; 4090-92; 4119-20}.

Travis testified that he got in his own car and followed Applicant in the Ford Escort back to Nursery Road. Applicant pulled over on the side of the road, cut his lights, and went into the woods for a minute. The next thing Travis saw was Applicant pulling a body by its feet face down. As Applicant opened the trunk and put the body inside, Travis could see by the trunk light it was Kandee. {R. 4093-97}.

Applicant looked back at Travis, and said, "You didn't think I would do it, did you?

I killed Kandee Martin." Applicant told Travis to go down the road and turn around, while Applicant drove the Escort up into a field. Travis watched as Applicant threw a light into the car, which erupted in flames. Travis then took Applicant back and returned to Valorna's, where he went to sleep. {R. 4098-4101; 4106}.

F. May and June 2001: a pistol found in the Edisto river – and bullets found in the couch

Applicant's murder weapon was found after police managed to get information in May and June 2001 from Applicant's wife Dorothy and his sisters Yolanda and Kendra, all of whom, as mentioned before, testified at trial with plea agreements. {R. 3735-36; 4161; 4167-68}. Dorothy stated that a few days after the murder Hiram Johnson told her the gun was hidden in the sleeper sofa at her trailer on Lockett Street. She found the pistol hidden a "cuff" or "sleeve" of the couch, put it in her pocketbook, and went over to see Kendra at Applicant's grandmother's. {R. 4198-4202; 4210-12}.

While Dorothy claimed she talked with Kendra and then left the gun at Kendra's in the clothes hamper, Kendra testified that she and Dorothy went to meet Applicant's father Marlon Bowman, Sr. at the EZ shop. Marion Sr. took the gun and put it in the middle console of his truck. {R. 4168-73; 4203-04; 4211-12; 4358}.

The next day, Kendra and Yolanda met with Marion Sr., and then followed him out to the graveyard at the Zion AME church. Applicant's father brought the pistol from out of the nearby woods, and they wrapped it in a towel and put it in Yolanda's trunk. Kendra and Yolanda drove out to the Old Cope Road bridge and threw the gun over the side into the Edisto River. {R. 4174-78; 4183-87}. On May 28th, 2001, diver Mark Sheetz recovered the black and grey High Point .380 semiautomatic in the river bottom about 25 to 30 feet from

5628

the bridge. {R. 4220-29}. The gun was conclusively matched by SLED firearms examiner David Collins to five of the six Winchester .380 shell casings found at the Nursery Road scene. While the sixth casing and spent bullet could not be conclusively matched to Applicant's .380, they were of course consistent. {R. 4315-20}.

Following Dorothy's statement to police in June 2001, officers visited the residence of her sister Sally Bookhart. Dorothy had moved from her trailer on Lockett Street within a week or so after Applicant's arrest, and she gave the sofa back to Sally. When the officers arrived, Sally willingly agreed to their requests to search the sofa. In a little "pocket" of the sofa's fabric, SLED agent James Helms discovered a box of Winchester .380 ammunition, consistent with the shell casings found at the Nursery Road scene. {R. 4205; 4244-49; 4259-62}.

G. The DNA match

Finally, SLED DNA analyst Fitts found human blood and semen in the vaginal swabs taken from Kandee at autopsy. While the mixture of female and male secretions in the vaginal swabs complicated identification, Agent Fitts was able to match Applicant to a probability of 1 in 5300. {R. 4370-72; 4379-87}.

H. The State's sentencing phase case

Following the 24-hour "cool down" period, the State began its evidentiary presentation in the sentencing phase by reincorporating its evidence from the guilt phase. {R. 4650}. It then introduced certified copies of Applicant's March 1998 convictions from two incidents – with a third degree burglary charge and a petty larceny charge for each. {R. 4652}.

Next to testify were Joseph Wimberly and David Thompson – the two victims from the March 1998 convictions. Wimberly noted that his house was robbed of a shotgun, of which the barrel was later sawed off. Stolen from Thompson's residence was cash and a .357 pistol. Within 24 hours, Applicant's cousin used the pistol to kill himself. {R. 4653-59; 4801-02}.

Next was SLED arson agent James Helms, through which the State introduced photographs of Kandee as she was found severely burned in the back of her trunk. {R. 4660-68}.

The pathologist Dr. Janice Ross described autopsy photographs of the entrance and exit wounds to Kandee's back and behind her left ear. The trial court excluded the general autopsy photographs in view of the pictures introduced through Helms. {R. 4669-91}.

Finally, Kandee's mother Cordillia Martin and father Wayne Martin gave victim impact testimony about Kandee and the effect of her loss on them and Kandee's young son. {R. 4692-4708}.

I. The defense's sentencing case

The defense case in mitigation began with Applicant's older sister Kendra Bowman. She generally described good times growing up with Applicant, but noted her biological father was abusive until he left when the children were babies. {R. 4742-48}.

Next to testify was Applicant mother Dorothy Bowman (his wife, who testified during the guilt phase, is also named Dorothy). Dorothy related that Applicant's father was abusive, but he left when the kids were very small. She theorized that Applicant longed for fatherly involvement, and noted that her subsequent boyfriend Joseph Sims was a

5630

positive influence on the kids. Applicant had trouble in school and only finished the ninth grade, but he would help his mother out after she became disabled. {R. 4750-59}.

Applicant called Margaret Baughman, an adult education teacher at the Dorchester County Detention Center. She testified that during he pre-trial Incarceration Applicant took classes, and even became a reliable assistant to her teaching at the jail. {R. 4761-67}.

A forensic social worker named Jeffrey Youngman also testified in Applicant's mitigation presentation. Generally, Youngman theorized Applicant's functioning was negatively impacted by his upbringing. {R. 4791-4805}.

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

Dorchester County Detention Center guard Sharon J. Branch testified that Applicant has "attitude", and would often speak out to guards. While Applicant never made her feel threatened or raised his hand, he would often refuse direct orders – depending on what kind of day he was having. For example, he would refuse to return to his cell when

ordered, saying: "you want me to go in, put me in". As his death penalty trial approached, Applicant started behaving "calmer" and "better", but had on a Sunday during the trial caused a problem requiring the intervention of ministers and prison staff, because he was not allowed to go to church when he wanted. {R. 4882-88}.

On the other hand, another jail guard named Enrique Badillo testified that Applicant was very polite, and presented no difficulty or threats to safety. {R. 4902-05}.

Finally, guilt phase witness Travis Felder was shown a security videotape from the Horizon EZ store at approximately 3:00 a.m. on February 17th, 2001. He admitted the tape showed him at the store – without Applicant – buying gasoline in a small gas container. Felder admitted that after Applicant came and got him from the girls' apartment in the Branchville Villas, Applicant gave him a gas jug and asked him to buy some fuel. Travis stated he thought Applicant was just filling up the can to move the car. {R. 4911-28}.

III.

Allegations in First Amended Application

Applicant makes three (3) allegations in his APCR. All of these involve ineffective assistance of counsel. As will be seen, all of the allegations should be dismissed or denied as a matter of law, and the petition dismissed with prejudice.

Pursuant to the familiar doctrine in Strickland v. Washington, Petitioner must first demonstrate that his trial counsel's performance fell below an objective standard of reasonableness. 466 U.S. 668 (1984). Judicial scrutiny of counsel's performance is highly deferential and not subject to the distorting effects of hindsight, and counsel may reasonably choose from a wide range of acceptable strategies. Strickland, 466 U.S. at

5632

689; Burket v. Angelone, 208 F.3d 172 (4th Cir. 2000).

Competency is measured against what an objectively reasonable attorney would have done under circumstances existing at the time of the representation. Savino v. Murray, 82 F.3d 593, 598 (4th Cir. 1996). The Court should "decline to allow an ineffective assistance of counsel claim to create a situation where post-conviction attorneys stroll in with the full benefit of hindsight to second-guess trial lawyers who professionally discharge their duties to their clients under the manifold pressures of a state trial." Mazzell v. Evatt, 88 F.3d 263, 269 (4th Cir. 1996).

As the Supreme Court made clear in Strickland:

. . . the reasonableness of counsel's actions may be determined or substantially influenced by the defendants own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigations are reasonable depends upon such information . . . [W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

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

Next, Petitioner must also establish prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. 668, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. It is insufficient to show only that the errors had some conceivable effect on the outcome of the proceeding, because

virtually every act or omission of counsel would meet that test. Id. at 693. "The Petitioner bears the 'highly demanding' and 'heavy burden' in establishing actual prejudice. Williams v. Taylor, 120 S.Ct. 1495, 1513-14 (2000).

Recently in Jones v. State, 332 S.C. 329, 504 S.E.2d.822 (1998) , the South Carolina Supreme Court restated the "prejudice" prong in a capital sentencing proceeding as being established when "there is a reasonable probability that, absent [counsel's] errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death," citing Strickland. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Jones, 504 S.E.2d at 823-824. Accord, Plath v. Moore, 130 F.3d 595 (4th Cir. 1997) ("given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and hence, the sentence imposed." Thus, in weighing the omitted evidence against that actually used to convict and sentence Plath, the mitigating evidence seems insufficient to shift the balance in Plath's favor.").

Finally, the Supreme Court of South Carolina has held that a hearing on an allegation is only required when factual allegations that lead to a Sixth Amendment deprivation are not conclusively refuted by the record. Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981).

As a general matter, Respondent submits that the Record on Appeal from Applicant's trial and sentencing hearing conclusively demonstrate that appointed counsel were not deficient in their performance nor was Applicant prejudiced in any way by their

5634

performance. To the contrary, the Record from each proceeding demonstrates that Applicant's attorneys were diligent in their representation of Applicant, performed well within the wide range of competence and reasonable professional assistance demanded of attorneys in criminal matters. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Marzullo v. Maryland, *supra*; Butler v. State, 286 S.C. 441, 34 S.E.2d 813 (1985); Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

A. Ground A

Applicant's first ground for relief is as follows:

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to investigate, challenge and present evidence related to a firearm during the verdict of the trial proceedings. Strickland v. Washington, 466 U.S. 668 (1984).

Applicant contends his counsel was ineffective for failing to challenge the ballistics findings matching a gun fished out of the Edisto River with the casings found at the murder scene.

Initially, Respondents deny that counsel were ineffective in their handling of the state's ballistics evidence, or that there was viable evidence materially challenging the State's ballistics results.

Moreover, summary judgment should be granted on this issue as there is no genuine issue of material fact as to prejudice under Strickland. Even if there had been evidence challenging the State's ballistics evidence, it would not rise to the level of Strickland prejudice as a matter of law. There was ample and conclusive evidence of identity without reference to the ballistics evidence. The victim's watch was found in Applicant's pants at his arrest the next morning. {R. 4129-32; 4142; 4150-52; 4195-98;

4207-08}. A number of witnesses heard Applicant threaten to kill the victim the afternoon of her murder. **{R. 3725-27; 3765-66; 3742-45}**. Tywan Gadsden described witnessing Applicant murder the victim. **{R. 3990-4035}**. Multiple witnesses observed Applicant driving the victim's car after her murder, and Applicant tried to sell the car at a club that night. He admitted killing the victim. **{See page 11, *supra*}**. Finally, Travis Felder described going with Applicant when he dragged the victim's body from the woods, put it in her car, and set it afire. **{R. 4042-4120}**.

Given all this evidence of identity, it cannot be said that a mere challenge to the State's ballistics result would have created a reasonable probability of a different result.

Accordingly, this allegation should be dismissed as a matter of law or summary judgment granted, as the face of the record disproves Applicant's contention that he was prejudiced by these issues. See, e.g. Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005) (summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law); Rule 12(b)(6), SCRPC (dismissal for failure to state facts sufficient to state a cause of action); S.C. Code Ann. §§ 17-27-40 & -50 (2003) (requiring that a PCR application specifically set forth the grounds for relief, stating that allegations of facts within the applicant's knowledge be verified, and requiring that affidavits, records, or other evidence of the allegations be attached or the application shall recite why they are not attached); S.C. Code Ann. §§ 17-27-70(b) (2003) (stating that after return by the State the PCR court may give notice of its intent to dismiss if it is clear on the basis of the pleadings and the record that the applicant is not entitled to relief).

In the event this Court disagrees the issue should be dismissed as a matter of law,

5636

Respondents request an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

B. Ground B

Applicant's second ground for relief is as follows:

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to object to improper testimony regarding a conspiracy to secrete a firearm wherein no evidence linked Applicant to this conspiracy. SCRE Rule 402, 403, & 494 and *Strickland v. Washington*, 466 U.S. 668 (1984).

Applicant contends his counsel was ineffective for failing to object to evidence his relatives were engaging in a conspiracy to "secrete" a firearm.

Respondents deny that counsel was deficient or Applicant prejudiced from the handling of this evidence.

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

When Applicant returned, a number of people, including trial witnesses Koger, Fogle, and Carolyn Brown – saw Applicant get upset at Tywan because someone had taken his gun. However, Hiram Johnson interceded, and told Applicant he had taken the gun back to Katrina West's apartment in the projects. Applicant went across the street and got the gun, and put it back in his pants. {R. 3677-79; 3684-85; 3690-91; 3701; 3985-90;

4058-60; 4077-78}.

Applicant's murder weapon was found after police managed to get information in May and June 2001 from Applicant's wife Dorothy and his sisters Yolanda and Kendra, all of whom, as mentioned before, testified at trial with plea agreements. **{R. 3735-36; 4161; 4167-68}**. Dorothy stated that a few days after the murder Hiram Johnson told her the gun was hidden in the sleeper sofa at her trailer on Lockett Street. She found the pistol hidden a "cuff" or "sleeve" of the couch, put it in her pocketbook, and went over to see Kendra at Applicant's grandmother's. **{R. 4198-4202; 4210-12}**.

While Dorothy claimed she talked with Kendra and then left the gun at Kendra's in the clothes hamper, Kendra testified that she and Dorothy went to meet Applicant's father Marlon Bowman, Sr. at the EZ shop. Marlon Sr. took the gun and put it in the middle console of his truck. **{R. 4168-73; 4203-04; 4211-12; 4358}**.

The next day, Kendra and Yolanda met with Marlon Sr., and then followed him out to the graveyard at the Zion AME church. Applicant's father brought the pistol from out of the nearby woods, and they wrapped it in a towel and put it in Yolanda's trunk. Kendra and Yolanda drove out to the Old Cope Road bridge and threw the gun over the side into the Edisto River. **{R. 4174-78; 4183-87}**. On May 28th, 2001, diver Mark Sheetz recovered the black and grey High Point .380 semiautomatic in the river bottom about 25 to 30 feet from the bridge. **{R. 4220-29}**. The gun was conclusively matched by SLED firearms examiner David Collins to five of the six Winchester .380 shell casings found at the Nursery Road scene. While the sixth casing and spent bullet could not be conclusively matched to Applicant's .380, they were of course consistent. **{R. 4315-20}**.

5638

Obviously the weapon was relevant to identity. It shows Applicant's possession of a firearm matched with or at least consistent with the gun used to kill the victim during the time period that the victim was killed. See Braxton, 343 S.C. at 634, 541 S.E.2d at 836 (testimony that witness knew appellant possessed a nine millimeter pistol was relevant because it tended to identify appellant as the possessor of the murder weapon, a nine millimeter pistol); State v. Cheeseboro, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001) (prior murder was admissible to establish appellant's identity in the prosecution of the current murder where the same weapon was used in both murders).

Indeed, Applicant was identified by his friends in possession of such a gun prior to the crime. Dorothy testified that on the night of the incident Applicant came in and slept in the chair where she later found the gun. {R. 4193-94; 4198-99}. It is certainly a reasonable inference from the evidence that Applicant hid the gun there, and his wife, sisters, and father subsequently attempted to permanently hide or destroy the gun to protect Applicant. Destruction of evidence is relevant to identity, and of course any admissions that Applicant made to his family about the gun – whether expressly testified to or implicit in the subsequent actions of the family – would be substantively admissible. See Rule 801(d)(2), SCRE (admissions of party opponent). See also State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999) (destruction of evidence and evidence of flight relevant as incriminating circumstance, and to show guilty knowledge and intent); State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (evidence of flight admissible to show guilty knowledge and intent); State v. Ezell, 321 S.C. 421, 468 S.E.2d 679 (Ct. App. 1996) (In case where defendant ran and vial of crack was found nearby, evidence of flight shows guilty knowledge and intent). See also United States v. Robinson, 161 F.3d 463 (7th Cir.

1998) (evidence of flight shows consciousness of guilt under Rule 404(b)); United States v. Jackson, 886 F.2d 838 (7th Cir. 1989) (evidence of flight and concealment is probative of guilty consciousness under Rule 404(b)).

Moreover, the description of how the gun was recovered was part of the *res gestae*, as it was necessary to tell the complete story of how the gun was recovered to show its link to Applicant and its relevance to this crime. In State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996), the court quoted with approval the Fourth Circuit's expression of the *res gestae* rule:

One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its "environment" that its proof is appropriate in order "to complete the story of the crime on trial by proving its immediate context or the 'res gestae', " or the "uncharged offense is 'so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other ...' [and is thus] part of the *res gestae* of the crime charged." And where evidence is admissible to provide this "full presentation" of the offense, "[t]here is no reason to fragmentize the event under inquiry" by suppressing parts of the "*res gestae*."

United States v. Masters, 622 F.2d 83, 86 (4th Cir. 1980), quoted in Adams, 322 S.C. at 122, 470 S.E.2d at 370-71. Moreover, "the jury is entitled to know the 'setting' of the case. It cannot be expected to make its decision in a void – without knowledge of the time, place, and circumstances of the acts which form the basis of the charge." United States v. Roberts, 548 F.2d 665, 667 (6th Cir. 1977), cited in Rebecca Smith, 309 S.C. at 453, 424 S.E.2d at 502 (Toal, J., dissenting).

Since the evidence surrounding recovery of the gun was admissible, then counsel could not have been deficient nor Applicant prejudiced as a matter of law. See Hough v.

5640

Anderson, 272 F.3d 878 (7th Cir. 2001) (Ineffective assistance claims based on failure to object is tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the complaint fails *both* prongs of the Strickland test, as it was neither deficient nor prejudicial).

Accordingly, this allegation should be dismissed as a matter of law or summary judgment granted, as the face of the record disproves Applicant's contention that counsel was deficient for failure to object or that he was prejudiced by these issues. See, e.g. Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005) (summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law); Rule 12(b)(6), SCRPC (dismissal for failure to state facts sufficient to state a cause of action); S.C. Code Ann. §§ 17-27-40 & -50 (2003) (requiring that a PCR application specifically set forth the grounds for relief, stating that allegations of facts within the applicant's knowledge be verified, and requiring that affidavits, records, or other evidence of the allegations be attached or the application shall recite why they are not attached); S.C. Code Ann. §§ 17-27-70(b) (2003) (stating that after return by the State the PCR court may give notice of its intent to dismiss if it is clear on the basis of the pleadings and the record that the applicant is not entitled to relief).

In the event this Court disagrees the issue should be dismissed as a matter of law. Respondents request an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

C. Ground C

Applicant's third ground for relief is as follows:

Applicant was denied the effective assistance of counsel as

guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to object to improper testimony regarding Applicant's character and other acts during the verdict phase of the trial. SCRE Rule 402, 403, & 494 and *Strickland v. Washington*, 466 U.S. 668 (1984).

Applicant contends that the evidence regarding his semen being found in the victim was improper character evidence, and that counsel was ineffective for failing to object.

Respondents deny that counsel was deficient or Applicant prejudiced from the handling of this evidence.

As noted before, SLED DNA analyst Fitts found human blood and semen in the vaginal swabs taken from Kandee at autopsy. While the mixture of female and male secretions in the vaginal swabs complicated identification, Agent Fitts was able to match Applicant to a probability of 1 in 5300. {R. 4370-72; 4379-87}.

This evidence is undoubtedly relevant to identity as it places Applicant in the presence of Kandee during the time period at issue. Moreover, the mere fact that Applicant and Kandee had sex – which is all the seminal evidence proves by itself – is not a “bad act” in the legal sense. See Rule 404(b), SCRE.

Since the evidence was admissible, then counsel could not have been deficient nor Applicant prejudiced as a matter of law. See Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001) (ineffective assistance claims based on failure to object is tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the complaint fails *both* prongs of the Strickland test, as it was neither deficient nor prejudicial).

Accordingly, this allegation should be dismissed as a matter of law or summary

5642

judgment granted, as the face of the record disproves Applicant's contention that counsel was deficient for failure to object or that he was prejudiced by these issues. See, e.g., Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005) (summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law); Rule 12(b)(6), SCRPC (dismissal for failure to state facts sufficient to state a cause of action); S.C. Code Ann. §§ 17-27-40 & -50 (2003) (requiring that a PCR application specifically set forth the grounds for relief, stating that allegations of facts within the applicant's knowledge be verified, and requiring that affidavits, records, or other evidence of the allegations be attached or the application shall recite why they are not attached); S.C. Code Ann. §§ 17-27-70(b) (2003) (stating that after return by the State the PCR court may give notice of its intent to dismiss if it is clear on the basis of the pleadings and the record that the applicant is not entitled to relief).

In the event this Court disagrees the issue should be dismissed as a matter of law, Respondents request an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

D. Ground D

Applicant's next ground for relief is as follows:

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to request that the verdict phase of the proceedings should be re-opened after the jury did not find the aggravating circumstance of criminal sexual conduct during the penalty phase of the proceedings. *Strickland v. Washington*, 466 U.S. 668 (1984).

Applicant contends his counsel should have moved to "reopen" the murder verdict after the jury did not find the criminal sexual conduct ("CSC") aggravator during the sentencing phase.

Respondents deny that counsel was deficient or Applicant prejudiced from the handling of this evidence.

As noted before, evidence was introduced at the guilt phase that Applicant's semen was found in the victim. As noted in the previous ground, this evidence was independently relevant to identity in the guilt phase. Thus, there would be no legal basis to reopen the guilt phase simply because independently admissible evidence was presented. Indeed, it is hard to see how the jury's declination of the CSC aggravator in the sentencing phase calls into question their conviction of Applicant of *murder* in the guilt phase – the two are separate crimes and there was nothing inextricably linking CSC and murder such that declination of one necessarily would result in declination of the other.

Moreover, there was evidence in the record that Kandee and Applicant were willingly together that evening, as well as evidence that Kandee and Applicant were friends are were often seen together. {R. 3991; 4079-80}. A jury could have reasonably concluded that Applicant and Kandee had consensual sex prior to Applicant killing Kandee, or that the State had simply failed to prove beyond a reasonable doubt that any CSC occurred "while [Applicant] was in the commission of" the murder itself. There is no inconsistency.

Even if the jury's declination of the CSC aggravator was somehow inconsistent with its murder verdict, it is of no consequence. The state supreme court has abolished inconsistent verdicts as a means through which one can get a new trial. State v.

5644

Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991).

Since as a matter of law there was no valid legal or factual basis for moving to "reopen" the guilt phase verdict following the sentencing phase, then counsel could not have been deficient nor Applicant prejudiced from the failure to raise the issue. See Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001) (Ineffective assistance claims based on failure to object is tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the complaint fails *both* prongs of the Strickland test, as it was neither deficient nor prejudicial).

Accordingly, this allegation should be dismissed as a matter of law or summary judgment granted, as the face of the record disproves Applicant's contention that counsel was deficient for failure to object or that he was prejudiced by these issues. See, e.g. Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005) (summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law); Rule 12(b)(6), SCRPC (dismissal for failure to state facts sufficient to state a cause of action); S.C. Code Ann. §§ 17-27-40 & -50 (2003) (requiring that a PCR application specifically set forth the grounds for relief, stating that allegations of facts within the applicant's knowledge be verified, and requiring that affidavits, records, or other evidence of the allegations be attached or the application shall recite why they are not attached); S.C. Code Ann. §§ 17-27-70(b) (2003) (stating that after return by the State the PCR court may give notice of its intent to dismiss if it is clear on the basis of the pleadings and the record that the applicant is not entitled to relief).

In the event this Court disagrees the issue should be dismissed as a matter of law, Respondents request an evidentiary hearing to resolve any questions of fact. See Sharper

v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

E. Ground E

Applicant next contends as follows:

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to object to testimony and evidence related to a petroleum product located on a pair of pants seized during the arrest of Applicant. *Strickland v. Washington*, 466 U.S. 668 (1984).

Applicant asserts counsel failed to object to introduction of Applicant's pants, because the accelerant present on the pants was not the same as the substance used to ignite Kandee's car.

Respondents deny that counsel was deficient or Applicant prejudiced from the handling of this evidence.

At trial, on Kandee's pocketbook, SLED chemist Grady Layton identified a medium petroleum accelerant; on the shirt, paper material, belt, and miscellaneous debris found in her car, Layton was able to conclusively identify the presence of gasoline. {R. 4298-4399}. Thus, SLED Agent Helms concluded the fire was intentionally set. {R. 3889-90}. SLED chemist Layton also found the presence of a heavy petroleum accelerant, but not gasoline, on the black Levi's – and a number of Appellant's friends testified at trial he was wearing black jeans the day before. {R. 3763; 4058; 4093; 4193; 4297-98}.

Here, there could be no deficiency for failure to object nor prejudice as there was no valid basis for objection. The pants themselves were relevant to identity, as they were consistent with and corroborative of what people said Applicant was wearing the night of

5646

the murders, and Applicant asked for them the next morning when he was arrested. Moreover, the pants contained Kandee's watch, which was very relevant to identity.

As to the accelerant, the SLED agent testified that while there was a heavy accelerant on Appellant's pants, it was not gasoline, and there is a difference. {R. 4297-98; 4301-05}. Thus, there was really nothing that incriminating about the pants themselves (other than the mere fact they were black, and Appellant was described as wearing similar pants the night before). Indeed, the solicitor in argument never mentioned the accelerant on the pants as indicative of anything. {R. 4461; 4476}.

Given these circumstances, as a matter of law description of the accelerant on the pants could not possibly have been so prejudicial to create a reasonable probability of a different result.

Accordingly, this allegation should be dismissed as a matter of law or summary judgment granted, as the face of the record disproves Applicant's contention that counsel was deficient for failure to object or that he was prejudiced by these issues. See, e.g., Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005) (summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law); Rule 12(b)(6), SCRCP (dismissal for failure to state facts sufficient to state a cause of action); S.C. Code Ann. §§ 17-27-40 & -50 (2003) (requiring that a PCR application specifically set forth the grounds for relief, stating that allegations of facts within the applicant's knowledge be verified, and requiring that affidavits, records, or other evidence of the allegations be attached or the application shall recite why they are not attached); S.C. Code Ann. §§ 17-27-70(b) (2003) (stating that after return by the State the PCR court may give notice of its intent to dismiss if it is clear on the basis

of the pleadings and the record that the applicant is not entitled to relief).

In the event this Court disagrees the issue should be dismissed as a matter of law, Respondents request an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

F. Ground F

Applicant's next ground for relief is as follows:

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to adequately challenge the search and seizure of property. *Strickland v. Washington*, 466 U.S. 668 (1984).

Applicant contends the search of his wife's trailer was conducted without his or his wife's consent, and counsel was thus ineffective for failing to properly challenge this evidence.

This issue should also be dismissed as a matter of law.

Extensive pre-trial hearings were held in this case not only on this issue but also the admissibility of Applicant's statements to police.

It first should be noted that while the town of Branchville where Applicant was arrested is in Orangeburg County, the body was found in Dorchester County. {R. 979; 5076-77}.

At the pre-trial hearings, Dorchester County Sherriff's Deputy Terrence Van Doran testified about accompanying other officers to the trailer of Ms. Dorothy Bowman. He testified he had spoken to the Chief of the Branchville Police and was told there was an outstanding Orangeburg County arrest warrant on Applicant. Van Doran stated that after

5648

they found Applicant hiding behind a bed, he was Mirandized and Applicant asked for his pants. Dorothy went into the other room and got the pants, but before she could give them to Applicant, Van Doren searched them. Inside he found a lady's wrist watch identified at trial as belonging to the victim. {R. 5076-81; 5085-88; 5177; 5187}.

Dorchester County officer Alvin Coker similarly testified that after they received information Applicant was with the victim the previous afternoon, they found out from Orangeburg County that there was a warrant on Applicant. He never saw the warrant physically, but Branchville Chief Walters told Coker he was aware of it. {R. 5124-25}. Coker also noted they had a signed consent to search form from Dorothy. {R. 5127}.

Chief Walters of the Branchville Police testified that he was aware of and had a copy – but not the original – of Applicant's Orangeburg arrest warrant for receiving stolen goods. He stated he went with the other officers to Dorothy's trailer, and knocked on the door. They told Dorothy they had a warrant for Applicant, and she invited them inside. Dorothy said she did not know where Applicant was but the officers could look around. Once they found Applicant, he was told he was under arrest for receiving stolen goods. {R. 320-23; 325-31}.

Willie Bamberg of the Orangeburg-Calhoun Regional Detention Center testified that Applicant was booked in that night on a receiving stolen goods warrant. {R. 665-66}.

Major Walters of the Orangeburg County Sheriff's Office testified she went to the trailer and talked with Dorothy. She noted she had been told there were charges on the defendant. {R. 683-85}.

Applicant testified at the pre-trial hearing, and stated that he was at his wife's trailer

at the point of his arrest but did not live there. He claimed he told his wife not to let the police in when they arrived, but they told her they had a *search* warrant to see if Applicant was in her house. Supposedly the police told him he needed to put something on his lower body, and only brought him a pair of his wife's jogging pants. {R. 729-37}. Applicant admitted being presented the warrant for receiving stolen goods once he reached the Orangeburg County Jail that night. {R. 796-97; 935; 987}.

On cross, Applicant admitted knowing Kandee's watch was in his pocket. He claimed he did not know a warrant was out for him even though he went and hid in a child's bedroom. {R. 910-13}.

Dorothy Bowman also testified. She stated Applicant was not living with her, although some of his clothes were at her house. According to Dorothy, the police came to her door and said "something about JR [Applicant] and a warrant". They asked if they could come in and look for him, and she agreed. After they found Applicant, one of the officers asked her for Applicant's clothes. She went and got them, including the black pants. Dorothy stated that after Applicant was taken out she signed the consent to search form. {R. 1039-43}.

On cross, Dorothy again stated that the police requested to come in, and she let them in voluntarily. She was not afraid of Chief Walters at all. She noted police only said they had a warrant for his arrest, and noted police did not have a warrant to search her house. {R. 1050-53; 1056}.

The defense moved to suppress the evidence, arguing (1) Applicant was not informed of the nature of his arrest; (2) there was no proof the Branchville chief had

5650

knowledge of an outstanding felony or warrant; (3) even if he did, only having a copy of a warrant is insufficient, and (4) Applicant never received a bail or bond hearing on that offense, which violates the state statute. Thus, the defense stated that the fruits of the illegal arrest should be suppressed. Applicant also argued that Dorothy did not consent until after the fact of the search, and that she could not consent to search Applicant's pants anyway. Finally, Applicant argued that since the pants were outside of Applicant's wingspan, a warrant was needed. {R. 1255-66; 1271-73}.

The trial court denied the motion to suppress, finding that the arrest was made on a valid warrant, that Applicant had no expectation of privacy in the pants as Applicant asked for them; the wife retrieved them and they were examined incident to arrest. Finally, the court ruled Dorothy consented to a search of the home before the watch and pants were removed. {R. 1275-76}.

When the pants and watch were entered into evidence, there was no objection. {R. 4129-30; 4164}.

On appeal, Applicant contended that his arrest was illegal, and thus the trial court should have suppressed the pants and Kandee's watch and the flammable liquid found within them. The South Carolina Supreme Court first held the issue was not preserved as the objection was not renewed when the evidence was offered at trial. State v. Bowman, 366 S.C. 485, 500-01, 623 S.E.2d 378, 386 (2005). However, the Court addressed the merits in the alternative, and concluded that Applicant "was legally arrested pursuant to a valid warrant". The Court found that a valid warrant for receiving stolen goods was issued, and "while [the officer was] possibly not in possession of the warrant itself, [the officer] was

acting pursuant to the warrant when the arrest was made". Bowman, 366 S.C. at 501, 623 S.E.2d at 386-87. The court also rejected any contention that Applicant's wife did not consent to the search, noting that she specifically testified to the contrary. Finally, the Court concluded that the search of the pants was permissible as a search incident to arrest, since Applicant asked to put on those pants before he was led from the residence. Id. at 502, 623 S.E.2d at 387.

Thus, the South Carolina Supreme Court has already ruled that not only was the arrest valid, but also the evidence was properly admitted for multiple reasons. Obviously, this Court does not have the authority in PCR to overrule an evidentiary and constitutional decision of the South Carolina Supreme Court. Since the arrest was valid and the evidence was admissible, counsel could not have been deficient nor Applicant prejudiced. See Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001) (ineffective assistance claims based on failure to object is tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the complaint fails *both* prongs of the Strickland test, as it was neither deficient nor prejudicial).

Moreover, Applicant does not identify any new *and different* facts or issues that would supposedly necessitate revisitation of the issue; thus, his allegation fails to allege sufficient facts and is insufficient to survive dismissal as a matter of law. The issue should be dismissed as a matter of law or summary judgment granted. See, e.g. Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005) (summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law); Rule 12(b)(6), SCRPC (dismissal for failure to state facts sufficient to state a cause of action); S.C. Code Ann. §§ 17-27-40 & -50 (2003) (requiring that a PCR

5652

application specifically set forth the grounds for relief, stating that allegations of facts within the applicant's knowledge be verified, and requiring that affidavits, records, or other evidence of the allegations be attached or the application shall recite why they are not attached); S.C. Code Ann. §§ 17-27-70(b) (2003) (stating that after return by the State the PCR court may give notice of its intent to dismiss if it is clear on the basis of the pleadings and the record that the applicant is not entitled to relief).

In the event this Court disagrees the issue should be dismissed as a matter of law, Respondent requests an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

G. Ground G

Applicant's next ground for relief is as follows:

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to investigate and present mitigating evidence at the penalty phase of the trial. 1 ABA Standards for Criminal Justice (2d ed. 1982 Supp.), *Wiggins v. Smith*, 539 U.S. 510 (2003), *Rompilla v. Beard*, 125 S.Ct. 2456 (2005), *Strickland v. Washington*, 466 U.S. 668 (1984).

Respondents deny that counsel were deficient or Applicant prejudiced. First, Applicant's claim is insufficient as he does not set forth with particularity exactly what evidence counsel failed to uncover. As such, this assertion lacks sufficient specificity on which to respond because it fails to set forth any facts to support the claim. This matter must be dismissed pursuant to S.C. Code § 17-27-70(b) (1976) by the failure to allege facts to support his legal conclusion. Alternatively, this allegation is subject to dismissal

pursuant to S.C. Rules of Civil Procedure, Rule 12(b)(6) ("failure to state facts to constitute a cause of action").²

Second, the record reflects that counsel hired and called in mitigation family, jail guards, jail education teachers, and corrections consultants. {R. 4742-4928}. Most importantly, counsel hired and called a forensic social worker who testified in detail during the mitigation case about the psychosocial assessment he conducted of Applicant's life. A number of courts have rejected similar claims where counsel actually hired experts, conducted an investigation, and presented a case in mitigation on the issues. See Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006) (Trial counsel did not render deficient performance by failing to fully investigate defendant's medical, mental, social, and familial history for purposes of penalty phase of capital murder trial, as element of ineffective assistance claim; counsel interviewed a number of witnesses about defendant's childhood and life, counsel hired a private investigator to go and gather background information on defendant, counsel called several witnesses, including three experts, to offer mitigating evidence, and counsel testified that information gathered about defendant's background was available to the experts). See also, e.g. Tucker v. Ozmint, 350 F.3d 433 (4th Cir. 2003) (where defendant claimed that counsel failed to submit early reports of sexual abuse to the trial expert, the case was unlike Wiggins in that there was no deficiency, as counsel presented a substantial mitigation case including lay witnesses and

² Rule 12(e), SCRPC, provides that if a pleading is "so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading", a motion for a more definite statement can be made. In the alternative to the grounds expressed in the preceding section, Respondent would move for a more definite statement of the allegations in Applicant's APCR.

5654

expert testimony on abuse and ASPD issues); Byram v. Ozmint, 339 F.3d 203 (4th Cir. 2003) (where counsel hired a psychologist, psychiatrist, social worker, and investigator for mitigation, and prepared extensively, investigation was reasonable despite claim counsel failed to present evidence of background, fetal alcohol syndrome, and brain damage; moreover, case was different from Wiggins on the prejudice prong in that here the jury did hear testimony about the background, and this was not a case where the jury was "completely in the dark as to the defendant's alleged mental problems"); Wilson v. Ozmint, 352 F.3d 847 (4th Cir. 2004) (counsel not deficient in investigating family members, given their substantial investigation into the defendant's family life and the large amount of evidence introduced at the plea hearing); Davis v. State, 875 So.2d 359 (Fla. 2004) (rejecting claim that counsel was ineffective for failure to present a "qualified" expert on the relationship between sexual abuse and PTSD, where, unlike Wiggins, counsel conducted an investigation into background and presented three mental health experts, with a number of diagnoses; relief is not warranted simply because PCR counsel can later find a "more favorable" expert report); Ringo v. State, 120 S.W.3d 743 (Mo. 2003) (en banc) (no deficiency in investigation where counsel hired four experts; while one trial expert merely noted a high score on the PTSD scale but did not diagnose it, and a PCR expert later actually diagnosed PTSD, counsel's hiring of four experts was sufficient and reasonable investigation, making this case different from Wiggins).

Indeed, if the qualified experts counsel hired failed to identify every possible malady or issue, that is not an actionable basis for ineffective assistance of counsel. Poyner v. Murray, 964 F.2d 1404, 1419 (4th Cir. 1992). Lawyers are entitled to reasonably rely on their experts, and they are not required to second-guess their expert's conclusions. See

Wilson v. Greene, 155 F.3d 396 (4th Cir. 1998) (to be reasonably effective, counsel is not required to second-guess the contents of an expert's report): While many of the cases cited here conducted evidentiary hearings as to counsel's investigation, the trial record in this case reflects that counsel hired and called the typically appropriate experts, and Applicant has not identified with specificity what experts or what of consequence was not only missed but also was not within the bailiwick of the experts counsel did retain and call. Thus, Applicant's claim should be dismissed as a matter of law or summary judgment granted. See, e.g. Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005) (summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law); Rule 12(b)(6), SCRCP (dismissal for failure to state facts sufficient to state a cause of action); S.C. Code Ann. §§ 17-27-40 & -50 (2003) (requiring that a PCR application specifically set forth the grounds for relief, stating that allegations of facts within the applicant's knowledge be verified, and requiring that affidavits, records, or other evidence of the allegations be attached or the application shall recite why they are not attached); S.C. Code Ann. §§ 17-27-70(b) (2003) (stating that after return by the State the PCR court may give notice of its intent to dismiss if it is clear on the basis of the pleadings and the record that the applicant is not entitled to relief).

Inasmuch as these claims raise factual issues as to counsel's preparation and representation, Respondent requests an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

H. Ground H

Applicant's next ground for relief is as follows:

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the

5656

United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to object to the prosecution's introduction of evidence relevant to an arbitrary factor during the penalty phase of the trial. *Strickland v. Washington*, 466 U.S. 668 (1984) and *State v. Burkhardt*, — S.E.2d —, 2007 WL 80036 (SC 2007).

Applicant contends his counsel failed to object to the solicitor's improper elicitation of evidence of "good prison conditions". As will be seen, since the defense opened the door on the issue and thus the solicitor's subsequent questioning was permissible as a matter of law, counsel could not have been deficient nor Applicant prejudiced. See Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001) (ineffective assistance claims based on failure to object is tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the complaint fails *both* prongs of the Strickland test, as it was neither deficient nor prejudicial). Thus, the issue should be rejected and dismissed as a matter of law.

1. Events at trial and on appeal

As noted before, during its sentencing phase case the State only presented the two victims of Applicant's prior crimes, the SLED arson agent, the pathologist, and two victim impact witnesses. {R. 4652-4708}. The State presented no witnesses or information as to any of Applicant's misbehavior in or lack of adaptability to prison.

On the other hand, the defense's third witness was Margaret Baughman, an adult education teacher at the jail where Applicant spent his pre-trial confinement. This teacher stated that Applicant had been taking her classes in jail for fourteen to fifteen months, and eventually became her reliable and trustworthy teacher's assistant. {R. 4761-65}. On

redirect, Applicant elicited that there are limited educational opportunities available for inmates, and Applicant made him self available for any class. {R. 4767}.

Applicant next called James Aiken, a former state corrections official and corrections consultant, who was qualified as an expert in future danger and prison adjustment issues. On direct, Aiken testified Applicant would *never* leave prison until he was dead. According to Aiken, Applicant's institutional record of one fight and assistance to Baughman in the classroom indicated he could adapt to prison, but fundamentally Aiken noted that SCDC could manage and incapacitate any inmate with its security measures. {R. 4838-4845}.

On cross, Aiken testified extensively without objection relevant to this issue on the various security levels of custody an inmate can achieve. Aiken stated that a LWOP inmate has the incentives of getting to go to work and "get[ting] an opportunity to live" – without objection from the defense. {R. 4854-4862}.

On redirect, *the defense* elicited that Applicant could not work outside the prison, that he would not be going to "kiddy camp" if he was given a life sentence, that he would not have "picnic lunches", and that he would be around a "predator, dangerous violent inmate population". *The defense* then elicited the dimensions of a supermax cell. *The defense* then asked Aiken what productive endeavors were available for Applicant in prison, to which Aiken replied that Applicant could "pay back society" and "do something for himself" by working in such areas as food service, maintenance, or painting. *The defense* asked Aiken if Applicant was going to be "molly-coddled", and elicited that Applicant could get involved with the Scared Straight program. {R. 4864-68}.

On re-cross, the prosecutor asked about escapes, to which the defense objected.

5658

Outside the presence of the jury, the court sustained the defense objection to the questioning on escape, but declined the motion for a mistrial. During the discussion, the prosecutor asked if he could explore "certain conditions of the general population, the work conditions he's already gotten into, that area", since the defense had established that Applicant was not going to "kiddy camp" and would have work available. The trial court agreed, to which the defense only stated, "We're on recross, Judge". The judge replied that work situations was an issue certainly before the jury "at this point". {R. 4869-76}.

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

Applicant next called jail guard Sharon Branch, who stated that while Applicant displayed some "attitude" and had a recent difficulty with authorities over going to church, he never made her feel physically threatened. The defense elicited that Applicant was allowed "one hour of rec per day", but that sometimes the guards extended that. {R. 4882-88}.

Finally, jail guard Enrique Badillo testified that Applicant displayed a very polite and cooperative attitude in jail. {R. 4902-05}.

On appeal, Applicant contended that the solicitor's questioning about movies, television, and books was irrelevant under the South Carolina Supreme Court's decision in State v. Plath, 281 S.C. 1, 313 S.E.2d 619, 627 (1984), and violative of the constitutional due process mandate in Gardner v. Florida, 430 U.S. 349 (1977), that a death sentence cannot be based "on information the defendant had no opportunity to deny or explain". The State argued, *inter alia*, that the issue was not preserved as the arguments made on appeal were not made to the trial court. The South Carolina Supreme Court agreed the issue was not preserved, but added a cautionary instruction to both sides that evidentiary presentations along these lines are improper:

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

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

Subsequent to Bowman, the South Carolina Supreme Court addressed a case where the *solicitor* preemptively called a witness who extensively testified as to the conditions of confinement for a inmate serving life without parole. The defense objected to the state's evidence, and later put in its own evidence of "bad" prison conditions. In a 3-2 decision, the state supreme court found that the evidence of prison conditions injected an arbitrary factor into sentencing outside of the circumstances of the crime and the

5660

characteristic of the defendant, and thus was reversible. State v. Burkhart, __ S.C. __, 640 S.E.2d 450 (2007).

Subsequent to Burkhart, the South Carolina Supreme Court reiterated that *defense* evidence of "dismal conditions in prison" was just as improper as State evidence on the subject. State v. Bryant, Op. No. 26278, __ S.C. __, __ S.E.2d __ (February 27, 2007).

2. Since the defense opened the door to the solicitor's limited questioning about conditions of confinement by first eliciting testimony about the harshness of life in prison as well as presenting evidence about employment opportunities in jail, then the evidence was admissible and counsel could not have been deficient for failing to object.

As an initial matter, the defense opened the door to the solicitor's questioning by eliciting testimony about the harshness of life in prison as well as bringing out employment opportunities available to Applicant. Since under Plath the evidence was admissible once the door was opened, counsel could not have been deficient nor Applicant prejudiced from the failure to object. See Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001) (ineffective assistance claims based on failure to object is tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the complaint fails both prongs of the Strickland test, as it was neither deficient nor prejudicial).

During James Alken's direct testimony, he stated Applicant would be "incapacitated" and "lock[ed] up" for the rest of his life, with guards "that know how to use weapons", and behind fences, gun towers, concrete, and bars. {R. 4842; 4845}. After the solicitor's cross, in which he did not specifically ask about conditions of confinement other than various security classifications, the defense elicited that the guards could use "lethal force", and Applicant could be further prosecuted for any violations in prison. At this point, the

defense asked whether a life sentence would be "kiddy camp", whether Applicant would get "picnic lunches", that he would live the rest of his days amidst a predatory and dangerous community of inmates, and that he would not be "molly-coddled" by the prison authorities. {R. 4864-66}.

Given this defense-elicited evidence of the harshness of prison, in which Applicant not only starkly discussed the severe security regime as well as very pointedly used terms as "kiddy camp", "picnic lunches", and "molly-coddled", it was only appropriate that the State be entitled to respond by showing that Applicant would have opportunities for recreation if sentenced to life – that "life imprisonment was not the total abyss which [the defendant] portrayed it to be". Plath, 281 S.C. at 15-16, 313 S.E.2d at 627-28. As this Court has stated, "[b]oth the accused and the State are entitled to a fair trial." State v. Woomer, 278 S.C. 468, 472, 299 S.E.2d 317, 319 (1982). Consistent with a level and fair adversary system, after defense counsel scored effective "points" by freely displaying all the negative consequences or aspects of a lifetime behind bars, the State was then able to respond in a limited fashion by eliciting some of the small comforts or enjoyments even a LWOP defendant will experience.

Moreover, the defense elicited prior to the solicitor's examination from both Baughman as well as Aiken that employment and educational opportunities available to a defendant behind bars. Like recreation, these opportunities undoubtedly can be a source of distraction from the rigors of prison life as well as a source of personal fulfillment; thus, it was only fair – and indeed certainly not prejudicial given the work evidence already elicited – that the State be allowed to also bring out in a limited fashion some other

5662

recreational activities available to inmates aside from work and education.³ Further, Aiken also very pointedly stated on cross that every inmate would be required to work, and that an inmate would be put in "supermax" if he refused. This was followed up on by the defense in redirect. {Tr.4862-63; 4866-67}. It was only appropriate that the State point out an inmate would have time for recreation, too – not that he would be breaking rocks all day every day "at hard labor".

Finally, when asked what motivation a life without parole inmate had to comply with the rules, Aiken stated that SCDC's only business was incapacitation of life without parole inmates, because they are not preparing such an inmate for release. {R. 4861}. It is only fair for the State to be able to rebut the obvious inferences from these statements by showing that SCDC does not merely incapacitate – it does allow life without parole inmates recreation and education.

The defense was able to score a lot of points with its presentation as to the harshness of life without parole. Indeed, the main thrust of the defense in the sentencing phase was the concept that the "without parole" portion of a life sentence in harsh conditions makes life without parole sufficiently severe enough punishment to be appropriate retribution for the crime, without the need to impose death. See {R. 4982} (defense derisively refers to prosecutor's argument as "reward-a-prison"); {R. 4991} (defense states its "easy to try to paint prison as a reward", and argues: "The line forms back there if anybody wants to spend the rest of their life behind bars."); {R. 4991}

³ See generally State v. Johnson, 306 S.C. 119, 410 S.E.2d 547 (1991) (proper for solicitor to respond that victim's family could only visit him at the grave after defendant's sister testified she would visit him in prison at Christmas); State v. Thibodeaux, 750 So.2d 916 (La. 1999) (defendant opened the door to prosecution questioning of its corrections expert on recreational activities at prison).

(defense argues it is "wrong" and an "injustice" if the jury thinks a life sentence is a "reward"); {R. 4996-97} (defense implies that a life sentence is worse than death for a person as young as Applicant, and argues "Can you imagine spending from the years of the youngest person on the jury until the oldest person on the jury behind bars? That's a life sentence without the possibility of parole."); {R. 4997-98} (defense argues that jury should give Applicant life so that he would have to remember what he did to Kandee for the rest of his days); {R. 5005-06} (defense argues that prison is a dangerous place, and prison is appropriate punishment for Applicant because it is a death sentence too).

Simply because the State was then able to score a few points back on cross – as is the case for any party during almost any examination – does not mean that counsel was somehow ineffective for opening the door. Trial counsel has to take the good with the bad, and in almost every case a prosecutor will be able to score points off of the defense's presentations. The fact of such an inevitable response does not make counsel deficient for eliciting it for his beneficial purposes. To find deficiency would be precisely the type of hindsight Strickland forbids. Cf. Bunch v. Thompson, 949 F.2d 1354 (4th Cir. 1991) (reviewing court should filter from its analysis the distorting effects of hindsight); See generally Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995) (standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel).

Since the door was opened for the prosecutor's limited response as to conditions of confinement, then counsel could not have been deficient nor Applicant prejudiced from the failure to object. See Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001) (ineffective assistance claims based on failure to object is tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the complaint fails

5664

both prongs of the Strickland test, as it was neither deficient nor prejudicial).

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

Accordingly, this allegation should be dismissed as a matter of law or summary judgment granted, as the face of the record disproves Applicant's contention that counsel was deficient or Applicant prejudiced by these issues. See, e.g. Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005) (summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law); Rule 12(b)(6), SCRPC (dismissal for failure to state facts sufficient to state a cause of action); S.C. Code Ann. §§ 17-27-40 & -50 (2003) (requiring that a PCR application specifically set forth the grounds for relief, stating that allegations of facts within the applicant's knowledge be verified, and requiring that affidavits, records, or other evidence of the allegations be attached or the application shall recite why they are not attached); S.C. Code Ann. §§ 17-27-70(b) (2003) (stating that after return by the State the PCR court may give notice of its intent to dismiss if it is clear on the basis of the pleadings and the record that the applicant is not entitled to relief).

In the event this Court disagrees the issue should be dismissed as a matter of law, Respondents request an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

I. Ground I

Applicant's next ground for relief is as follows:

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to object to the trial court's limitation placed upon Applicant's right to allocution, as allowed under South Carolina law. S.C. Code Section 16-3-28; *State v. Moore*, 593 S.E. 2d 608 (SC 2004); *Strickland v. Washington*, 466 U.S. 668 (1984).

Applicant contends the trial court erred in advising him that he must limit his penalty closing argument to evidence in the record, and that counsel was ineffective for failing to object to this limitation.

During colloquy on Applicant's right to give argument in the penalty phase, the trial court advised Applicant that he would be bound by the evidence in the case and could not simply testify to the jury in argument. The judge noted Applicant would be limited by the record and its reasonable inferences. However, the judge also pointed out to Applicant that he would be certainly entitled to talk about the proper penalty, and that Applicant should "feel free" to do that. The judge noted that Applicant would be allowed to discuss the penalty itself "freely". {R. 4942-45}. Applicant ultimately declined to give argument. {R. 5012}.

Respondents deny that counsel were deficient or Applicant prejudiced, because

5666

there was no valid basis for objection to the trial court's instructions. Like any lawyer, a defendant would be limited in argument to arguing only within the evidence presented and its reasonable inferences – this argument right is not an unfettered opportunity for the defendant to give unsworn and un-crossexamined testimony before the jury. See State v. Moore, 357 S.C. 458, 593 S.E.2d 608 (2004) (in description of the facts quoting the trial court's admonition to a capital defendant during argument that he could not testify or go beyond comment on the evidence admitted at trial, and concluding that a defendant in the guilt phase could not stress something irrelevant like the fact that his life was at stake). Inherent credibility of a non-testimonial statement is not a proper point for argument, and thus consideration of it is not appropriate for a prejudice analysis. The trial court properly limited Applicant from giving unsworn testimony, but allowed him to discuss the proper penalty "freely".

Since the instructions were correct, counsel could not have been deficient nor Petitioner prejudiced. Accordingly, this allegation should be dismissed as a matter of law or summary judgment granted, as the face of the record disproves Applicant's contention that counsel was deficient or Applicant prejudiced by these issues. See, e.g. Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005) (summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law); Rule 12(b)(6), SCRPC (dismissal for failure to state facts sufficient to state a cause of action); S.C. Code Ann. §§ 17-27-40 & -50 (2003) (requiring that a PCR application specifically set forth the grounds for relief, stating that allegations of facts within the applicant's knowledge be verified, and requiring that affidavits, records, or other evidence of the allegations be attached or the application shall recite why they are not

attached); S.C. Code Ann. §§ 17-27-70(b) (2003) (stating that after return by the State the PCR court may give notice of its intent to dismiss if it is clear on the basis of the pleadings and the record that the applicant is not entitled to relief).

In the event this Court disagrees the issue should be dismissed as a matter of law, Respondents request an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

J. Ground J

Applicant finally contends as follows:

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to properly rehabilitate jurors who were struck for cause. *Strickland v. Washington*, 466 U.S. 668 (1984).

The issue is insufficiently pled and should be dismissed or made more definite and certain as it does not specify which jurors were improperly struck for cause, and what evidence Applicant thinks would prove they could have been rehabilitated. This matter must be dismissed pursuant to S.C. Code § 17-27-70(b) (1976) by the failure to allege facts to support his legal conclusion. Alternatively, this allegation is subject to dismissal pursuant to S.C. Rules of Civil Procedure, Rule 12(b)(6) ("failure to state facts to constitute a cause of action").⁴

⁴ Rule 12(e), SCRPC, provides that if a pleading is "so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading", a motion for a more definite statement can be made. In the alternative to the grounds expressed in the preceding section, Respondent would move for a more definite statement of the allegations in Applicant's APCR.

5668

In any event, Applicant cannot show prejudice as a matter of law, as there is no indication Applicant's jury was not fair and impartial.

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CONCLUSION

Each and every allegation in the Application not hereinabove either expressly admitted, denied, qualified or explained is hereby denied.

WHEREFORE, Respondent submits that the Application for Post-Conviction Relief should be dismissed, summary judgment granted, or in the alternative that its motions for a more definite statement be granted.

Respectfully submitted,

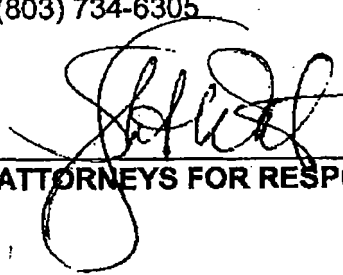
HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

S. CREIGHTON WATERS
Assistant Attorney General
(Counsel of Record)

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

By: 

ATTORNEYS FOR RESPONDENT

March 14, 2007

5670

STATE OF SOUTH CAROLINA)
)
 COUNTY OF DORCHESTER)
)
 MARION BOWMAN, # 6006)
)
)
)
 v.)
)
)
 STATE OF SOUTH CAROLINA)
)
 Defendant.)
)

IN THE COURT OF COMMON PLEAS
 Case No.: 2006-CP-18-569

AFFIDAVIT OF
 DALE M. DAVIS

FILED RECORDS
 2007 JUN 20 AM 8:41
 CHERYL GRAHAM
 CLERK OF COURT
 DORCHESTER COUNTY

I, Dale M. Davis, being duly sworn, do state:

1. I perform work as a mitigation specialist in capital proceedings in South Carolina and Georgia. In that regard, I previously worked as a mitigation specialist for the defense in the trial of State of South Carolina vs. Marion Bowman.
2. During the preparation for that case, a request was made for any and all records from the Department of Social Services regarding the childhood of Marion Bowman and his siblings. This request was made to both Orangeburg and Dorchester counties. Orangeburg county referred me to Dorchester County as the last county of contact for the family.
3. Dorchester county provided me with information in response to this request; however, these records only included reports regarding assistance programs such as food stamps and welfare services provided to his mother.
4. Because of a death in my family, I was unable to attend the entire trial; I returned as the penalty phase began.
5. However, it has been brought to my attention that additional records were received from the Department of Social Services during the trial.
6. I was unaware of these records as they were not provided to me to review. Neither was I provided the opportunity to investigate any of the items contained in these records.
7. In the process, I learned that Kandee was known in the Branchville law enforcement community to have been involved in loitering/prostitution activities in the area of Highway 78.

(#) (G)

JA 1653

8. Alternatively, I interviewed Kandee Martin's mother as part of this case. During this interview, I learned that Kandee had three children, not one.
9. Further, I learned that Marion and Kandee attended school together and were friends for many years before Kandee's death.
10. Finally, I spoke with Dr. Brian West during the preparation for the underlying trial of Marion Bowman. Dr. West was a neuro-psychologist who was consulted by the defense attorneys.
11. Although Dr. West gathered information indicating that Marion Bowman suffered from various difficulties including a low-average IQ of 80; Attention Deficit Hyperactivity Disorder, a Learning Disability, and a Reading Disability, Dr. West was not called to testify regarding this information because Dr. West was not contacted early enough to allow sufficient time to travel from his office in North Charleston to St. George, SC.
12. I make this statement of my own free will, absent any coercion or duress.

Dale M. Davis
Dale M. Davis

June 13, 2007

5672

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)
MARION BOWMAN, # 6006)
v.)
STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS
Case No.: 2006-CP-18-569

AFFIDAVIT OF
MARION BOWMAN

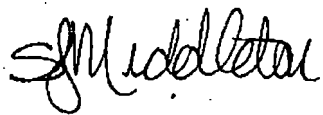
FILED RECORD
2007 JUN 20 AM 8:41
CHERYL GRAHAM
CLERK OF COURT
DORCHESTER COUNTY

I, Marion Bowman, being duly sworn, do state:

1. I am currently housed at Lieber Correctional Facility in Ridgeville, South Carolina.
2. In 2001, I was charged with the murder of Kandee Martin.
3. I was tried for this murder in 2002.
4. I was represented at this trial by Norbert Cummings and Marva Hardee-Thomas.
5. During this trial, the trial judge explained that I had the right to address the jury during the penalty phase.
6. However, I understood the judge's instruction to be a limitation on my comments to the jury.
7. I understood this instruction to be a limitation which prevented me from requesting that the jury impose a life sentence as an act of mercy or based upon remorse or other factors.
8. Had I been explained that I could request a life sentence from the jury because of mercy or in recognition of remorse or other factors, then I would have exercised my right to personally address the jury in the penalty phase and I would have asked them to spare my life.
9. I make this statement of my own free will, absent any coercion or duress.


Marion Bowman

June 13, 2007
13 MBJ


commission exp July 24, 2012

(I)

JA 1655

5673

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

Case No.: 2006-CP-18-569

COUNTY OF DORCHESTER)

MARION BOWMAN, # 6006)

v.)

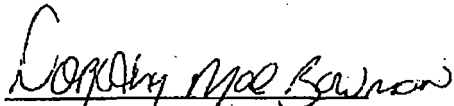
AFFIDAVIT OF
DOROTHY BOWMAN

STATE OF SOUTH CAROLINA)

FILED - RECEIVED
2007 JUN 20 AM 8:41
CHERYL GRAHAM
CLERK OF COURT
DORCHESTER COUNTY

I, Dorothy Bowman, being duly sworn, do state:

1. I am married to Marion Bowman. In 2001, I lived in a mobile home in Branchville, South Carolina.
2. On February 17, 2001, I was sweeping off the front porch when the police rode by.
3. ^{About two minutes later} ~~Later that day~~, the police returned and asked if they could search my house for Marion Bowman. I agreed to this search.
4. After Marion's arrest that day, the police continued to search the house. The police used metal detectors during this search.
5. I was never questioned during the trial about the use of the metal detectors during this search of my house.
6. I make this statement of my own free will, absent any coercion or duress.


Dorothy Bowman

June 13, 2007

JA 1656

5674

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

Marion Bowman, Jr.,

Petitioner,

v.

State of South Carolina

Respondent

IN THE COURT OF COMMON PLEAS

C/A No. 2006-CP-18-569

ORDER RELIEVING CO-COUNSEL,
APPOINTING NEW CO-COUNSEL
AND SCHEDULING FURTHER
MATTERS

FILED-RECORDED
2008 FEB-6 AM 10:14
CLERK OF COURT
DORCHESTER COUNTY

ON JANUARY 16, 2008, this Court held a status conference in the above-captioned matter. This conference was held in the Darlington County Courthouse. Present at this conference was the Petitioner, Marion Bowman, Jr., and his counsel, Mr. James A. Brown, Jr. and Mr. Charlie Jay Johnson, Jr. The State was represented by Mr. S. Creighton Waters of the Office of the South Carolina Attorney General.

During this hearing, the Court was informed that Mr. Johnson was offered and has accepted employment as a prosecutor with the Solicitor's Office for the First Judicial Circuit. This judicial circuit includes Dorchester County, the venue and jurisdiction of Petitioner Bowman's underlying criminal trial and this post-conviction proceeding. Further, this Solicitor's Office is the same office which prosecuted Mr. Bowman during the trial which serves as the basis for this post-conviction action.

Because of this change in circumstance, the Court finds that it is appropriate to relieve Mr. Johnson from his appointment as counsel for Petitioner Bowman. The relief from this appointment is effective as of January 16, 2008. Further, Mr. Johnson shall provide all information, including his case file and all related documents, to the Jim Brown within 10 days

JA 1657

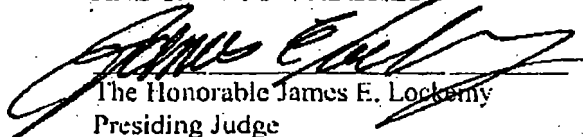
of the January 16, 2008 hearing. Also, Mr. Johnson shall have no discussions with anyone regarding this matter. Specifically, Mr. Johnson is prohibited from discussing this case with anyone employed by the First Circuit Solicitor's Office. However, as an exception to this "gag" Order, Mr. Johnson may discuss this case with Mr. Brown and the newly appointed co-counsel for Petitioner Bowman. Finally, a violation of this "gag" Order is subject to punishment for contempt of court.

Having relieved Mr. Johnson as co-counsel, this Court now appoints Mr. John Sinclair, III of the Charleston County Bar as co-counsel for Mr. Bowman. This appointment is effective as of January 16, 2008. Within two weeks of the January 16, 2008 hearing, Mr. Brown and Mr. Sinclair shall meet with Petitioner Bowman. At this meeting, counsel shall discuss any potential conflicts and obtain from Petitioner Bowman his position regarding the appointment of Mr. Sinclair.

Also, this Court determined that it is appropriate to conduct another status conference on March 26, 2008 in the Dillon County Courthouse. Petitioner Bowman shall be transported to this conference by arrangement of the Attorney General.

Finally, the merits hearing in this matter is tentatively scheduled for the week of May 27, 2008. It is likely that the 29th and 30th of May will be the actual dates that this hearing commences. This Court will endeavor to conduct this proceeding in the Dorchester County Courthouse. If this matter is not concluded during that week, then it will continue until the next week.

AND IT IS SO ORDERED


The Honorable James E. Lockemy
Presiding Judge

1-31, 2008
 SC

5676

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS

C.A. No. 06-CP-18-569

MARION BOWMAN, #6006)

Petitioner,)

v.)

STATE OF SOUTH CAROLINA)

Respondent.)

FIRST AMENDED APPLICATION FOR
POST-CONVICTION RELIEF

FILED-RECORDED
2007 FEB 23 AM 11:18
CLERK OF COURT
DORCHESTER COUNTY

[Note: This application follows SCRCP Appendix of Forms, Form 5, as required by Rule 71.1(b), SCRCP.]

1. Applicant is detained at the Lieber Correctional Institution, Campbell Thicket Road, Ridgeville, South Carolina, 29472.
2. The sentence was imposed by the Dorchester County Court of General Sessions, the Honorable Diane S. Goodstein, presiding.
3. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed:
 - (a) 01-GS-18-0348- Murder
 - (b) 01-GS-18-0349- Third Degree Arson
4. The date upon which sentence was imposed and the terms of the sentence:
 - (a) Sentenced on May 23, 2002 to death.
 - (b) Sentenced on May 23, 2002 to ten years
5. A finding of guilty on was made on May 20, 2002 after a plea of not guilty.
6. The applicant did appeal from judgment of conviction and sentence.
7. (a) The Courts to which applicant appealed:
 - (i) The South Carolina Supreme Court.

- (ii) The United States Supreme Court
- (b) The result in each Court to which applicant appealed:
 - (i) Conviction and sentence of death were affirmed.
 - (ii) The Petition for Writ of Certiorari was denied.
- (c) The date on which each Court affirmed the sentence or denied certiorari:
 - (i) Conviction and sentence were affirmed on November 28, 2005
 - (ii) The Petition for Writ of Certiorari was denied on June 12, 2006
- (d) Citations of any written opinion or orders entered pursuant to such results:
 - (i) State v. Bowman, 623 S.E.2d 378 (2005)
 - (ii) Bowman v. South Carolina, 126 S.Ct. 2867 (2006).
- 8. Not applicable.

9 & 10 Grounds for Relief and Concise Statement of Supporting Facts.¹

Ground A

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to investigate, challenge and present evidence related to a firearm during the verdict of the trial proceedings. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground A

- (1) The gun attributed to the death at issue was purportedly linked to this crime by the testimony of an expert witness who testified on behalf of the state.
- (2) This expert testified that shell casings found at the alleged scene exclusively matched the firearm linked to the Applicant's family.
- (3) Trial counsel failed to investigate, challenge and present evidence related to this purported exclusive match.
- (4) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

¹ Applicant reserves his right to amend this application.

5678

Ground B

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to object to improper testimony regarding a conspiracy to secrete a firearm wherein no evidence linked Applicant to this conspiracy. SCRE Rule 402, 403, & 404 and *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground B

- (1) During the verdict phase of the trial, the state elicited information tending to establish the existence of a conspiracy among several of Applicant's relatives to secrete a firearm.
- (2) No evidence linked Applicant to this conspiracy. However, admission of evidence that applicant's relatives engaged in such criminal activity improperly suggested that Applicant endorsed or suggested such activity.
- (3) Trial counsel failed to object to the admission of such evidence.
- (4) But for trial counsels' deficient performance, the outcome of the trial proceedings would have been different.

Ground C

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to object to improper testimony regarding Applicant's character and other acts during the verdict phase of the trial. SCRE Rule 402, 403, & 404(b) and *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground C

- (1) During the verdict phase of the trial, the State elicited testimony regarding the character and other acts of the Applicant. Specifically, a State's witness testified that Applicant's seminal fluid was located in a mixture found in the victim's vaginal cavity.
- (2) This information should not have been admitted during the verdict phase of the trial.
- (3) Trial counsel did not object to this testimony.

- (4) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

Ground D

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to request that the verdict phase of the proceedings should be re-opened after the jury did not find the aggravating circumstance of criminal sexual conduct during the penalty phase of the proceedings. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground D

- (1) During the verdict phase of the trial, the State elicited testimony regarding the character and other acts of the Applicant. Specifically, a State's witness testified that Applicant's seminal fluid was located in a mixture found in the victim's vaginal cavity. This information should not have been admitted during the verdict phase of the trial.
- (2) During the penalty phase of the proceedings, the government offered that the murder was committed during the commission of criminal sexual conduct. This aggravating circumstance was based upon the information elicited during the verdict phase of the proceedings.
- (3) The jury did not find the existence of this aggravating factor beyond a reasonable doubt.
- (5) Trial Counsel failed to move to re-open the murder conviction based upon the failure of the jury to find this aggravating circumstance and the improper admission of this evidence during the verdict phase of the proceedings.
- (6) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

Ground E

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to object to testimony and evidence related

5680

to a petroleum product located on a pair of pants seized during the arrest of Applicant. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground E

- (1) During the verdict phase of the proceedings, the state introduced a pair of pants seized during the arrest of Applicant.
- (2) Also elicited at this phase of the trial was expert testimony that these pants contained a petroleum product.
- (3) This testimony was not relevant to any issue at trial as the product found on the pants did not match the accelerant alleged to have been used during the commission of the arson.
- (4) Trial counsel did not object to the admission of this testimony and evidence.
- (5) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

Ground F

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to adequately challenge the search and seizure of property. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground F

- (1) During the verdict phase of the trial, the state introduced items seized during a search conducted at the trailer of Dorothy Bowman. This search was conducted without a search warrant, without probable cause and without the consent of the Applicant. Further, the consent of Mrs. Bowman was obtained through the use of subterfuge and thus was not knowingly, intelligently and willfully given.
- (2) Trial counsel failed to adequately challenge this search and seizure.
- (3) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

Ground G

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to investigate and present mitigating evidence at the penalty phase of the trial. 1 ABA Standards for Criminal Justice (2d ed. 1982 Supp.), *Wiggins v. Smith*, 539 US 510 (2003), *Rompilla v. Beard*, 125 S.Ct. 2456 (2005) *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground G

- (1) Trial counsel only received access to significant amounts of mitigating information contained within Department of Social Service files during the break between the verdict and penalty phase of the proceedings.
- (2) Counsel did not adequately investigate the information contained in these files or other mitigating information.
- (3) Further, counsel did not investigate and present information related to Applicant's intoxication in an effort to qualify for an additional mitigating circumstance.
- (4) Also, counsel did not investigate evidence to rebut the victim impact evidence offered by the state.
- (5) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

Ground H

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to object to the prosecution's introduction of evidence relevant to an arbitrary factor during the penalty phase of the trial. *Strickland v. Washington*, 466 U.S. 668 (1984) and *State v. Burkhardt*, --- S.E.2d ---, 2007 WL 80036 (SC 2007).

Supporting Facts for Ground H

- (1) During the penalty phase of the trial, the state elicited information regarding "good prison conditions."
- (2) Trial counsel failed to object to this testimony.

5682

- (3) The Supreme Court of South Carolina failed to address this issue during the direct appeal because trial counsel did not preserve this issue for appeal.
- (4) But for counsel's deficient performance, the outcome of the proceedings would have been different.

Ground I

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsel's failure to object to the trial court's limitation placed upon Applicant's right to allocution, as allowed under South Carolina law. S.C. Code Section 16-3-28; *State v. Moore*, 593 S.E.2d 608 (SC 2004); *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground I

- (1) Applicant was incorrectly advised by the trial judge that he must limit his closing argument to the jury in the penalty phase to evidence in the record.
- (2) Trial counsel failed to object to this improper limitation by the trial judge.
- (3) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

Ground J

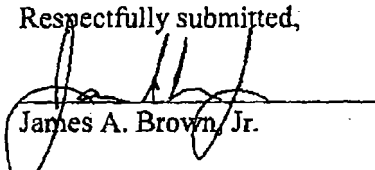
Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsel's failure to properly rehabilitate jurors who were struck for cause. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground J

- (1) During the jury selection process, the court struck jurors for cause.
- (2) Trial counsel failed to rehabilitate these jurors.
- (3) But for counsel's deficient performance, the outcome of the proceedings would have been different.

- 11 & 12. Applicant appealed his conviction and sentence to the South Carolina Supreme Court. Applicant has not previously filed an application for post-conviction relief nor a petition for a writ of habeas corpus in state or federal court.
13. None of the grounds set forth in (9) has been presented to this or any other Court, state or federal.
14. N/A
15. These grounds rely on additional facts outside the record which was before the previous court.
- 16 & 17. (a) Applicant was represented at his trial by Norbert E. Cummings, Jr., Cummings Law Firm, 100 S. Main Street, Suite B, Summerville, SC 29483 and Myra Ann Hardee-Thomas, 130 E. Richardson Ave., Summerville, SC 29483
- (b) Applicant was represented in his direct appeal by Robert M. Dudek, S.C. Office of Appellate Defense, 1122 Lady St., Suite 940 Columbia, S.C. 29201.
18. Applicant seeks the vacation of his convictions and sentences.
19. Applicant is not under sentence from any other court.

Respectfully submitted,


James A. Brown, Jr.

February 16, 2007.

James A. Brown, Jr.
Law Offices of Jim Brown, P.A.
1111 Bay St., P.O. Box 592
Beaufort, SC 29901-0592
(843) 470-0003

Charlie Jay Johnson, Jr.
Attorney at Law
P.O. Box 11212
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Attorneys for the Applicant

5684

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jim.brown@scbar.org

February 16, 2007

Via E-Mail and US Mail

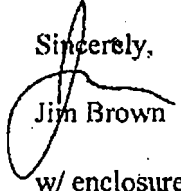
jlockemyj@sccourts.org
The Honorable James E. Lockemy
South Carolina Circuit Court Judge
P.O. Box 750
Dillon, SC 29536

Re: Bowman v. State, 06-CP-18-569

Dear Judge Lockemy:

I write to provide your Honor with a 1st Amended Application for Post-Conviction Relief in the above-referenced matter. Even though only being appointed to this case in November, 2006, I believe this application provides an outline of the matters at issue in this case to date. However, I must note that this can not be an exhaustive list of claims as the non-lawyer members of the death penalty team only began work on this case following the receipt of the funding order in my office on January 23, 2007. Further, even though I have requested copies of the entire law enforcement files generated by SLED and the Dorchester County Sheriff's Department, I am not yet in receipt of these items. Finally, I must point out that my client's ability to communicate with my office has been limited in the recent months. First, there were difficulties in arranging telephone communications. Next, my client was placed in solitary confinement and lastly, he has been transferred to the "supermax" wing of the facility in Columbia. I ask that you keep these circumstances in mind as the discovery effort continues in this case. Thank you for your understanding in this regard. Please do not hesitate to contact my office with any questions or concerns.

Sincerely,


Jim Brown

w/ enclosure

cc:  Dorchester County Clerk of Court, via US mail, w/ enclosure
S. Creighton Waters, AAG, via e-mail and US mail, w/ enclosure
Charlie J Johnson, Jr, Esq, via e-mail and US mail, w/ enclosure
Tyler Lee, Law Clerk to Judge Lockemy, via e-mail and US mail, w/ enclosure

JA 1667

5685

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS

C.A. No. 2006-CP-18-569

MARION BOWMAN, #6006

Petitioner,

v.

MOTION FOR A CONTINUANCE

STATE OF SOUTH CAROLINA

Defendant.

The applicant, Marion Bowman, respectfully moves this Court, by and through his undersigned counsel, for an Order continuing the Merits Hearing in this matter from the scheduled date in May, 2008 until a time which will afford the applicant and his counsel the opportunity to adequately investigate and present all evidence and claims in a competent fashion. This Motion is based upon the following information.

- 1). Marion Bowman was charged, inter alia, with Capital Murder by the First Circuit Solicitor's Office in Dorchester County, South Carolina in 2001.
- 2). Following a trial conducted in May 2002, Mr. Bowman was convicted of Murder and Arson, 3rd Degree. He was sentenced to death for the Murder charge.
- 3). His conviction was affirmed on direct appeal in 2006. His appellate counsel filed the initial application for post-conviction relief in 2006.
- 4). Mr. James A. Brown, Jr. and Mr. Charlie Jay Johnson, Jr. were appointed to represent Mr. Bowman following a hearing on November 6, 2006.
- 5). The First Amended Application for Post-Conviction Relief was filed on or about February 16, 2007.

5686

6). A summary judgement hearing was convened during June 2007 to review the claims made in this First Amended Application for Post-Conviction Relief.

7). In July 2007, the original mitigation specialist assisting Mr. Bowman's PCR counsel was removed from the PCR team.

8). Arrangements were made to utilize the services of a second mitigation specialist; however, she backed out of this arrangement on or about October 8, 2007.

9). Thereafter, counsel engaged the services of a third mitigation specialist. Explicit funding for this third mitigation specialist was obtained by Order dated November 7, 2007.

10). During December 2007, counsel Brown became aware that co-counsel Johnson had been extended an offer of employment by the First Circuit Solicitor's Office.

11). In January 2008, counsel Brown first became aware that co-counsel Johnson had accepted this offer of employment. This employment effectively precluded co-counsel Johnson from continuing in the representation of applicant Bowman.

12). By Order, signed January 31, 2008, co-counsel Johnson was relieved of his obligations and John Sinclair, III, was appointed to assist Mr. Brown in these proceedings.

13). Mr. Sinclair first received his copy of the file from former counsel Johnson on or about February 27, 2008.

14). This file did not include two volumes of the trial transcript.

15). Further, the trial counsel files received by Mr. Sinclair were disorganized and the individual folders and notebooks were not marked for reference purposes.

16). Also, Mr. Sinclair practices as a solo practitioner; operating a law office with only the assistance of a shared secretary.

17). At the time of his appointment and continuing until the time of this motion, Mr.

Sinclair represents approximately 60 clients in other matters, not related to Mr. Bowman's case.

18). Mr. Sinclair also presides over the Town of Mount Pleasant Municipal Court as a part-time judge.

19). South Carolina law provides that all applicants in capital post-conviction proceedings be provided "two counsel." SC Code Section 17-27-160(B).

20). The guidelines for death penalty proceedings promulgated by the American Bar Association make clear that counsel in capital post-conviction proceedings have two tasks before them: a) reinvestigating the capital case and b) investigating the client. 31 Hofstra Law Review 913, at 1086.

21). These guidelines also describe the manner of this investigation. ("...counsel must obtain and read the entire record of the trial, including all transcripts and motions, as well as proceedings (such as bench conferences) that may have been recorded but not transcribed. In many cases, the record is voluminous, often amounting to many thousands of pages. Counsel must also inspect the evidence and obtain the files of trial and appellate counsel, again scrutinizing them for what is missing as well as what is present..."). 31 Hofstra 913, at 933.

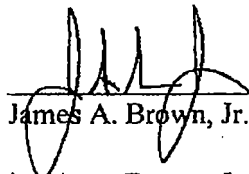
22). Read together, it is clear that Mr. Bowman is entitled to sufficient time to allow both counsel Brown and newly appointed counsel Sinclair the opportunity to investigate the case.

23). Because Mr. Bowman is already on death row, the State will suffer no prejudice should the Court grant this Motion.

Thus, based upon the information presented above, it is requested that this Court grant this Motion and continue these proceedings until both counsel for applicant Bowman have the opportunity to investigate his conviction and sentence and present his matter to this Court.

5688

Respectfully Submitted by:



James A. Brown, Jr.

March 24, 2008
Beaufort, SC

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jslawver@bellsouth.net

CERTIFICATE OF DELIVERY

I hereby certify that a copy of the foregoing pleading
was e-mailed and mailed to all counsel of record in this proceeding

this 24 day of March, 2008.



JA 1671

5689

CA

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	C.A. No. 06-CP-18-569
MARION BOWMAN, #6006	)	
	)	
Petitioner,	)	
	)	
v.	)	SECOND AMENDED APPLICATION FOR
	)	POST-CONVICTION RELIEF
STATE OF SOUTH CAROLINA	)	
	)	
Respondent.	)	
	)	

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CHERYL GRAHAM
CLERK OF COURT
DORCHESTER COUNTY

[Note: This application follows SCRCF Appendix of Forms, Form 5, as required by Rule 11(c) SCRCF.]

1. Applicant is detained at the Lieber Correctional Institution, Campbell Thicket Road, Ridgeville, South Carolina, 29472.
2. The sentence was imposed by the Dorchester County Court of General Sessions, the Honorable Diane S. Goodstein, presiding.
3. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed:
 - (a) 01-GS-18-0348- Murder
 - (b) 01-GS-18-0349- Third Degree Arson
4. The date upon which sentence was imposed and the terms of the sentence:
 - (a) Sentenced on May 23, 2002 to death.
 - (b) Sentenced on May 23, 2002 to ten years
5. A finding of guilty on was made on May 20, 2002 after a plea of not guilty.
6. The applicant did appeal from judgment of conviction and sentence.
7. (a) The Courts to which applicant appealed:
 - (i) The South Carolina Supreme Court.

5690

- (ii) The United States Supreme Court
- (b) The result in each Court to which applicant appealed:
 - (i) Conviction and sentence of death were affirmed.
 - (ii) The Petition for Writ of Certiorari was denied.
- (c) The date on which each Court affirmed the sentence or denied certiorari:
 - (i) Conviction and sentence were affirmed on November 28, 2005
 - (ii) The Petition for Writ of Certiorari was denied on June 12, 2006
- (d) Citations of any written opinion or orders entered pursuant to such results:
 - (i) State v. Bowman, 623 S.E.2d 378 (2005)
 - (ii) Bowman v. South Carolina, 126 S.Ct. 2867 (2006).

8. Not applicable.

9 & 10 Grounds for Relief and Concise Statement of Supporting Facts.¹

Ground A

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to investigate, challenge and present evidence related to a firearm during the verdict of the trial proceedings. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground A

- (1) The gun attributed to the death at issue was purportedly linked to this crime by the testimony of an expert witness who testified on behalf of the state.
- (2) This expert testified that shell casings found at the alleged scene exclusively matched the firearm linked to the Applicant's family.
- (3) Trial counsel failed to investigate, challenge and present evidence related to this purported exclusive match.
- (4) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

¹ Applicant reserves his right to amend this application.

Ground B

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to object to improper testimony regarding a conspiracy to secrete a firearm wherein no evidence linked Applicant to this conspiracy. SCRE Rule 402, 403, & 404 and *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground B

- (1) During the verdict phase of the trial, the state elicited information tending to establish the existence of a conspiracy among several of Applicant's relatives to secrete a firearm.
- (2) No evidence linked Applicant to this conspiracy. However, admission of evidence that applicant's relatives engaged in such criminal activity improperly suggested that Applicant endorsed or suggested such activity.
- (3) Trial counsel failed to object to the admission of such evidence.
- (4) But for trial counsels' deficient performance, the outcome of the trial proceedings would have been different.

Ground C

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to object to improper testimony regarding Applicant's character and other acts during the verdict phase of the trial. SCRE Rule 402, 403, & 404(b) and *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground C

- (1) During the verdict phase of the trial, the State elicited testimony regarding the character and other acts of the Applicant. Specifically, a State's witness testified that Applicant's seminal fluid was located in a mixture found in the victim's vaginal cavity.
- (2) This information should not have been admitted during the verdict phase of the trial.
- (3) Trial counsel did not object to this testimony.

5692

- (4) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

Ground D

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to request that the verdict phase of the proceedings should be re-opened after the jury did not find the aggravating circumstance of criminal sexual conduct during the penalty phase of the proceedings. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground D

- (1) During the verdict phase of the trial, the State elicited testimony regarding the character and other acts of the Applicant. Specifically, a State's witness testified that Applicant's seminal fluid was located in a mixture found in the victim's vaginal cavity. This information should not have been admitted during the verdict phase of the trial.
- (2) During the penalty phase of the proceedings, the government offered that the murder was committed during the commission of criminal sexual conduct. This aggravating circumstance was based upon the information elicited during the verdict phase of the proceedings.
- (3) The jury did not find the existence of this aggravating factor beyond a reasonable doubt.
- (5) Trial Counsel failed to move to re-open the murder conviction based upon the failure of the jury to find this aggravating circumstance and the improper admission of this evidence during the verdict phase of the proceedings.
- (6) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

Ground E

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to object to testimony and evidence related

to a petroleum product located on a pair of pants seized during the arrest of Applicant. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground E

- (1) During the verdict phase of the proceedings, the state introduced a pair of pants seized during the arrest of Applicant.
- (2) Also elicited at this phase of the trial was expert testimony that these pants contained a petroleum product.
- (3) This testimony was not relevant to any issue at trial as the product found on the pants did not match the accelerant alleged to have been used during the commission of the arson.
- (4) Trial counsel did not object to the admission of this testimony and evidence.
- (5) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

Ground F

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to adequately challenge the search and seizure of property. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground F

- (1) During the verdict phase of the trial, the state introduced items seized during a search conducted at the trailer of Dorothy Bowman. This search was conducted without a search warrant, without probable cause and without the consent of the Applicant. Further, the consent of Mrs. Bowman was obtained through the use of subterfuge and thus was not knowingly, intelligently and willfully given.
- (2) Trial counsel failed to adequately challenge this search and seizure.
- (3) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

Ground G

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Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to investigate and present mitigating evidence at the penalty phase of the trial. 1 ABA Standards for Criminal Justice (2d ed. 1982 Supp.), *Wiggins v. Smith*, 539 US 510 (2003), *Rompilla v. Beard*, 125 S.Ct. 2456 (2005) *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground G

- (1) Trial counsel only received access to significant amounts of mitigating information contained within Department of Social Service files during the break between the verdict and penalty phase of the proceedings.
- (2) Counsel did not adequately investigate the information contained in these files or other mitigating information.
- (3) Further, counsel did not investigate and present information related to Applicant's intoxication in an effort to qualify for an additional mitigating circumstance.
- (4) Also, counsel did not investigate evidence to rebut the victim impact evidence offered by the state.
- (5) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

Ground H

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to object to the prosecution's introduction of evidence relevant to an arbitrary factor during the penalty phase of the trial. *Strickland v. Washington*, 466 U.S. 668 (1984) and *State v. Burkhardt*, --- S.E.2d ---, 2007 WL 80036 (SC 2007).

Supporting Facts for Ground H

- (1) During the penalty phase of the trial, the state elicited information regarding "good prison conditions."
- (2) Trial counsel failed to object to this testimony.

- (3) The Supreme Court of South Carolina failed to address this issue during the direct appeal because trial counsel did not preserve this issue for appeal.
- (4) But for counsels' deficient performance, the outcome of the proceedings would have been different.

Ground I

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to object to the trial court's limitation placed upon Applicant's right to allocution, as allowed under South Carolina law. S.C. Code Section 16-3-28; *State v. Moore*, 593 S.E.2d 608 (SC 2004); *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground I

- (1) Applicant was incorrectly advised by the trial judge that he must limit his closing argument to the jury in the penalty phase to evidence in the record.
- (2) Trial counsel failed to object to this improper limitation by the trial judge.
- (3) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

Ground J

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to properly rehabilitate jurors who were struck for cause. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground J

- (1) During the jury selection process, the court struck jurors for cause.
- (2) Trial counsel failed to rehabilitate these jurors.
- (3) But for counsel's deficient performance, the outcome of the proceedings would have been different.

5696

Ground K

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to introduce evidence of a the use of metal detectors during the search of Dorothy Mae Bowman's house. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground K

- (1) During the verdict phase of the trial, the state presented evidence that the weapon used to kill the deceased had been secreted in a couch at Dorothy Mae Bowman's house (the same house where Marion Bowman was arrested shortly after the killing of the deceased).
- (2) The defense countered that this gun was not found during the search of the house when Mr. Bowman was arrested and was not found until a months later in a river.
- (3) The state replied by arguing that the couch was of such design that the weapon could have eluded the search conducted at the time of Mr. Bowman's arrest.
- (4) However, the defense failed to present evidence that the police used metal detectors during this search. This evidence eviscerates the state's explanation for its failure to find the gun during search contemporaneous with Mr. Bowman's arrest.
- (3) But for counsel's deficient performance, the outcome of the proceedings would have been different.

Ground L

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to present evidence supporting a statutory mitigating circumstance. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground L

- (1) During the trial below, evidence was presented regarding the consumption of alcoholic beverages by witnesses in the trial proceedings.

- (2) Further, applicant himself consumed alcohol during the time in question.
- (3) However, trial counsel failed to elicit evidence from the witnesses who testified at trial about appellant's intoxication on the date in question.
- (4) But for counsel's deficient performance, the outcome of the proceedings would have been different.

Ground M

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to present exculpatory evidence. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground M

- (1) During the trial below, trial counsel argued that state's witness James Tywan Gadson was the guilty party in the death of Kandee Martin. Counsel argued that Mr. Gadson killed Ms. Martin without help from Mr. Bowman.
- (2) Further, trial counsel were provided information regarding a statement made by Ricky Davis indicating that he overheard Mr. Gadson confess to the shooting.
- (3) This statement indicated that Mr. Gadson shot Ms. Martin and then returned the gun to Mr. Bowman.
- (4) Also, this statement indicated that the police told Mr. Gadson what to say on the stand.
- (5) Police notes confirm portions of the statement regarding Mr. Davis' placement in custody in the same cell block with Mr. Gadson.
- (6) However, trial counsel never presented this statement or any testimony regarding Mr. Gadson's confession to this crime.
- (7) But for counsel's deficient performance, the outcome of the proceedings would have been different.

Ground N

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and

5698

Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to present applicant with information at trial regarding a conflict of interest pertaining to witness Ricky Davis. *Thomas v. State*, 346 S.C. 140, 551 S.E.2d 254 (2001).

Supporting Facts for Ground N

- (1) During the trial below, trial counsel was represented by an attorney who had previously represented Ricky Davis.
- (2) This same trial counsel provided advise to applicant concerning the presentation of Ricky Davis as a witness in the proceedings.
- (3) However, trial counsel failed to inform Mr. Bowman of the attorney client relationship referenced above.
- (4) Had counsel informed applicant of this conflict, applicant would have objected to representation by this counsel.
- (5) Further, because of this conflict, applicant was provided deficient advise regarding the presentation of Mr. Davis' testimony.
- (5) This actual conflict of interest adversely affected the proceedings below.

Ground O

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to present impeaching and exculpatory evidence undermining the expert opinion of SLED regarding the firearm located in the Edisto River. *Strickland v. Washington*, 466 U.S. 668 (1984).

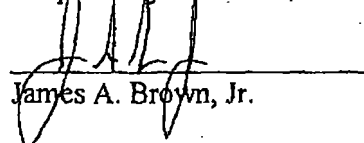
Supporting Facts for Ground O

- (1) The gun attributed to the death at issue was purportedly linked to this crime by the testimony of an expert witness who testified on behalf of the state.
- (2) This expert testified that shell casings found at the alleged scene matched the firearm linked to the Applicant's family "to the exclusion of all other firearms."
- (3) Trial counsel failed to present evidence that "uniqueness (of firearm toolmarks) has

not been demonstrated, such statements (that toolmarks link bullets or casings to a particular gun 'to the exclusion of all other firearms.') do not have a firm statistical basis. These claims, which imply an error rate of zero, also don't reflect the element of subjectivity involved in declaring a match, a determination that's always made by a firearms examiner." See *Ballistics Imaging*, Opening Statement, Prof. John Rolph, National Academies National Resource Council Chair, Committee to Assess the Feasibility, Accuracy, and Technical Capability of a National Ballistics Database, March 5, 2008 Telephone News Conference.

- (4) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.
- 11 & 12. Applicant appealed his conviction and sentence to the South Carolina Supreme Court. Applicant has not previously filed an application for post-conviction relief nor a petition for a writ of habeas corpus in state or federal court.
- 13. None of the grounds set forth in (9) has been presented to this or any other Court, state or federal.
- 14. N/A
- 15. These grounds rely on additional facts outside the record which was before the previous court.
- 16 & 17. (a) Applicant was represented at his trial by Norbert E. Cummings, Jr., Cummings Law Firm, 100 S. Main Street, Suite B, Summerville, SC 29483 and Myra Ann Hardee-Thomas, 130 E. Richardson Ave., Summerville, SC 29483
- (b) Applicant was represented in his direct appeal by Robert M. Dudek, S.C. Office of Appellate Defense, 1122 Lady St., Suite 940 Columbia, S.C. 29201.
- 18. Applicant seeks the vacation of his convictions and sentences.
- 19. Applicant is not under sentence from any other court.

Respectfully submitted,


James A. Brown, Jr.

James A. Brown, Jr.
Law Offices of Jim Brown, P.A.

May 19, 2008.

5700

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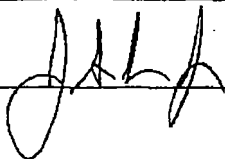
John Sinclair, III
John Sinclair, III, LLC.
P.O. Box 370
Charleston, SC 29402-0370
(843) 853-9300

Attorneys for the Applicant

CERTIFICATE OF DELIVERY

I hereby certify that a copy of the foregoing pleading
was hand delivered to all counsel of record in this proceeding

this 19th day of May, 2008.



5701

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIRST JUDICIAL CIRCUIT
COUNTY OF DORCHESTER	)	
	)	Case No.: 2006-CP-18-569
Marion Bowman	)	
	)	
Applicant,	)	
	)	
v.	)	
	)	ORDER
State of South Carolina,	)	
	)	
Respondent.	)	

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 CLERK OF COURT
 DORCHESTER COUNTY

The applicant Marion Bowman (Bowman) previously served a subpoena on the Department of Social Services (DSS) in December 2007, seeking DSS records on a number of individuals. Following clarification, it was determined that the DSS records sought involved child protective services records and not economic service records.

After inquiry, DSS determined that there was at least computer entry data from two incidents on one of the individuals named in the subpoena. However, both incidents- one case in 2001 and the other in 2007- resulted in "unfounded" DSS case decisions. Upon discerning such, DSS communicated to Bowman's attorney that case material from these incidents, whatever there may be, could not be disclosed without a court order pursuant to S.C. Code Ann. 20-7-650 (J). Bowman now moves this court for such an order¹.

The statute governing the release of "unfounded" DSS investigations severely restricts the agencies and individuals who can have access to this information. One classification, however, covers the matter before the court - subsection (4).

¹ DSS waives service of a written motion.

5702.

Bowman has filed a post-conviction relief action in the Court of Common Pleas. One of the burdens he must meet is proving ineffective assistance of counsel. Without determining whether the DSS information constitutes such, this court holds that the information from the unfounded case file² could be used as evidence in a post-conviction relief action. This court also determines that this information (if it exists) may also be admissible. However, this ruling is not binding on the trial judge.

Accordingly, DSS is ordered to divulge material, if any there is, from the 2001 unfounded DSS case investigation to both parties. *in so far as it pertains to the applicant*
AND IT IS SO ORDERED.

James E. Kelly
JUDGE, COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

August 20, 2008
Subler, South Carolina

² This court is mindful that per state law (20-7-650 (J)), there may no longer be records in existence from the 2001 incident. The 2007 incident occurred after Bowman's trial in 2002; as such, it is of no value in this PCR matter.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	
	)	
Marion Bowman, Jr.,	)	C/A No. 2006-CP-18-569
	)	
Applicant,	)	
	)	
v.	)	RESPONDENT'S OBJECTION TO
	)	AMENDMENTS, MOTION TO STRIKE,
The State of South Carolina,	)	AND MOTION TO COMPEL DISCOVERY
	)	
Respondent.	)	

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2008 SEP -5 AM 11:3
CLERK OF COURT
DORCHESTER COUNTY

Respondent, above-named, hereby files an objection to the Third Amended Application under Rule 15(a), SCRCP, a motion to strike the Third Amended Application based in Rule 12(e), SCRCP, and a motion to compel supplemental responses to the State's interrogatories pursuant to Rule 37, SCRCP.

I.

Motion to Strike and Objection to Amendments

Counsel for the State has stated *since the appointment hearing* on November 6th, 2006, that all he cared most about was that he be given a fair opportunity to prepare by way of a timely filed Final Amended Application, and that the case not be litigated in an unfair manner with new allegations being dumped on him at the last minute. This Court at that hearing agreed the request was fair, and an amended application deadline was set. As required, Applicant filed that Amended Application on February 17, 2007.

Subsequently, the State filed an Amended Return and Motion for Summary Judgment, which the parties litigated in June of 2007. The case was set for a merits hearing in November 2007. Based on the issue with Applicant's mitigation specialist Paige Tarr, that date was continued, and reset for March 31st, 2008. However, initial co-counsel

5704

Johnson took employment with the solicitor, and the evidentiary hearing date was moved to May 25, 2008. Subsequently, on March 24, 2008, Applicant moved to continue the May date, arguing new counsel Sinclair had not had sufficient time to prepare. The hearing date was reset for September 15th, 2008. Applicant then filed a Second Amended Applicant on May 19th, 2008.

Additionally, on June 20, 2007, Respondent submitted interrogatories to Applicant. Applicant has responded *once*, on December 7, 2007, nearly *six (6)* months after they were submitted, despite Rule 33(b), SCRPC, which requires service of answers within thirty (30) days. The parties have conducted depositions, in May 2008, July 14, 2008, and August 26, 2008. At each of those depositions, undersigned counsel told Applicant's counsel that they needed to get him an Amended Application, and he would object if allegations were dumped on him at the last minute. Similarly, in an email to this Court's law clerk on July 17th, 2008, undersigned counsel again reiterated his concern that Applicant was going to try to amend, and that while the State would be ready for the September 15th date based on the allegations presently raised, the State would object if new issues arrived to late for a fair opportunity to prepare.

Now, Respondent received late yesterday afternoon the Third Amended Application setting forth a number of new claims, of which almost all are fact-based. Indeed, the document sent yesterday was missing one page (on which a number of factual allegations were made), and another page was blurred. Although undersigned counsel immediately responded to the email that the document sent was insufficient, a corrected version was not sent until this morning, Thursday, September 4, 2008. Thus, Respondent has less than seven (7) days to respond to and prepare for these allegations.

This conduct is extremely prejudicial to Respondent and the entire Third Amended Application should be struck. South Carolina Code § 17-27-50 (Rev. 2003) requires an applicant to "specifically set forth the grounds upon which the application is based", and requires the applicant to use the form set forth by the Supreme Court. Rule 71.1, SCRCP, adopts the form which is contained in the Appendix, and that form requires an Applicant to state not only the grounds on which he claims relief but also "the facts which support each of the grounds". Of course, Rule 12(e), SCRCP allows the Court to strike any scandalous matter. More importantly, Rule 15(a), SCRCP, provides that a party may amend his pleading after a responsive pleading has been filed only with written consent or an order of the judge. Consent to amend should be freely given where "justice so requires *and* [the amendment] does not prejudice any other party". Rule 15(a), SCRCP (emphasis added). The use of the italicized "and" means that concerns of justice are alone not dispositive; there must also be no prejudice to the opposing party.

Here, there is no consent, and leave to amend should not be given due to the obvious prejudice from such litigation practices. Of course, the whole point of pleading is notice, and it is virtually impossible to defend a case if the Applicant is allowed to raise new factual claims a week before trial. Given the time periods set in the rules and statutes, the time remaining is insufficient time to file an Amended Return, file for and litigate summary judgment, or – most importantly – conduct any sort of discovery. Counsel must scramble to contact witnesses and obtain and peruse records. Further, as will be addressed in the next section, undersigned counsel has not received any supplemental responses to its interrogatories, and thus does not have even that aid in preparing for trial.

And, of course, this all assumes that undersigned counsel can just drop everything

5706

else and do nothing but this case for the next seven (7) business days. That is simply not the case. Counsel has the direct appeal brief due in the murder case of H. Dewain Herring, Esquire on September 10, 2008, and no further extensions can be obtained. Moreover, counsel is set to speak at a conference on both September 11 and 12, 2008, and the following weekend is his parents' 40th anniversary for which significant family activities are planned. And, of course, counsel has had to spend this entire morning drafting this motion rather than working on these pressing deadlines or actually preparing for this case.

Indeed, although the State has every interest in seeing this action move forward, during the conference call on Applicant's extension request in March 2008 undersigned counsel noted he understood Mr. Sinclair's dilemma, having recently been appointed. Now, despite this, Applicant has turned around and done to Respondent precisely what Respondent requested they not do, and placed far greater burdens on undersigned counsel than Mr. Sinclair ever was facing.

The other problem, of course, is that the remedy of a continuance inures to the benefit of the Applicant as well. This is a prime example of one seeking to "have their cake and eat it too", as either they force the State to go to trial scrambling at the last minute to prepare, which is of course strategically advantageous to them, or they achieve a continuance, which provides more delay and is strategically advantageous to them as it further prevents enforcement of the judgment. The State is faced with the unfair choice of either going to trial, "winging it", and hoping for the best, or seeing yet another trial date go by the wayside with months in the interim before a new one could occur.

Accordingly, the only appropriate remedy is striking the Third Amended Application,

whether based in Rule 12(e) or Rule 15(a), SCRCP. WHEREFORE, Respondent hereby requests an Order of this court to that effect, and any other relief this Court deems just and proper.

II.

Motion to Compel

Respondent, above-named, hereby moves this Court for an Order pursuant to Rule 37, SCRCP, for an Order compelling the Applicant to more completely respond to interrogatories served on Applicant by Respondent, and for any other relief this Court deems just and proper, including striking of claims. It should be noted that counsel has not consulted with Applicant's counsel on this motion, as time is of the essence given the fact that Applicant dumped new allegations on the undersigned less than seven working days before trial, and counsel has repeatedly advised Applicant's counsel at the discovery depositions in May, July, and August 2008 that he expected supplemental responses from Applicant as required by the rules.

On June 20th, 2007, Respondent sent interrogatories to Applicant, consisting of sixteen (16) written questions. Of course, Rule 33(b), SCRCP, requires service of answers within thirty (30) days. Nearly six (6) months later, Respondent received responses to the interrogatories.

However, these answers are insufficient. For all of the witnesses, no addresses are provided. Moreover, many of the summaries are insufficient. While affidavits were attached from a few witnesses, for the most part the summaries are insufficient to "inform the other party of the important facts known to or observed by such witnesses". For

5708

example, as to many of the witnesses it is only stated they will "testify concerning the consumption of alcoholic beverages by Marion Bowman on February 16, 2001", but precisely what important fact the witness observed about Bowman's alleged drinking (or lack thereof) is not specified. Similarly, the answer with regard to "Ms. Marty LeMatty" is insufficient, as it states she will testify "concerning the provision of DSS regarding Marion Bowman, Jr., and his family". Respondent is unsure what this means; indeed, this provides little information if any as to what important facts this witness allegedly possesses.

Moreover, counsel this morning received a Third Amended Application, setting forth a number of new grounds, of which almost all are fact-based. However, Applicant has not sent any supplemental responses to the interrogatories, although by definition the creation of these new grounds would give rise to new information which needed to be disclosed.

This case is scheduled for evidentiary hearing beginning September 15th, 2008, and sufficient answers to these interrogatories are crucial for Respondent to prepare for trial. Indeed, this Court denied some of Respondent's pre-trial dispositive motions in part because Applicant's answers to interrogatories would provide sufficient notice to Respondent of the substance of Applicant's claims for relief.

WHEREFORE, pursuant to Rule 37(d), SCRCP, Respondent requests an Order compelling Applicant's full and complete response to Respondent's interrogatories, as well as any other relief this Court in its discretion deems just and proper, including an order refusing to allow support of designated claims or refusing to allow designated matters into evidence, see Rule 37(b)(2)(B), SCRCP; or an order striking relevant pleadings or parts thereof, or dismissing the action or any part thereof, see Rule 37(b)(2)(C), SCRCP.

Respectfully submitted,

HENRY D. McMASTER
Attorney General

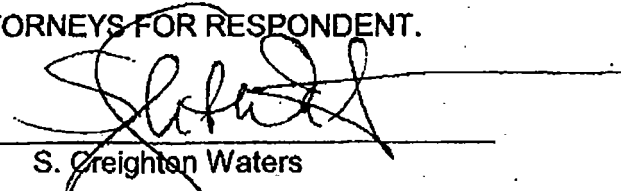
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ATTORNEYS FOR RESPONDENT.

BY: 

S. Creighton Waters

ATTORNEYS FOR RESPONDENT

September 4, 2008.

5710

STATE OF SOUTH CAROLINA)
)
COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS

C.A. No. 06-CP-18-569

MARION BOWMAN, #6006)

Petitioner,)

v.)

STATE OF SOUTH CAROLINA)

Respondent.)

**THIRD AMENDED APPLICATION FOR
POST-CONVICTION RELIEF**

FILED-RECORDED
2008 SEP -8 AM 10:30
CLERK OF COURT
DORCHESTER COUNTY

[Note: This application follows SCRCF Appendix of Forms, Form 5, as required by Rule 71.1(b), SCRCF.]

1. Applicant is detained at the Lieber Correctional Institution, Campbell Thicket Road, Ridgeville, South Carolina, 29472.
2. The sentence was imposed by the Dorchester County Court of General Sessions, the Honorable Diane S. Goodstein, presiding.
3. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed:
 - (a) 01-GS-18-0348- Murder
 - (b) 01-GS-18-0349- Third Degree Arson
4. The date upon which sentence was imposed and the terms of the sentence:
 - (a) Sentenced on May 23, 2002 to death.
 - (b) Sentenced on May 23, 2002 to ten years
5. A finding of guilty on was made on May 20, 2002 after a plea of not guilty.
6. The applicant did appeal from judgment of conviction and sentence.
7. (a) The Courts to which applicant appealed:
 - (i) The South Carolina Supreme Court.

- (ii) The United States Supreme Court
- (b) The result in each Court to which applicant appealed:
 - (i) Conviction and sentence of death were affirmed.
 - (ii) The Petition for Writ of Certiorari was denied.
- (c) The date on which each Court affirmed the sentence or denied certiorari:
 - (i) Conviction and sentence were affirmed on November 28, 2005
 - (ii) The Petition for Writ of Certiorari was denied on June 12, 2006
- (d) Citations of any written opinion or orders entered pursuant to such results:
 - (i) State v. Bowman, 623 S.E.2d 378 (2005)
 - (ii) Bowman v. South Carolina, 126 S.Ct. 2867 (2006).

8. Not applicable.

9 & 10 Grounds for Relief and Concise Statement of Supporting Facts.¹

Ground A

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to investigate, challenge and present evidence related to a firearm during the verdict of the trial proceedings. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground A

- (1) The gun attributed to the death at issue was purportedly linked to this crime by the testimony of an expert witness who testified on behalf of the state.
- (2) This expert testified that shell casings found at the alleged scene exclusively matched the firearm linked to the Applicant's family.
- (3) Trial counsel failed to investigate, challenge and present evidence related to this purported exclusive match.
- (4) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

¹ Applicant reserves his right to amend this application.

5712

Ground B

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to object to improper testimony regarding a conspiracy to secrete a firearm wherein no evidence linked Applicant to this conspiracy. SCRE Rule 402, 403, & 404 and *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground B

- (1) During the verdict phase of the trial, the state elicited information tending to establish the existence of a conspiracy among several of Applicant's relatives to secrete a firearm.
- (2) No evidence linked Applicant to this conspiracy. However, admission of evidence that applicant's relatives engaged in such criminal activity improperly suggested that Applicant endorsed or suggested such activity.
- (3) Trial counsel failed to object to the admission of such evidence.
- (4) But for trial counsels' deficient performance, the outcome of the trial proceedings would have been different.

Ground C

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to object to improper testimony regarding Applicant's character and other acts during the verdict phase of the trial. SCRE Rule 402, 403, & 404(b) and *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground C

- (1) During the verdict phase of the trial, the State elicited testimony regarding the character and other acts of the Applicant. Specifically, a State's witness testified that Applicant's seminal fluid was located in a mixture found in the victim's vaginal cavity.
- (2) During a deposition conducted by PCR counsel, Tawain Gadson indicated that no sex occurred during the time he claims that applicant shot and killed the deceased and that he was not aware of any sexual encounter between the applicant and the

deceased during the time in question before the trial jury.

- (3) The information regarding the applicant's seminal fluid being located in the victim's vaginal cavity was irrelevant, prejudicial and improper character evidence which should not have been admitted during the verdict phase of the trial.
- (4) Trial counsel did not object to this testimony.
- (5) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

Ground D

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to request that the verdict phase of the proceedings should be re-opened after the jury did not find the aggravating circumstance of criminal sexual conduct during the penalty phase of the proceedings. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground D

- (1) During the verdict phase of the trial, the State elicited testimony regarding the character and other acts of the Applicant. Specifically, a State's witness testified that Applicant's seminal fluid was located in a mixture found in the victim's vaginal cavity. This information should not have been admitted during the verdict phase of the trial.
- (2) During the penalty phase of the proceedings, the government offered that the murder was committed during the commission of criminal sexual conduct. This aggravating circumstance was based upon the information elicited during the verdict phase of the proceedings.
- (3) The jury did not find the existence of this aggravating factor beyond a reasonable doubt.
- (4) Trial Counsel failed to move to re-open the murder conviction based upon the jury finding negating the claim of a sexual encounter and the improper admission of this evidence during the verdict phase of the proceedings.
- (5) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

5714

Ground E

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to object to testimony and evidence related to a petroleum product located on a pair of pants seized during the arrest of Applicant. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground E

- (1) During the verdict phase of the proceedings, the state introduced a pair of pants seized during the arrest of Applicant.
- (2) Also elicited at this phase of the trial was expert testimony that these pants contained a petroleum product.
- (3) This testimony was not relevant to any issue at trial as the product found on the pants did not match the accelerant alleged to have been used during the commission of the arson.
- (4) Trial counsel did not object to the admission of this testimony and evidence.
- (5) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

Ground F

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to adequately challenge the search and seizure of property. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground F

- (1) During the verdict phase of the trial, the state introduced items seized during a search conducted at the trailer of Dorothy Bowman. This search was conducted without a search warrant, without probable cause and without the consent of the Applicant. Further, the consent of Mrs. Bowman was obtained through the use of subterfuge and thus was not knowingly, intelligently and willfully given.

- (2) Trial counsel failed to adequately challenge this search and seizure.
- (3) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

Ground G

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to investigate and present mitigating evidence at the penalty phase of the trial. 1 ABA Standards for Criminal Justice (2d ed. 1982 Supp.), *Wiggins v. Smith*, 539 US 510 (2003), *Rompilla v. Beard*, 125 S.Ct. 2456 (2005) *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground G

- (1) Trial counsel only received access to significant amounts of mitigating information contained within Department of Social Service files during the break between the verdict and penalty phase of the proceedings.
- (2) Counsel did not adequately investigate the information contained in these files or other mitigating information.
- (3) Further, counsel did not investigate and present information related to Applicant's intoxication in an effort to qualify for an additional mitigating circumstance.
- (4) Also, counsel did not investigate evidence to rebut the victim impact evidence offered by the state.
- (5) The applicant's work record was not submitted to the testifying social worker to accurately construct a psycho-social assessment.
- (6) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

Ground H

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to object to the prosecution's introduction of evidence relevant to an arbitrary factor during the penalty phase of the trial. *Strickland*

5716

v. Washington, 466 U.S. 668 (1984) and *State v. Burkhardt*, --- S.E.2d ----, 2007 WL 80036 (SC 2007).

Supporting Facts for Ground H

- (1) During the penalty phase of the trial, the state elicited information regarding "good prison conditions."
- (2) Trial counsel failed to object to this testimony.
- (3) The Supreme Court of South Carolina failed to address this issue during the direct appeal because trial counsel did not preserve this issue for appeal.
- (4) But for counsels' deficient performance, the outcome of the proceedings would have been different.

Ground I

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to object to the trial court's limitation placed upon Applicant's right to allocution, as allowed under South Carolina law. S.C. Code Section 16-3-28; *State v. Moore*, 593 S.E.2d 608 (SC 2004); *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground I

- (1) Applicant was incorrectly advised by the trial judge that he must limit his closing argument to the jury in the penalty phase to evidence in the record.
- (2) Trial counsel failed to object to this improper limitation by the trial judge.
- (3) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

Ground J

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to properly rehabilitate jurors who were struck for cause. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground J

- (1) During the jury selection process, the court struck jurors for cause.
- (2) Trial counsel failed to rehabilitate these jurors.
- (3) But for counsel's deficient performance, the outcome of the proceedings would have been different.

Ground K

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to introduce evidence of the use of metal detectors during the search of Dorothy Mae Bowman's house. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground K

- (1) During the verdict phase of the trial, the state presented evidence that the weapon used to kill the deceased had been secreted in a couch at Dorothy Mae Bowman's house (the same house where Marion Bowman was arrested shortly after the killing of the deceased).
- (2) The defense countered that this gun was not found during the search of the house when Mr. Bowman was arrested and was not found until a months later in a river.
- (3) The state replied by arguing that the couch was of such design that the weapon could have eluded the search conducted at the time of Mr. Bowman's arrest.
- (4) However, the defense failed to present evidence that the police used metal detectors during this search. This evidence eviscerates the state's explanation for its failure to find the gun during the search contemporaneous with Mr. Bowman's arrest.
- (5) But for counsel's deficient performance, the outcome of the proceedings would have been different.

Ground L

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the

5718

South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to present evidence supporting a statutory mitigating circumstance. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground L

- (1) During the trial below, evidence was presented regarding the consumption of alcoholic beverages by witnesses in the trial proceedings.
- (2) Further, applicant himself consumed alcohol during the time in question.
- (3) However, trial counsel failed to elicit evidence from the witnesses who testified at trial about appellant's intoxication on the date in question or of applicant's habit of consuming alcoholic beverages or being habitually under the influence.
- (4) But for counsel's deficient performance, the outcome of the proceedings would have been different.

Ground M

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to present exculpatory and impeaching evidence. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground M

- (1) During the trial below, trial counsel argued that state's witness James Tawain Gadson was the guilty party in the death of Kandee Martin. Counsel argued that Mr. Gadson killed Ms. Martin without help from Mr. Bowman.
- (2) Trial counsel were provided information regarding a statement made by Ricky Davis indicating that he overheard Mr. Gadson confess to the shooting.
- (3) This statement indicated that Mr. Gadson shot Ms. Martin and then returned the gun to Mr. Bowman.
- (4) Also, this statement indicated that the police told Mr. Gadson what to say on the stand.
- (5) Police notes confirm portions of the statement regarding Mr. Davis' placement in custody in the same cell block with Mr. Gadson.

- (6) However, trial counsel never presented this statement or any testimony regarding Mr. Gadson's confession to this crime.
- (7) Further, trial counsel failed to inform the jury that the state swore in previous statements to a different tribunal that Tawain Gadson was the shooter of the deceased.
- (8) Trial counsel failed to question Tawain Gadson about his voluminous consumption of marijuana, his blackouts, his verbal memory impairment or his hearing a voice or a "beeping noise."
- (9) Trial counsel failed to question Tawain Gadson about his deceptive statements provided to Dorchester County Sheriff's Deputy T.E. Stephenson.
- (10) Also, trial counsel failed to elicit testimony from Travis Felder that he lied during his direct examination (Transcript 4093-4094 & 4105); thereby exposing himself to more charges and nullifying the provisions of the plea agreement.
- (11) Trial counsel failed to inform the jury that Agent Coker viewed videotape footage of the Horizon E-Z store wherein a person stated that he heard several persons getting gas who were overhead confessing to killing a girl and having her body in the trunk of a car on the same night as the decedent's killing.
- (12) Trial counsel failed to inform the jury that Alvin Coker stated that Tawain Gadson purchased a "High Point 380 Model CF-Serial Number : P732433...[t]his gun is believed to be the gun used in Murder."
- (13) Trial counsel failed to inform the jury that casings linked to Tawain Gadson's gun were compared by SLED Agent Collins.
- (14) But for counsel's deficient performance, the outcome of the proceedings would have been different.

Ground N

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to present applicant with information at trial regarding a conflict of interest pertaining to witness Ricky Davis. *Thomas v. State*, 346 S.C. 140, 551 S.E.2d 254 (2001).

Supporting Facts for Ground N

5720

- (1) During the trial below, trial counsel was represented by an attorney who had previously represented Ricky Davis.
- (2) This same trial counsel provided advise to applicant concerning the presentation of Ricky Davis as a witness in the proceedings.
- (3) However, trial counsel failed to inform Mr. Bowman of the attorney client relationship referenced above.
- (4) Had counsel informed applicant of this conflict, applicant would have objected to representation by this counsel.
- (5) Further, because of this conflict, applicant was provided deficient advice regarding the presentation of Mr. Davis' testimony.
- (6) This actual conflict of interest adversely affected the proceedings below.

Ground O

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsel's failure to present impeaching and exculpatory evidence undermining the expert opinion of SLED regarding the firearm located in the Edisto River. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground O

- (1) The gun attributed to the death at issue was purportedly linked to this crime by the testimony of an expert witness who testified on behalf of the state.
- (2) This expert testified that shell casings found at the alleged scene matched the firearm linked to the Applicant's family "to the exclusion of all other firearms."
- (3) Trial counsel failed to present evidence that "uniqueness (of firearm toolmarks) has not been demonstrated, such statements (that toolmarks link bullets or casings to a particular gun 'to the exclusion of all other firearms.') do not have a firm statistical basis. These claims, which imply an error rate of zero, also don't reflect the element of subjectivity involved in declaring a match, a determination that's always made by a firearms examiner." See *Ballistics Imaging*, Opening Statement, Prof. John Rolph, National Academies National Resource Council Chair, Committee to Assess the Feasibility, Accuracy, and Technical Capability of a National Ballistics Database,

March 5, 2008 Telephone News Conference.

- (4) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

Ground P

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to exclude or limit the opinion testimony offered by the state regarding the firearm located in the Edisto River. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground P

- (1) The gun attributed to the death at issue was purportedly linked to this crime by the testimony of an expert witness who testified on behalf of the state.
- (2) This expert testified that shell casings found at the alleged scene matched the firearm linked to the Applicant's family "to the exclusion of all other firearms."
- (3) Trial counsel failed to exclude or limit this evidence given that "uniqueness (of firearm toolmarks) has not been demonstrated, such statements (that toolmarks link bullets or casings to a particular gun 'to the exclusion of all other firearms.') do not have a firm statistical basis. These claims, which imply an error rate of zero, also don't reflect the element of subjectivity involved in declaring a match, a determination that's always made by a firearms examiner." See *Ballistics Imaging*, Opening Statement, Prof. John Rolph, National Academies National Resource Council Chair, Committee to Assess the Feasibility, Accuracy, and Technical Capability of a National Ballistics Database, March 5, 2008 Telephone News Conference.
- (4) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

Ground Q

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 because trial counsel labored under an actual conflict of interest due to counsel's employment as a Dorchester County Public Defender while failing to present

5722

exculpatory information from a witness who was also represented by same Dorchester County Public Defender. *Thomas v. State*, 346 S.C. 140, 551 S.E.2d 254 (2001).

Supporting Facts for Ground Q

- (1) During the trial below, trial counsel was represented by an attorney who had previously represented Ricky Davis.
- (2) This same trial counsel provided advice to applicant concerning the presentation of Ricky Davis as a witness in the proceedings.
- (3) However, trial counsel failed to inform Mr. Bowman of the attorney client relationship referenced above.
- (4) Had counsel informed applicant of this conflict, applicant would have objected to representation by this counsel.
- (5) Further, because of this conflict, applicant was provided deficient advise regarding the presentation of Mr. Davis' testimony.
- (5) This actual conflict of interest adversely affected the proceedings below.

Ground R

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 because trial counsel labored under an actual conflict of interest due to counsel's employment as a Dorchester County Public Defender while the state's witness was also represented by another Dorchester County Public Defender. *Thomas v. State*, 346 S.C. 140, 551 S.E.2d 254 (2001).

Supporting Facts for Ground R

- (1) During the trial below, applicant was represented by an attorney who was employed as a Dorchester County Public Defender.
- (2) The main witness for the state, who identified applicant as the shooter of the deceased, was also represented by the Dorchester County Public Defender office.
- (3) However, trial counsel failed to obtain a waiver of this conflict from Mr. Bowman.
- (4) This actual conflict of interest adversely affected the proceedings below.

Ground S

Applicant was denied the due process of law when the prosecution allowed false testimony to stand in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article 1, Section 3 and Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 the state allowed false testimony to be presented and go uncorrected during the guilt/innocence phase of the trial below. See *Napue v. Illinois*, 360 US 264 (1959).

Supporting Facts for Ground S

- (1) During the guilt/innocence phase of the trial below, the prosecutor presented the testimony of Travis Felder.
- (2) Mr. Felder testified that he left the apartment (Number) and followed applicant to McAlheny Road and then to Nursey Road. Transcript 4093-4094 and Transcript 4105, l. 7-9.
- (3) These responses were false because Travis Felder went to purchase gasoline from the E-Z Horizon Shop in Branchville during the time between his stay at the apartments and his trip to Nursery Road.
- (4) During a deposition, Travis Felder admitted he lied during this part of his testimony.
- (5) During a deposition, Travis Felder admitted he told the prosecutor about his involvement in the purchase of gasoline during this point in time.
- (6) The state allowed this testimony to go un-corrected.

Ground T

Applicant was denied the due process of law in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article 1, Section 3 and Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 the state failed to provide the trial attorneys with evidence demonstrating that Travis Felder purchased gasoline from the E-Z Horizon gas station prior to the burning of the car and the decedent's body. See *Brady v. Maryland*, 373 US 83 (1963).

Supporting Facts for Ground T

- (1) During the guilt/innocence phase of the trial below, the prosecutor presented the testimony of Travis Felder.

5724

- (2) Mr. Felder testified that he left the apartment (Number ☐) and followed applicant to McAlheny Road and then to Nursey Road. Transcript 4093-4094 and Transcript 4105, l. 7-9.
- (3) However, Felder never informed the jury that he purchased gasoline from the E-Z Horizon Shop in Branchville during the time between his stay at the apartments and his trip to Nursery Road.
- (4) Tawain Gadson testified that he witnessed applicant shoot and kill the deceased.
- (5) However, the state knew that Tawain Gadson admitted smoking six marijuana blunts a day, suffered from impairment of verbal memory and black outs and hears a voice and a "beeping noise."
- (6) Further, the prosecutor never informed trial counsel of this information.
- (7) This withheld information is material to the issue of whether applicant murdered the deceased and burned the car and body of the deceased or whether these crimes were committed by others, as alleged by the defense during the guilt/innocence phase of the trial. Alternately, this information was of impeachment value.

Ground U

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to move for a new trial and new sentencing, pursuant to SC Rule of Criminal Procedure Rule 29 (b) following the sentencing of Travis Felder. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground U

- (1) During the guilt/innocence phase of the trial below, the prosecutor presented the testimony of Travis Felder.
- (2) Mr. Felder testified that he left the apartments (Number ☐) and followed applicant to McAlheny Road and then to Nursery Road. Transcript 4093-4094 and Transcript 4105, l. 7-9.
- (3) However, Felder lied during this testimony because he never informed the jury that he purchased gasoline from the E-Z Horizon Shop in Branchville during the time between his stay at the apartments and his trip to Nursery Road.

- (4) During Felder's sentencing following applicant's trial and sentencing, the prosecutor honored a plea agreement with Felder that required Felder to testify truthfully.
- (5) Trial counsel never moved for a new trial based upon the after discovered information that Travis Felder lied under oath, but received leniency in accordance with that due truthful testimony.
- (6) But for trial counsel's deficient performance, the outcome of the trial would have been different.

Ground V

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsel's failure to successfully challenge the kidnapping aggravating factor during the penalty phase of the trial below. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground V

- (1) During the penalty phase fo the trial, the state submitted a statutory aggravating circumstance of kidnaping to the jury.
 - (2) Trial counsel failed to adequately note to the court that no evidence supported this aggravating circumstance, even under a theory of inveiglement.
 - (3) But for counsel's deficient performance, the outcome of the proceeding would have been different.
- 11 & 12. Applicant appealed his conviction and sentence to the South Carolina Supreme Court. Applicant has not previously filed an application for post-conviction relief nor a petition for a writ of habeas corpus in state or federal court.
13. None of the grounds set forth in (9) has been presented to this or any other Court, state or federal.
14. N/A
15. These grounds rely on additional facts outside the record which was before the previous court.
- 16 & 17. (a) Applicant was represented at his trial by Norbert E. Cummings, Jr.,

5726

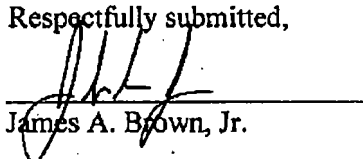
Cummings Law Firm, 100 S. Main Street, Suite B, Summerville, SC 29483
and Marva Ann Hardee-Thomas, 130 E. Richardson Ave., Summerville, SC
29483

(b) Applicant was represented in his direct appeal by Robert M. Dudek, S.C.
Office of Appellate Defense, 1122 Lady St., Suite 940 Columbia, S.C. 29201.

18. Applicant seeks the vacation of his convictions and sentences.

19. Applicant is not under sentence from any other court.

Respectfully submitted,


James A. Brown, Jr.

September 3rd, 2008.

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1111 Bay St., P.O. Box 592
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(843) 470-0003

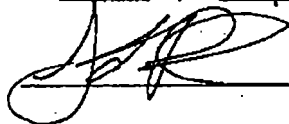
John Sinclair, III
John Sinclair, III, LLC.
P.O. Box 370
Charleston, SC 29402-0370
(843) 853-9300

Attorneys for the Applicant

CERTIFICATE OF DELIVERY

I hereby certify that a copy of the foregoing pleading
was e-mailed to all counsel of record in this proceeding

this 3 day of September, 2008.



5727

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)
MARION BOWMAN, #6006)

Petitioner,

v.

STATE OF SOUTH CAROLINA)
Defendant.)

IN THE COURT OF COMMON PLEAS

C.A. No. 06-CP-18-569

**NOTICE OF INTENT TO RELY UPON
AFFIDAVITS AND OTHER
DOCUMENTARY EVIDENCE**

FILED-RECORDED
2008 SEP 15 AM 11:4
CLERK OF COURT
DORCHESTER COUNTY

Petitioner, Marion Bowman, by and through undersigned counsel, hereby informs the Court and counsel for respondent that he intends to offer proof in support of his claims for post-conviction relief through affidavits and other documentary evidence in lieu of live direct examination of selected witnesses at trial. In support of this notification, applicant apprizes this Court of the following relevant facts and legal principles:

1. Petitioner is an indigent death-sentenced inmate. He was convicted of murder and sentenced to death in 2002. The evidentiary hearing in this matter is scheduled to commence on September 15, 2008.

2. In support of his application for post-conviction relief, applicant intends to rely upon an affidavit provided by Kendra Haigler in lieu of conducting a direct examination of this witness at trial. This procedure is expressly authorized by S.C. Code § 17-27-80, which provides that, in a hearing on an application for post-conviction relief, "[a]ll rules and statutes applicable in civil proceedings are available to the parties. The court *may receive proof by affidavits, depositions, oral testimony or other evidence* and may order the applicant brought before it for hearing." (emphasis

5728

added).

3. By employing this procedure, applicant seeks to expedite the hearing and eliminate the need for live testimony from this witness.

4. Contemporaneously with the filing of this Notice, applicant's counsel has provided respondent with a photocopy of the affidavit he intends to admit.

5. Applicant fully acknowledges that respondent has the prerogative to call this witness for purposes of cross-examination. Whether to do so, of course, is completely within respondent's discretion.

WHEREFORE, applicant requests that the Court accept the affidavits, and other documentary evidence provided by certain defense witnesses in lieu of a direct examination of those witnesses at trial, as authorized by S.C. Code §17-27-80.

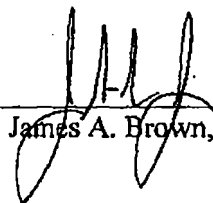
Respectfully submitted,

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Attorneys for Applicant

BY: _____


James A. Brown, Jr.

September 12, 2008

5846

118

1 MR. BROWN: We don't agree with that.

2 THE COURT: Sheriff, let's make sure we have
3 a Clerk, I need a Clerk's file or something with a
4 full transcript before me.

5 Okay, let's go ahead and take a break for
6 lunch. Let's be back here at 2:50, 2:50, all
7 right? We'll see you all then.

8 MR. BROWN: Yes, sir, Your Honor.

9 (Recessed at 1:12 p.m.).

10 (Reconvened at 3:23 p.m.)

11 THE COURT: We ended with the one witness Mr.
12 Davis, and I'm ready for your next witness, Mr.
13 Brown.

14 MR. BROWN: We call James Tawain Gadson.
15 Your Honor, Mr. Gadson's testimony during the trial
16 below appears at pages 3980 through page 4040.

17 THE COURT: I do not have the transcript
18 before me right now. Hopefully it is going to be
19 in the file of the Clerk.

20 MR. BROWN: Yes, sir, and I point that out --

21 THE COURT: In other words, 60 pages of
22 testimony.

23 Mr. Gadson, come on around here. If you
24 would, to the best of your ability, Mr. Gadson. Do
25 you see that Bible right there?

JA 1712

1 JAMES TAWAIN GADSON,
2 after being first duly sworn, testified as follows:

3 THE COURT: Have a seat, if you would, sir.
4 If you would, Mr. Gadson -- officer, help him pull
5 that microphone down a little bit.

6 Mr. Gadson, give me your name, sir.

7 THE WITNESS: James Tawain Gadson.

8 THE COURT: How do you spell your last name?

9 THE WITNESS: G-a-d-s-o-n.

10 THE COURT: Your witness, Mr. Brown.

11 MR. BROWN: May it please the Court, Your
12 Honor.

13 DIRECT EXAMINATION

14 QUESTIONS BY MR. BROWN:

15 Q We spoke at a deposition back in July, July
16 14th of this year, 2008?

17 A Yes, sir.

18 Q All right. And since that time, gosh, you're
19 back in, I guess you're back in prison again? I
20 say that because we had spoken to you about a
21 parole violation warrant.

22 A Yes, sir.

23 Q And you informed us at that time that you
24 were expecting to have a parole hearing for some
25 past due money?

5848

120

1 A On the 23rd.

2 Q And you told us on the 14th you owed money?

3 A Yes.

4 MR. WATERS: Your Honor, I object to the
5 relevance of this. I'm not quite sure what it has
6 to do --

7 THE COURT: What are you in prison for now,
8 parole violation?

9 THE WITNESS: Yes.

10 THE COURT: What were you serving time for
11 before you got out on parole?

12 THE WITNESS: Misprisonment of a felony and
13 accessory after the fact of murder.

14 THE COURT: Proceed on

15 BY MR. BROWN:

16 Q You didn't report to your parole officer?

17 A No.

18 Q You did report?

19 A I wasn't reporting.

20 Q You were not, okay. So, when you told us in
21 the deposition you hadn't paid your money, that
22 that was a problem, that wasn't true, was it?

23 A No. I was behind on my money, too, but I
24 wasn't reporting.

25 Q You just didn't tell us everything?

JA 1714

1 A No, sir.

2 Q Did you know you were going back?

3 A Yes.

4 Q Let's talk about this case. You testified
5 back in May of 2002 as a witness for the
6 prosecution, didn't you?

7 A Yes.

8 Q And originally you were charged in an
9 indictment for murder?

10 A Yes, sir.

11 (Indictment marked as Plaintiff's Exhibit
12 Number 1).

13 BY MR. BROWN:

14 Q I hand you what has been marked as
15 Plaintiff's 1, if you will take a look at that. Do
16 you recognize that sheet of paper?

17 A Yes, sir.

18 Q And this is your indictment for murder, isn't
19 it?

20 A Yes, sir.

21 Q And in this indictment doesn't it in part
22 allege that you shot Kandee Martin?

23 A Yes, sir.

24 Q And this indictment came down in June of
25 2001, right?

5850

122

1 A June 18th.

2 Q Okay. And you knew you could get the death
3 penalty for that murder, didn't you?

4 A Yes, sir.

5 Q And in fact you were threatened with the
6 death penalty, weren't you?

7 A No.

8 Q You never were?

9 A No.

10 Q All right.

11 (Four motions filed by the witness marked
12 as Plaintiff's Exhibit Number 2).

13 BY MR. BROWN:

14 Q If you will, take a look at what has been
15 marked Plaintiff's 2, and those are three, four
16 items that have been filed with the Clerk of Court,
17 is that correct?

18 A Yes, sir.

19 Q And they have your name at the bottom of it?

20 A Yes, sir.

21 Q And these are, for lack of a better term,
22 motions that you filed?

23 A I had a jailhouse lawyer helping me on it.

24 Q You signed it saying you agreed with all this
25 stuff, didn't you?

JA 1716

1 A Yes, sir.

2 Q First of all it's written to Gene Dukes,
3 among other people?

4 A Yes. That is my attorney.

5 Q Okay. You refer to him as the Dorchester
6 County Public Defender, don't you?

7 A Yes, sir.

8 Q Is that what he was?

9 A Yes, sir.

10 Q All right. And in there don't you say things
11 like you want to know when you're going to get a
12 second attorney in this death penalty case?

13 A Yes, because that is what I was being
14 charged.

15 Q Okay. So, you thought you could get death,
16 you feared death?

17 A Yes.

18 Q All right, you feared for your life.

19 (Plea agreement marked as Plaintiff's Exhibit
20 Number 3).

21 BY MR. BROWN:

22 Q And let's take a look at, let's take a look
23 at Plaintiff's 3. Is that a plea agreement you
24 entered into, a four page document?

25 A Yes, sir.

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124

1 Q All right. And that document also references
2 the death penalty, doesn't it?

3 A What page do you see that on?

4 Q That's on the third page, paragraph nine.

5 A No.

6 Q Paragraph nine B, does it not say if you fail
7 to cooperate with the prosecution that they can
8 reinstate the murder charge, seek death and you
9 can't object to it?

10 A I don't see nothing about a death penalty.

11 Q Nine B, "The State may vacate the plea"?

12 A Yes.

13 Q Reinstate murder, seek the death penalty and
14 you waive any objection to the death penalty?

15 A Yes, sir.

16 Q That is what it says, doesn't it?

17 A Yes.

18 (Warrant marked as Plaintiff's Exhibit
19 Number 4).

20 BY MR. BROWN:

21 Q If you will take a look at Plaintiff's 4.
22 That is an arrest warrant for you, isn't it?

23 A Yes.

24 Q And that warrant was sworn out by Detective
25 Coker?

JA 1718

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1 A Uh-huh.

2 Q In that warrant it says, "James Tawain Gadson

3 did shoot and kill one Kandee Martin," didn't it?

4 A "Did commit the offense of murder."

5 Q "Section," it has a code, "Common Law, of the

6 South Carolina Code of Law 1976 as amended."

7 A Yes.

8 Q "In that he did," he meaning you, right?

9 A Yes.

10 Q "Willfully and unlawfully with malice

11 aforethought shoot and kill one Kandee Martin"?

12 A Yes.

13 Q That thing says you shot the gun that killed

14 Kandee Martin, the warrants says you shot Kandee

15 Martin?

16 A Yes.

17 Q And the indictment says you shot Kandee

18 Martin?

19 A Yes.

20 Q Ricky Davis says you shot Kandee Martin?

21 A Ricky Davis?

22 Q You know who Ricky Davis is?

23 A That dude in the holding cell?

24 Q Have you ever been in A side of the

25 Dorchester County Detention Center with Ricky

JA 1719

1 Davis?

2 A I know him as Crab. I don't know him by his
3 real name.

4 THE COURT: For the court reporter, you know
5 him as what?

6 A Crab.

7 THE COURT: C-r-a-b?

8 A Crab, however you spell it. I never knowed
9 his real name.

10 THE COURT: Okay.

11 Q Were you on A side with him at one time?

12 A I remember seeing his face but I ain't never
13 told him I killed nobody.

14 Q Wayne Mood says you shot Kandee Martin?

15 A Who?

16 MR. WATERS: Your Honor, I object to the form
17 of that question.

18 THE COURT: Is that something in the record
19 here, sir?

20 MR. BROWN: It will be.

21 THE WITNESS: No.

22 MR. WATERS: Your Honor, that pits witnesses
23 even if it is. He can ask if he has ever made a
24 statement to someone.

25 THE COURT: I know, I'm aware if there were a

5856

127

1 jury. So far there is nothing in the record.

2 MR. BROWN: Not yet.

3 THE COURT: You're asking him if this
4 gentleman said he did it?

5 MR. BROWN: Yes.

6 THE COURT: Tell me the name of the
7 gentleman.

8 MR. BROWN: Wayne Mood, M-o-o-d.

9 THE COURT: Your question was, "Does Wayne
10 Mood say you did it?"

11 MR. BROWN: Yes, sir.

12 THE WITNESS: No.

13 BY MR. BROWN:

14 Q He doesn't say --

15 A No.

16 Q Did you ever hear he had said you did this?

17 A No.

18 Q Do you know who Wayne Mood is?

19 A Yes, I know him.

20 Q Mr. Dukes has never mentioned that to you?

21 A No.

22 Q Solicitor Bailey never mentioned that to you?

23 A No.

24 Q Now, you mentioned Gene Dukes the Public
25 Defender?

JA 1721

1 A Yes.

2 Q We talked a little bit at the deposition
3 about that?

4 A Yes.

5 Q Tell me who Marva Hardee-Thomas is.

6 A I don't know. She's a black woman.

7 Q Where did she work?

8 A Public Defender's office, I guess.

9 Q Okay. As for as you know she always worked
10 in the Public Defender office?

11 A Not that I know of. I didn't know she was a
12 PD, I just know she's a black woman.

13 Q Did you not say in your deposition that she
14 worked in the Public Defender's office?

15 A I guess. Her and Gene Dukes used to talk a
16 lot.

17 Q What do you mean by that?

18 A I guess they worked in the same law firm, I
19 guess.

20 Q Okay.

21 MR. BROWN: Your Honor --

22 Q Let me ask you, Mr. Gadson, if you recall
23 testifying back at that deposition in July? We had
24 a deposition with a court reporter in Orangeburg.

25 A Yes.

5858

129

1 Q And if I showed you that transcript would
2 that refresh your memory of what you said at that
3 time?

4 A Yes. Let me see it.

5 MR. BROWN: Could I open it?

6 THE COURT: Have you asked him a specific
7 question?

8 MR. BROWN: Yes, sir.

9 THE COURT: What was it?

10 MR. BROWN: What his understanding of who
11 Marva Hardee-Thomas was.

12 THE WITNESS: I said no.

13 MR. BROWN: That is not not what he said.

14 THE COURT: What did you say, sir?

15 THE WITNESS: No.

16 THE COURT: You don't know her?

17 THE WITNESS: I seen her, I don't know who
18 she is.

19 THE COURT: Did you not say -- do you have a
20 copy of the deposition there?

21 MR. BROWN: Yes, sir, I've got a copy.

22 THE COURT: Did he not say -- just hand me
23 the deposition while you're doing that.

24 MR. BROWN: I'm sorry, Your Honor, I have it
25 with my own stuff here. As Mr. Waters indicates,

JA 1723

1 the record is voluminous.

2 THE COURT: Let this record reflect I am
3 opening the deposition of Mr. James T. Gadson taken
4 on the 14th of July, 2008.

5 MR. BROWN: I direct the Court's attention to
6 page 17 and it begins at line 13, it talks about
7 Mr. Dukes, line 15 it starts talking about --

8 THE COURT: Why don't you ask him that
9 question?

10 BY MR. BROWN:

11 Q Now, was Mr. Dukes your Public Defender?

12 A Yes.

13 Q And did he work in the same office as Marva
14 Hardee-Thomas?

15 A I guess he did.

16 MR. BROWN: I would like --

17 THE COURT: Did you not say yes back in July
18 of '08?

19 THE WITNESS: No.

20 THE COURT: All right. I will let the record
21 reflect that the record, the deposition reflects he
22 answered yes to the following question, "Okay. Did
23 he, referring to Gene Dukes, work in the same
24 office as Marva Hardee-Thomas?" And Mr. Gadson
25 said yes.

5860

131

1 BY MR. BROWN:

2 Q And Mr. Dukes continued to represent you
3 throughout the whole case, didn't he?

4 A Yes.

5 Q And he was employed as a Public Defender at
6 that time?

7 A Yes.

8 Q And did he ever tell you he worked separately
9 from the Public Defender office?

10 A No.

11 Q Now let's talk about what you testified at
12 trial about -- do you remember testifying at the
13 trial?

14 A Yes, sir.

15 Q Do you remember stating that you went out
16 with Kandee Martin and Marion Bowman on Nursery
17 Road?

18 A Yes.

19 Q At trial you never mentioned that Marion told
20 you he was going to kill Kandee before you got out
21 there, did he?

22 A No.

23 Q You never said that at trial, did you?

24 A No.

25 Q And you never mentioned any sex between

JA 1725

1 Marion and Kandee that night, did you?

2 A No.

3 Q And you stated you saw Kandee being shot?

4 A Yes, sir.

5 Q And you stated Marion threatened to blow your
6 brains out?

7 A Yes, sir.

8 Q And you stated, "I went to the Allen Murray
9 Club with Marion, Darien and Hiram"?

10 A Yes.

11 Q Now, you gave a couple statements back in
12 February of the year before, didn't you?

13 A The year before?

14 Q February, 2001.

15 A Yes, sir.

16 Q Take a look at Plaintiff's Exhibit 5 and
17 Plaintiff's Exhibit 6. Are you familiar with those
18 items?

19 A Yes.

20 Q All right. And the first statement that you
21 gave the police was the statement that is in your
22 handwriting, which is five, isn't it?

23 A Yes, sir.

24 Q Okay. And that statement was given on
25 February 18th, 2001?

5862

133

1 A Yes, sir.

2 Q And you said you were dropped off after
3 Marion and Kandee pulled a drive-off at the gas
4 station, didn't you?

5 A Yes, sir.

6 Q You never said you saw Kandee being shot, did
7 you?

8 A No.

9 Q And you never said you saw Travis Felder, did
10 you?

11 A No.

12 Q And you never said you saw Marion on Nursery
13 Road, did you?

14 A No.

15 Q You never said Marion and Kandee had sex that
16 night, did you?

17 A No.

18 Q And you never said Marion threatened to blow
19 your brains out, did you?

20 A No.

21 Q And you said the last thing Kandee said was
22 to give her a lighter?

23 A Yes, sir.

24 Q Did you give her that lighter?

25 A No.

JA 1727

1 Q What would you say if I told you later your
2 fingerprints was found on Nursery Road?

3 A My fingerprints wasn't on no lighter.

4 Q Now, do you recall speaking to an
5 investigator T. E. Stephenson?

6 A No.

7 Q Let me direct you back real quick. In the
8 statement it clearly says you gave, you did give
9 her the lighter, that is all on page three of the
10 fifth exhibit, the handwritten, "The last words
11 Kandee said to me, let me hold your lighter, and I
12 did. I told her I had more at the house."

13 A Yes, sir.

14 Q Did you give her that lighter?

15 A No.

16 Q So, you lied in that statement?

17 A Yes, sir.

18 Q Now, do you remember a fellow named T. E.
19 Stephenson?

20 A No.

21 Q Dorchester Sheriff's Department?

22 A No, sir.

23 (Statement marked as Plaintiff's Exhibit
24 Number 7).

25 BY MR. BROWN:

5864

135

1 Q I will show you Plaintiff's Exhibit 7. Do
2 you remember being questioned after you wrote that
3 four page statement out? Do you see that document?

4 A Yes, sir.

5 Q Do you remember being examined by T. E.
6 Stephenson?

7 A Yes, sir.

8 MR. WATERS: Your Honor, I think he needs to
9 be asked if he has ever seen that document before.
10 I don't think he has seen it.

11 THE COURT: Have you seen that document
12 before?

13 THE WITNESS: No.

14 THE COURT: He asked the question had he ever
15 seen Mr. Stephenson, whether it's on that document
16 or not, the man said he had. What is the next
17 question?

18 BY MR. BROWN:

19 Q Did T. E. Stephenson question you about
20 shooting Kandee?

21 A He didn't ask me where I been that night.

22 Q He asked you if you shot Kandee Martin?

23 A No.

24 Q He did not ask you that?

25 A No.

JA 1729

1 Q You didn't tell him no, you didn't shoot
2 Kandee Martin?

3 A Yes. He kept asking me, I came out and told
4 him.

5 Q He asked, you said, "No, I didn't shoot her"?

6 A Yes.

7 Q You answered without being asked a question?

8 A Yes. Scared.

9 Q He asked you if you shot Kandee near
10 Reevesville?

11 A No.

12 Q He never asked you that question?

13 A Huh-uh.

14 Q He never asked you either one of the
15 questions that are indicated on this form?

16 A No.

17 Q And you didn't tell him nothing?

18 A No.

19 Q You didn't lie to him?

20 A No.

21 Q You didn't change your story after you had
22 spoken to T. E. Stephenson?

23 A Of course I did, after he said I killed
24 somebody, of course I changed it.

25 Q You changed your story after you spoke to

5866

137

1 him?

2 A Yes.

3 Q Did you change your story because you learned
4 you failed a polygraph?

5 A Of course. I was trying to help Black out.

6 THE COURT: Help who?

7 THE WITNESS: Marion Bowman.

8 THE COURT: What did you use, sir?

9 THE WITNESS: Black.

10 THE COURT: B-l-a-c-k?

11 THE WITNESS: Yes.

12 THE COURT: Nothing else other than that,
13 sir?

14 THE WITNESS: No.

15 BY MR. BROWN:

16 Q So I make make sure I understand this, you
17 said you lied to T. E. Stephenson and then changed
18 your mind about what happened, you changed your
19 story because you failed a polygraph examination?

20 A Yes.

21 Q And the questions on that polygraph were,
22 "Did you shoot Kandee Martin?"

23 A No.

24 Q "Did you shoot Kandee Martin near
25 Reevesville?"

JA 1731

5867

1 A No.

2 Q This was not the questions?

3 A Huh-uh (negative).

4 Q If Stephenson said that would he be lying?

5 MR. WATERS: Your Honor, I object to that
6 question.

7 MR. BROWN: I withdraw it.

8 THE COURT: Well, that would be pitting.

9 Just ask him a question about what he did.

10 BY MR. BROWN:

11 Q But you do admit you changed your story
12 because you failed the polygraph?

13 A Yes, after he brought a warrant for me
14 talking about I killed somebody, somebody I didn't.

15 MR. BROWN: Your Honor, on that note, among
16 the other things, we allege defective impeachment
17 by counsel, so we don't raise another claim. You
18 mentioned if something comes up, the case of U.S.
19 v. Moore, in which it was allowed.

20 THE COURT: What specifically?

21 MR. BROWN: At some point in time we need to
22 address whether or not he could have been impeached
23 at trial because of the fact he changed his story
24 because of a polygraph he failed. That is a Fourth
25 Circuit case that allows that.

5868

139

1 MR. WATERS: Well --

2 MR. BROWN: I just, not trying to get into an
3 argument, I want to put it up while we're at it now
4 so we can cross this bridge later. We do raise a
5 claim there was defective impeachment of this
6 witness.

7 THE COURT: Keep on going, sir.

8 MR. BROWN: Thank you.

9 THE COURT: What he was going to answer but
10 he changed his story because he failed a polygraph.

11 BY MR. BROWN:

12 Q Now, you gave a statement marked as
13 Plaintiff's Exhibit 6, didn't you, the statement
14 typed out?

15 A Yes.

16 Q Now, in this statement you said you knew
17 Marion was going to kill Kandee before they got to
18 Nursery Road, before you rode out there?

19 A Yes, sir.

20 Q Okay. And you said Kandee Martin smoked
21 crack cocaine?

22 A Yes.

23 Q And you did not go to the Allen Murray Club
24 after you said Marion shot Kandee, did you,
25 according to that statement?

JA 1733

1 A No.

2 Q This statement says you drove back to
3 Branchville and you got dropped off?

4 A Yes.

5 Q You never said you saw Marion and Kandee have
6 sex that night, did you?

7 A No.

8 Q And you never said Marion threatened to blow
9 your brains out, did you?

10 A No.

11 Q Now, that's not what you said at trial,
12 though, was it?

13 A Yes.

14 Q Which part?

15 A He threatened to kill me.

16 Q You never said that in your written
17 statement, Exhibit 5, did you?

18 A No.

19 Q And you never said that to T. E. Stephenson,
20 did you?

21 A No.

22 Q And you never said that in the typed
23 statement after you changed your story, did you?

24 A No.

25 Q Did you ever tell or write down anywhere

5870

141

1 during this investigation that Marion Bowman had
2 threatened to blow your brains out if you talked
3 about this?

4 A No.

5 Q The first time you revealed that was at
6 trial?

7 A Yes.

8 Q How about going to the Allen Murray Club?

9 A What about it?

10 Q You didn't put that in your first handwritten
11 statement, did you?

12 A No.

13 Q And you didn't put it in the statement after
14 you failed the polygraph, did you?

15 A No.

16 Q And you didn't tell Stephenson that, did you?

17 A No.

18 Q But then at some point, I guess at trial, you
19 said you went to the Allen Murray Club?

20 A Because we did.

21 Q Did you tell the prosecutor that you went to
22 the Allen Murray Club?

23 A No.

24 Q The first time you said it was when you took
25 the stand?

JA 1735

1 A Yes, because they said tell the truth,
2 nothing but the truth, so help you, God, so I tell
3 the truth.

4 Q When did you change your story?

5 A That was my story, I just didn't put it on
6 paper.

7 Q That was your story when you wrote that
8 handwritten statement?

9 A Look here, I wrote that statement there
10 before they brought the warrant and talked about I
11 killed somebody, I was trying to help that man
12 there, I wrote this statement right there, had them
13 type this one.

14 Q You typed that one and you had been charged
15 with killing her?

16 A When he brought the warrant in.

17 Q That is when you typed that statement?

18 A Yes.

19 Q And you didn't tell him you went to Allen
20 Murray Club then either, did you?

21 A No.

22 Q In fact you lied about it?

23 A Not necessarily.

24 Q Tell me in there where it says you went when
25 you came back from Nursery Road?

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143

1 A It's not in here.

2 Q What does it say you did?

3 A I didn't put it all on paper to tell what I
4 did.

5 Q You don't say you went back to the Villas
6 Apartments?

7 A Yes, I did.

8 Q And it doesn't say, "Then I went to Meeka's
9 apartment"?

10 A Yes.

11 Q And then it says you spent the night, Chance
12 Bennett came over?

13 A Yes.

14 Q You never mentioned going anywhere else, did
15 you?

16 A No.

17 Q So, when did you change that story?

18 A When I got on the stand, I put my hand on
19 that Bible.

20 Q That's when you changed your story?

21 A That is when I told the truth.

22 Q Is that after you signed that plea agreement?

23 A No, that is before I signed the plea
24 agreement.

25 Q You told that story before you signed your

JA 1737

1 plea agreement?

2 A No, it was after, after I signed the plea
3 agreement.

4 Q So, after they threatened to give you death
5 without objection?

6 A They didn't threaten to give me nothing.

7 Q Does it not say if you don't cooperate you
8 get the death and you can't object to it?

9 A They said the hand of one is the hand of all.

10 Q Does that document not say in paragraph nine
11 B that if you don't cooperate --

12 A It ain't got nothing to do with it.

13 Q You changed your story after you signed that
14 agreement, didn't you?

15 A Yes.

16 Q Because he had threatened to kill you. I
17 want to make sure I understand this. You changed
18 your story after you signed the agreement or before
19 you signed it?

20 A After I signed it.

21 Q Who did you first tell that?

22 A What you mean who I told?

23 Q Who did you first tell this latest version
24 to?

25 A The Court.

5874

145

1 Q In trial?

2 A Yes.

3 Q You never told the prosecutor?

4 A No.

5 Q So, he had no idea you were going to say, "I
6 went to the Allen Murray Club"?

7 A No.

8 Q And let's go back to that plea agreement. It
9 says that if you omit facts or testimony that you
10 breach your plea agreement, doesn't it? Let's look
11 at paragraph ten. In this plea agreement right
12 here marked as Plaintiff's Exhibit 3, paragraph 10,
13 it says you understand that you may not omit any
14 facts while on the witness stand?

15 A Yes.

16 Q Doesn't it say that?

17 A Yes, sir.

18 Q At trial you never mentioned that you knew
19 Kandee was going to be killed when you all got to
20 Nursery Road, did you?

21 A No.

22 Q You never said that at trial?

23 A No.

24 Q But you did say that earlier, didn't you?

25 A Yes.

JA 1739

1 Q Did you omit that testimony?
2 A No.
3 Q Was it true or not?
4 A Yes, it was true.
5 Q Is it true that he told you he was going to
6 kill her?
7 A Yes.
8 Q That's true?
9 A Yes.
10 Q And you did omit this?
11 A Yes.
12 Q So, you breached this plea agreement?
13 A Yes.
14 Q It says when you breach your plea agreement
15 that they may vacate your plea and subject you to
16 murder and the death penalty?
17 A Yes.
18 Q And that that would be determined by a judge?
19 A Yes.
20 Q And has that happened yet?
21 A No.
22 Q Now I want to make sure I understand this.
23 At your deposition didn't you testify that the
24 first time you knew there was going to be, not
25 going to be a robbery was when Marion actually

5876

147

1 started shooting Kandee Martin?

2 A Yes, sir.

3 Q That's what you said at your deposition?

4 A Yes, sir.

5 Q Now, was that true?

6 A Yes, that's true.

7 Q Now, how can you tell me that it's true you
8 didn't know there was going to be a killing until
9 the bullets were fired, when it is also true that
10 you knew before you got to Nursery Road that there
11 was going to be a killing? Which one is true,
12 Tawain?

13 A When he started shooting.

14 Q So, I want to make sure I understand this.
15 When you gave the statement earlier that said that
16 you saw him indicate with his finger, acting like
17 his finger was a gun, that he was going to shoot
18 her, before you got to Nursery Road, that you knew
19 there was going to be a killing?

20 A I didn't really know right offhand right then
21 but he was leaning back in his seat, had his hand
22 behind her head.

23 Q In your statement you said he pointed his
24 finger like a gun at the back of her head?

25 A He didn't point it directly at the back of

JA 1741

1 her head but he had it laying behind her.

2 Q So, did you know before you got to Nursery
3 Road there was going to be a killing or not?

4 A No.

5 Q So, you lied in this statement about that
6 finger pointing?

7 A Yes.

8 Q You didn't know that until you got out there,
9 until you saw the bullets being fired?

10 A Yes.

11 Q And let's talk about that. You believed
12 there was going to be a robbery?

13 A Yes.

14 Q Kandee believed there was going to be a
15 robbery?

16 A Yes.

17 Q You thought there was going to be a robbery?

18 A Yes.

19 Q You really did believe that?

20 A Yes.

21 Q Let's talk about your deposition where you
22 said, we talked about whether or not there was any
23 sex between Marion and Kandee.

24 A Yes.

25 Q Was there any sex that night while you were

5878

149

1 with Marion and Kandee?

2 A No.

3 Q That's from the time they picked you up at
4 the apartments in Branchville, to the time that you
5 went back to the apartment in Branchville?

6 A Yes.

7 Q There was absolutely no sex?

8 A No.

9 Q No sex with a corpse?

10 A No.

11 Q No sex beforehand?

12 A Beforehand, no.

13 Q Before the shooting?

14 A No.

15 Q Was there any sex?

16 A No.

17 Q Did you ever, was there ever a time when they
18 weren't in your sight and there was sex?

19 A No.

20 Q Never sex?

21 A No.

22 Q So, if you found out that Kandee and Marion
23 would have had sex that day sometime it would not
24 have been that night at the time you were picked up
25 when you said Kandee Martin was killed?

JA 1743

1 A What you talking about?

2 Q If there was sex that night it wouldn't have

3 been during the killing, it would have been --

4 A No.

5 Q If you were asked that question at trial back

6 in 2002 would you have answered it the same way?

7 A Yes.

8 Q I want to make sure. No sex while she was

9 alive?

10 A No.

11 Q No sex after she was killed?

12 A No.

13 Q No rape?

14 A No.

15 Q And let me ask you, when you all went out

16 there to pull a caper what did Kandee do to

17 participate in that?

18 A Nothing but drove the car.

19 Q She didn't suggest houses?

20 A No.

21 Q She didn't point out any houses?

22 A No.

23 Q All right. Let's talk about the drinking

24 that day.

25 A All right.

5880

151

1 Q February 16th, do you recall talking about
2 drinking?

3 A Yes. That was on Joe's birthday.

4 Q Joe who?

5 A Fogle.

6 Q Joe Fogle's birthday?

7 A Yes.

8 Q Okay. Let's talk about who was drinking.

9 Who was drinking out there?

10 A Everybody that had been out there.

11 Q Does that include Marion Bowman?

12 A Yes.

13 Q And do you recall testifying at your
14 deposition that Marion Bowman was drinking for four
15 to five hours that day?

16 A I ain't even sure what the time, however long
17 it was but everybody was out there drinking that
18 day, had big bottles of gin.

19 Q If I told you that during the deposition, if
20 the Court follows, I think the original deposition
21 is up there, how long, if I said how long did
22 Marion sit out out there with you all and drink, do
23 you agree you answered, "I would say about four or
24 five hours"?

25 A I was just giving an estimate.

JA 1745

1 Q Would you agree that is an accurate estimate?

2 A No.

3 Q You lied about him drinking for four to five
4 hours?

5 THE COURT: Now, an accurate estimate, aren't
6 those sort of --

7 MR. BROWN: Actually, Your Honor, if I can
8 just get him --

9 THE COURT: You mean a good faith estimate,
10 is what you meant?

11 MR. BROWN: Sure.

12 BY MR. BROWN:

13 Q Is that a good faith estimate?

14 A No.

15 MR. BROWN: May I impeach him with his
16 testimony?

17 THE COURT: What page are you on?

18 MR. BROWN: Page 13, lines 5 through 10.

19 Q When you were asked this question back in
20 July at this deposition, Mr. Gadson, did you say in
21 response to the question, "So, he dranked? No."
22 When asked, "How long did Marion sit out there with
23 you all and drink," did you say, "I would say about
24 four or five hours tops, something like that"?

25 THE WITNESS: Yes, something like that, just

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153

1 estimate.

2 THE COURT: "He dranked for four or five
3 hours, tops?" What did you answer? Did you
4 answer, "Off and on"?

5 THE WITNESS: Yes.

6 THE COURT: All right. He admits he said he
7 drank for four or five hours, tops?

8 THE WITNESS: Yes.

9 THE COURT: What do you mean by that, what
10 does that answer mean when you said that?

11 THE WITNESS: Like off and on, not just
12 sitting constantly drinking but every now and then
13 he would come back, drink, leave, come back, drink.
14 Everybody was doing that.

15 BY MR. BROWN:

16 Q And when I asked you about him using drugs
17 you said no, didn't you?

18 A Yes.

19 Q And you said all he would do is drink?

20 A Yes.

21 Q And I said, "All he does is drink, like
22 regularly?" And your response was?

23 A Yes.

24 Q "Beer?" "Beer, yes. Every day he get a
25 beer." And I said, "Every day?" And you said

JA 1747

1 every day, didn't you?

2 A Yes.

3 Q "That's what he used to drink, 800 Old
4 English"? "Yes, a big bottle." I asked, "Is it
5 his normal habit for him to drink Old English 800
6 every day?"

7 A Yes.

8 Q "And when would he start drinking, Tawain"?

9 A I used to see him early in the morning with
10 one.

11 Q "Early in the morning and would he drink all
12 day?"

13 A I wouldn't be with him all day.

14 Q "Did he drink every day?"

15 A Every day I used to see him with one.

16 Q Every day, and I said, "Every day all day?"

17 And you said every day, didn't you?

18 A Yes. I see him every day.

19 Q And that day, because I guess it was a
20 birthday, you all were also drinking liquor,
21 weren't you?

22 A Beer, too.

23 Q And liquor?

24 A Yes.

25 Q Yes. And did Marion drink some of that

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155

1 liquor?

2 A Might have drunk a little bit of it, he
3 didn't drink much.

4 Q I think I asked you was he drinking and you
5 said yes. And I said, and you said everybody,
6 unsolicited, "Everybody was drinking liquor that
7 day." And I said, "Did he drink liquor?" And you
8 said yes, didn't you?

9 A I said a little bit.

10 Q Okay.

11 MR. WATERS: Your Honor, if he wants to show
12 him the testimony and ask him questions and refresh
13 his recollection, but he is just reading answers
14 into the record.

15 THE COURT: I know. He has already answered
16 this, I've read it.

17 MR. BROWN: Okay. Well, but I need it in the
18 record, Your Honor.

19 THE COURT: I know, but he has already
20 answered it four or five times.

21 MR. BROWN: I want to make sure. That was
22 beer, now he also drank liquor that day.

23 THE COURT: All right, what is your next
24 question.

25 BY MR. BROWN:

JA 1749

1 Q And you said you would characterize him as
2 tipsy, wouldn't you?

3 A Yes.

4 Q So, he was tipsy that day?

5 A Yes.

6 Q And I asked you if you dranked alcohol that
7 day, so could you feel the effect of that alcohol?

8 THE COURT: Why don't ask you him now, go
9 ahead and ask him did he drink and see if he agrees
10 or disagrees.

11 Q Did you drink that day to feel the effects of
12 alcohol?

13 A Yes. I told you everone was drinking.

14 Q Okay. And did Marion drink so he could feel
15 the effects of the alcohol.

16 THE COURT: You mean did he drink? The
17 question is did he drink, which you have already
18 asked him.

19 MR. BROWN: No, I'm asking him whether he was
20 drunk to the point, did he drink alcohol to the
21 point that he felt the effects.

22 THE COURT: Wait one second. How does he
23 know what Mr. Bowman felt? You mean what he could
24 observe, is what you mean?

25 MR. BROWN: Yes, sir.

5886

157

1 THE COURT: You have to ask Mr. Bowman.

2 MR. BROWN: Well, the prior testimony --

3 MR. WATERS: It is in discovery deposition
4 where all objections are reserved.

5 THE COURT: I'm not going to let the witness
6 testify what Mr. Bowman did or didn't feel. If
7 it's in the deposition it's in the deposition.
8 This is the trial. You can ask him what he
9 observed, if Mr. Bowman was tipsy, drunk or
10 whatever.

11 BY MR. BROWN:

12 Q You thought he was tipsy?

13 A Yes.

14 Q Meaning that there was some effect from the
15 alcohol?

16 A Yes.

17 Q You thought he was affected by the alcohol?

18 A I guess.

19 Q Alcohol influenced him to the point where you
20 saw it?

21 A Yes.

22 Q Okay. And if you were questioned about that
23 back in May of 2002 at the trial would you have
24 testified the same way?

25 A Yes.

JA 1751

1 Q Now, you've got a memory problem, don't you?
2 Tawain, you've got a memory problem, don't you? Do
3 you remember being evaluated?

4 A Yes.

5 Q In Columbia?

6 A Yes.

7 Q Did they tell you you have a memory, verbal
8 memory disorder?

9 A No.

10 Q You don't recall them saying that?

11 A No.

12 Q Impairment of verbal memory?

13 A No.

14 Q Did you ever review -- I apologize. I'll go
15 ahead and mark this.

16 (Mental evaluation marked as Plaintiff's
17 Exhibit Number 8).

18 BY MR. BROWN:

19 Q I will show you Plaintiff's Exhibit 8. Do
20 you recall going to Columbia August 20, 2001?

21 A Yes, sir.

22 Q And did you speak with a doctor there?

23 A Yes.

24 Q Was your attorney there?

25 A No.

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159

1 Q Was there anyone else there besides this one
2 doctor?

3 A Just him.

4 Q I'm sorry, just him?

5 A Yes.

6 Q Did you ever meet with a psychologist?

7 A No.

8 Q They never performed any testing on you?

9 A No.

10 Q Never did?

11 A No, not I know of.

12 Q Not that you remember? And did they ever ask
13 you about what happened on February 16th and
14 February 17th?

15 A Not that I remember, that I can recall.

16 Q They never asked you about why you were
17 charged?

18 A No.

19 Q They never --

20 A This was for evaluation.

21 Q As part of that evaluation they asked you why
22 you were charged?

23 A No.

24 Q Did they ask you about your warrants?

25 A No.

JA 1753

1 Q Because at that time you were still charged
2 with murder, weren't you?

3 A Yes.

4 Q And they didn't ever once ask you about the
5 murder?

6 A No.

7 Q And they never asked you to give your version
8 of the events?

9 A No.

10 Q They never asked you to give a recollection
11 of the alleged offense?

12 A No.

13 Q Do you recall speaking to them about your
14 blackouts?

15 A Yes. I have seizures.

16 Q You told them sometimes you would just,
17 quote, just black out. Does that sound right?

18 A Yes, sometimes.

19 Q Okay. Did you also tell them about your use
20 of marijuana?

21 A Yes.

22 Q Did you tell them that you used to smoke six
23 Blunts of marijuana a day on a daily basis?

24 A Yes.

25 Q And is that true?

5890

161

1 A Yes.

2 Q Was that true up until the time of your

3 incarceration?

4 A Yes, it still was.

5 Q And did you tell them that you heard voices?

6 A No.

7 Q You never told them that you heard a voice?

8 A No.

9 Q I would ask you what that voice told you but

10 you didn't hear it?

11 A I wish I would have known.

12 Q Did you tell them that you heard beeping

13 noises?

14 A No.

15 Q You never told them that?

16 A No. I ain't no psycho or nothing.

17 Q Now, who's Margaret Hawkins?

18 A I don't know.

19 Q You don't know who that is?

20 A No.

21 Q And Tiara Coleman?

22 A I don't know.

23 Q Does Margaret Hawkins live in the apartments

24 at Branchville? Let's make sure I understand this.

25 The apartments in Branchville, are they also known

JA 1755

5891
182

1 as projects?
2 A Yes.
3 Q And they are also known as the Villas?
4 A Yes.
5 Q It is all the same place?
6 A Yes..
7 Q Okay. Did you know Tweety?
8 A Yes.
9 Q And could that be Tiara Coleman?
10 A I never knew her real name.
11 Q Did Meeka live in the apartments?
12 A Yes.
13 Q Does Tweety live in the apartments?
14 A No.
15 Q Does Tweety hang out at the apartments?
16 A Used to hang out.
17 Q Tell me about shooting a High Point .380 in
18 those apartments back in February, 2001.
19 A Shooting a .380?
20 Q Yes.
21 A What about it?
22 Q First of all you owned a High Point .380,
23 didn't you?
24 A I did at one time, yes.
25 Q You testified about a High Point .380 that

JA 1756

5892

163

1 was introduced in evidence at trial, didn't you?

2 A Yes.

3 Q They asked you to take a look at that gun?

4 A Yes.

5 Q That gun looked like your gun, didn't it?

6 A Yes. It looks like a bunch of them but yes.

7 Q Okay. Didn't you shoot a High Point .380 at
8 the Villas Apartment project in Branchville
9 February of 2001?

10 MR. WATERS: Your Honor, I object to the
11 relevance.

12 MR. BROWN: I will tell you exactly, because
13 those casings are linked to him shooting that gun
14 at those projects before Kandee Martin was killed
15 and are linked to the case.

16 THE COURT: In trial?

17 MR. BROWN: It was brought out at the trial
18 by the Solicitor's expert.

19 THE WITNESS: If I did shoot it why would I
20 hide the gun?

21 THE COURT: Ask the question.

22 BY MR. BROWN:

23 Q Did you shoot a High Point .380 at the Villas
24 projects in February, 2001?

25 A Yes, I did. That is way before the murder

JA 1757

1 even happened, weeks before.

2 Q Weeks before the murder you shot a High Point

3 .380?

4 A Yes.

5 Q High Point .380?

6 A Yes.

7 Q At the projects?

8 A Yes.

9 Q In Branchville?

10 A Yes.

11 Q Now let's talk about your plea agreement

12 again for a second. You pled guilty to accessory

13 after the fact of murder?

14 A Yes.

15 Q And you went into court after Marion Bowman's

16 trial?

17 A I don't remember before.

18 Q When did you enter your guilty plea?

19 A Before trial.

20 Q And when did you go to sentencing?

21 A I don't know exactly.

22 Q Were you sentenced the same day you pled

23 guilty?

24 A Yes. I was still in the county. I hadn't

25 been sent up the road, I was still in the county.

5894

165

1 (Sentencing sheets marked as Plaintiff's
2 Exhibit Numbers 9 and 10).

3 BY MR. BROWN:

4 Q I'm going to show you what has been marked
5 Plaintiff's Exhibit 9 and what has been marked
6 Plaintiff's Exhibit 10. And on the front of that
7 sheet, Plaintiff's Exhibit 9, it is two pages, two
8 different sentencing sheets, isn't it.

9 A 6/19.

10 Q Both of them marked 6/19/02, aren't they?

11 A Yes.

12 Q I want to make sure I understand this. This
13 is the day you were sentenced. You know,
14 Plaintiff's Exhibit 9 are two different sentencing
15 sheets, aren't they?

16 A Yes.

17 Q And one is for accessory after the fact of
18 murder?

19 A Both of them are accessory after the fact of
20 murder.

21 Q Exhibit 9 --

22 A Yes.

23 Q -- is two sentencing sheets stapled together?

24 A One for accessory after the fact and one
25 misprison of a felony.

JA 1759

1 Q Okay. Both of those are dated the 19th,
2 aren't they?

3 A Yes, '02.

4 Q Okay. And that was the day you were
5 sentenced, wasn't it?

6 A Yes.

7 Q All right. Is that the same day you pled
8 guilty?

9 A Yes.

10 Q And, so, if you pled guilty and were
11 sentenced in June of '02 and Mr. Bowman's trial was
12 in May of '02 you didn't plead guilty until after
13 the trial, did you?

14 A I pleaded before the trial.

15 Q Did you plead the same day you were
16 sentenced?

17 A No, I pleaded before the trial, I didn't
18 plead after the trial.

19 Q Let me make sure you understand the question.
20 Did you plead guilty the same day you were
21 sentenced?

22 A Yes, the same day I was sentenced.

23 Q Okay. Is that sentencing sheet accurate?

24 A I don't get that. I pleaded guilty before
25 the trial.

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167

1 Q You entered a plea agreement before the
2 trial, didn't you?

3 A Yes.

4 Q But you didn't go in front of a judge and
5 say, "I'm guilty," did you?

6 A No, not right away.

7 Q That was after the trial, wasn't it?

8 A Yes.

9 Q Okay. And then you got a second set of
10 sentencing sheets marked as Number 20, I mean
11 Number 10, on June 20?

12 A Yes.

13 Q And first of all, I don't know the answer to
14 this, what happened, why did you go back the next
15 day?

16 A I don't know, you got to ask the judge. The
17 judge brought me back over.

18 Q The judge brought you back?

19 A Yes.

20 Q And what did they do?

21 A Said something about five years, something
22 about the five years about to run out since I been
23 sitting in the county almost a year and a half or
24 something.

25 Q Because you had been sitting in the county so

JA 1761

1 long, they switched your sentences or something?

2 A I don't know what happened, you got to ask
3 the judge that one. He the one brought me back
4 over there, it was his call on that.

5 Q You did go back?

6 A Yes, I went back. I was still in the county,
7 I didn't have no choice but to go back.

8 Q Now, what did the prosecutor say when you
9 were sentenced, about your testimony?

10 A What do you mean, what he said?

11 Q What did he tell the judge about your
12 testimony?

13 A I don't know what he told the judge.

14 Q You weren't there?

15 A No.

16 Q He didn't say anything to the judge when you
17 were sentenced?

18 A No.

19 Q He didn't tell him you cooperated?

20 A Not that I remember.

21 Q Did he tell the judge that you left out
22 important facts in your testimony at trial?

23 A I can't remember.

24 Q Did he ask the judge to judicially determine
25 whether you had breached your plea agreement?

5898

169

1 A I don't remember.

2 Q Did he honor your plea agreement?

3 A I don't remember.

4 Q Did you get the plea agreement that you

5 bargained for?

6 A I don't remember.

7 Q Did he tell you you were going to face the

8 death penalty?

9 A I don't remember.

10 Q You don't remember that?

11 A No.

12 Q Now, your plea agreement again told you you

13 faced the death penalty, right?

14 A That is what they got in the paper, the

15 paperwork.

16 Q You signed it, right?

17 A Yes.

18 Q And tell me about being debriefed by

19 Solicitor Bailey. What did he tell you?

20 A What do you mean, what he told me?

21 Q What did you tell him, what did he ask you on

22 May 13th when you signed that plea? It has your

23 signature, your lawyer's signature and Solicitor

24 Bailey's signature. First of all did you write a

25 statement that day?

JA 1763

5899

1 A No.

2 Q Did he write notes?

3 A Did he write notes?

4 Q Did he write down what you said?

5 A He got a pad and pencil.

6 Q He did?

7 A He wrote something down, I don't remember.

8 Q What did you tell him that day about whether

9 or not you knew there was going to be a killing?

10 A I never mentioned it.

11 Q You never mentioned it one way or the

12 another?

13 A No.

14 Q And what did you tell him about Marion Bowman

15 threatening to blow your brains out?

16 A I told him at trial -- I never told him.

17 Q You didn't tell him that day that either?

18 A Not that I can remember.

19 Q Now, what did you tell the judge you did when

20 you pled guilty? That you put her body in a car?

21 A No. I wasn't there.

22 Q Did you burn the car?

23 A No.

24 Q Did you drive the car away from the scene of

25 the murder?

JA 1764

5900

171

1 A No.

2 Q Did you plant the gun in any apartment or any
3 river?

4 A No.

5 Q Did you cover up the shell casings?

6 A No.

7 Q What did you do to be guilty of anything?

8 A Nothing, just being there.

9 Q Just being there? Did your lawyer tell you
10 just being there is not a crime?

11 A No.

12 Q Did he tell you that the law says being
13 present at the scene of the crime is not a crime?

14 A No.

15 Q You didn't do anything?

16 A No.

17 Q And why did you plead to accessory to the
18 murder, to aiding him?

19 A Because they said the hand of one is the hand
20 of all and they say if I plead guilty to accessory
21 after the fact, misprison of a felony, I wouldn't
22 get life in prison.

23 Q And what did the Solicitor tell you about
24 what sentence you would get?

25 A I just told you.

JA 1765

1 Q And do you recall testifying in deposition
2 about that? I asked you what did the Solicitor
3 tell you and you said, "He told me if I pled guilty
4 and testified against Marion Bowman," that they
5 would give you fifteen years and five years?

6 A Yes.

7 Q And you agreed?

8 A Yes.

9 Q And I asked you, "What did he say you would
10 have to do? Did you have to testify against
11 Marion?" And you said yes. And I asked you, "What
12 did he tell you about testifying truthfully?" And
13 didn't you answer --

14 THE COURT: Why don't you ask him these
15 questions here today?

16 Q What did Solicitor Bailey tell you about
17 testifying truthfully?

18 A I don't remember.

19 Q Did you not say in the deposition, "He didn't
20 say nothing about truthful, he just told me about
21 the sentence." And I said, "So, he didn't say he
22 wanted you to testify truthfully, he said you just
23 had to testify against Marion?" Is that true?

24 A He told me to testify, he said he would give
25 me fifteen years for accessory after the fact, five

5902

173

1 years for misprisonment.

2 Q If you testified against Marion?

3 A The hand of one was the hand of all.

4 Q And, so, just for being there they were going
5 to kill you?

6 A Give me life.

7 Q But if you testified against Marion they
8 would give you twenty?

9 A Yes.

10 Q And he didn't mention testifying truthfully,
11 did he?

12 A No.

13 Q Let me hear that again.

14 A No.

15 Q Let me ask you about the statement you gave
16 to the police at the time you were polygraphed.

17 Did they tape record those statements?

18 A Yes.

19 Q You're sure they did?

20 A They had one in there.

21 Q Was it going?

22 A I'm not sure.

23 Q Did you see them turn it on?

24 A I can't remember, it been so long ago, but he
25 had one, you know.

JA 1767

1 Q And when you say they had it in there, who
2 was it?

3 A I know one detective from Orangeburg, Coker.

4 Q Colter?

5 A Coker, and one detective from Orangeburg.

6 Q Coker had a tape recorder?

7 A One of them had it, I don't know if the
8 detective from Orangeburg or Coker.

9 Q And who questioned you, you said Coker?

10 A Yes.

11 Q All right. And I think you were asked
12 before, I'm going to ask you again, did they record
13 the statements?

14 A No, not that I know of.

15 Q At the deposition when I asked you did they
16 record the statements didn't you say yes?

17 A Yes.

18 Q For the Court's record, I'm referring to page
19 59, line 11 through 12 of the deposition.

20 "Did they record it?" "Yes." "They tape
21 recorded it?" What was your answer then?

22 A I said yes, because they had one in there,
23 I'm not sure if they were recording or not but they
24 had one.

25 Q And I asked you, "Did they tape record the

5904

175

1 second statement?"

2 Did they?

3 A They had one in there, too, I'm not sure if
4 they had it on or not. I didn't see them press
5 start or nothing.

6 Q And I asked you, "Did the tape cut off in
7 between the statements?"

8 A I told you no.

9 Q And I said, "Did it run the entire time?"

10 THE COURT: Why are we continuing to read the
11 deposition?

12 Q Did it run the entire time?

13 A I don't know. When I got finished I left out
14 of the room.

15 MR. BROWN: Your Honor, if I may impeach him
16 with the deposition?

17 THE COURT: He said it ran the entire time in
18 the deposition, I see that.

19 Q Okay. Including the paragraph, polygraph, I
20 mean?

21 MR. WATERS: Your Honor, I think he needs to
22 be shown the testimony. He is just asking him --

23 THE COURT: Give him that.

24 MR. WATERS: I think he deserves a chance to
25 look at it.

JA 1769

1 THE COURT: Do you see what we're talking
2 about there, Mr. Gadson? It says A where you
3 answered, Q is where he asked questions.

4 THE WITNESS: Yes.

5 THE COURT: What is your question?

6 BY MR. BROWN:

7 Q My question is did they tape record your
8 statement you gave on February 18th, 2001?

9 THE COURT: Is that the one with the
10 polygraph or without?

11 MR. BROWN: All three were that one day,
12 handwritten statement, the polygraph and the typed
13 statement.

14 A Yes.

15 Q So --

16 THE COURT: Wait one second. He's not asking
17 you just to read what is on your deposition. What
18 he is asking you is the question. If you know the
19 answer to the question, fine. If not, you can just
20 let me know you're reading the deposition. He
21 would rather first see if you know the answer to
22 the question.

23 THE WITNESS: Yes.

24 THE COURT: All right, listen to his
25 question.

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177

1 BY MR. BROWN:

2 Q Did they tape record the entire questioning
3 on February 18th, 2001?

4 A I don't know.

5 THE COURT: All right, do you want to read
6 what it says there? What line is it?

7 Q Line 21, I asked you, "It ran the entire
8 time?"

9 A Yes.

10 Q Your answer was yes. And you said that
11 Detective Coker was there, is that right?

12 A Yes.

13 Q And did also an Officer Van Doran come in?

14 A I don't remember.

15 THE COURT: Next question?

16 Q Did Officer Van Doran come in? I'm sorry, I
17 didn't hear the answer.

18 A I don't remember.

19 Q And at the deposition you were asked whether
20 Officer Van Doran came in, page 58, line 23.

21 A I'm trying to look.

22 Q 58, line 23.

23 A He came in afterwards.

24 Q And after you had started talking?

25 A Yes.

JA 1771

1 Q Let me ask you, was he in there when you were
2 talking to the police?

3 A No.

4 Q And when I asked you did he come in before
5 you started talking you said --

6 A He never come in before we started talking.

7 Q Page 59, line 3, "Before you started
8 talking?"

9 A No.

10 Q What was your response?

11 A "Yes, but he never had come in right there."

12 Q And I asked you, "So, it wasn't just Coker,"
13 didn't I?

14 A Yes.

15 Q And it wasn't just Coker in there?

16 A No.

17 Q It wasn't just Coker in there, was it?

18 A It was a detective from Orangeburg.

19 Q And Coker?

20 A No, Coker wasn't in there.

21 Q You just testified earlier just a few minutes
22 ago that it was Coker in there.

23 A It was a detective from Orangeburg.

24 Q And Coker, so there was Coker and another
25 fellow in there?

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179

1 A Yes.

2 Q So, there was more than one officer in there,
3 when the tape recorder was running, that is?

4 A When they had the tape recorder, you know,
5 I'm not sure if it was running or not.

6 Q You said it was running before.

7 A It could have been, it could have been. I
8 know it was one in there, I don't know if he had it
9 on or not. I wasn't paying that much attention to
10 no tape recorder.

11 Q Now, what did you mean when you say they put
12 the body in the trunk of the car?

13 A I wasn't there when they put nobody in the
14 trunk. How I know who put a body in a trunk?

15 Q Would you look at page 72 of your deposition?

16 A Yes.

17 Q And you were asked about Kandee Martin
18 wearing a wire, by the Attorney General?

19 A Yes.

20 Q And he asked you to flesh that out a little
21 bit and what did you say?

22 A Where you at, which number you at?

23 Q It would be line 10, "Can you flesh that out
24 a little bit," and what did you say? Your part
25 starts with the A, for answer. Did you not say,

JA 1773

1 "All I know was when we were driving back they done
2 put the body in the woods."

3 Who is they if you weren't there? Who is
4 they?

5 A The ones you have for accessory after burying
6 the car.

7 Q You were accessory, too?

8 A I didn't burn no car because I wasn't there.

9 Q You were accessory to the whole killing, that
10 is what you told the judge under oath you did?

11 A No, I didn't have nothing to do with no
12 burning of no car.

13 MR. BROWN: Beg the Court's indulgence.

14 MR. BROWN: No further questions at this time
15 until cross-examination.

16 THE COURT: All right. Mr. Waters?

17 MR. WATERS: Thank you, Your Honor.
18
19
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24
25

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181

CROSS EXAMINATION

QUESTIONS BY MR. WATERS:

Q Mr. Gadson, you were arrested and brought in by the police in this case, right?

A Yep.

Q And you gave that first statement, correct?

A Yes.

Q And in that statement you stated that you had seen Kandee and Marion and they were talking about going and pulling a caper, right?

A Yes.

Q Or pulling a lick, which means what?

A Rob a house.

Q Rob a house, okay. And you said that you were with them but eventually you left them and that was the last time you saw Kandee that night, correct?

A Yes.

Q Okay. That is the first statement you gave?

A Yes.

Q Okay. Then after that you found out that Mr. Bowman was saying you were the one who killed Kandee, is that correct?

A Yes.

Q Okay. So, what did you decide to do at that

JA 1775

1 point?

2 A Tell the truth.

3 Q All right. And at that point you gave this
4 second statement here, the typewritten one, is that
5 correct?

6 A Yes.

7 Q Okay. And let me look at these documents
8 real quick. You know, this arrest warrant right
9 here that has been marked Plaintiff's Exhibit 4,
10 that one right there, that was the one that they
11 signed against you based on what Marion Bowman had
12 said you did, correct?

13 A Yes.

14 Q It says in there what Marion says, that you
15 were the one who killed Kandee or shot her the
16 first three times, correct?

17 A Uh-huh.

18 Q Okay. All right, then you gave the second
19 statement in here, I'm going to show it to you
20 again. This has been marked as Plaintiff's Exhibit
21 6, right there, and that's the one where you kind
22 of came clean about the whole thing, correct?

23 A Yes.

24 Q Okay. And in there you talk about initially
25 there was some lady named Lilly or Lil who had come

5912

183

1 up there and Marion said she owed him some money
2 for crack. Right?

3 A Yes.

4 Q And he had the .380 and he was going to go
5 over there and whip her with it, correct?

6 A Yes.

7 Q Okay. And you also talk in there about,
8 about Marion and Kandee again wanting to go pull a
9 caper. Is that correct?

10 A Yes.

11 Q And that meant to rob a house, right?

12 A Yes.

13 Q You also talked about when you all were in
14 there you drove around looking for houses to rob,
15 correct?

16 A Yes, spotted the big house, big brick house.

17 Q All right. Now, you were asked a lot of
18 questions about whether or not Marion Bowman was
19 leaning back and pointing his finger at Kandee's
20 head with a gun motion, correct?

21 A Uh-huh.

22 Q Did that happen?

23 A No. He was like leaning his hand like this,
24 he could have been pointing at a house or anything,
25 he didn't directly point at her head, it may have

JA 1777

1 seemed like that, it wasn't exactly like that.

2 Q You don't know if he was pointing at a house
3 or he was making a gun motion to her head? Is that
4 correct?

5 A Yes.

6 Q Okay. But he did do that?

7 A Yes.

8 Q He did point his finger in the direction of
9 her head, correct?

10 A Yes.

11 Q Okay.

12 MR. WATERS: I'm going to ask the record
13 reflect he was pointing with more than one finger.

14 THE WITNESS: Like this.

15 MR. WATERS: That wasn't the motion before.

16 THE COURT: What did you do, sir?

17 THE WITNESS: I did like this.

18 MR. BROWN: First of all he did this with his
19 hand as opposed to one finger, then he just did one
20 finger.

21 MR. WATERS: Thank you.

22 BY MR. WATERS:

23 Q You also put in your statement there once you
24 got there Marion Bowman gave Kandee a hit of crack,
25 is that right?

5914

185

1 A Yes.

2 Q You and Marion kind of went walking off and
3 Kandee was in the car smoking the crack, correct?

4 A He didn't walk off, I did.

5 Q You walked off, they were back at the car, is
6 that correct?

7 A Yes, sir.

8 Q Okay. So, there was a period of time when
9 they were alone, that you didn't see them, correct?

10 A Yes, but it wasn't that long.

11 Q Wasn't that long, but he was at the time
12 giving her crack cocaine to smoke, is that correct?

13 A Uh-huh.

14 Q All right. You were asked a few questions
15 about this series of letters here marked
16 Plaintiff's Exhibit 2?

17 A Yes.

18 Q Do you recall those?

19 A Yes.

20 Q Other than your signature at the bottom, did
21 you write those?

22 A No.

23 Q So, you went to some jailhouse lawyer in
24 Dorchester County to get to help you, correct?

25 A The dude nextdoor.

JA 1779

1 Q He wrote them up for you?

2 A Yes. All I had to do was sign them.

3 Q You told him what you had been charged with,
4 what you knew and he wrote those things up, right?

5 A Yes.

6 Q You signed them at the bottom?

7 A Yes.

8 Q So, you never actually drafted those,
9 correct?

10 A No. I didn't know nothing about law.

11 Q What was that?

12 A I don't know nothing about the law, then I
13 didn't.

14 Q Were you ever served with a document called a
15 notice of intent to seek the death penalty?

16 MR. BROWN: We concede there is not one in
17 the file, Your Honor.

18 Q That wasn't my question. Were you served
19 with a document?

20 A No.

21 MR. BROWN: Your Honor, we would ask the
22 Court be aware neither the prosecutor's office nor
23 the Clerk of Court can locate his indictment.

24 THE COURT: All right, let's proceed.

25 MR. BROWN: There is no copy except the one

5916

187

1 that we have entered today, the only true copy of
2 that indictment for murder.

3 THE COURT: All right.

4 BY MR. WATERS:

5 Q Mr. Dukes was your attorney, correct?

6 A Yes.

7 Q Not Marva Hardee-Thomas?

8 A No.

9 Q You never talked to Marva Hardee-Thomas about
10 your case?

11 A Never a day in my life.

12 Q You never talked to her?

13 A No.

14 Q You only talked to Mr. Dukes?

15 A Yes.

16 Q Did Mr. Dukes say he talked to Marva
17 Hardee-Thomas and, "She told me to do something"?

18 A No.

19 Q Mr. Dukes told you you could potentially be
20 on the hook for murder because the hand of one was
21 the hand of all, is that right?

22 A That's exactly what he said.

23 Q All right. Now, you were shown this plea
24 agreement right here, Plaintiff's Exhibit 3. Let
25 me show that to you again. Again, you had Mr.

JA 1781

5917

1 Dukes as your lawyer, right?

2 A Yes.

3 Q You just said you don't know much about law,
4 right?

5 A No.

6 Q You're not a lawyer?

7 A No.

8 Q You relied on Mr. Dukes of course to explain
9 that to you?

10 A Yes.

11 Q You didn't peruse every single word in there
12 looking for words of legal meaning and the like?

13 A No.

14 Q Was your understanding of that plea
15 agreement, just in general, what did you have to do
16 and what was going to happen if you did what you
17 had to do?

18 A I seen a way of seeing freedom one day so I
19 took the fifteen years and the five and I ran with
20 that.

21 Q Okay. And what did you have to do for the
22 State to be willing to give you the fifteen and the
23 five?

24 A I had to plead.

25 Q You had to plead?

JA 1782

5918

189

1 A I had to testify.

2 Q And you had to testify. How did you have to
3 testify?

4 A Against the murderer.

5 Q Did you have to testify a certain version of
6 facts or did you have to just tell the truth?

7 A I had to tell the truth.

8 MR. BROWN: Your Honor, we would move to
9 strike that, leading.

10 MR. WATERS: I'm on cross-examination.

11 THE COURT: Proceed on.

12 BY MR. WATERS:

13 Q In fact, let's ask a little bit about that.
14 Now, you were asked about your deposition and
15 whether or not the Solicitor told you you had to
16 testify truthfully. Correct?

17 A Yes.

18 Q And what did the Solicitor tell you?

19 A I could get, I could be charged with before
20 the fact or after the fact, before the fact carried
21 life, after the fact carried fifteen, I could get
22 five for misimprisonment.

23 MR. WATERS: The Court's indulgence one
24 second. Let me get my copy of the deposition.

25 Q All right. What did Mr. Dukes tell you about

JA 1783

1 your obligation to testify truthfully?

2 A I can't remember.

3 Q All right. I'm going to show you page 30 of
4 this deposition and ask you to start reading at
5 line 12, down to the end there. Does that refresh
6 your recollection about what Mr. Dukes told you?

7 A Yes. He told me to tell the truth when I get
8 up there.

9 Q Mr. Dukes was clear for you to honor that
10 plea agreement you had to get up and tell the
11 truth, correct?

12 A Yes.

13 Q Okay. He didn't tell you you have to say it
14 a certain way, he said you've got to get up and
15 tell the truth?

16 A Yes.

17 Q Is that correct?

18 A Yes.

19 Q Okay. All right, let's talk about you said
20 you never saw Marion Bowman and Kandee have sex
21 that night. Correct?

22 A No.

23 Q But you were not with Marion Bowman that
24 entire day, were you?

25 A No.

5920

191

1 Q You saw him a little bit in the morning,
2 correct?

3 A A little bit in the afternoon. When it got
4 dark, that is when I seen them again.

5 Q So, there was a period of time in the morning
6 when you were not with Marion Bowman, correct?

7 A Yes.

8 Q And there was a period of time in the
9 afternoon when you were not with Marion Bowman,
10 correct?

11 A Yes.

12 Q But then they picked you up at that point and
13 that is when all these events took place?

14 A Yes.

15 Q Okay. So, you don't know if they had sex
16 before that or not?

17 A No.

18 Q All right. Let's talk a little bit about the
19 drinking here. Do you remember that deposition we
20 had?

21 THE COURT: The one you have been reading
22 from?

23 Q The one we've been reading from. I will get
24 it, hold on. I'll get to it. Remember you were
25 asked about whether or not Marion Bowman was

JA 1785

1 drinking, intoxicated and you said no. Correct?

2 A Yes.

3 Q You said he was tipsy, which you defined as
4 your lowest level of drinking?

5 A Yes.

6 Q That's just having a couple drinks, right?

7 A Yes.

8 Q Marion Bowman wasn't staggering, was he?

9 A No.

10 Q He wasn't slurring, was he?

11 A No.

12 Q He didn't display any outward signs of being
13 intoxicated, did he?

14 A No

15 MR. BROWN: Your Honor, I had asked whether
16 he was intoxicated as well. These are exactly the
17 same questions.

18 THE COURT: This is the witness. If he is
19 answering different in your view, he's answering
20 different in your view.

21 MR. BROWN: I was not allowed to ask --

22 THE COURT: No, no, I wouldn't let you read
23 that. If you want to come back, come back and ask
24 him questions.

25 MR. BROWN: Sure, no problem.

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193

1 THE COURT: I wouldn't stop you from asking
2 those questions. If I did, we had a
3 miscommunication.

4 MR. BROWN: Thank you.

5 BY MR. WATERS:

6 Q Okay. So, to reiterate, he was not
7 staggering?

8 A No.

9 Q He was not slurring his words?

10 A No.

11 Q He didn't display any outward sign of
12 drinking, correct?

13 A No.

14 Q Okay. And you said that you, you were
15 hanging out at Hank Koger's house most of the day,
16 correct?

17 A Yes, I was.

18 Q And Marion Bowman was coming and going?

19 A Yes, he was.

20 Q You were drinking pretty steady but Marion
21 Bowman wasn't there all the time, isn't that right?

22 A Yes.

23 Q Okay. All right. And didn't you say when
24 you were defining tipsy, if you're tipsy you
25 wouldn't be worried about being pulled over by the

JA 1787

1 police, correct?

2 A Correct.

3 Q In your view if you're drunk that is when
4 you're worried about being pulled over by the
5 police, but not just when you're tipsy, correct?

6 A Yep.

7 Q When you said Marion Bowman was tipsy that's
8 all you meant, correct?

9 A Yes.

10 Q Now, when they asked you in the deposition,
11 and as Mr. Brown has asked you recently, you said,
12 when they asked you if Marion Bowman drank or if he
13 did drink you said all he did was drink. You don't
14 mean he just drinks all the time, you just meant he
15 doesn't do drugs, the only way he gets high is by
16 drinking. Correct?

17 A Yes.

18 Q Marion Bowman wasn't a total drunk, just all
19 the time drunk laying in the street, right?

20 A No.

21 Q He wasn't like that?

22 A No.

23 Q He might get him a beer every day but he was
24 not off his rocker all the time?

25 A No.

5924

195

1 Q You didn't mean he was drunk all the time?
2 A No, not no stone cold drunk.
3 Q Okay. All right. Just a couple little
4 questions here. When you refer to Black, that's
5 Marion Bowman's street name, right?
6 A Yes.
7 Q You are Gap, correct?
8 A Yes.
9 Q Did Hiram Johnson have a street name?
10 A No.
11 Q They just knew him as Hiram?
12 A Yes.
13 Q You were asked a little bit about firing a
14 High Point .380, and you had a High Point .380,
15 right?
16 A Yes, I did.
17 Q You bought that legally in a pawn shop,
18 correct?
19 A Willie's Pawn Shop.
20 Q What happened to that gun?
21 A It got stole.
22 Q Whenabouts did it get stolen?
23 A It was out of my sister's Escort, she had a
24 '97 Escort.
25 Q I'm sorry?

JA 1789

1 A She had a '97 Escort, it was stolen out of
2 that.

3 Q When did it get stolen?

4 A That was way before the accident happened,
5 that was back in 2000 my gun come up missing.

6 Q It was 2000 it got stolen?

7 A Yes.

8 Q Did you report it stolen?

9 A Yes. I went to the pawn shop. They told me
10 I should have went to the police.

11 Q You didn't go to the police, you went to the
12 pawn shop?

13 A Went to the pawn shop.

14 Q Which .380 were you firing at the Villas that
15 they were asking about?

16 A The one Marion bought from the dude in
17 Orangeburg.

18 Q That was Marion's gun?

19 A Uh-huh.

20 Q He let you borrow it?

21 A It was a dude standing in front of the
22 apartments talking as if he had a knife, he handed
23 me the gun, I started shooting it.

24 Q Marion Bowman was there?

25 A Yes, he was there.

5926

197

1 Q At the time that happened your High Point was
2 long gone?

3 A Yes.

4 Q The only silver and black High Point around
5 you knew of was the gun Marion Bowman had?

6 A Yes.

7 Q You were asked a lot of questions about
8 whether or not they were tape recording your
9 statements.

10 A Yes.

11 Q And just so I understand, you are saying that
12 they did have a tape recorder in there?

13 A Yes.

14 Q But you just don't know whether or not it was
15 running?

16 A Yes. Whether it was on, off, what, I wasn't
17 paying attention to it.

18 Q Did they reach over and press start or stop?

19 A I couldn't really tell because I know one
20 officer was on this side, one was on this side but
21 I mainly had my eyes focused on the one from
22 Orangeburg. I can't remember his name, he's a tall
23 dude, tall blonde headed dude, he was a detective,
24 he was talking to me at the same time because he
25 kept saying Marion had outstanding warrants from

JA 1791

1 Orangeburg County, he had a warrant, he was already
2 looking for him.

3 Q You say it was a tall guy, blonde hair?

4 A Yes. I can't remember his name. I knew he
5 worked for Orangeburg County.

6 Q All right. You were asked about a guy named
7 Ricky Davis?

8 A Yes.

9 Q Do you know anybody named Ricky Davis?

10 A No, I ain't never knew him until today they
11 put me in the holding cell with him.

12 Q That's when you figured out that was the guy
13 named Crab, correct?

14 A Yes.

15 Q Do you know Crab?

16 A Yes.

17 Q Did you know Crab back in 2001 when this
18 crime happened, when you first went to jail?

19 A I never talked to him but he had a home boy
20 right here from Summerville when he first come
21 here, they told me never mess with him because he
22 wasn't nothing but a Crab, that is what I got that
23 name from, he was getting people cases and trying
24 to flip it on them, but me and him bump heads in
25 the holding cell and he said Marion --

5928

199

1 MR. BROWN: Objection, hearsay.

2 THE COURT: What is the purpose of your
3 asking this question?

4 MR. WATERS: Your Honor, there is an
5 allegation, there is a piece of paper --

6 THE WITNESS: He had a written paper.

7 THE COURT: Hold on.

8 MR. WATERS: There is a piece of paper that
9 Ricky Davis wrote in which he says that, "James
10 Tawain Gadson told me that he shot Kandee and the
11 police told him to just say that Black," which is
12 Marion Bowman, "did it because his family had a
13 grudge." Now, Mr. Davis says that he and Bowman
14 were on the same block and Bowman asked him to
15 write that and that he doesn't know anything about
16 the case, and I'm asking Mr. Gadson if he ever said
17 that to this man.

18 THE WITNESS: He told me that back there,
19 too.

20 MR. BROWN: I don't understand what asking
21 him about hearsay has got to do with anybody.
22 Davis is here.

23 THE COURT: Well, do you want Mr. Gadson to
24 testify whether Mr. Davis ever told him Mr. Bowman
25 told him to do this?

JA 1793

1 MR. WATERS: No, sir. I was asking him,
2 number one, if he knew Ricky Davis. Number two,
3 how did he know Ricky Davis and if he ever said
4 that to Ricky Davis.

5 THE COURT: Said what to Mr. Davis?

6 MR. WATERS: That he shot Kandee Martin.

7 MR. BROWN: Already asked.

8 THE COURT: Is your question did Mr. Davis
9 ever tell Mr. Gadson that Mr. Davis, is your
10 question Mr. Gadson ever told Mr. Davis --

11 MR. WATERS: My question is did Mr. Gadson
12 ever tell Mr. Davis that he shot Kandee?

13 THE COURT: You can ask that question.

14 MR. WATERS: I was trying to get whether or
15 not he even knew this man and how he knew him. Mr.
16 Gadson started talking about some other things but
17 that was my question.

18 THE COURT: Yes.

19 BY MR. WATERS:

20 Q When did you come to know him? In Leiber, is
21 that correct?

22 A No, in the county jail.

23 Q In the county jail?

24 A Yes.

25 Q Did you ever tell him you shot Kandee Martin?

5930

201

1 A No, I never discussed my case with anyone in
2 the county jail, even in prison.

3 Q Okay. Did you ever tell him that the police
4 told you to just say that Black did it?

5 A No.

6 Q Did you ever tell him that because Black's
7 family had been caught with a gun, that that is
8 what you should say?

9 A No.

10 Q Have you ever had a conversation with Ricky
11 Davis?

12 A No.

13 Q Did you have one today with him in lockup?

14 A Yes, right back there in the holding cell.
15 If I would commit a crime why would I give my gun
16 to his family for them to go hide? I got family of
17 my own.

18 MR. BROWN: Move to strike, Your Honor,
19 unresponsive.

20 THE COURT: Noted. I'll let it stand.

21 Mr. Brown?

22 MR. BROWN: I'm sorry.

23 MR. WATERS: The Court indulge us one moment,
24 please.

25 MR. BROWN: I'm sorry, Your Honor.

JA 1795

1 THE COURT: Any other questions?

2 MR. WATERS: The Court's indulgence.

3 MR. WATERS: Your Honor, I have nothing
4 further at this time. Again, we don't release
5 anyone from their subpoena at this point.

6 THE COURT: All right.

7 MR. BROWN: May it please the Court.

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203

REDIRECT EXAMINATION

QUESTIONS BY MR. BROWN:

Q Did you not tell the police that you had reported this gun stolen to the pawn shop?

A I reported it to the pawn shop, I never went to the police.

Q Did you tell the police that?

A No.

Q You didn't ever talk to the police about the gun being stolen?

A No.

Q And if you would refer to page 56 of the deposition, Mr. Gadson, line 10.

A Yes, I've got it right here.

Q "You told the police that day that the gun had been stolen, you reported it to the pawn shop." What was your answer?

A Yes, I reported it to the pawn shop. I talked to the police when he questioned me, asked me about the gun.

THE COURT: Did you want to read what the answer says?

Q The answer says yes, doesn't it?

A Yes, I reported it to the pawn shop. That is what it says, reported it to the pawn shop, yes.

JA 1797

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204

1 Q It doesn't say that, does it? It says, "Did
2 you tell the police that day that the gun had been
3 stolen and you reported it to the pawn shop?"

4 A Yes, that is what I did.

5 Q You told the police that you had reported it
6 to the pawn shop?

7 A Yes. I never reported it to --

8 Q At some point in time before Mr. Bowman's
9 trial you told the police about the alleged theft
10 of your .380?

11 A No, that was way before the trial.

12 Q Sometime before his trial you told them that,
13 didn't you?

14 A No, no.

15 Q I'm confused, Mr. Gadson. Explain how you
16 said at your deposition that yes, you had told the
17 police about reporting the gun stolen.

18 A That is during my questioning after I done
19 failed the polygraph, when I talked to the police
20 about the gun being stolen, I never mentioned about
21 it before no trial.

22 Q Did you mention it --

23 A You got things twisted.

24 Q When did you mention that, I'm sorry, I
25 didn't hear you?

JA 1798

5934

205

1 A When I got questioned about the polygraph
2 test, that is when I was telling the police about
3 my gun being stolen.

4 Q Is that in your statement?

5 A No. I ain't never put it in there.

6 Q Wait a second, now. You gave a statement
7 right here after your polygraph. Isn't that right?

8 A Yes.

9 Q I want to make sure I understand this. Did
10 you put the truth in that statement?

11 A No.

12 Q No? You lied in that statement, too?

13 A I didn't have to put everything in there to
14 tell the truth when I get up on the stand.

15 Q You didn't think it was important to put in
16 there you had a High Point.380 but it had been
17 stolen?

18 A No.

19 Q I'm sorry?

20 A No.

21 Q You didn't find that to be important but you
22 told them that?

23 A But I told them, yes.

24 Q Okay. And who decided what was important to
25 put in here?

JA 1799

5935
206

1 A The police, they the one typed that.
2 Q They're the ones that typed it?
3 A Yes.
4 Q You told them some things but they didn't put
5 everything in that statement?
6 A No.
7 Q They just put some things?
8 A Yes.
9 Q But the tape recorder would have it all on
10 there, wouldn't it?
11 A Yes, if it would have been recorded, yes, it
12 would.
13 Q Now, let's make sure we understand about Mr.
14 Bowman drinking. Was he in a habit of drinking all
15 the time?
16 A Like I said, when I see him every day he have
17 beer in his hand, he be drinking.
18 Q Every day he had a beer in his hand, he was
19 drinking?
20 A Every day I seen him he got one.
21 Q Is that just the one moment you saw him or
22 every time you saw him he had a beer in his hand?
23 A Every few times I seen him. I ain't seen him
24 all those times.
25 Q Is he your first cousin?

JA 1800

5936

207

1 A Yes.

2 Q Does he live in Branchville?

3 A Yes.

4 Q You live in Branchville?

5 A Yes, I do.

6 Q How big a town is Branchville?

7 A A small town but I had a car during that

8 time.

9 Q Every time you saw him he had a beer in his

10 hand?

11 A Yes.

12 Q That day he also had some liquor, too, didn't

13 he?

14 A Yes.

15 Q He had a beer and liquor every time you saw

16 him?

17 A Not every time he didn't have no liquor but

18 he had a beer.

19 Q That day he had the liquor and the beer all

20 the time?

21 A No, not all the time, not the liquor.

22 Q He had the beer all the time?

23 A And had some liquor to top it off.

24 Q And he was drinking and was tipsy?

25 A Yes, I call it tipsy.

JA 1801

1 Q You call it tipsy?

2 A Yes.

3 Q Okay. And that doesn't mean sober, does it?

4 A No.

5 Q Let me ask you about the polygraph that they
6 gave you after you signed your plea agreement.

7 A They ain't never given a polygraph.

8 Q They required in that plea agreement you had
9 to take and pass a polygraph?

10 A No.

11 Q They didn't?

12 A No. I ain't took a polygraph but one time.

13 Q And you served less than five years in jail,
14 didn't you?

15 A Something like that.

16 Q You went in, you got credit back to February,
17 2001, didn't you?

18 MR. WATERS: Your Honor, this is beyond the
19 scope of redirect.

20 THE COURT: Continue on.

21 A I believe they give me credit for that, yes

22 Q Then you were released on July 7th, 2005,
23 weren't you?

24 A Yes, on parole.

25 Q That is not even four and a half years, is

5938

209

1 it?

2 A Something like that.

3 Q But you don't know why you went back and got
4 that re-sentencing, do you?

5 A No. You got to ask the judge that.

6 Q They never took you in and talked about you
7 omitting facts from your testimony in violation of
8 your plea agreement.

9 A No.

10 Q Mr. Dukes as a good lawyer went through all
11 this, didn't he, he went through your plea
12 agreement? Mr. Waters asked you about him going
13 through this plea agreement?

14 A Yes.

15 Q He went through it?

16 A Yes.

17 Q And you didn't call him a drunk?

18 A No.

19 Q No, you never called him that, you didn't
20 call him a drunk in these statements?

21 A The man that wrote that put that in there, he
22 knew Gene Dukes more than I did, I never knew the
23 man.

24 Q You didn't say in your deposition you had to
25 be your own lawyer because he was a drunk?

JA 1803

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1 A I let the man do it.

2 Q I'm asking you whether you let Mr. Dukes do
3 your lawyering or you had to do it on your own?

4 A I mainly did most of it on my own, get help
5 to do it on my own.

6 Q Did he go over the plea agreement with you?

7 A Afterwards.

8 Q After you signed it?

9 A After he brought my indictment papers.

10 Q Where it says you were charged with shooting
11 her, didn't it -- let me make sure I understand
12 that. He went over that, that is what you just
13 said, this document right here marked as
14 Plaintiff's Exhibit 1 said that you did shoot one
15 Kandee Martin?

16 A Yes.

17 Q And he went over that, didn't he?

18 A No, just handed me a paper.

19 Q You can read?

20 A I can read it myself.

21 Q Okay. So you read it?

22 A Yes.

23 Q And you know shooting and killing somebody,
24 you can get the death penalty, don't you?

25 A Not exactly. You can get life.

JA 1804

5940

211

1 Q What is Marion Bowman facing the death
2 penalty for?

3 A I don't know.

4 Q Did you not sign this agreement that said you
5 faced the death sentence?

6 A Yes.

7 Q Mr. Dukes went over that as a good lawyer?

8 A Yes.

9 Q And doesn't it say that you can either
10 testify truthfully or cooperate. It doesn't have
11 an or in there?

12 A I don't think so.

13 Q It says if you do not testify truthfully, at
14 all times tell the complete and absolute truth or
15 you fail to cooperate?

16 A Uh-huh.

17 Q So, just failing to cooperate, it doesn't say
18 anything about the truthful, does it?

19 A No.

20 Q We talked about that at your deposition,
21 didn't we?

22 A Yes.

23 Q And Solicitor Bailey said you get the
24 sentence to the lesser charges if you testify
25 against Marion, didn't he?

JA 1805

1 A Yes.

2 Q What did you say at the deposition?

3 A Yes.

4 Q Now, right here you said that Marion stayed
5 back at the car. Now let's turn to your trial
6 testimony, page 3998. Do you have a copy of that?

7 THE COURT: He doesn't have it.

8 A No.

9 THE COURT: That's the deposition.

10 Q If you had a copy of that testimony would it
11 refresh your recollection of what it said back
12 then?

13 A No.

14 Q It won't?

15 A Huh-uh.

16 Q You're testifying, page 3998 of the trial
17 testimony, doesn't it say, line 15, you were asked
18 what happened, you said, "We were walking down the
19 road and then she came down the road." Who is the
20 we, Tawain?

21 A Me and Marion.

22 Q Okay. So, Marion is not back at the car, he
23 is walking down the road with you, isn't he?

24 A Yes. During the time Mr. Waters talked about
25 he was at the car, he was giving her the crack, I

5942

213

1 ain't talking about walking down the road.

2 Q It says, "When you and Marion got out what
3 did you do?" That is on 3997. Line 22 is your
4 answer.

5 A Yes.

6 Q And you said, "We was walking down the road,"
7 didn't you?

8 A Yes.

9 Q And was that a lie?

10 A No. He turned around and went back to the
11 car.

12 Q He went back to the car?

13 A Yes.

14 Q That's the third version I've heard.

15 MR. WATERS: Your Honor, I object to that.

16 THE COURT: Well, let's continue on. What is
17 your --

18 Q The question is, did you lie here today when
19 you said he stayed at the car or did you lie back
20 in the trial when you say you both walked away?

21 A We was both walking, he went back to the car,
22 that is where he give her the crack at.

23 Q Did you lie when you told the Attorney
24 General that he stayed at the car?

25 A No. He had walked, we walked a little piece,

JA 1807

5943

1 about from here to that table, he turned around and
2 went back to the car, that is when he gave her the
3 crack.

4 Q Did you testify to that in this trial?

5 A No.

6 Q Why didn't you testify that he went back?

7 THE COURT: While he's doing that, I just got
8 a message from the Department of Corrections.
9 Because of the situation with gasoline, they are
10 going to have a tough time getting people back if
11 we send them back. Had you all planned to have Mr.
12 Bowman here all week? I assume, right, he's in
13 Dorchester?

14 MR. BROWN: I'm sorry?

15 THE COURT: Is Dorchester housing Mr. Bowman
16 all week?

17 MR. BROWN: He's at Leiber. It is even
18 closer than Dorchester jail.

19 THE COURT: Where is Mr. Gadson.

20 MR. BROWN: I have no idea.

21 THE COURT: We have Davis and Williams.

22 MR. BROWN: I have a feeling he's going to be
23 done today.

24 THE COURT: Hold on a second. Davis and
25 Williams, where are they at?

5944

215

1 MR. BROWN: Davis is at Leiber.

2 THE COURT: Close by here?

3 MR. BROWN: Very close.

4 THE COURT: Here's the problem when we get
5 the bureaucracy of the State, although Leiber is
6 close, they don't want to bring them back. Is
7 Davis and the other gentleman at the Dorchester
8 County jail now? Where are they? Who can work out
9 seeing that St. George can keep them overnight?
10 See if they would? You know, I'm just concerned
11 about the bureaucracy of them going back to Leiber
12 and Leiber not willing to bring them, although it's
13 not that far. Let me tell you what, let me step
14 off and talk to this individual. You say both Mr.
15 Davis and Mr. Williams are at Leiber.

16 SCDC GUARD: Gadson is at Richland.

17 THE COURT: Who's at Leiber?

18 SCDC GUARD: He's at Leiber.

19 THE COURT: Where is Mr. Williams?

20 DEPUTY SHERIFF: He's nextdoor now.

21 SCDC GUARD: The ones at Leiber, Davis and
22 Mr. Gadson, is the farthest.

23 THE COURT: I'm aware of that. I'm only
24 trying to find out where they are serving their
25 time. Davis is at Leiber, is that correct?

JA 1809

1 SCDC GUARD: Yes.

2 MR. BROWN: Yes, sir.

3 THE COURT: Mr. Bowman is at Leiber?

4 MR. BROWN: Yes, sir.

5 THE COURT: This gentleman is in a prison in
6 Richland County, Columbia?

7 MR. BROWN: Jasper County.

8 THE COURT: Jasper County, Ridgeland? Now,
9 we don't know where Mr. Williams is being housed
10 but isn't someone with SCDC with Mr. Williams?

11 SCDC GUARD: He's in the Columbia area, sir.

12 THE COURT: In the Columbia area? Can you
13 check to see if someone would bring, would hold Mr.
14 Williams and Mr. Davis here? Can you come back and
15 talk to this lady back here for me to make sure,
16 tell her, come in my office back here and let her
17 know that we can always bring him back later on if
18 we need to, you're almost through with him, we need
19 Mr. Williams and Mr. Davis to be close by, if you
20 can work out something with them so we keep
21 Williams and Davis.

22 MR. WATERS: Your Honor, if we're going to
23 keep them, get to them tomorrow, I mean, they are
24 going to have to send a crew back and come and get
25 him anyway. It would be the same amount of trips,

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217

1 wouldn't it?

2 THE COURT: Exactly. You are not familiar
3 with bureaucracy.

4 MR. WATERS: Yes, sir.

5 THE COURT: It would be a lot easier to have
6 them here than to bring them back. It is more
7 facilitory to the finishing and continuing of this
8 trial for them that stay here.

9 MR. WATERS: Yes, sir.

10 THE COURT: I can work a lot better with the
11 Dorchester County Sheriff's Department than I can
12 with the South Carolina Department of Corrections
13 and all their budgetary formalities right now.
14 This woman standing right here can attest to that.

15 MR. BROWN: I know my hotel has continental
16 breakfast every morning.

17 THE COURT: Let's continue with the questions
18 for Mr. Gadson.

19 MR. BROWN: Okay.

20 BY MR. BROWN:

21 Q Now, my question to you, at the trial, if at
22 trial you said that Marion walked away, walked away
23 with you, but now you say that he walked back to
24 give her crack. Why didn't you include that in
25 your testimony at trial?

JA 1811

1 A I don't know.

2 Q Did you omit facts in violation of your plea
3 agreement?

4 A No.

5 Q Did you include the --

6 MR. BROWN: Your Honor, let the record
7 reflect, it stands on his own, there is no
8 testimony about any crack at all from this witness
9 during any testimony in trial.

10 Q So, my question again, why did you leave that
11 out if that's the truth, when your agreement was to
12 avoid murder by telling the truth, why did you
13 leave it out?

14 A Because I'm telling you everything, I told
15 everything when I got on the stand.

16 Q I'm sorry?

17 A I told everything when I got on the stand

18 Q But you didn't talk about the crack, did you?

19 A No.

20 Q Why?

21 A Because I told everything when I got on the
22 stand. Why I have to put it in there for?

23 Q I'm confused. You didn't talk about the
24 crack on the stand at trial. Why?

25 A Oh, I ain't mentioned it.

5948

219

1 Q Why?

2 A I don't know.

3 Q Did your agreement say you agreed to tell the
4 absolute truth and that you understand that if you
5 omit facts that you lose your plea agreement?

6 A Uh-huh.

7 Q And as it stands right now, because you agree
8 you omitted that fact, right, and so this judge,
9 this Court or any other person in this court can
10 refer you back to court for the court there to
11 revoke your plea, to vacate it and give you death
12 for murder, can't they?

13 A Yes.

14 Q They could do that tomorrow, couldn't they?

15 A Yes.

16 Q Because you omitted facts in trial?

17 A Yes.

18 Q Did you tell Solicitor Bailey that Mr. Bowman
19 went back and gave her crack at the car?

20 A No.

21 Q So, he didn't know that, so you lied to him
22 when you said that, you lied when you said that
23 something else happened besides that, didn't you?

24 A Uh-huh.

25 Q I need to hear a yes or no.

JA 1813

1 A Yes.

2 Q So, yes, you lied to the Solicitor?

3 A Yes.

4 Q And we're finding it out for the first time
5 right now?

6 A Yes.

7 Q That you lied back then?

8 A Yes.

9 Q So, you lied in court at that trial?

10 A No.

11 Q I'm a little confused.

12 A I just didn't mention it.

13 Q You lied by omission?

14 A Just because I ain't mentioned it in court,
15 why --

16 MR. WATERS: Your Honor --

17 THE COURT: Wait a minute. He said he didn't
18 know. I think you made your point. He didn't say
19 it.

20 MR. BROWN: I understand. I'm trying to find
21 out if he willfully withheld --

22 THE COURT: I thought he said no one asked
23 him about it.

24 MR. BROWN: They asked him what happened, the
25 question, after that, what happened?

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221

1 THE COURT: Well, that is your interpretation
2 of that but I know, we all know he didn't say
3 anything about the crack.

4 MR. BROWN: And I asked, and he says it is in
5 fact true and he says the plea agreement, he is
6 supposed to tell the truth, not omit facts.

7 THE COURT: Right. He didn't say anything
8 about the crack?

9 THE WITNESS: I didn't mention the crook.

10 MR. BROWN: He lied when he left that out, is
11 my question to him.

12 THE WITNESS: Well, if nobody didn't ask me
13 about it why should I mention it?

14 THE COURT: In his view he didn't lie but yet
15 he didn't mention it. So, what else can we say
16 other than that? Do we want a ruling on whether
17 that is a lie or not?

18 MR. BROWN: Ultimately I do.

19 THE COURT: Maybe we'll look at that in the
20 case, but he said he didn't say anything about it.
21 Now, in a minute if you want to go into it you can
22 but --

23 MR. WATERS: There is kind of a legal point I
24 think that --

25 MR. BROWN: Okay.

JA 1815

1 THE COURT: Hey, I get to say okay. Have you
2 got any other questions?

3 MR. BROWN: Yes, sir.

4 THE COURT: Go ahead, continue on.

5 BY MR. BROWN:

6 Q Now, I want to make sure I understand this.
7 Your gun was stolen out of your sister's 1997 Ford
8 Escort?

9 A Yes.

10 Q Now, do you recall testifying in the
11 deposition about the theft of that gun?

12 A No.

13 Q Is your deposition there in front of you?
14 And to make sure I've got this correct, you were
15 being questioned, you were being questioned, you
16 were questioned today by Mr. Waters about that gun
17 being stolen?

18 A Yes.

19 Q And you told him just a few minute ago it was
20 stolen from your car, from her car?

21 A Yes.

22 Q And you were being questioned by Mr. Waters
23 back in July of this year about that gun being
24 stolen, weren't you?

25 A Yes.

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223

1 Q And you were asked then whether it was stolen
2 out of a car or a house, weren't you?

3 A Yes.

4 Q And you said no, didn't you?

5 A "No, a house or car."

6 Q You said, "No. I had set it down up under a
7 brick"?

8 A No, it was in the car.

9 Q Would you look at page 74, start with line
10 22, And the question says, "Where did it get stolen
11 from?"

12 A Out of Branchville.

13 Q Out of Branchville. The next question, "Was
14 it in a car, a house?" And your answer?

15 A "I didn't never talked to Mr. Waters this
16 year."

17 Q What was your answer appearing at line 25,
18 for the record?

19 A "I sat it up under a brick. I ain't never
20 talked to him this year."

21 Q You said, "No, I sat it down under a brick."
22 And the next question, "You hid it somewhere?" And
23 the answer was?

24 A Somebody found it.

25 THE COURT: What was that, I couldn't hear

JA 1817

1 that?

2 A Somebody found it.

3 THE COURT: Something I just found?

4 Q Somebody found it.

5 THE COURT: Somebody found it?

6 Q That's not stolen from a car, is it? I want
7 to make sure, I'm asking you, we're not omitting
8 this, are you lying now or did you lie in July?

9 A I didn't lie either time.

10 MR. BROWN: Your Honor, at some point I would
11 ask he be investigated for perjury.

12 THE COURT: You can seek that from the
13 Solicitor's office.

14 MR. BROWN: They prosecuted the case.

15 THE COURT: Let's wait until this case is
16 over.

17 MR. BROWN: Thank you.

18 THE COURT: Any other questions?

19 MR. BROWN: I hadn't gotten an answer from
20 him yet, whether he lied then or lied now.

21 THE COURT: He said a minute ago he never
22 lied, he said he didn't lie either time, that is
23 what he just said.

24 BY MR. BROWN:

25 Q How can you explain that was stolen from a

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1 brick and also stolen from a car?

2 A When you talked to me in July you was asking
3 me these questions, I didn't ever come out and tell
4 you, I didn't know you were putting all this down,
5 talking about no court. You were starting to be a
6 little too nosey.

7 Q Excuse me?

8 A You were being a little too nosey.

9 Q Didn't I tell you that this was being
10 recorded, at the very beginning, on page 4, "This
11 is being transcribed, good morning, my name is Jim
12 Brown."

13 Skip down --

14 THE COURT: "I guess it's being recorded." He
15 said something else about being nosey.

16 Q So, to make sure I understand it, if I look
17 back, I didn't ask that question?

18 THE COURT: Any other questions?

19 Q I would like him to answer whether --

20 THE COURT: What is your question?

21 MR. BROWN: How could he explain the
22 difference.

23 THE COURT: Can you explain the difference?

24 THE WITNESS: No.

25 BY MR. BROWN:

JA 1819

1 Q Other than it being a lie?

2 A No.

3 Q So, is it a lie?

4 A No.

5 Q How do you explain that it was stolen from a
6 car and also stolen from a brick?

7 A The last time I had it, it was in a car.

8 Q I want to go back. It says, "I hid it under
9 the brick." On page 75, the question, "You came
10 back and it wasn't there?"

11 A It was in the car.

12 Q That's not what you said back in July.

13 THE COURT: What is your answer?

14 THE WITNESS: No.

15 MR. BROWN: I would like the record to
16 reflect that he indicated it was stolen from under
17 the brick in July.

18 THE COURT: By the way, was he sent a copy of
19 that deposition?

20 MR. BROWN: He declined to do so after being
21 informed. It was one witness that did ask to read
22 and sign.

23 THE COURT: Any other questions?

24 MR. BROWN: No other questions.

25 THE COURT: All right. Now, do you want to

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1 ask questions about this issue or some other issue?

2 MR. WATERS: Well, very briefly.

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JA 1821

RECROSS EXAMINATION

QUESTIONS BY MR. WATERS:

Q Do you recall being instructed by the Solicitor and defense counsel based on an agreement with defense counsel that it is memorialized in the record not to mention illegal drugs or pulling licks or any of that other stuff that we have talked about that was not in the trial testimony?

A Yes.

Q You recall that?

A Yes.

Q Okay.

THE COURT: When was this, Mr. Waters?

MR. WATERS: 3671 of the record, at the beginning they are talking with two other witnesses but there was an agreement between trial counsel and Mr. Cummings at Mr. Cummings' request to excise any mention of crack smoking and drug selling and pulling licks and all the rest.

THE COURT: This is on the record, this agreement?

MR. WATERS: Right here, "Before calling you," in fairness, right now they are talking to Joseph Fogle and Keith Rivers, which is two initial witnesses, but Mr. Bailey puts on the record that,

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1 "Before I call you all as witnesses in front of the
2 jury --"

3 THE COURT: Not too fast.

4 MR. WATERS: "We have an agreement among
5 counsel and the Court that we're not getting into
6 anything involved in any illegal drugs, cocaine,
7 anything of that nature, so I would ask that in the
8 course of your testimony that you all not mention
9 anything like that, you know."

10 Now, there is no indication in the record at
11 this point that Mr. Gadson was standing there but
12 my understanding was that was the agreement between
13 the Solicitor and Mr. Cummings.

14 THE COURT: If you want to ask him questions
15 about it.

16 MR. WATERS: I just asked him if he
17 remembered that limitation, he said he did.

18 THE COURT: Now what is your other question.

19 MR. WATERS: That's all I have.

20 MR. BROWN: And I would ask, I had asked just
21 a few seconds ago why he omitted that information.

22 THE COURT: Okay.

23 MR. BROWN: He clearly was not there for
24 that, so I don't know, because he wasn't there,
25 Your Honor, and I have asked him why he left that

JA 1823

1 part out, if that's going to be, and Your Honor,,
2 because I'm predicting the argument from the State
3 is going to be somehow or another there was steps
4 in that period of time when he wasn't there with
5 them and I'm predicting that is what they're going
6 to argue because it is crystal clear, about the
7 only unequivocal thing from this witness, he said
8 there was no sex while he was there and the
9 question has come out, the question has come out
10 that, "Was there ever a point in time when they
11 were not with you?" "Yes, when they went back to
12 give them crack." "There was a point in time you
13 were not there?" That was some of the questions.
14 I'm predicting they are going to argue there was
15 sex during that brief period of time, that that
16 makes it an important omission. My question, why
17 he omitted that, if that is in fact true, and he
18 said he didn't know why.

19 THE COURT: That's right, he said that.

20 MR. BROWN: Now it seems to be, "I don't know
21 I was there." Still --

22 THE COURT: That's right.

23 MR. BROWN: So, my question is why did you
24 omit that?

25 THE COURT: Wait a minute, I thought he has

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1 already answered that. He answered it, "I don't
2 know," then to him he said he remembered the
3 Solicitor saying that, so --

4 MR. BROWN: We have a fraud on the court,
5 Your Honor, this is classic fraud on the court.

6 MR. WATERS: Your Honor, I think it is clear
7 he probably doesn't remember a lot of this.

8 THE COURT: What if he doesn't remember one
9 way or the other? What we are having is a lot of
10 lying on the court. The witness is here, basically
11 I sense this gentleman seems to be looking at you
12 all, going along with what one or the other of you
13 is saying every once in awhile. I'm not sure what
14 the man remembers or doesn't remember, to tell you
15 the truth.

16 MR. BROWN: I have asked him direct
17 questions.

18 THE COURT: Right, and I'm not sure if he
19 remembers it or not.

20 MR. BROWN: And one question I asked is
21 whether he signed an agreement and, Your Honor, I
22 can't say this is a public policy contract but it
23 says if he doesn't cooperate or violates the
24 agreement he gets death without objection.

25 THE COURT: Exactly.

JA 1825

1 MR. BROWN: I have never seen anything like
2 that.

3 THE COURT: Exactly. What do you want me to
4 do with this witness?

5 MR. BROWN: Go back and determine whether he
6 violated this agreement.

7 THE COURT: That is not up to me. I'm here
8 dealing with the trial of the PCR of Mr. Bowman.

9 MR. BROWN: I understand that.

10 THE COURT: That is up to someone else to
11 handle.

12 MR. BROWN: For this Court it is important to
13 determine whether the prosecution --

14 THE COURT: One second. There is a lady back
15 here that's bothering me. Ma'am, would you just
16 stay still? She does her head this way, that way,
17 all kinds of motion, it is very distracting.
18 Please, ma'am, if you want to stay in the courtroom
19 don't make motions and everything else, stay where
20 you are, listen. You are welcome to do that but I
21 don't need any insinuations one way or the other.
22 I can't tell whether you're against or for Mr.
23 Bowman in your actions but, I mean, it's confusing
24 to me. Sometimes it sounds like you're against me,
25 other times you're for him. I don't want to see

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1 anything, I would rather make my decision on the
2 evidence before me.

3 But, I mean, I'm not sure, I can't make the
4 witness answer one way or the other.

5 MR. BROWN: I'm trying to make sure I
6 understand whether -- this is, this really goes to
7 the heart of the integrity of this conviction,
8 whether the prosecutor informed him to omit facts
9 in violation of this very same agreement that they
10 had --

11 THE COURT: I have been reading in the
12 transcript of the trial where they said they
13 agreed, and the question, whether he was there when
14 he said that, they would not go into issues of some
15 crack and other things, drug use.

16 MR. BROWN: Which was all clearly prejudicial
17 to Mr. Bowman, it was an obvious strategic decision
18 on the part of the defense. That is exactly the
19 exact proof that --

20 THE COURT: I'm looking for your remedy.
21 What do you want me to do?

22 MR. BROWN: I'm offering to prove in this
23 hearing that either he omitted facts --

24 THE COURT: You didn't hear my question.
25 What is it you want the Court to do at this time?

JA 1827

1 MR. BROWN: I want him to answer whether Mr.
2 Bailey allowed or encouraged him to omit that
3 critical fact.

4 THE COURT: If you want to ask him that
5 question, ask him the question but you got to stand
6 with whatever he answers.

7 MR. BROWN: Can I do it in a leading way?

8 THE COURT: Do it any way you wish to.
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REDIRECT EXAMINATION

QUESTIONS BY MR. BROWN:

Q Okay. Did the Solicitor tell you to leave that testimony out?

A No.

Q So, you omitted it on your own?

A Yes.

Q And you omitted it in violation of that agreement?

A Yes.

Q And you entered that agreement before you testified?

A Yes.

MR. BROWN: Nothing further.

THE COURT: All right. Anything else from you?

JA 1829

RECROSS EXAMINATION

QUESTIONS BY MR. WATERS:

Q So, no one told you not to talk about the crack?

A No.

Q You don't recall that?

A No.

Q Now, this has been seven years ago, right?

A Yes, it's been a while.

Q Have you had all these documents here to go through over the past seven years?

A No.

Q You're just kind of getting all this right now, is that correct?

A Yes.

Q Okay. You're just trying to answer these questions, right?

A Yes.

MR. WATERS: Nothing further, Your Honor.

THE COURT: All right, sir, you may step down. You're still under subpoena, if we have to get you back we'll get you back some other way.

Have we worked anything out with the other two people?

DEPUTY SHERIFF: Your law clerk has the

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248

1 RICKY DAVIS,

2 after being first duly sworn, testified as follows:

3 THE COURT: Now, Mr. Davis, can you grab that
4 microphone there to your right and let's go ahead,
5 if you would, and give us your name and make sure
6 everyone can hear you.

7 THE WITNESS: Ricky Davis.

8 THE COURT: Mr. Davis, speak into the
9 microphone.

10 All right, Mr. Brown.

11 MR. BROWN: May it please the Court.

12 DIRECT EXAMINATION

13 QUESTIONS BY MR. BROWN:

14 Q Mr. Davis, were you at some point during 2001
15 housed in the Dorchester County Detention Center?

16 A Yes.

17 Q Okay. And do you know a James Tawain Gadson?

18 A Yes, I do.

19 Q And was he also housed there with you?

20 A Yes.

21 Q And would that have been on A side?

22 A Yes, sir.

23 Q Okay. And at this time I'm going to show you
24 what has been marked Plaintiff's Exhibit 11. Are
25 you familiar with that document?

JA 1831

1 A Yes.

2 Q Yes? Is that your handwriting on that
3 document?

4 A Yep.

5 Q That's a yes?

6 MR. BROWN: At this time, Your Honor, we
7 would move this be introduced into evidence as
8 Plaintiff's Exhibit 11.

9 THE COURT: Could I see the document? You
10 have seen the document, Mr. Waters?

11 MR. WATERS: I have, Your Honor. For
12 purposes of this hearing and assistance to
13 plaintiff's counsel, I have no objection.

14 THE COURT: Now, what is this document, or
15 you haven't gone into that yet?

16 MR. BROWN: I haven't gotten into it.

17 THE COURT: No objection, it's in evidence as
18 Plaintiff's Exhibit 11, no objection.

19 (Ricky Davis August 6 memo marked and
20 received in evidence as Plaintiff's Exhibit
21 Number 11).

22 BY MR. BROWN:

23 Q Was that document written by you back in
24 2001?

25 A Yes.

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1 Q Yes. And that would have been August 6th?
2 A I guess.
3 Q Is that the date you wrote on the top of it?
4 A Yes.
5 Q Okay. And were you, do you remember being
6 transported to the Dorchester County Courthouse?
7 A Yes.
8 Q And that was in May of 2002?
9 A I believe so.
10 Q Okay. And that was for the trial of Marion
11 Bowman?
12 A Yes.
13 Q Okay. And you were transported there. Where
14 did you go when you arrived at the courthouse?
15 A To the holding cell.
16 Q And what happened when you were in the
17 holding cell?
18 A They asked me a couple questions and I told
19 them I didn't have nothing to do with that, and
20 that was it.
21 Q Who asked you questions?
22 A I can't remember, that was too long ago.
23 Q Marion Bowman?
24 A No.
25 Q Did you ever speak to Marion Bowman that day?

JA 1833

1 A No.

2 Q Okay. And was it an attorney?

3 A I think Marva Hardee, if I understand.

4 Q Marva Hardee came to speak to you? You said
5 you didn't have anything to do with this. You're
6 talking about what, that you didn't have anything
7 to do with?

8 A Whatever it was, I guess this case or
9 whatever.

10 Q You said, "I didn't have anything to do with
11 the case." Did you talk to her about the writing
12 of this statement?

13 A I think we did in the beginning.

14 Q And did you tell her that you wrote this
15 statement?

16 A Yes.

17 Q So, she knew that this statement was from
18 you?

19 A I'm pretty sure she did.

20 Q From your memory of that conversation did you
21 tell her that?

22 A Yes, if I'm not mistaken, yes.

23 Q Okay. And how do you know Marva
24 Hardee-Thomas?

25 A She represented me on my case.

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1 Q Okay. Now, let's talk about that first. Was
2 she a Public Defender?
3 A Yes.
4 Q She worked for the Dorchester County Public
5 Defender office?
6 A Uh-huh.
7 Q You have to answer.
8 A Yes.
9 Q And you were charged with two counts of armed
10 robbery?
11 A Yes.
12 Q I'm going to show you what has been marked
13 Plaintiff's Exhibit 12. Do those look like the
14 warrant numbers to your armed robbery case?
15 A Yes.
16 Q I'm sorry?
17 A Yes.
18 Q Okay. And it says armed robbery times two.
19 These are not two Counts from one incident, are
20 they?
21 A No.
22 Q They are saying you committed armed robbery
23 on two different times?
24 A Yes.
25 Q Okay.

JA 1835

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1 MR. BROWN: Your Honor, this is an
2 appointment order from the Clerk's office and we
3 ask that it be moved into evidence as Plaintiff's
4 12.

5 MR. WATERS: No objection, Your Honor.

6 THE COURT: In evidence, Plaintiff's 12.

7 (Attorney appointment sheet marked and
8 received in evidence as Plaintiff's Exhibit
9 Number 12).

10 BY MR. BROWN:

11 Q And she spoke with you about both of these
12 charges?

13 A Yes.

14 Q And you went to trial on one?

15 A Yes, sir.

16 Q And what happened at that trial?

17 A I got twenty years.

18 Q You got convicted and got twenty years?

19 A Yes.

20 Q All right. And what happened to the other
21 charge?

22 A I think it got dismissed, to my knowledge.

23 Q To your knowledge? Do you remember telling
24 us at the deposition about your understanding of
25 that case?

JA 1836

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1 A I can't remember.

2 Q And why do you say now that it was dismissed?

3 A I haven't heard anything about it.

4 Q Did you speak with Marva Hardee-Thomas about

5 your cases after your conviction in October of

6 2001?

7 A Which one, the first one or the second one?

8 Q Either one.

9 A Not that I remember.

10 Q You didn't speak to her about either one

11 after you were convicted?

12 A No.

13 Q Did she file notice of appeal for you?

14 A Yes.

15 Q Okay. And did she come back down and see you

16 after that?

17 A I think the last time I seen her was on my

18 PCR, that was it.

19 Q Okay. Did you all have a conversation about

20 the other case?

21 A No.

22 Q Since the date of your conviction in October

23 of 2001 have you talked to her about the other

24 case?

25 A No.

JA 1837

1 Q And, so, she never told you it was dismissed?

2 A No, not to my knowledge, not that I can
3 remember.

4 Q And did you ever receive anything in the mail
5 indicating, from the Clerk's office, that it was
6 dismissed?

7 A No.

8 MR. BROWN: Beg the Court's indulgence.

9 THE COURT: Okay.

10 Q All right. And do you recall being
11 questioned when you were deposed, which was on May
12 19th, 2008?

13 A Yes.

14 Q Okay. And you were questioned about did you
15 have any other charges outstanding when you came
16 back to court. Do you recall being asked that
17 question? Do you recall answering, "I still
18 believe I've got another pending armed robbery"?

19 MR. WATERS: Your Honor, again I think he
20 needs to --

21 THE COURT: Do you remember saying that?

22 THE WITNESS: Yes.

23 THE COURT: He said it.

24 BY MR. BROWN:

25 Q Okay. So, you told us in May of this year

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256

1 you thought it was still pending?

2 A Yes, sir.

3 Q And do you recall being asked who your
4 attorney was on that case?

5 A Yes.

6 Q And what did you say?

7 A Marva Hardee, if I'm not mistaken.

8 Q In May of 2008 you believed Marva
9 Hardee-Thomas was your attorney on a charge that
10 was still pending?

11 A I guess. I'm not sure because I ain't never
12 talked to nobody about it, so --

13 Q Okay.

14 MR. BROWN: Your Honor, for the sake of
15 dealing with some of the issues, we have some
16 information from the Clerk's file and I want to try
17 to present these.

18 Q Now, Mr. Davis, I'm going to hand you a
19 series of documents and see if you recognize any of
20 these documents. The first one would be
21 Plaintiff's 13. Does that look like a letter, do
22 you recognize that?

23 THE COURT: Do you recognize the letter?

24 A Not this one right here.

25 THE COURT: He doesn't recognize it.

JA 1839

1 Q Okay. Does it appear to be a letter
2 concerning your case?

3 THE COURT: Is it out of the Clerk's file?

4 MR. BROWN: It is, all of these are.

5 THE COURT: If it's out of the Clerk's file
6 in Dorchester County I'm sure the State has no
7 objection to it coming in.

8 MR. WATERS: No. My only objection is that
9 if he starts trying to get him to comment on it or
10 read it into the record or anything like that.

11 THE COURT: As for as putting it in evidence,
12 have you got it marked already?

13 MR. BROWN: They are marked.

14 THE COURT: You looked at them, Mr. Waters,
15 and all these are from the Clerk of Court of
16 Dorchester County's file?

17 MR. WATERS: I have no reason to think it's
18 not. I have not reviewed Ricky Davis' Dorchester
19 County file and so I guess --

20 THE COURT: Subject to later on if you find
21 out they are not, then I'll admit them in evidence
22 and let's make sure they're marked.

23 MR. BROWN: They are. That would be
24 Plaintiff's 13, 18, 19, 20, 21, 22, and 23, Your
25 Honor, will be offered in evidence subject to the

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258

1 condition that the Court --

2 THE COURT: Mr. Court Reporter, are you just
3 putting that down by typing it in or do you write
4 them down, too?

5 (Notice of appeal marked and received in
6 evidence as Plaintiff's Exhibit 13).

7 (Warrant G-326981 affidavit marked and
8 received in evidence as Plaintiff's
9 Exhibit Number 18).

10 (Arrest warrant G371372 was marked and
11 received in evidence as Plaintiff's
12 Exhibit Number 19).

13 (Sentence sheet in indictment 2001-GS-18-734
14 was marked and received in evidence as
15 Plaintiff's Exhibit Number 20).

16 (Indictment/arrest warrant G587667 was marked
17 and received in evidence as Plaintiff's
18 Exhibit Number 21).

19 (Docket sheet 2001-GS-18-106 was marked and
20 received in evidence as Plaintiff's Exhibit
21 Number 22).

22 (Docket sheet 2001-GS-18-0606 was marked and
23 received in evidence as Plaintiff's Exhibit
24 Number 23).

25 THE COURT: The ones you had before were 11

JA 1841

1 and what?

2 MR. BROWN: Were 11 and 12.

3 THE COURT: His statement that he signed,
4 what number was that?

5 MR. BROWN: That was 11?

6 THE COURT: Okay, thank you. All right.

7 BY MR. BROWN:

8 Q Now, the only thing I want to ask you about,
9 Mr. Davis, regarding these documents, if you will
10 look at numbers 22 and 23, and those appear to be
11 an armed robbery charge, don't they?

12 A Uh-huh.

13 Q That indicates they are an armed robbery
14 charge, it was dismissed?

15 MR. WATERS: Your Honor, again, he hasn't
16 asked him if he recognizes these documents.

17 THE COURT: They are in evidence now, you can
18 publish them to whoever you want to publish the
19 documents. Do you want to publish them?

20 BY MR. BROWN:

21 Q I have a simple question, whether or not
22 anybody sent you a copy of these documents?

23 A Not this one right here I'm looking at now,
24 either one of them.

25 Q Okay. So, you have never gotten an

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1 indication from the Clerk's office that the case
2 has been dismissed?

3 A No.

4 Q When you went to court in May of 2002 for
5 Marion Bowman's trial you were under the impression
6 Marva Hardee-Thomas was still your attorney?

7 A Yep.

8 THE COURT: When is it that you were tried on
9 the other charge you got twenty years for?

10 THE WITNESS: 2001, I think in May.

11 MR. BROWN: October 16th, and it's in the
12 record as well, Your Honor.

13 THE COURT: Okay.

14 MR. BROWN: On Plaintiff's 20 it says October
15 16. Two days later his other charges was dismissed
16 with leave to restore it, as a matter of fact.

17 THE COURT: So, in '01 he had no charges
18 pending against him.

19 MR. BROWN: But he didn't know it.

20 THE COURT: I understand, but he didn't know.

21 BY MR. BROWN:

22 Q Yet you were put in the cell with James
23 Tawain Gadson?

24 A Yes.

25 Q You were?

JA 1843

1 A Yes.

2 Q What did you all talk about?

3 A Bullshit, really.

4 Q You all didn't talk about your testimony in
5 this case?

6 A No.

7 Q Did he ask you about the statement that you
8 wrote, Plaintiff's 11?

9 A No.

10 Q He never mentioned to you anything that would
11 have caused you, quote, to bump heads?

12 A No.

13 MR. BROWN: Beg the Court's indulgence.

14 Q Lastly, did Marva Hardee-Thomas ever talk
15 about any conflict between representing you and
16 representing Mr. Bowman?

17 A Not -- no, not to me.

18 Q Okay. Did she ever ask you to waive any
19 conflict of interest?

20 A No.

21 MR. BROWN: Nothing further on direct.
22 Please answer any questions from the State.

23 THE COURT: Mr. Waters.
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262

CROSS EXAMINATION

QUESTIONS BY MR. WATERS:

Q Mr. Davis, how you doing today?

A All right.

Q You remember we had that deposition back in May that Mr. Brown was asking you about, correct, and we talked about that handwritten statement that you gave in the Marion Bowman case, correct? Now, when did you first meet James Gadson?

A 2001 sometime.

Q Was that in Dorchester County general population?

A Yes.

Q Okay. Did you know him well?

A Somewhat.

Q Did Mr. Gadson ever tell you that he was the one who killed Kandee Martin?

A I can't remember.

Q Did he ever tell you that the police said to just say that Black did it because his family got caught with the gun?

A You're asking me questions from 2001, I can't remember, I got my own court cases going on too, now.

Q You're under oath in court, I need you to

JA 1845

1 search your memory. Did he every tell you that?

2 A I can't remember.

3 Q Subsequently you got moved to max where you
4 met Marion Bowman, isn't that right?

5 A Yes.

6 Q Okay. And isn't it true that you have
7 testified under oath that Marion Bowman and you
8 were talking through a flap, correct?

9 A Uh-huh.

10 Q And he asked you to write this statement to
11 help out his case, correct?

12 A Yep.

13 Q Is that accurate?

14 A Yes.

15 Q Is that the truth?

16 A Uh-huh.

17 Q That is what you testified to before on the
18 deposition, correct?

19 A Yes.

20 Q Okay. So, to reiterate, Marion Bowman was
21 talking to you about your case and he is the one
22 who told you to write this thing down, correct?

23 A Yes.

24 Q Is that correct?

25 A Yes.

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1 Q Okay. So, you don't actually know anything
2 about this case other than what Marion Bowman told
3 you, is that right?

4 A Yep.

5 Q Now, you said earlier that you don't remember
6 what Gadson told you but isn't it true that in the
7 deposition you told us that you never heard Gadson
8 tell you anything about this case?

9 A Yes.

10 Q So, that's the truth?

11 A Yes.

12 Q Okay. So, James Gadson never once told you
13 the stuff that is in this letter, correct?

14 A Not that I can remember.

15 Q Okay. And it was Marion Bowman who told you
16 what was in this letter?

17 A Yep.

18 Q Correct, and he was asking you to do him a
19 favor in his case by writing this, correct?

20 A Yes.

21 Q Okay. And how was he going to help you?

22 A I can't remember, something we talked about,
23 I can't remember what it was now.

24 Q Okay. But you wrote it and gave it to him,
25 correct?

JA 1847

1 A Something like that.

2 Q Okay. You didn't notarize this and sign it
3 and give it to the police, correct?

4 A Right.

5 Q Okay. So, this was totally done at Marion
6 Bowman's instigation, correct?

7 A Yes.

8 Q That is what you testified to before,
9 correct?

10 A Yes.

11 Q Correct?

12 A Uh-huh.

13 Q All right. And you were in Dorchester County
14 lockup when Marva Hardee-Thomas came down in 2002
15 to see you about this case. Is that correct?

16 A About what case this would be?

17 Q About Marion Bowman's case.

18 A We didn't talk nothing about that.

19 Q She didn't come down and ask you about this
20 statement you had given right here?

21 A Not that I can remember.

22 Q Didn't you testify earlier she came down and
23 asked you about it and you told her just what
24 you're saying now, that Marion Bowman was the one
25 who told you to write that and they turned around

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1 and sent you back home?

2 A Oh, yes, I wasn't there then, I was at Leiber
3 at that time.

4 Q She came and saw you at Leiber?

5 A They brought me to Dorchester County.

6 Q What happened?

7 A She asked me about it and I told her what I
8 just told you.

9 Q That Marion Bowman was the one who asked you
10 to write this letter, correct?

11 A Yep.

12 Q And so she then turned around and said okay,
13 thanks, and you went right on back to Leiber where
14 you're serving your sentence?

15 A Yes.

16 Q Is that correct?

17 A Yes.

18 Q All right. When you -- you were asked some
19 questions about whether or not you thought these
20 other charges, the other armed robbery was pending
21 or not but when you got to Leiber you thought you
22 were done, you were going to have to do your twenty
23 years and that was the end of it, correct?

24 A Yes.

25 Q You didn't think you were going back for any

JA 1849

5997

1 more trials, did you?

2 A No.

3 Q And the only thing you thought you might have
4 is a PCR, correct?

5 A Yes.

6 Q Which you did have, correct?

7 A Uh-huh.

8 Q That was on the other charges. You weren't
9 under the belief you would be called back down to
10 Dorchester County to undergo trial for some more
11 armed robbery charges?

12 A No.

13 Q Okay. And you got in 2001, you're serving
14 now twenty years for armed robbery and failure to
15 stop, correct?

16 A Yes.

17 Q And then your only other prior of anything
18 major was possession of drugs, correct?

19 A Yes.

20 Q And that was back in 1997?

21 A I guess so.

22 Q Okay.

23 MR. WATERS: The Court's indulgence one
24 moment.

25 Your Honor, I have nothing further.

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1 THE COURT: Any redirect?
2 MR. BROWN: Yes, sir, briefly.
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REDIRECT EXAMINATION

QUESTIONS BY MR. BROWN:

Q If you look at Plaintiff's 11, which is your statement from August, 2001.

THE COURT: You have to give it to him.

Q Do you see where it has a notation of being notarized. That's year handwriting?

A Which one where you talking about, the bottom?

Q That's correct.

A Yes.

Q This is your handwriting down here?

A No, not the part to the bottom. I thought you were talking about where I signed it at.

Q That notary portion was written by Marva Hardee-Thomas, wasn't it?

A I guess. I don't know who wrote that.

Q She came down and got you to notarize this statement, or asked you to have it notarized?

A It has handwriting on the bottom, ain't nobody signed it at the bottom.

Q Somebody wrote in this notary portion, didn't they?

A Obviously, it is on the bottom of the paper.

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270

1 Q It wasn't you?

2 A No.

3 Q And it was Marva Hardee-Thomas?

4 A I guess. I don't know who wrote that bottom
5 part.

6 Q Now, you don't recall being asked about
7 Tawain Gadson telling you that he shot someone, in
8 the deposition?

9 A Not that I can remember.

10 Q Do you remember being asked that at the
11 deposition?

12 A Not that I can remember.

13 Q You don't remember being asked that?

14 MR. BROWN: Your Honor, at this time I would
15 mark as Plaintiff's Exhibit 24, it is still sealed
16 and signed.

17 THE COURT: Okay.

18 MR. BROWN: May I open it?

19 THE COURT: Yes. Just let me open it.

20 You're offering the original deposition here of
21 Ricky Davis taken on the 19th of May, 2008, 10:30
22 in the morning at Leiber Correctional. What page
23 are you going to?

24 MR. BROWN: Page 21, Your Honor, line 10.

25 THE COURT: All right. Now what's your

JA 1853

6001

1 question you want to ask him?

2 MR. BROWN: Does he recall being questioned
3 in the deposition about what Tawain Gadson told
4 him. The AG has just asked whether Tawain Gadson
5 told him he had shot this girl. He said no today.
6 That is contradicted by the answer then.

7 THE COURT: The Court is looking at the
8 answer then. Does the State contend it was taken
9 down wrong?

10 MR. BROWN: No, I believe --

11 THE COURT: I'm talking about the State.

12 MR. WATERS: No, I don't contend it was taken
13 down wrong but I think his answer isn't in context.

14 THE COURT: I'm going to read it myself.
15 Question on line 10 was, "So, he never told you
16 that he was the one who shot the victim and that
17 the police told him to blame it on Black, or Marion
18 Bowman?" Answer, line 13, "I mean, I can't, like I
19 say, this happened like, what, six years ago, I
20 can't even remember. I had actually went down
21 now."

22 All right. That is what he said back in May.
23 Sir, do you remember saying that?

24 THE WITNESS: Yes, I remember saying it.

25 BY MR. BROWN:

JA 1854

6002

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1 Q All right. You just told the Attorney
2 General that Tawain Gadson didn't say that he shot
3 the girl.
4 A That is what it says there, no.
5 Q But in May you say you don't remember?
6 A That is what I'm saying now, I don't
7 remember. That's like six, so many years ago, I
8 don't remember.
9 Q I just want to know the truth, that's all I'm
10 trying to find out is do you not remember whether
11 Tawain Gadson told you to write that or told you he
12 shot the girl?
13 A I'm pretty sure he didn't.
14 Q Huh?
15 A I'm pretty sure he didn't.
16 Q Did?
17 A Did not tell me that.
18 Q Do you remember?
19 A I mean, no, not really.
20 Q You can't remember whether he told you that
21 or not?
22 A No.
23 Q But you wrote down in August of 2001 that he
24 did?
25 A Like I told you, like I told him in the

JA 1855

6003

1 beginning, that is what he wanted me to say.

2 Q You were housed in the A side in Dorchester
3 jail with Tawain Gadson, weren't you?

4 A Yes.

5 Q And that's in that statement as well, isn't
6 it?

7 A I'm pretty sure it is, yes.

8 Q And a statement like that would certainly
9 help Mr. Bowman, wouldn't it?

10 A Yes, I guess so, I don't know.

11 Q If Tawain Gadson actually confessed to the
12 shooting to him that would help him, wouldn't it?

13 A I'm pretty sure it would.

14 Q If you were on trial for a crime, if somebody
15 else said they had done it, you would want that?

16 MR. WATERS: Your Honor, I object.

17 THE COURT: He answered. I understand the
18 answer.

19 MR. BROWN: Nothing further of this witness.

20 THE COURT: Recross again?

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JA 1856

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RECROSS EXAMINATION

QUESTIONS BY MR. WATERS:

Q You were asked a little bit on Plaintiff's Exhibit 11, which is the statement, about who wrote this notary stuff at the bottom, and you don't remember. Is that what you testified?

A Yes.

Q Okay. But if Marva Hardee-Thomas told you she had written that there when she came to see you that is when you told her Marion made you write this and you don't about this case, right?

A I guess.

Q You didn't ultimately have this signature notarized, correct?

A Yes.

Q Because it's not true?

A Yes.

Q Now, you were asked about whether or not you remember or don't remember what James Gadson said but one thing you do remember is Marion Bowman is the one who asked you to write this?

A Yes.

Q And he's the one who told you the information in this statement?

A Uh-huh.

JA 1857

6005

1 Q And that was when both of you all were in
2 super max talking to one another through a flap?

3 A Yes.

4 Q At Dorchester County?

5 A Yes.

6 Q All right. Now, you were shown a little bit
7 from the deposition, and just for context, I'm
8 going to show you page 21 of this deposition.

9 THE COURT: Now, is this the deposition we
10 just read from?

11 MR. WATERS: Yes, sir. It's actually the
12 answer immediately preceding the one that Mr. Brown
13 asked for.

14 THE COURT: Let me just show it to you, sir.
15 This is when you were there in May, someone was
16 typing everything you all said and that is what a
17 deposition is, but I'm going to hand it to you,
18 that is page 21. Where the letter A is, that
19 letter says that's your answer. The letter Q is
20 where someone asked you a question.

21 BY MR. WATERS:

22 Q And beginning with line 6, do you recall
23 testifying, when you were asked did Tawain Gadson
24 ever tell you he was the one who shot -- you said,
25 I quote, "Like I said, I mean, I talked to him

JA 1858

6006

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1 briefly but it ain't been nothing like, I don't
2 think it been nothing pertaining to the case or
3 anything like that there."

4 Is that correct?

5 A Uh-huh.

6 THE COURT: Hand it back to me.

7 Q That is what you're saying now today, is that
8 correct?

9 A Yes.

10 Q All right. Let's look over on page 12 of
11 that deposition.

12 THE COURT: Do you see those numbers there on
13 the side? He might refer to the line number, just
14 go to that number he refers to.

15 Q I'm going to point you to line 19, and that
16 was your answer there where you said, when you were
17 asked if you remembered speaking to Gadson about
18 this case you stated, "Me and Gadson ain't never
19 really talked about this case, not like that, not
20 until he got here. But once we got here he had
21 been like he had done get his time in.

22 Now, do you remember saying that?

23 A Uh-huh.

24 Q Is that correct?

25 THE COURT: Answer yes or no.

JA 1859

6007

1 A Yes.

2 Q When you said, "We didn't really talk about
3 this until we got here," we were taking that
4 deposition at Leiber, correct?

5 A I believe so, yes.

6 Q All right. So, when you were saying here you
7 were talking about once Gadson came to Leiber, too,
8 that is when you all talked?

9 A Yes.

10 Q And that was long, long after. When this
11 statement right here was given you all were in
12 Dorchester then, correct?

13 A Yes.

14 Q Okay. All right, let's turn over to page 13,
15 the very next page, and look at line 22 where you
16 stated, "But I ain't no, you know what I'm saying,
17 about the who did what part."

18 Do you recall that?

19 A Yes.

20 Q That's correct, isn't it?

21 A Yes.

22 Q You were saying you don't really know who did
23 what in this case, is that right?

24 A Yes.

25 Q Okay.

JA 1860

6008

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1 MR. WATERS: Your Honor, I have nothing
2 further on recross.

3 THE COURT: Anything else of this witness
4 that hadn't been asked already?

5 MR. BROWN: Well, I just need to clear up one
6 thing.

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REDIRECT EXAMINATION

QUESTIONS BY MR. BROWN:

Q Can you remember whether Tawain Gadson told you that or not?

A No, I can't.

Q I hate to go back and forth like this.

THE COURT: All right, what else?

Q There is an item, did you ever write notes to Rebecca Richardson?

A No.

Q Do you know who that is?

A No.

THE COURT: I don't either, sir. Do you know who that is?

THE WITNESS: No.

MR. WATERS: Your Honor, I believe this is beyond the scope of redirect. I didn't ask anything about that.

THE COURT: What's it about?

MR. BROWN: It's got some notes about Ricky Davis on that, I was wondering if they were his notes.

MR. WATERS: They are clearly not his, the handwriting isn't alike. I didn't ask him anything about that.

JA 1862

6010

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1 THE COURT: He says no.

2 MR. BROWN: I will take the concession they
3 were not written by Ricky Davis. Nothing further.

4 THE COURT: Let me ask you, sir --

5 MR. WATERS: Your Honor, I didn't get a
6 recross.

7 THE COURT: On this thing? What's her name?

8 MR. BROWN: Rebecca.

9 MR. WATERS: He asked him again about whether
10 or not he remembered or didn't remember.

11 THE COURT: Then you are going to ask him, he
12 says he doesn't, didn't talk to him or he doesn't
13 remember. The person said, two things he said he
14 didn't do, he didn't talk to Gadson about this and
15 Gadson didn't tell him to write, didn't tell him he
16 killed the person, that Bowman told him to write
17 the note, help him out. He also said he doesn't
18 remember whether Gadson, and then he also says he
19 don't think he did this. So, I mean, you've got
20 several things. We can go back and forth each
21 time.

22 MR. WATERS: The one things he is sure of he
23 was talking to Marion Bowman at super max and
24 Marion Bowman gave him this information and asked
25 him to write this as a favor to him.

JA 1863

1 THE COURT: He said that. He has not said
2 anything to take away from that. Did he say Mr.
3 Bowman --

4 MR. WATERS: That is all I was going to
5 reiterate.

6 THE COURT: Do you have any other questions?

7 MR. BROWN: I was just trying to hear what
8 you said.

9 THE COURT: Mr. Bowman asked him to write the
10 statement.

11 MR. BROWN: Yes, sir, we understand that.

12 THE COURT: The only issue is going back and
13 forth on the issue whether or not he remembers Mr.
14 Gadson told him he did the murder or not, he said
15 one time no, he didn't, "I don't think he did, I
16 can't remember, I'm pretty sure he didn't." He has
17 given all those type answers.

18 MR. BROWN: I agree that is the issue, too.

19 THE COURT: All right. I said that is what
20 he said. Okay, you can step down, sir.

21 MR. BROWN: Thank you.

22 (Witness excused).

23 MR. BROWN: Subject to the Court's
24 instruction about keeping him available.

25 THE COURT: Yes, let's keep him available,

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282

1 Sheriff.

2 MR. BROWN: But he can go back to Leiber?

3 THE COURT: Yes.

4 (Witness excused).

5 MR. BROWN: Your Honor, at this time we call
6 David Collins, he is a Richland County Sheriff's
7 Deputy instructed to be here at 11:00 o'clock. I
8 don't know if he is here. We do have other
9 witnesses.

10 THE COURT: I'm sorry, one question. Could
11 you ask the last witness to come back in, Officer,
12 would you all get Mr. Davis back in.

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JA 1865

1 RICKY DAVIS,
2 having been previously sworn, testified as follows:

3 All right, let's come to order, please. Come
4 to order, Mr. Waters, Mr. Brown.

5 One thing I forgot to ask you, Mr. Davis,
6 when Miss Hardee-Thomas came to see you at Leiber,
7 I think?

8 THE WITNESS: Yes.

9 THE COURT: This is after you had been
10 convicted of a robbery. Now, did you know she was
11 involved in representing Mr. Bowman?

12 THE WITNESS: No, sir.

13 THE COURT: Do you know why she came to see
14 you?

15 THE WITNESS: They took me to Dorchester
16 County to see her.

17 THE COURT: I'm sorry, they took you to
18 Dorchester? She came down to the county jail to
19 see you?

20 THE WITNESS: Yes.

21 THE COURT: Did you know why she came to see
22 you?

23 THE WITNESS: Not until she came in and
24 started explaining to me.

25 THE COURT: That was about the note that you

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1 had written?

2 THE WITNESS: Yes.

3 THE COURT: And you told her Mr. Bowman asked
4 you to write it?

5 THE WITNESS: Yes.

6 THE COURT: Did she ask you whether or not it
7 was true or not?

8 THE WITNESS: I can't remember. I don't
9 think she did. Once I told her that, I told her I
10 didn't have nothing to do with it, she let me go
11 from there.

12 THE COURT: What do you mean, what did you
13 mean by the term, "I didn't have anything to do
14 with it"?

15 THE WITNESS: That he told me to write it and
16 that was it.

17 THE COURT: Okay. So, did you tell her
18 whether it was true or not?

19 THE WITNESS: I can't remember. I think I
20 probably told her it wasn't.

21 THE COURT: That it what?

22 THE WITNESS: That it wasn't.

23 THE COURT: That it was not true?

24 THE WITNESS: Uh-huh.

25 THE COURT: Now, when she came to see you,

JA 1867

1 you had been convicted of robbery and you were
2 serving your twenty years?

3 THE WITNESS: Yes.

4 THE COURT: You told them, in response to one
5 of the attorneys, that you had thought the other
6 charges may have been gone, then you weren't sure,
7 then you said maybe they were still pending.

8 When she came down to see you did you ask her
9 anything about the other charges pending?

10 THE WITNESS: No.

11 THE COURT: Did she say anything to you about
12 the other charges pending?

13 THE WITNESS: No. The reason why I thought
14 that, every time I would look, it show it in the
15 computer, it shows I have a pending charge, so I
16 thought it was still pending, to my knowledge.

17 THE COURT: Well, at the time that you saw
18 her at Dorchester after they brought you back from
19 Leiber had you looked at the computer and saw it
20 was still pending?

21 THE WITNESS: I believe so, yes.

22 THE COURT: Well, why didn't you ask her
23 about it?

24 THE WITNESS: It just didn't concern me right
25 then.

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1 THE COURT: Why didn't it concern you?

2 THE WITNESS: Because we was talking about
3 this Bowman case at the time.

4 THE COURT: All right. So, neither you nor
5 she mentioned anything about it?

6 THE WITNESS: Which we found it out it wasn't
7 pending, that's right, in actuality it wasn't
8 pending.

9 MR. BROWN: Actually it has been dismissed
10 and later restored.

11 THE COURT: All right, restored. In any
12 event, it had actually been dismissed, neither you
13 nor she knew that, or you didn't know it, anyway?

14 THE WITNESS: Yes.

15 THE COURT: But you all, nobody brought it
16 up?

17 THE WITNESS: No.

18 THE COURT: So, it didn't concern you?

19 THE WITNESS: No, not really, not at the
20 time.

21 THE COURT: All right. Have you got any
22 questions about my questions?

23 MR. WATERS: I do.

24 THE COURT: Mr. Brown, you get to go first.

25 MR. BROWN: Okay.

JA 1869

REDIRECT EXAMINATION

QUESTIONS BY MR. BROWN:

Q The first time you talked to Marva Hardee-Thomas about this case was at Marion Bowman's trial?

A I believe so, yes.

Q So, she didn't take down that statement from you?

A No.

MR. BROWN: I hate to open up a can of worms.

THE COURT: She didn't what, now?

Q She didn't dictate the statement, I know you wrote it, but she didn't go down there and dictate the statement, because I think there was a question about whether or not you gave that, you gave that written statement to Marva Hardee-Thomas?

A I gave it to Bowman.

Q You gave this paper to Bowman?

A Yes.

Q It is not like you gave it to Marva Hardee-Thomas?

A Huh-uh.

Q I'm sorry, you have to answer.

A No, I didn't.

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288

1 Q So, you didn't give the statement to Marva,
2 she came and talked to you about it but it wasn't
3 until May, 2002, was it?

4 A I believe, I believe that's the date, I
5 guess.

6 Q During his trial?

7 THE COURT: Right. That was clear. I'm not
8 sure --

9 MR. BROWN: He had asked whether he had given
10 a statement to Marva Hardee-Thomas.

11 MR. WATERS: I was asking about --

12 THE COURT: The Court understands this. If
13 anyone has some different understanding, the Court
14 understands Mr. Bowman had the statement, the Court
15 assumes Mr. Bowman gave it to Marva Hardee-Thomas
16 and Miss Marva Hardee-Thomas had him brought from
17 Leiber to Dorchester to court for trial or just
18 before the trial and talked to him about it.

19 Is that everybody's understanding?

20 MR. BROWN: No, sir.

21 THE COURT: What is it?

22 MR. BROWN: We don't agree the statement went
23 from Marion Bowman to his lawyers.

24 THE COURT: Okay. Do we agree the testimony
25 is that the witness here says he gave it to Mr.

JA 1871

1 Bowman?

2 MR. BROWN: We heard him say it, we don't
3 agree with that.

4 THE COURT: He said that. All right.

5 MR. BROWN: That is not where we got it from.

6 THE COURT: The testimony is, of Mr. Davis,
7 is he gave it to Mr. Bowman and the testimony of
8 Mr. Davis is that even during the trial of Mr.
9 Bowman or around that time Miss Hardee, Miss
10 Thomas, Hardee-Thomas, came to Dorchester where he
11 had been brought from Leiber, had a copy of the
12 statement and talked with her about it.

13 MR. BROWN: He thought she represented him on
14 the charge still pending.

15 THE COURT: No, no, listen. One statement at
16 a time.

17 MR. BROWN: Yes, I agree with that.

18 THE COURT: Now, I asked him about that, with
19 the charges. He has answered that like he did a
20 couple other things, three or four different ways,
21 but he last answered it three or four different
22 ways.

23 MR. WATERS: That was going to be what my
24 question was, because he told me clearly that when
25 he got twenty years in Leiber he thought he was

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1 done.

2 THE COURT: That is all in the record, what
3 he said about that. I was just curious as to if in
4 fact any uncertainty he had with the other
5 questions, why he wouldn't ask his lawyer about a
6 charge that he thought was pending. But that's why
7 I wanted to, really the only purpose I brought him
8 back for was to ask him at the time she came to see
9 him if he thought the charge was pending why would
10 he not ask her about it, and he didn't.

11 All right, anything else from anyone?

12 MR. WATERS: No, sir, Your Honor.

13 MR. BROWN: No, sir.

14 THE COURT: All right. Okay, you may step
15 down.

16 (Witness excused).

17 THE COURT: Now, do you know whether the
18 other witness is here yet?

19 MR. BROWN: I have his cell phone number, a
20 Richmond County Sheriff's deputy.

21 MR. WATERS: I told Mr. Collins the witnesses
22 are sequestered, he may be waiting out in the hall.

23 MR. BROWN: He was to be here at 11:00
24 o'clock, he is a ballistics person. My expert from
25 Pittsburg's plane has already touched down in

JA 1873

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1 at least two of them were expelled casings from the
2 same firearm, number 52. We will show the Court
3 through the course of this trial that we heard
4 testimony yesterday from Mr. Gadson's mouth that he
5 in fact fired a gun in the location where the other
6 casings were found, were collected.

7 BY MR. BROWN:

8 Q And my question is, if Tawain Gadson fired
9 the gun that he opines fired at least two of those
10 casings, 46 through 49, then by the associative

11 property that he mentions isn't it true at some
12 point Tawain Gadson fired the same gun that also
13 fired four, five, six, seven, eight and thirteen?

14 A My studies showed that those items that you
15 mentioned were all fired by one gun. The fact
16 there are items that matched that gun collected
17 from two different locations, I can't state the
18 significance of that. All I can state is those
19 items came from that gun, I cannot state who fired
20 the gun when they were fired.

21 Q And that is fine. I want to, my question is
22 pretty simple, I know it is long winded, but I'm
23 not going to sit up here and say yes or no only,
24 but by the associative property, if we know, if it
25 is known that Tawain Gadson fired the items, I want

1 HIRAM JOHNSON,
2 after being first duly sworn, testified as follows:

3 THE COURT: All right, Mr. Johnson, if you
4 would, pull that microphone, you see it to your
5 right, pull it around just so we can make sure we
6 can hear you.

7 Give me your full name, sir.

8 THE WITNESS: Hiram Johnson.

9 THE COURT: H-i-r-a-m?

10 THE WITNESS: Yes, sir.

11 THE COURT: Your witness, Mr. Sinclair.

12 DIRECT EXAMINATION

13 QUESTIONS BY MR. SINCLAIRE:

14 Q Mr. Johnson, how old are you?

15 A 27.

16 Q And are you related to Tawain Gadson?

17 A Yes.

18 Q How are you related to him?

19 A Cousin.

20 Q His daddy is your uncle?

21 A Yes.

22 Q You're related to Marion Bowman as well?

23 A Yes.

24 Q And how are you related to him?

25 A His mom is my aunt.

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1 Q What about Darien Williams, are you related
2 to him?

3 A His mother is my aunt.

4 Q Do you remember back on February the 22nd,
5 2001, being transported by Chief Boone Walters to
6 the Branchville Police Department?

7 A I don't remember.

8 Q Do you remember meeting with Detective Coker
9 on February 22nd at 4:27 in the afternoon?

10 A I remember meeting a detective at a carwash.

11 THE COURT: What are we talking about?

12 MR. SINCLAIRE: The carwash would have been
13 April 5th, Your Honor.

14 THE COURT: What year?

15 MR. SINCLAIRE: 2001.

16 BY MR. SINCLAIRE:

17 Q Do you remember meeting with Detective Coker
18 at the Branchville Police Department after being
19 transported there by Boone Walters February 22nd,
20 six days after this incident?

21 A No. I remember meeting him at Simpson.

22 Q All right. So, let me ask you some specific
23 questions, then. Do you remember telling, on
24 February 22nd, Detective Coker that you saw Marion
25 on February the 16th wearing black jeans and a

JA 1876

1 light colored shirt? Do you remember telling
2 Detective Coker that?

3 A I remember writing a statement, I believe I
4 wrote a statement when we was at Simpson carwash.

5 Q Okay.

6 A But I think, when I wrote it I think I was at
7 Simpson carwash. I remember meeting, Boone taking
8 me to the police station.

9 Q We're going to get to the April 5th statement
10 in a minute. Just so the record is clear, I would
11 ask you this specific question, if that's okay. Do
12 you remember telling Detective Coker Marion was
13 wearing black jeans and a light colored shirt on
14 February 16, 2001?

15 A Was that the day of the incident?

16 Q Yes.

17 A Yes.

18 Q Do you remember telling Detective Coker you
19 drove to the Allen Murray's Club with Marion,
20 Tawain and Darien? This is an oral statement you
21 gave on February 22nd.

22 A An oral statement?

23 Q Correct.

24 A Where were we?

25 Q At the Branchville Police Departmnet.

6254

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1 Actually you were sitting in one of the courtrooms
2 there.

3 A Okay. Well, I don't remember that.

4 Q So, is it safe to say you don't remember
5 telling them you rode with Marion, Tawain and
6 Darien, you also don't remember telling them what
7 car you rode to the club in?

8 A It's in my statement but I don't remember him
9 transporting me. What I'm telling you, I don't
10 remember him transporting me to the police station.
11 I wrote a statement but I'm thinking I wrote a
12 statement at the Simpson carwash when we met in
13 April.

14 Q You're correct about that. We're going from
15 the notes Detective Coker took when he met with you
16 on February 22nd, 2001, a couple months before your
17 written statement.

18 A I don't remember.

19 Q And, so, you didn't tell Detective Coker what
20 car you and Marion and Tawain and Darien rode to
21 the club in?

22 A What I'm telling you is I remember talking to
23 Mr. Coker, Koger, whatever his name is, in April.
24 As for as my memory can go back, I do have a
25 statement that I'm pretty sure you have read it but

JA 1878

1 being transported, I don't remember it, so --

2 Q Well, let me ask you a couple more questions
3 about your February 22nd conversation you had with
4 Detective Coker. February 22nd, 2001, where you
5 told Detective -- do you remember telling Detective
6 Coker you saw Marion with a gun in his lap?

7 A It's in my statement?

8 Q I'm talking about the conversation you had on
9 February 22nd, two months before your written
10 statement. Do you remember telling tell Detective
11 Coker, "I saw Marion with a gun in his lap"?

12 A I don't remember.

13 Q You don't remember telling him what kind of
14 gun it was either, do you?

15 A I don't remember. I remember writing a
16 statement in April.

17 Q All right. Shortly after your meeting with
18 Detective Coker do you remember them giving you a
19 ride back to your house in search of some gloves?

20 A I don't remember.

21 Q You do not remember 5:35 p.m. on February
22 22nd giving Detective Miller the gloves you and he
23 and Detective Coker had talked about --

24 A I don't remember.

25 Q -- back at your house? Do you have any

6256

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1 recollection of that?

2 A Huh-uh (negative).

3 Q Were you ever arrested for your involvement
4 in this case?

5 A No, sir.

6 Q Did you ever get a lawyer as a result of your
7 involvement in this case?

8 A No, sir.

9 Q Does the name John O'Leary ring a bell with
10 you?

11 A Yes, sir.

12 Q Who is he?

13 A A lawyer I had in an incident where I got
14 shot by a cop and I had, he was representing me in
15 that case and this came up prior to when he was
16 already representing me but as for as hiring him
17 for this right here, no, he was already hired.

18 Q Okay. So, it's safe to say when you and I
19 met in your deposition and I asked you if you had a
20 lawyer during the time in question and you said
21 your lawyer was John O'Leary?

22 A Yes, he was my lawyer prior to this incident
23 happened and he came to the trial whenever it was
24 just to sit in and hear the case but he wasn't
25 hired for me to be represented in this right here.

JA 1880

1 That is what I'm telling you, he was hired maybe
2 six months before, prior to this.

3 Q Okay. And do you know, did you pay John
4 O'Leary for his assisting you and his sitting with
5 you during your testimony in the trial of Marion
6 Bowman?

7 A No.

8 Q Was he paid by the Public Defender
9 Corporation?

10 A I wouldn't know. That is something you have
11 to ask him or the Public Defender, they do things
12 behind closed doors.

13 Q All right. You mentioned just briefly, I
14 think a second ago, that John O'Leary represented
15 you in a lawsuit as a result of the injuries you
16 sustained?

17 A Yes.

18 Q Okay. And what agency, what law enforcement
19 agency was it that Mr. O'Leary was suing on your
20 behalf for injuries you sustained?

21 A Orangeburg.

22 Q Orangeburg County Sheriff's Department?

23 A Yes.

24 Q Okay. That is where Chief Larry Williams
25 works?

6258

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1 A Does he? He's the sheriff.

2 Q All right.

3 Q Do you remember when your case was settled
4 against Orangeburg County Sheriff's Department?

5 A No.

6 Q Did Orangeburg County Sheriff's Department
7 through the insurance defense fund pay you money
8 during the pendency of Marion Bowman's trial?

9 A No.

10 Q Was it before he was put on trial or after he
11 was put on trial?

12 A After. About what?

13 Q When did you get your money?

14 A We all know lawsuits take time. I got shot
15 in 2000, I'm pretty sure. You have some paperwork
16 where I got shot, November 2nd, 2000, and we all
17 know lawsuits take maybe five, maybe more years, so
18 I'm pretty sure it was after, you know.

19 Q You have no recollection today of whether you
20 were paid before your testimony in the Marion
21 Bowman case. Is that correct?

22 MR. WATERS: Your Honor, I object at this
23 point.

24 A I don't believe this is --

25 THE COURT: Wait a minute, sir.

JA 1882

1 MR. WATERS: I don't believe it is relevant
2 to any issue in the case.

3 THE COURT: Are you planning to connect this
4 at all?

5 MR. SINCLAIRE: Judge, I just found it
6 interesting he is going to be a witness,
7 effectively for the Orangeburg County Sheriff's
8 Department and he's about to, he's suing them for
9 money and they are giving him money, so there is
10 some money changing hands for whatever reason.

11 THE COURT: Among us chickens we do know
12 insurance companies were involved.

13 MR. SINCLAIRE: Correct.

14 THE COURT: Are you saying he got money from
15 the fund or the county or the state or city or
16 whatever, there wasn't an insurance company
17 involved?

18 MR. SINCLAIRE: At least in his mind he would
19 get money from the agency that injured him. I
20 think it's relevant to whether he thought --

21 THE COURT: He doesn't remember when he got
22 the money. Do you want me for whatever reason to
23 note that lawsuit and he did recover?

24 Did you recover a money amount?

25 THE WITNESS: Yes, sir.

6260

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1 THE COURT: He recovered money.

2 MR. SINCLAIRE: Can we ask how much money he
3 recovered?

4 THE WITNESS: You don't need to know that.
5 He told me not to discuss it.

6 THE COURT: If the judge told him not to
7 discuss it --

8 THE WITNESS: It was court order.

9 MR. SINCLAIRE: Your Honor, it's the timing,
10 not the dollar amount.

11 THE WITNESS: Last year.

12 MR. SINCLAIRE: So, you did --

13 THE COURT: Wait, listen, you all probably
14 need to talk before he starts questioning. It is
15 kind of, I'm not sure the court reporter can take
16 down what you're saying or --

17 MR. BROWN: I'm sorry.

18 MR. WATERS: Your Honor, my objection is one
19 of relevance and I would also object to any attempt
20 to amend on the fly to assert a new ground that
21 counsel should have cross-examined Hiram Johnson on
22 his pending suit against Orangeburg County. I
23 think it would be inappropriate. Since it hasn't
24 been pled, this line of questioning is irrelevant,
25 I move to strike it.

JA 1884

6261

1 THE COURT: I will let you ask a couple
2 things about it.

3 MR. SINCLAIRE: Judge, we took his deposition
4 back on August 26, 2008, and just to quote, where I
5 had it written, I asked him if he had a lawyer
6 during the pendency of this action. At the time it
7 was my understanding John O'Leary was representing
8 him in the Marion Bowman case. This is the first I
9 heard he had a financial interest in it. He had a
10 potential bias for testifying for the State if the
11 State is going to be paying him money.

12 MR. WATERS: If anything, he wasn't suing the
13 State, they weren't adversaries at the time.

14 THE COURT: In any event, are we saying at
15 the time he testified in the trial he had a lawsuit
16 pending against the Sheriff's Department of
17 Dorchester County.

18 MR. SINCLAIRE: That is my understanding,
19 Orangeburg.

20 THE COURT: Orangeburg? You made that point.

21 MR. SINCLAIRE: Right.

22 THE COURT: What else do you need to ask him?
23 He had a lawsuit against Orangeburg County
24 Sheriff's Department.

25 MR. SINCLAIRE: Orangeburg County Sheriff's

JA 1885

6262

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1 office, chief of which is Larry Williams, one of
2 the major players in the Marion Bowman case.

3 THE COURT: All right. So, what else do you
4 need to ask him?

5 THE WITNESS: I'm wrong, sir, it was Papa
6 Johnson at the time.

7 THE COURT: Papa Johnson, he said was Chief
8 of Police.

9 MR. SINCLAIRE: Thank you, Judge.

10 BY MR. SINCLAIRE:

11 Q Was your lawsuit filed in federal court?

12 A Huh?

13 THE COURT: I don't think he knows. Do you
14 know if it was state court or federal court?

15 THE WITNESS: I don't know.

16 THE COURT: He doesn't know.

17 THE WITNESS: I think it was both. It didn't
18 make it to trial.

19 MR. BROWN: Your Honor, I think --

20 THE COURT: Mr. Sinclair has this witness.

21 MR. SINCLAIRE: Judge, the significance of
22 that is --

23 THE COURT: Do you have a question? This is
24 not argument, this is a witness.

25 BY MR. SINCLAIRE:

JA 1886

1 Q Let me ask you something. Did John O'Leary
2 change the named principal from Chief Larry
3 Willaims to whatever that guy's name was, Papa
4 somebody?

5 MR. WATERS: I object on relevance.

6 A Really this doesn't have nothing to do with
7 anybody but I got shot November 2nd, 2000, Larry
8 Williams didn't come in as sheriff until January,
9 2001.

10 Q Okay. So, you were suing Larry Williams in
11 federal court?

12 THE COURT: Why don't you get John O'Leary up
13 here to say all this?

14 THE WITNESS: Yes.

15 MR. SINCLAIRE: Thank you, Judge.

16 THE COURT: Any other questions?

17 BY MR. SINCLAIRE:

18 Q Mr. Johnson, did you have pending charges in
19 Dorchester or Orangeburg County at the time of this
20 arrest?

21 A Yes.

22 Q What were those charges?

23 MR. WATERS: Your Honor, again I object to
24 the relevance.

25 A I don't remember.

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1 THE COURT: He doesn't remember. Are you
2 talking about at the time of the incident involved
3 here?

4 MR. SINCLAIRE: Yes.

5 THE COURT: He doesn't remember. He said he
6 had charges, he doesn't remember what they were or
7 what.

8 THE WITNESS: No.

9 BY MR. SINCLAIRE:

10 Q Were they burglary charges or receiving
11 stolen goods charges?

12 A I don't know what it was.

13 Q But you had charges pending in Dorchester
14 County?

15 A No, never had charges.

16 Q Charges pending in Orangeburg County at the
17 time of Marion Bowman's trial?

18 A Yes, I had a lawsuit. I got shot November
19 2nd of 2000.

20 Q I'm not talking about your civil lawsuit, I'm
21 talking about criminal charges pending where you
22 had been arrested for something.

23 A Never been arrested since I got shot in
24 November, I'm telling you, November 22nd. After I
25 got shot, never been arrested a day in my life in

JA 1888

1 Orangeburg. I had charges but I don't remember
2 them, they never arrested me because of the
3 condition I was in.

4 Q All right. Did you have charges, did you
5 have criminal charges pending, whether they arose
6 before or after you were shot, did you have
7 criminal charges pending?

8 A Yes. I don't remember --

9 Q Yes, you had them but you don't know what
10 they were?

11 A Uh-huh.

12 Q Okay. And that was in Orangeburg County,
13 wasn't it?

14 A Yes.

15 MR. SINCLAIRE: Beg the Court's indulgence,
16 Your Honor.

17 Q Okay. Do you remember on April 5th giving a
18 written statement at 2:15 in the afternoon to
19 Detective Alvin Coker?

20 A Yes.

21 Q Prior to giving that statement do you
22 remember Detective Coker reading you your Miranda
23 rights?

24 A I'm not sure.

25 Q All right. Let me show you what has been

6266

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1 marked Plaintiff's Exhibit Number 32 and ask you if
2 you recognize your signature and initials on that
3 form?

4 A Yes.

5 Q So, those are your initials by each of your
6 Miranda warnings and that is your signature under
7 the waiver of rights. Is that correct?

8 A Yes.

9 MR. SINCLAIRE: Plaintiff's 32 into evidence,
10 Your Honor?

11 THE COURT: Can I see that again?

12 MR. SINCLAIRE: Absolutely.

13 THE COURT: And this is from Officer Coker of
14 Dorchester County Sheriff's Department, okay. All
15 right, any objection to 32?

16 MR. WATERS: No objection, Your Honor.

17 THE COURT: 32 in evidence.

18 (Hiram Johnson Miranda rights waiver marked
19 and received in evidence as Plaintiff's
20 Exhibit Number 32).

21 BY MR. SINCLAIRE:

22 Q And after Sergeant Coker of the Dorchester
23 County Sheriff's office read you your Miranda
24 rights did you give him a written statement?

25 A Yes.

JA 1890

1 Q I hand you now what has been marked
2 Plaintiff's Exhibit Number 33. Do you recognize
3 this statement that bears your signature at the
4 bottom?

5 A Yes.

6 MR. SINCLAIRE: Your Honor, I move
7 Plaintiff's Exhibit 33 into evidence at this time.

8 MR. WATERS: No objection, Your Honor.

9 THE COURT: All right, 33 in evidence. After
10 he does that hand it back to me so I can read it.

11 (Hiram Johnson statement marked and received
12 in evidence as Plaintiff's Exhibit 33).

13 BY MR. SINCLAIRE:

14 Q I will let you hold a copy of it in case
15 there is any question you might have about it.

16 In that statement, Mr. Johnson, do you
17 remember telling Sergeant Coker that you went to
18 E-Z Horizon in Yolanda's blue car?

19 A Yes.

20 Q Do you remember telling him you took Kandee's
21 car to the Allen Murray Club?

22 A No. I remember telling him I rode in
23 Kandee's car to Allen Murray, I don't remember
24 telling him I took Kandee's car to the club.

25 Q Okay. And who else was with you in the car

6268

538

1 that you rode to the Allen Murray Club in?

2 A Darien, Marion and Tawain.

3 Q Darien Williams, Marion Bowman and Tawain
4 Gadson?

5 A Yes, sir.

6 Q And I think in your statement you say that on
7 April the 5th at least you told the police that
8 Marion had told you he stole the car, is that
9 correct?

10 A I don't remember telling him that Marion
11 stole the car.

12 Q All right. If you will go down one, two,
13 three, four, five, six, seven lines, the line
14 starts with got. At the end of that line it says,
15 "We all wore brown gloves because J.R. said he had
16 stole the car." Do you remember telling Detective
17 Coker that?

18 A Yes. He said that but you asked me, you told
19 me Marion stole the car.

20 Q And who is J.R.?

21 A Marion.

22 Q Marion Bowman, okay. At least on April 5th
23 when you were talking to Sergeant Coker you told
24 him that Marion had told you he stole the car?

25 A That's what he said but I didn't know for

JA 1892

6269

1 sure.

2 Q He told you he stole the car, right?

3 A Yes.

4 Q He told you to wear these brown cotton gloves
5 while you all were riding in the car, correct?

6 A Yes.

7 Q Did you not understand at the time that
8 riding in the car when a guy told you he stole it
9 and you are wearing gloves, that that makes you
10 guilty of at least possession of a stolen motor
11 vehicle?

12 MR. WATERS: Your Honor, I object to that
13 question.

14 THE COURT: What's the relevance of that?

15 MR. SINCLAIRE: Judge, if he thinks -- two
16 things, I think, Judge. First off, if he thought
17 that there was a possibility he could be arrested,
18 this is a five year offense, he certainly would
19 have an incentive to testify in court to whatever
20 the Solicitor asked him to.

21 Second, that he was never actually impeached
22 with the possibility he had an additional five year
23 sentence hanging over his head.

24 MR. WATERS: Judge, first of all --

25 THE COURT: He was never charged, was he?

JA 1893

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1 MR. SINCLAIRE: There is no statute of
2 limitations on criminal offenses in South Carolina.

3 THE COURT: I'm talking about your thought is
4 that had some effect on his testimony?

5 MR. SINCLAIRE: I think it is something the
6 jury certainly should have been entitled to know,
7 that he had.

8 THE COURT: The jury should have been
9 entitled to know that he possibly could be charged,
10 he said the judge instructed the jury, which is not
11 a PCR matter.

12 MR. SINCLAIRE: I think the fact he was not
13 impeached on the fact he had possible criminal
14 charges pending, my much more learned co-counsel
15 tells me it's ground M in the application, that
16 that is something he should have been examined
17 about at trial.

18 MR. WATERS: Your Honor, that is my
19 objection. Again, there is nothing in ground M
20 about impeaching Hiram Johnson on the fact he had
21 pending charges. Again I would object to any
22 attempt to amend on the fly and I would, Mr.
23 Johnson is his witness and I would object to any
24 attempt to amend on the fly and because of that
25 this line of questioning is not relevant to any

JA 1894

1 matter of issue in this.

2 MR. BROWN: Your Honor --

3 MR. WATERS: Your Honor, Mr. Brown is not his
4 witness.

5 MR. BROWN: I'm explaining the objection to
6 the amendment.

7 THE COURT: Anyway, you can ask him
8 questions. To me, the fact he's in a car he knows
9 is stolen, he's a passenger in the car he knows is
10 stolen, it's a stretch to say that no doubt he can
11 be charged with a crime, no doubt that he now has
12 something to be concerned with because that is such
13 a discretionary thing. It is not like he had
14 possession of the car. He is actually in a car
15 that he said someone said he stole it. Now, I
16 guess theoretically there could be some accessory
17 to possession of a stolen weapon, stolen vehicle,
18 something of that nature because he had no, there
19 is no statement here he had possession of the
20 vehicle, so I assume that is what you're going at,
21 is some possibility, although I have never seen
22 accessory to stolen vehicle in my nineteen years on
23 the bench, but that is what you're saying he could
24 have been charged with?

25 MR. SINCLAIRE: What I'm saying, I'm basing

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1 this on my seventeen years in the Solicitor's
2 office when these files come across my desk, where
3 four people were caught in a car, one of them was
4 driving and all four of them were charged with
5 possession of a stolen motor vehicle.

6 THE COURT: All right. Under what theory
7 does he have constructive possession, from reading
8 his statement?

9 MR. WATERS: Your Honor --

10 THE COURT: You need to ask the questions.

11 MR. WATERS: The witness seems to be shaking.
12 His family says he might be having a seizure.

13 THE COURT: Are you okay?

14 THE WITNESS: I'm all right.

15 THE COURT: Let us know if anything is wrong.

16 THE WITNESS: It's cold. All these fans
17 blowing, I'm cold.

18 MR. SINCLAIRE: In my opinion, Judge, not
19 that I liked it when these files came across my
20 desk, I will tell you that all four parties --

21 THE COURT: I know that but how did you prove
22 it with the statement here?

23 MR. SINCLAIRE: I used the fact he was in a
24 car, in a common place.

25 THE COURT: Possession of a stolen vehicle

JA 1896

1 doesn't have a requirement of possession?

2 MR. SINCLAIRE: He has constructive
3 possession.

4 THE COURT: By being inside?

5 MR. SINCLAIRE: Yes.

6 THE COURT: As a passenger?

7 MR. SINCLAIRE: He's a passenger.

8 THE COURT: We can talk about the practical
9 nature of charging people but it's a long stretch
10 of convicting someone as a passenger without
11 evidence he had control, constructive or otherwise,
12 of the vehicle.

13 MR. SINCLAIRE: Judge, in my day it required
14 actual knowledge the car was stolen. He was told
15 it was stolen. There is no question, I agree with
16 the Court it would be a long stretch getting a
17 conviction for it. That wasn't the reason we bring
18 it up. I think the relevance was he admitted he
19 was riding in a car that was stolen, had brown
20 gloves on so he wouldn't leave his fingerprints in
21 the car.

22 THE COURT: All right. The record shows or
23 reflects, I'm sure, that no one asked him that in
24 front of the jury, so that is what you want me to
25 be aware of, you all made it clear the record does

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1 not show that that interesting point was not made.
2 That practical use by Solicitors and police
3 officers as opposed to being legal consideration,
4 it wasn't made. But, Mr. Waters, do you still say
5 that isn't a ground for PCR?

6 MR. WATERS: Yes, absolutely. I want to make
7 sure the record reflects you overruled my
8 objection. You have to have a preservation.

9 THE COURT: Your objection was what? I
10 didn't give you a chance to talk.

11 MR. WATERS: They were questioning him on his
12 pending charges and there is nothing in ground M
13 about trial counsel should have impeached Hiram
14 Johnson on anything. I would object, number one,
15 none of this is relevant. It is not relevant to
16 the issues pled and I would object to any attempt
17 now to start asking questions, clearly ones they
18 could have known and then attempt to amend on the
19 fly to have the pleadings conform to the proof.
20 That is getting around the PCR statute, and the
21 rule clearly requires --

22 THE COURT: In M -- which number is Mr.
23 Johnson involved in? I don't see his name
24 anywhere.

25 MR. BROWN: Your Honor, M is the ground. The

JA 1898

1 supporting facts.

2 THE COURT: Where is there -- is Mr. Johnson
3 named anywhere in M?

4 MR. WATERS: No, sir, Your Honor.

5 MR. BROWN: We would assert under Simpson v.
6 Moore, when the evidence comes out at trial we're
7 allowed, in fact that case, it is his case --

8 THE COURT: All right, in M are you referring
9 to Hiram Johnson not being impeached --

10 MR. BROWN: I'm not --

11 THE COURT: M is not the ground?

12 MR. BROWN: M is the ground, Your Honor, if I
13 can make it clear?

14 THE COURT: Well, reading M, which you say
15 excludes your discussions of Mr. Johnson's pending
16 charges --

17 MR. BROWN: Your Honor, just to make clear,
18 the application is set up, if you will notice the
19 way it is pled according to the rule, which
20 requires this form, it used to be nine and ten, and
21 the way I have done it, it is still under nine and
22 ten. Nine is the ground for relief. Nine M is
23 that the trial counsel was ineffective for not
24 presenting impeachment evidence.

25 THE COURT: How could Mr. Waters know to

6276

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1 prepare in regard to Mr. Johnson?

2 MR. BROWN: We didn't know this information
3 until now.

4 THE COURT: All right. So, you didn't call
5 Mr. Johnson to discuss that with him? Why did you
6 call Mr. Johnson, about the civil case or what?

7 MR. BROWN: We called him to talk about his
8 discrepancy in his statement and his trial
9 testimony and we learned new information, which is
10 what a trial is for, to get evidence.

11 THE COURT: You know, you really have a tough
12 time asking questions without making speeches.
13 What I need to ask is this. What pending charges
14 did Mr. Johnson have at the time?

15 MR. BROWN: We don't know. This is the first
16 we found out about it. We even asked him --

17 THE COURT: Did you have pending charges,
18 excuse me, did you have pending charges in
19 Dorchester County in 2001?

20 THE WITNESS: Dorchester?

21 THE COURT: Yes.

22 THE WITNESS: No, sir, only Orangeburg, I
23 never had charges pending in Dorchester County.

24 THE COURT: Did you have charges pending in
25 Orangeburg County?

JA 1900

1 THE WITNESS: I don't know. They got threw
2 out, they didn't stay long.

3 THE COURT: Do you remember when they were
4 thrown out?

5 THE WITNESS: I don't remember.

6 THE COURT: Do you know why?

7 THE WITNESS: My lawyer called me -- no, I
8 don't.

9 THE COURT: Who was your lawyer?

10 THE WITNESS: John O'Leary out of Columbia.

11 THE COURT: Was this involving the shooting
12 that occurred in 2000?

13 THE WITNESS: Yes.

14 THE COURT: So, there were charges about that
15 and after that you had sued them for it?

16 THE WITNESS: Uh-huh.

17 THE COURT: Those charges in Orangeburg
18 County were thrown out?

19 THE WITNESS: Yes, sir.

20 THE COURT: All right. So, that's the
21 information.

22 MR. BROWN: The same Solicitor's office.

23 THE COURT: Okay.

24 MR. BROWN: There is a motion filed by --

25 THE COURT: What is your question now?

6278

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1 Overruled, ask the question. What is your
2 question?

3 MR. BROWN: Now it is a different issue.

4 THE COURT: What is your question? He said
5 he does not know about why they were thrown out or
6 anything else. What's your question?

7 BY MR. SINCLAIRE:

8 Q Do you remember being charged with burglary
9 and grand larceny prior to the trial of Marion
10 Bowman, in Orangeburg County?

11 A I don't remember.

12 MR. WATERS: Your Honor, they knew there were
13 charges and motions filed, they clearly knew this
14 information.

15 THE COURT: Your next question?

16 Q Do you know whether as a result of your
17 cooperation in the trial of Marion Bowman that
18 those charges were thrown out?

19 A No. They were thrown out long, my case
20 didn't get over until last year, they was thrown
21 out way after Marion. Probably, if not the
22 beginning of last year, the end of 2006.

23 Q And did Mr. O'Leary ever tell you why your
24 charges were dismissed?

25 A No. He didn't tell me anything, really.

JA 1902

1 THE COURT: Mr. Sinclair, this is something
2 your client hadn't told you? He keeps giving you
3 information that he knew about all this. Is this
4 something you didn't discuss with him? I'm asking
5 you, Mr. Sinclair.

6 MR. SINCLAIRE: I have no idea.

7 THE COURT: You and Mr. Bowman never
8 discussed this at all, this is something he knew,
9 he just didn't reveal it to you until today, you
10 keep talking with him and he tells you about the
11 charges and all that?

12 MR. SINCLAIRE: Judge, so the record --

13 MR. BROWN: I would assert attorney/client
14 privilege on that. As lead counsel we're not going
15 into discussions between our client and counsel.

16 THE COURT: Therefore were you all surprised
17 about it today?

18 MR. BROWN: I'm not going to answer what we
19 talked about.

20 THE COURT: You said a minute ago you were
21 surprised. Were you surprised?

22 MR. BROWN: We were surprised.

23 THE COURT: So, you heard nothing about this
24 until today?

25 MR. BROWN: I'm not going to reveal any

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1 conversations with my client.

2 THE COURT: When you say surprised, does that
3 mean you heard about it before today or you didn't
4 hear about it before today?

5 MR. BROWN: I have not heard about it from
6 any State's witnesses, State's file, State's
7 documents before today.

8 THE COURT: All right. So, therefore if I am
9 going to determine that you all had no idea to put
10 the State on notice, you had no information to put
11 the State on notice about it?

12 MR. BROWN: That is not my answer. We put
13 the State on notice we're alleging ineffective
14 impeachment.

15 THE COURT: Let me ask you a question.
16 Regarding the fact Mr. Johnson may have had pending
17 charges and may should have been impeached on
18 pending charges, were you aware of that before
19 today?

20 MR. BROWN: No.

21 THE COURT: Okay. That is all I need to
22 know. Therefore no one told you about it before
23 today, therefore you didn't tell the State about
24 it. That was my question, if you are telling me no
25 one told you, so that is why I was just curious

JA 1904

1 about the fact no one told you but I must be
2 observant in the courtroom and noticed Mr. Bowman
3 keeps telling Mr. Sinclair these things, keeps
4 asking questions.

5 Now, I don't want to get involved in your
6 attorney/client privilege but I find it amazing
7 that you say no one told you this at all before
8 today but yet your client seems to keep giving
9 information about it during the course of the
10 questioning of this witness. That just seems very
11 interesting.

12 MR. BROWN: And let me make sure you
13 understand. My client has been incarcerated with
14 no access to any court records since his arrest on
15 February 17th, 2001.

16 THE COURT: That means today he knows to tell
17 you. How does that affect his ability to tell you
18 about it today?

19 MR. BROWN: The question was whether he had
20 pending charges during his testimony at trial.

21 THE COURT: Right.

22 MR. BROWN: He didn't know that because there
23 is no record in the trial counsel's file.

24 THE COURT: Those are my observations of Mr.
25 Bowman and what Mr. Sinclair said is probably

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1 incorrect. Mr. Sinclair says his client keeps
2 telling him this about pending charges and all
3 that. But let's proceed on this.

4 MR. BROWN: Just to make sure we're clear,
5 without waiving any attorney/client privileges and
6 without waiving my right to have other counsel come
7 in and represent me on that issue, then we would
8 like to put on the record --

9 THE COURT: I'm not asking you to reveal any
10 attorney/client privilege.

11 MR. BROWN: I don't know how to respond to
12 the question otherwise.

13 THE COURT: Well, when you say you wish to
14 make sure when new evidence comes up, you responded
15 clearly, you said that this thing is something you
16 had no idea about until Mr. Johnson testified to it
17 today. And therefore, you see, let me finish, and
18 therefore since you had no knowledge of it, no one
19 told you about it because obviously as an officer
20 of the court if your client had told you about it
21 you wouldn't tell me you had no knowledge of it
22 because then you would not be being clear to the
23 Court. And therefore I'm assuming and I know you
24 are a reputable attorney and you would tell me if
25 you knew about it. So, I'm accepting the fact you

JA 1906

1 had no knowledge of Mr. Johnson having pending
 2 charges at the time of his testimony in the trial.

3 MR. BROWN: At the time of his testimony we
 4 did not know he had pending charges, with the
 5 caveat my client was arrested on February 17th, not
 6 for this murder but for receiving stolen goods
 7 which we have belief was related to his charge,
 8 which we have yet to know whether or not it is
 9 pending at the time of trial in May of 2002. We
 10 don't have access to his SLED records, I cannot run
 11 his rap sheet, we do not have access --

12 MR. WATERS: Your Honor -- I'm sorry, go
 13 ahead.

14 THE COURT: I'm only trying to address this
 15 issue of you wanting this to be part of the PCR
 16 because you had no knowledge of it.

17 MR. BROWN: Yes, sir.

18 THE COURT: Then when I say if you had no
 19 knowledge of it why is Mr. Bowman over here in
 20 front of me telling Mr. Sinclair the questions to
 21 ask and therefore if he's telling the questions to
 22 ask it seems to me Mr. Bowman must have been aware
 23 of it, so Mr. Bowman is aware of it, I find it
 24 surprising you all didn't discuss it with him.
 25 When I asked that it made you all assume I'm trying

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1 to get you to reveal attorney/client privilege,
2 which I'm not trying to do. It seems none, put it
3 that way, I guess I have to consider all matters,
4 even unusual matters when I decide on your request
5 to make amendment, to make another amendment to
6 your petition because evidence came out today that
7 you were not aware of.

8 MR. BROWN: And let me make sure we're clear
9 on that. We don't believe that is an amendment to
10 our claims. Our claim is ineffective impeachment.

11 THE COURT: I know that but, Mr. Brown, I
12 agree with you your claim is ineffective
13 impeachment but you then can't say ineffective
14 impeachment for not telling who you're talking
15 about and bring all these people in that you don't
16 have opportunity to prepare, that you are saying
17 were the ones who you think should have been
18 impeached and were not.

19 MR. BROWN: Let me go ahead and make clear
20 for notice right now that there may well be a claim
21 of Brady violation and a discovery violation
22 against the State based on the fact that they
23 didn't turn over the deal, whether it is implicit
24 or not, cut with Hiram Johnson to go easy on him
25 for these charges which he said were dismissed.

JA 1908

1 THE COURT: What evidence do you have of
2 that?

3 MR. BROWN: This much. He was called as a
4 State's witness, he testified favorably for the
5 State, they dismissed his charges. That's
6 circumstantial evidence there was a deal cut.

7 THE COURT: When did they dismiss his
8 charges?

9 MR. BROWN: After the trial, he said.

10 THE COURT: He said sometime in the last
11 year.

12 THE WITNESS: Which I never was charged.

13 THE COURT: Now he says he never was charged.

14 MR. BROWN: He has a memory problem, too,
15 Your Honor, that came out at trial as well.

16 THE COURT: He may or may not be remembering
17 the charges.

18 MR. BROWN: I don't know he's competent as a
19 witness. If you want to admit allegations and have
20 a competency evaluation, he may not have been
21 competent in 2002.

22 THE COURT: Mr. Waters?

23 MR. WATERS: I think he is talking about he
24 wasn't charged in this case when he asked, there is
25 nothing in this application for me to look at, his

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1 deal, pending lawsuit with Orangeburg, or charged
2 in some other things, I had no reason to look at
3 any of that because none of that is in the
4 application. I don't know the circumstances of
5 that deal, I don't know whether he was charged with
6 burglary. That is not something that was in this
7 application or related specifically to this trial,
8 so that is not something I looked at and that is
9 the apparent prejudice, just to make sure, I think
10 we can answer that question, he was talking about
11 he was never charged in the Marion Bowman case.
12 That is it. Whether or not his charges got
13 dismissed in the course of dealing with John
14 O'Leary and a lawsuit about him getting shot in the
15 back of the head, I don't know. The first thing
16 about that, there is certainly nothing I have ever
17 seen that indicates there was any sort of quid pro
18 quo with Hiram Johnson based on that lawsuit, and
19 to throw that in at this time I think is extremely
20 prejudicial.

21 THE COURT: I assume they must have evidence
22 other than this testimony.

23 MR. BROWN: I have to be quite honest with
24 you, Brady says any evidence that is either
25 exculpatory or impeaching has to be turned over.

JA 1910

1 THE COURT: All right, let's proceed on with
2 the questions. Thank you very much. What other
3 questions do you have of Mr. Johnson?

4 BY MR. SINCLAIRE:

5 Q In your statement you gave, do you still have
6 a copy of it there, Mr. Johnson, right beside you?
7 This is a statement you gave Sergeant Coker on
8 April 5th, 2001. You told him that J.R. talked to
9 Travis at the club. Isn't that correct?

10 A Yes.

11 Q All right. And you told him, Sergeant Coker,
12 that Black, and when you say Black who were you
13 referring to?

14 A Marion.

15 Q Black was a nickname for Marion?

16 A Yes.

17 Q You told Sergeant Coker on April 5th, 2001,
18 Black had a pistol in his lap. Isn't that correct?

19 A Yes.

20 Q You didn't tell him he had a .380 in his lap,
21 did you? It just says pistol, doesn't it?

22 A Yes.

23 Q Did you know Tawain Gadson carried a .380 as
24 well?

25 A I wouldn't, I never seen him with one.

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1 Q Do you know Black carried a .32 instead of a
2 .38, with a broken handle, have you ever seen Black
3 with a .32 with a broken handle?

4 MR. WATERS: Your Honor, again I object to
5 the relevance of this.

6 THE COURT: Overruled, let's proceed.

7 MR. WATERS: I understand, Your Honor, I will
8 sit down after this but I want to let you know I'm
9 not trying to harass you, but he keeps mentioning
10 the Simpson v. Moore case, that is precisely what
11 I'm trying to stop from happening to me again,
12 that's why I'm making sure that anything that is
13 not related to anything pled, that I'm not standing
14 up and complaining about. I'm not trying to harass
15 you.

16 THE COURT: Okay.

17 BY MR. SINCLAIRE:

18 Q In anywhere in your statement on April the
19 5th, 2001, did you tell Sergeant Coker, "I killed
20 Kandee, ha, ha, ha?" Is that anywhere in your
21 statement?

22 THE COURT: Are you talking about Exhibit 33?

23 THE WITNESS: Who killed Kandee?

24 MR. WATERS: Your Honor, same objection.

25 THE COURT: The statement is right here.

JA 1912

1 MR. SINCLAIRE: He testified, thank you, Your
2 Honor, he testified at trial for the first time
3 that he heard Mr. Bowman tell him, "I killed
4 Kandee, ha, ha, ha."

5 THE COURT: Okay.

6 BY MR. SINCLAIRE:

7 Q My question to you is did you ever tell the
8 police that prior to getting on the witness stand?

9 A I don't remember.

10 Q So, you don't remember -- let me put it this
11 way. You didn't tell them that on February 22nd,
12 2001, did you?

13 A I don't remember that.

14 Q You didn't tell them that on April 5th, did
15 you?

16 A No, I don't remember saying that.

17 Q You didn't tell them that when they read you
18 your Miranda rights at 4:27 p.m., did you?

19 A I don't remember them reading me any rights.
20 That's about seven years ago.

21 MR. WATERS: Your Honor, again, the objection
22 is to new ground on apparently failure to impeach
23 Hiram Johnson on whether or not he said, "I killed
24 Kandee, ha, ha, ha." Again that is not pled, which
25 I assume you're overruling the objection at this

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1 point.

2 THE COURT: Yes.

3 BY MR. SINCLAIRE:

4 Q So, you didn't tell him when you rode back in
5 the car to your house to find the gloves that you
6 heard him say, "I killed Kandee"?

7 A I didn't ride back with him to my house.

8 Q Do you remember us taking your deposition?

9 A August 26.

10 Q Thank you. August 26, 2008, and during that
11 deposition do you remember telling us that you
12 thought Marion Bowman was kidding when he said, "I
13 killed Kandee, ha ha ha"?

14 A Yes.

15 Q But you never told the jury in the case that
16 you thought he was kidding, did you?

17 A I don't remember that.

18 Q Did you meet with the Solicitor prior to your
19 testimony?

20 A No.

21 Q You never met with Solicitor Walter Bailey
22 prior to him calling you as a witness in the
23 capital murder trial of Marion Bowman?

24 A I don't remember.

25 Q Would it be safe to say that you did not tell

JA 1914

1 Solicitor Bailey that you heard Marion say, "I
2 killed Kandee, ha, ha, ha"?

3 A No.

4 Q Do you remember telling Solicitor Bailey that
5 prior to getting on the witness stand?

6 A No, I don't remember telling him that..

7 MR. SINCLAIRE: The Court's indulgence, Your
8 Honor?

9 THE COURT: Is there another question, Mr.
10 Sinclair? I know you're having a discussion there
11 with Mr. Bowman.

12 MR. SINCLAIRE: Thank you, Your Honor.

13 BY MR. SINCLAIRE:

14 Q Do you remember a fight on February 16th,
15 2001?

16 MR. WATERS: Your Honor, I object to
17 relevance of a fight.

18 THE COURT: I will see if you can connect it.

19 Q Do you remember an argument between Tawain
20 Gadson and Marion Bowman on February 16th about a
21 gun?

22 A Yes.

23 Q Okay. And that was because Marion -- do you
24 remember what that fight was about?

25 A Yes.

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1 Q What was it about?

2 A Marion couldn't find his gun.

3 Q Isn't it the truth he couldn't find it
4 because you had possession of it and you had moved
5 it?

6 A Yes.

7 Q Did you tell Dorothy Bowman the gun was in
8 the couch?

9 A No.

10 MR. WATERS: Your Honor, again I object to
11 that last statement inasmuch as it may be used to
12 try to amend with yet another new issue with regard
13 to the discovery of a weapon. I don't know how
14 they are going to try to phrase it.

15 THE COURT: I'm letting him ask the question,
16 I'm not deciding it in any way by letting him ask
17 the question to see if he can connect the
18 relevance.

19 Is that all, Mr. Sinclair?

20 MR. SINCLAIRE: That's all I have.

21 THE COURT: Cross-examination.

22 MR. WATERS: Thank you, Your Honor. Your
23 Honor, just for the record, I just want to be clear
24 that, given Your Honor's rulings, that if I examine
25 on some of these issues that have been raised, that

JA 1916

1 I'm not waiving my objection to these even being
2 considered and ask that I can have a continuing
3 objection in that regard and not be deemed to waive
4 anything if I inquire.

5 MR. BROWN: We would object under the same
6 line of thinking that the Court says if you draw
7 out the first sting of impeachment by your own
8 criminal charges you waive the objection to the
9 State properly impeaching if it is later --

10 THE COURT: Thank you. I note your
11 statement, you're not waiving your objection. You
12 may proceed.

13 MR. WATERS: Your Honor, again if I don't
14 have that I can't ask any questions and I, I don't
15 know they can have their cake and eat it too.

16 MR. BROWN: That's the way it works.

17 THE COURT: Your motion is noted and your
18 request is noted, we will go forward. When we
19 finish this matter we'll note and put all our
20 issues on the record as for as what the petitioner
21 is claiming, we'll address those.

22 MR. WATERS: All right.
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CROSS EXAMINATION

QUESTIONS BY MR. WATERS:

Q You know Darien Williams, correct?

A Yes.

Q You know his reputation in the community for truthfulness or untruthfulness, whether he tells the truth or tells lies?

A Yes.

Q What is that reputation?

A Shaky. He's liable to say anything.

Q He's liable to say anything?

A Yes.

Q Okay. And didn't he claim that you shot Patrick Strange?

A Yes.

Q When in fact the proof showed that Patrick Strange killed himself playing Russian Roulette?

A Yes.

Q That is an example of a lie he tells, is that correct?

A Yes.

Q All right. You were asked about saying in the deposition that you thought Marion Bowman was kidding when he said, "I killed Kandee, ha, ha, ha," right?

JA 1918

1 A Yes.

2 Q But did you know at the time that Kandee was
3 dead?

4 A No.

5 Q Okay. So, you had no knowledge that she was
6 dead then?

7 A No, sir.

8 Q So, you just thought he was kidding when he
9 said that because you didn't know she had been, she
10 was laying in the woods somewhere, right?

11 A Yes, sir.

12 Q Okay. You were asked about a party at Hank
13 Coker's house on the day of the incident in which
14 Kandee was killed, correct?

15 A Yes.

16 Q And you were asked about moving Marion
17 Bowman's gun?

18 A Yes.

19 Q Why did you move his gun?

20 A Because he had pulled it out, it was in a
21 brown paper bag and we wasn't at no party, it
22 wasn't a party, it was early in that day, that
23 morning about 10:00 or 11:00, it was before 12:00.

24 Q There were people gathered there?

25 A Yes, people was gathered there, sitting

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1 around. And I had set the gun in a barrel and when
2 I came back from the store Hank told me that he
3 felt uncomfortable with the gun just sitting in the
4 barrel, so what I did, I moved the gun and took it
5 to my cousin Katrina's house and put it in a
6 cabinet but at the time he didn't know, so when I
7 came back from the store him and Tawain was arguing
8 about a gun, so I pulled him to the side and I told
9 him that I moved it and I put it to Katrina's
10 house.

11 Q Because Marion was accusing Tawain Gadson of
12 taking the gun, right?

13 A Yes.

14 Q And you told him, "Hey, man, I'm the one who
15 did it"?

16 A Yes.

17 Q And that is because Marion was waving it
18 around and playing with it and Hank Coker didn't
19 like that, is that right?

20 A Well, I mean, I didn't never see him waving
21 it or pulling it out, but he told me Black had put
22 it in the barrel. When I come up to the barrel it
23 was in a brown paper bag so I moved it and I took
24 it across the street to Katrina's house.

25 Q All right. You remember we had that

1 deposition, I guess a couple months ago?

2 A Uh-huh.

3 Q And I think you were asked about Marion
4 Bowman, you said there is no telling what Marion
5 Bowman would do, is that correct?

6 A Uh-huh.

7 Q You said you meant by that he had a pretty
8 rough reputation and nobody wanted to cross him, is
9 that correct?

10 A Yes.

11 Q So, if you were friends of Marion Bowman you
12 didn't want to get on his bad side, is that
13 correct?

14 A I mean, he was all right, I mean, he was good
15 hearted but, you know, coming up, all of us had
16 pretty bad background coming up, you know.

17 MR. WATERS: Your Honor, I have nothing
18 further at this time.

19 THE COURT: Mr. Sinclair?

20 MR. SINCLAIRE: Your Honor, just briefly.

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REDIRECT EXAMINATION

QUESTIONS BY MR. SINCLAIRE:

Q Back on when Marion told you kidding that he killed Kandee, do you remember in your deposition telling us whether you believed him or not? Do you remember what you said?

A I didn't believe him. The way he said it, it was a shock, I mean, he always jokes around.

Q Your response was, "Man, stop playing"?

A Yes.

Q You were asked about Marion's reputation in the community. Do you know Marion's reputation for drinking alcohol?

A No.

MR. WATERS: Your Honor, I would object to this being beyond the scope of redirect.

THE COURT: Overruled.

Q I will ask you specific questions. Did you ever see Marion with English 800 in his hand, 42 ounce beer?

A No.

Q You don't know whether he drinks or not every day?

A No.

Q All right. You said that Marion, you said

JA 1922

1 Tawain told you the gun had been put in the barrel,
2 is that correct?

3 A Tawain?

4 Q You were testifying earlier about the gun was
5 in a bag and in a barrel. Tawain knew the gun was
6 in a bag and in the barrel?

7 A I said Hank.

8 Q Hank Coker did?

9 A Yes.

10 Q But no question in your mind, based on the
11 argument that you overheard, that Marion thought
12 Tawain had his gun?

13 A Yes.

14 Q Do you know of your own personal knowledge
15 whether Tawain had possession of Marion's gun prior
16 to that?

17 A Like I said, when Hank told me the gun was in
18 the barrel I moved the gun and put it in Katrina's
19 house.

20 Q You just said earlier, too, that Marion was a
21 good hearted person. Can you expand on that for me
22 a little bit?

23 A We first cousins, we all got along pretty
24 good, I mean, but you coming up as a child you run
25 into incidents or whatever, that is part of growing

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1 up.

2 MR. SINCLAIRE: Thank you. Nothing further.

3 THE COURT: Anything?

4 MR. WATERS: Yes, Your Honor very briefly.

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JA 1924

1 RECROSS EXAMINATION

2 QUESTIONS BY MR. WATERS:

3 Q Back at that deposition they asked you if you
4 had seen Marion Bowman drinking on the day of that
5 incident and your response was what?

6 A The best of my knowledge I think I said no.

7 Q Right. So, you don't recall ever seeing him
8 drinking on the day of the incident?

9 A No.

10 MR. WATERS: Nothing further, Your Honor.

11 THE COURT: You can step down.

12 (Witness excused).

13 THE COURT: Now, Mr. Johnson, you are still
14 under subpoena, so you may be called back or you
15 may not but you don't need to stay here as long as
16 they are in contact, okay?

17 MR. BROWN: Your Honor, just on that note,
18 there is something I had for the number but I have
19 803 378-7038. I would like the Court to inquire.

20 THE COURT: Mr. Johnson, is that the number
21 to reach you at?

22 THE WITNESS: Yes, 803 --

23 MR. BROWN: 803 378-7038?

24 THE WITNESS: Call it right now.

25 THE COURT: Go ahead, call it, see what

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1 TRAVIS DeWITT FELDER,
2 after being first duly sworn, testified as follows:

3 THE COURT: Mr. Felder, see that microphone
4 in front of you there, we have to hear you. Give
5 me your full name, sir.

6 THE WITNESS: Travis DeWitt Felder.

7 THE COURT: All right, your witness, Mr.
8 Sinclair.

9 MR. SINCLAIRE: Thank you, Your Honor. May
10 it please the Court.

11 DIRECT EXAMINATION

12 QUESTIONS BY MR. SINCLAIRE:

13 Q Mr. Felder, how old are you?

14 A 27.

15 Q Where do you live?

16 A Charleston, South Carolina.

17 Q All right. And do you know Marion Bowman?

18 A Yes, I do.

19 Q How long have you known him?

20 A Since school, elementary school.

21 Q All right. How did you find out the police
22 were looking for you back in February of 2001?

23 A They called my mama's house.

24 Q What did you do as a result of getting a
25 phone call that the police were looking for you?

JA 1926

6381

1 A I went up to the police station.

2 Q All right. Where was the police station that
3 you went to?

4 A The one in Branchville.

5 Q And who did you talk to there?

6 A I don't know, some officers from Dorchester
7 County.

8 Q I'm sorry, I didn't hear.

9 A Some officers from Dorchester County.

10 Q Thank you. And the first time you went there
11 did you speak with the officers from Dorchester
12 County?

13 A No.

14 Q Okay.

15 A I mean, I didn't did nothing like that, they
16 just came in, they just, you know --

17 Q They asked you if you knew anything about the
18 incident involving Kandee Martin?

19 A Yes.

20 Q What did you tell them?

21 A No.

22 Q You told them, "I don't know anything about
23 Kandee Martin, I didn't have anything to do with
24 her death," is that correct?

25 A Yes, sir.

JA 1927

6382

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1 Q And did you leave after that?

2 A Yes, sir.

3 Q You were free to go?

4 A Yes, sir.

5 Q All right. And were you subsequently
6 notified that they wanted you to come back down
7 again?

8 A They came there on the Monday, February 19th,
9 they came and they called the house again and they
10 said, "We got warrant on you from Dorchester
11 County, it is just a matter of time for us to get
12 them from Orangeburg County, so would you come on
13 down," and I went on down to Dorchester County and
14 they locked me up.

15 Q The second time they just called you up and
16 said, "We have a warrant for your arrest, we need
17 you to turn yourself in"?

18 A Yes. I did that.

19 Q Okay. I'm showing you Plaintiff's Exhibit
20 Number 16 and ask if you recognize that statement
21 of Miranda rights, with the initials to the left of
22 the Miranda warnings and the signature under the
23 waiver of rights?

24 A Yes.

25 Q Are those the rights they advised you of and

JA 1928

1 are those your initials on that document?

2 A Yes, sir.

3 Q Is that your signature at the bottom?

4 A Yes, sir.

5 MR. SINCLAIRE: All right, thank you. I move
6 Plaintiff's Exhibit 16 into evidence.

7 MR. WATERS: Your Honor, the only issue
8 raised as to Mr. Felder, impeachment, this was
9 raised a few different ways in regard to viewing on
10 videotape, if they are trying to create some new
11 claim with regard to polygraph, whatever the case
12 may be, either free-standing claim which obviously
13 would be barred, but any sort of claim under
14 ineffective assistance, I would object on the same
15 ground with regard to relevance and adopt my prior
16 argument.

17 THE COURT: That is noted but insofar as my
18 admitting this evidence, I overrule your request.
19 I'm not sure how to respond other than what you
20 said is noted but that will come in evidence.

21 Number what?

22 MR. SINCLAIRE: Plaintiff's 16, Your Honor.

23 THE COURT: Plaintiff's 16 is in evidence.

24 (Waiver of rights form marked and received
25 in evidence as Plaintiff's Exhibit 16).

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1 MR. SINCLAIRE: Would you like to see that,
2 Your Honor?

3 THE COURT: Is it a waiver?

4 MR. SINCLAIRE: Yes.

5 THE COURT: I don't need it.

6 BY MR. SINCLAIRE:

7 Q After you were advised of your Miranda
8 warnings and waived them did you give the police a
9 similar statement to the one you had told them
10 before you were arrested?

11 A Yes, sir.

12 Q That statement was, "I don't know anything
13 about it, I didn't have anything to do with it"?

14 A Yes.

15 Q Is that correct?

16 A Yes, sir.

17 Q You told them you had not participated in
18 this incident and had no prior knowledge of it. Is
19 that correct?

20 A Yes, sir.

21 Q And do you remember what the warrants were
22 for that they had prepared for you?

23 A Accessory after the fact of murder and an
24 arson charge, I can't remember.

25 Q Okay. I'm showing you now that which has

JA 1930

1 been marked Plaintiff's Exhibit Number 17. Do you
2 recognize this warrant for accessory to felony
3 murder and arson? It was served on you February
4 the 19th, 2001.

5 A Yes, sir.

6 Q Okay.

7 MR. SINCLAIRE: I move Plaintiff's 17 into
8 evidence at this time, Your Honor.

9 MR. WATERS: Same objection I just previously
10 expressed.

11 THE COURT: Noted and it's in evidence. Go
12 ahead and give it to the court reporter. 16 and 17
13 you have put in so far?

14 MR. SINCLAIRE: Yes, Your Honor.

15 (Arrest warrant marked and received in
16 evidence as Plaintiff's Exhibit 17).

17 BY MR. SINCLAIRE:

18 Q That warrant is for accessory to felony
19 murder, is that correct?

20 A Yes, sir.

21 Q And in that warrant it cites at the top
22 Section 16-1-40. Do you see where it has been
23 handwritten 40 over the 110?

24 A Yes, sir.

25 Q Down in the body of the warrant itself where

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1 after big bold capital letters it says accessory to
2 felony murder, slash, arson, in violation of, that
3 section is 16-1-40, isn't it?

4 A Yes, sir.

5 Q Okay. And the allegations in that particular
6 warrant signed by, sworn to and attested to by
7 Sergeant Alvin Coker, it says a co-defendant Marion
8 Bowman, Jr., signed a written statement wherein he
9 stated that between the incident time
10 aforementioned the defendant," which would be you,
11 correct?

12 A Yes, sir.

13 Q "And a co-defendant James Tawain Gadson took
14 the victim to a remote area of Dorchester County
15 where they shot and killed the victim Kandee
16 Martin." That is talking about you and Tawain
17 Gadson shooting and killing Kandee Martin?

18 MR. WATERS: Your Honor, I would object.
19 This is Sergeant Coker's affidavit.

20 THE COURT: Whatever the affidavit is, it
21 speaks for itself, so I'm not going to ask him to
22 interpret what it means.

23 MR. SINCLAIRE: The reason -- I'm not asking
24 him to interpret, Judge, but if I may, the reason,
25 it is significant as to what was his impression at

JA 1932

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1 the time, I would like to get that.

2 THE COURT: Yes, but you want to ask him what
3 they, what he felt they charged him with doing. Is
4 this a warrant he's reading from?

5 MR. SINCLAIRE: Yes, Your Honor.

6 THE COURT: Okay. "After reading the
7 warrant," you're going to ask him to read this
8 warrant, "what did you feel they were saying you
9 did?"

10 BY MR. SINCLAIRE:

11 Q Back in 2001, after having been served that
12 warrant, what did you feel that they charged you
13 with?

14 A Murder and arson.

15 THE COURT: Do you want to ask him did he
16 have any impression about what they said he did to
17 commit the murder, or accessory to the murder?

18 MR. SINCLAIRE: It sounded to me, Your Honor,
19 the court reporter will be able --

20 THE COURT: Because the records are in the
21 record, number one, that's in the record. If you
22 want the words in the record --

23 MR. SINCLAIRE: I did want the record in the
24 record and his answer as well, Judge. His answer
25 was he thought he had been charged with murder and

JA 1933

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1 arson.

2 THE COURT: Is that right?

3 THE WITNESS: Yes.

4 THE COURT: That is what he thought.

5 MR. SINCLAIRE: Thank you.

6 BY MR. SINCLAIRE:

7 Q I'm showing you now that which is marked

8 Plaintiff's Exhibit Number 18. I ask if you

9 recognize this warrant for arson third degree?

10 A Yes, sir.

11 Q Is that the arson third degree warrant they
12 served on you back in February, 2001?

13 A Say that again.

14 Q Is that the warrant for arson third degree
15 that was served on you in February of 2001?

16 A No, sir.

17 Q Are you Travis DeWitt Felder?

18 A Yes, sir.

19 Q Do you not recall being served on February
20 19, 2001, with a warrant for arson in the third
21 degree?

22 A No, sir.

23 Q You just testified to this Court you thought
24 you were being charged with murder and arson?

25 A Yes, sir.

1 Q Isn't that the arson that you were being
2 charged with?

3 A Yes, sir.

4 MR. SINCLAIRE: Your Honor, I move
5 Plaintiff's 18 into evidence at this time.

6 MR. WATERS: Same objection as the previous
7 two, Your Honor.

8 THE COURT: Based on those two objections
9 that I overruled, it can come in.

10 (Warrant marked and received in evidence as
11 Plaintiff's Exhibit Number 18).

12 BY MR. SINCLAIRE:

13 Q All right. Did you hire an attorney to
14 represent you on accessory before the fact of
15 murder and arson third degree charges?

16 A Yes, sir.

17 Q And who was that lawyer?

18 A I had two lawyers. I had Clyde Dean and I
19 was represented by Charles Williams.

20 Q Was Clyde Dean appointed to represent you?

21 A No.

22 Q You had retained him first and fired him?

23 A Yes.

24 Q And you subsequently retained Charles
25 Williams?

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1 A Yes, sir.

2 Q And did Mr. Williams explain to you, then,
3 that you were looking at accessory before the fact
4 of murder which is life or death in prison and ten
5 years for the arson third degree?

6 A Yes.

7 MR. WATERS: Your Honor, I object to that
8 question as an incorrect statement of the law.

9 MR. BROWN: That's not true.

10 THE COURT: Mr. Sinclair, what was your
11 question?

12 MR. SINCLAIRE: Did Mr. Williams explain to
13 him that he was charged with accessory before the
14 fact of murder and arson, which carries life in
15 prison or death, and arson third degree which
16 carries up to ten years?

17 MR. WATERS: Your Honor, the State Supreme
18 Court has expressly ruled accessory before the fact
19 of murder does not carry the death penalty.

20 THE COURT: But Mr. Sinclair is asking if
21 Mr. Williams told him. It may be true or false.
22 Is that what Mr. Williams told you?

23 (No response).

24 THE COURT: Or do you remember?

25 THE WITNESS: He told me I was looking at

JA 1936

1 twenty years.

2 THE COURT: Okay. That is what he said, Mr.
3 Sinclaire, Mr. Williams said he was looking at
4 twenty years.

5 BY MR. SINCLAIRE:

6 Q When you were arrested and when you first met
7 with your attorney, maybe Clyde Dean, is he the one
8 told you you were looking at life or death in
9 prison?

10 A No, he never talked to me about that.

11 Q Were you subsequently indicted for accessory
12 after the fact to the murder and arson third
13 degree? Did you ever see your indictment?

14 A No, sir.

15 Q Were you made aware by Mr. Williams you had
16 been indicted for accessory after the fact of
17 murder which carried up to fifteen years?

18 A I don't recall.

19 Q Did Mr. Williams tell you you had been
20 indicted for arson third degree which carried up to
21 ten years?

22 A I don't recall, sir.

23 Q Your best recollection, though, is that your
24 lawyer at the time, your retained counsel advised
25 you were looking at twenty years minimum for the

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1 two charges you had been arrested for?

2 A Yes, sir.

3 Q And you never gave a written statement to the
4 police in this case, did you?

5 A No, sir.

6 Q But about a month before the trial you were
7 provided an opportunity to take a polygraph exam.
8 Isn't that correct?

9 A I don't recall.

10 Q All right. It may be this document won't
11 refresh your recollection but I'm going to see. I
12 would like to show you that which is marked
13 Plaintiff's Exhibit Number 15 and ask if this
14 Dorchester County Sheriff's office polygraph report
15 refreshes your recollection of sitting down with
16 Sergeant Van Doran --

17 MR. WATERS: Your Honor, I object to this.

18 THE COURT: Let's see if it refreshes his
19 recollection.

20 MR. WATERS: I think he should be asked if he
21 has ever seen this document. If he hasn't, it
22 couldn't refresh his recollection.

23 BY MR. SINCLAIRE:

24 Q Do you remember sitting down with Sergeant
25 Van Doran and giving a polygraph?

JA 1938

6393

1 A No, sir.

2 Q Have you ever seen that document before?

3 A No, sir.

4 Q Let me ask you some questions anyway. At the
5 polygraph exam do you remember Sergeant Terrance A.
6 Van Doran asking you did you see Kandee Martin's
7 body placed into the trunk of her car? Do you
8 remember him asking you that?

9 A No, sir.

10 Q If he had asked you that what would your
11 answer have been?

12 A Say again.

13 Q If Sergeant Van Doran asked you did you see
14 Kandee Martin, on April the 16th, 2002, did you see
15 Kandee Martin's body placed in the trunk of her car
16 what would your answer have been on April 16, 2002?

17 A What's that date again?

18 Q The exam was on April 16th, 2002. Did you
19 discuss with Charlie Williams the taking of a
20 polygraph exam?

21 A I don't recall.

22 Q So, back to the previous question, did you
23 see Kandee Martin's body, when asked on April 16,
24 2002, did you see Kandee Martin's body placed in
25 the trunk of her car what would your answer have

JA 1939

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1 been?

2 MR. WATERS: Your Honor, he has already said
3 he doesn't recall that. He is asking what his
4 answer would have been on April 16, 2002.

5 THE COURT: I'm curious about April 16th.
6 From what you have asked him so far, how would the
7 Court know that is a special day? Do you know
8 anything about April 16, 2000 and what?

9 MR. SINCLAIRE: 2002, Your Honor.

10 THE COURT: 2002.

11 THE WITNESS: I don't recall, sir.

12 MR. WATERS: If he wants to ask him if he saw
13 Kandee Martin's body being put in the car that is a
14 fair question.

15 MR. BROWN: Quite honestly --

16 THE COURT: I'm concerned about this.

17 MR. BROWN: We're going to recall --

18 THE COURT: You may be calling him but has
19 this guy, the witness, been charged with a crime
20 other than these? He was charged with these two
21 matters, with accessory to felony murder, I've
22 still not understood yet whether the warrant is for
23 accessory after the fact or before the fact. Which
24 is the warrant?

25 MR. SINCLAIRE: The warrant says before the

JA 1940

1 fact, Your Honor.

2 THE COURT: Okay. Then arson three, but what
3 I'm concerned with is I don't want to prejudice
4 this fellow in regard to making statements that may
5 or may not incriminate him, that's the only thing
6 I'm concerned about. You asked what he and his
7 lawyer talked about. You know, I'm concerned,
8 about, which I know Mr. Brown is concerned about,
9 lawyer/client privilege.

10 MR. BROWN: He wants to assert a privilege?

11 THE COURT: You all give me one second, I'll
12 be right back.

13 All right, sorry about that. Let's continue
14 on. We were on the issue that I mentioned that I
15 was concerned about making sure we didn't get into
16 attorney/client privilege and we went over the two
17 charges he had. He was charged with accessory
18 after or before the fact?

19 MR. SINCLAIRE: The warrant reads accessory
20 before the fact to murder and arson.

21 THE COURT: And then whether he does or does
22 not remember making some comments on April 16th?

23 MR. SINCLAIRE: Correct, Your Honor.

24 THE COURT: 2002.

25 All right, what is your next question, Mr.

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1 Sinclair?

2 MR. SINCLAIRE: Thank you.

3 BY MR. SINCLAIRE:

4 Q Do you remember during a deposition we took
5 on August 26, 2008 -- do you remember having a
6 deposition?

7 A Yes, sir.

8 Q And during that deposition, without revealing
9 any attorney, anything you have discussed with your
10 lawyer, do you remember me asking you, "Okay, when
11 did you and Mr. Williams decide to cooperate, when
12 did you and Mr. Williams decide to cooperate with
13 the Solicitor's office in the prosecution of Marion
14 Bowman?"

15 Do you remember when that was?

16 A No, I don't.

17 Q Would it refresh your recollection if I
18 showed you the transcript where it says you decided
19 to cooperate after you spoke with Mr. Williams?

20 A Let me see.

21 Q Okay. Referring to the transcript, page
22 eight, lines --

23 MR. WATERS: Page what?

24 Q Page eight, lines 15, 16 and 17 and 18 and
25 19.

JA 1942

6397

1 A Yes, after I talked to Mr. Williams.

2 Q Again, do you also remember, if I asked you,
3 "Did you tell Mr. Williams everything you knew
4 about this case," did you do that, did you tell Mr.
5 Williams everything you knew about this case?

6 A Yes.

7 Q And was it your decision then at that time to
8 enter into a plea agreement with the Solicitor's
9 office?

10 A Yes.

11 Q As part of that plea agreement you had to
12 testify truthfully, is that correct?

13 A Yes, sir.

14 Q Do you remember that you had to tell the
15 absolute truth at any trial proceeding?

16 A Yes, sir.

17 Q And do you remember agreeing that you were
18 not going to be able to omit any facts or attempt
19 in any way to benefit while on the witness stand?
20 Do you remember that as part of your plea
21 agreement?

22 A Say again, sir.

23 Q As part of your plea agreement do you
24 remember saying you were not going to be able to,
25 not able to omit facts or attempt in any way to

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1 benefit while on the witness stand?

2 A Yes, sir.

3 Q And you knew that, I mean, you went over that
4 with your lawyer, correct, before you testified?

5 A Yes, sir.

6 Q And as part of that plea agreement you also
7 were required to do what is known as a debriefing
8 with the Solicitor's office, is that correct?

9 A Yes, sir.

10 Q And do you remember meeting with Solicitor
11 Bailey and Charles Williams at Mr. Williams'
12 office?

13 A Yes, sir.

14 Q So, your lawyer was there and the Solicitor
15 was there. It was actually at Mr. Williams'
16 office, correct?

17 A Yes, sir.

18 Q And during that debriefing you told Solicitor
19 Bailey everything about that night, including the
20 fact that you had bought the gas.

21 Is that correct?

22 MR. WATERS: Your Honor, I object to the
23 leading.

24 THE COURT: Is that correct?

25 A I don't recall.

JA 1944

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1 Q I refer you -- have you discussed your
2 testimony today, since our deposition have you
3 discussed it with anybody at all, the contents of
4 your deposition and what you thought you might be
5 testifying here today?

6 A Say again.

7 Q Did you talk to anybody since your deposition
8 about your deposition or about what you were going
9 to testify to here today?

10 A Did I talk to anyone, yes, I did.

11 Q Did that person or persons suggest to you it
12 would be a good idea to change your testimony from
13 the deposition?

14 A No, sir.

15 Q And I would like to show you -- who were the
16 people you spoke to?

17 A My parents.

18 Q Anybody else?

19 A Cousins.

20 Q Could I have the names of your cousins you
21 spoke to?

22 A Harry Carson, Jo Ann Britt, Kenneth Britt,
23 Alena Britt. There is a bunch of people, man, I
24 mean my cousins, my cousins out there.

25 Q It's your testimony today that none of them

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1 told you to change your testimony from the
2 deposition, is that correct?

3 A No.

4 Q All right. Let me just refer you, then, to
5 deposition page 27, lines 23 through 25 and on to
6 page 28, lines 1 and 2. Do you remember during
7 your deposition --

8 THE COURT: It must have been someone's
9 written rule of law that says depositions must be
10 encased in the loudest folders possible. I am
11 opening the deposition of Mr. Travis Felder taken
12 on the 26th of August, 2008, court reporter Elaine
13 McLeod, and what page did you want to refer to?

14 MR. SINCLAIRE: Page 27, Your Honor, lines 23
15 through 25. And then on to page 28, lines 1 and 2.

16 THE COURT: Looking at the deposition, I will
17 hand it to you, Mr. Felder, these depositions have
18 page numbers and then they have line numbers and he
19 wants to read where it says Q, that means that's a
20 question, A means that that was your answer. He's
21 going to read at the bottom of that page 27 and one
22 line that goes over to the next page. Then it has
23 your answer. If you would just read, when he
24 finishes reading the question read the one answer
25 you gave on the next page but let him, watch as he

1 reads. Go ahead and read the question.

2 Q "In your meeting with the Solicitor
3 originally you told him you had bought the gas that
4 was used to burn Kandee Martin and her car, right,
5 Kandee Martin and her car?"

6 A I said, "Yes, sir."

7 Q So, is it true that in your debriefing with
8 the Solicitor you told him that you had bought the
9 gas that was used to burn Kandee Martin and her
10 car?

11 A According to the paper, yes, sir.

12 Q No. Isn't that what you testified to on
13 August 26, 2008?

14 A Yes, sir.

15 Q And isn't that the truth?

16 A Yes, sir.

17 Q Now, is it also true that you met with the
18 Solicitor again that morning before you testified
19 at trial, and by that, I mean the day you were
20 called, the first day you were called as a witness
21 did you meet with the Solicitor to go over your
22 testimony?

23 A I can't remember every time I met with him.
24 I met with him about twice, that is what I said
25 when I told you what's his name.

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1 Q All right. I would like to hand you now that
2 which is the trial transcript of the Marion Bowman
3 trial and refer you to page 4110, lines three
4 through eight. It is redirect examination by Mr.
5 Bailey where the question from Mr. Bailey to you
6 is, "Travis, we met in your lawyer's office a
7 couple weeks ago, right," and that was the
8 debriefing, "is that correct?" Your answer at that
9 time was?

10 A Yes.

11 Q Okay. Mr. Bailey asked you again, "And this
12 morning we also talked, is that correct?"

13 A Yes.

14 Q So, at least according to Mr. Bailey, his
15 next question is, "So, you have actually talked to
16 me two times?" And your answer then during the
17 trial?

18 A Yes, sir.

19 Q Do you also remember being called back to the
20 stand during the trial of Marion Bowman?

21 A Yes, sir.

22 Q And before that testimony do you recall
23 meeting again with Solicitor Bailey before you were
24 called back to the witness stand?

25 A I don't recall.

1 Q Okay. Open February 16th, in the early
2 morning hours of February 17th, roughly 3:03
3 o'clock in the morning where were you?

4 A I was what?

5 Q Roughly 3:00 --

6 A The hours was what?

7 Q Roughly 3:00 o'clock in the morning.

8 A I was, I was out in the country in Dorchester
9 County.

10 Q After you all had gone to the Allen Murray
11 Club where did you go?

12 A I went in the projects, Villas Apartments.

13 Q Which apartment were you in, whose apartment?

14 A Valona Smith.

15 Q And what was going on there?

16 A I was laying down.

17 Q All right. And when you left the Allen
18 Murray Club, Allen Murray Club where did you go
19 enroute to Valona Smith's apartment, where did you
20 go?

21 A I went to the store.

22 Q Which store was that?

23 A E-Z Horizon.

24 Q What did you buy there?

25 A Some chips.

6404

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1 Q Some chips? All right. And then what
2 happened after you had got back to Valona's
3 apartment and you were eating the chips?
4 A Mr. Bowman came to the door.
5 Q All right.
6 A Knocked on the door, said, "Come here, let me
7 talk to you, man."
8 Q What happened after that?
9 A Word for word?
10 Q Yes.
11 A You let me see my testimony?
12 Q Do you have any recollection of it today?
13 A Say that again.
14 Q Do you have any independent recollection of
15 what Mr. Bowman asked you to do?
16 A I can't tell you word for word. If I miss
17 one word you tell me I left one word out and I'm
18 lying.
19 Q Directing your attention to the trial
20 transcript, page 4093, the question -- I will back
21 up just a little bit, page 4092, talking about,
22 "What time were we talking about then?" "Around
23 3:00 o'clock, somewhere there." "Around 3:00
24 a.m.?" "Yes."
25 Then the question to you, "Okay. When he

JA 1950

1 said that to you what did you do?" I'm sorry, back
2 up a little farther. "Okay, go ahead and tell the
3 jury what occurred when Marion Bowman arrived at
4 the apartment."

5 A "Knock at the door, let Mr. Bowman in, we
6 opened the door, said come in, he came in, he said
7 hey Trav, come here, let me holler at you."

8 Q All right. And the question was, "Said,
9 Trav, come here, let me holler at you," right
10 quick, quick like?

11 A Yes.

12 Q About what time are we talking about by then?

13 A 3:00 o'clock.

14 Q Around 3:00 a.m.?

15 A Around 3:00 a.m.

16 Q When he said that to you what did you do?

17 A I got up and went outside and closed the
18 door.

19 Q All right. And the question is, "When you
20 say he, you got to give his name." Your answer
21 was?

22 A Mr. Bowman.

23 Q All right. Full answer?

24 A "Mr. Bowman. Mr. Bowman. I talked to Mr.
25 Bowman, he said come here."

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1 Q All right. On further direct examination by
2 Mr. Bailey, on page 4094 he asked, "Okay, and did
3 you follow the car?" Your answer was?

4 A "Yes, sir."

5 Q And then where it picks up there, "Who was
6 driving the car?"

7 A "Mr. Bowman was driving the car."

8 Q All right. "And did you leave the town of
9 Branchville?"

10 A "Yes."

11 Q "Okay. Tell the jury where he went, where
12 you followed him." What was your answer?

13 A "We went out down McElhanney Road, then we
14 went out to Nursery Road."

15 Q "Okay. And what happened when you got out to
16 Nursery Road?"

17 A "He pulled, he pulled up, he pulled in a
18 little ways and he pulled over to the right side of
19 the road."

20 MR. WATERS: Your Honor, let the record
21 reflect they were simply reading from the
22 transcript, there were not questions and answers.

23 THE COURT: So reflected.

24 Q Isn't it true, Mr. Felder, that at that point
25 you left out the fact that you had bought the gas

JA 1952

6407

1 that was used to burn Kandee Martin's car and
2 Kandee Martin?

3 A Yes, sir.

4 Q Okay. And that was an intentional omission
5 on your part, wasn't it?

6 A No, sir.

7 Q Referring back to page 4091, in direct
8 examination from the Solicitor, starting at line 9,
9 4091, starting at line 9, okay, just talking about
10 leaving the club, and his single question was,
11 "Okay, where did you go when you left the club?"
12 And what was your answer?

13 A "We went back to Branchville."

14 Q The full answer?

15 A "We went, I went, I went back to Branchville,
16 I went to the store and got some chips."

17 Q "What store did you go to then?"

18 A "E-Z Horizon."

19 THE COURT: That is also read from the
20 transcript of the trial.

21 Q No question, Mr. Felder, though, that on
22 direct examination, a simple question, okay, where
23 did you go when you left the club, your answer at
24 that time was, "I went, went back to Branchville, I
25 went to the store and got some chips." That was

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1 your answer to the simple question from Mr. Bailey,
2 "Okay, and where did you go when you left the
3 club?" Isn't that correct?

4 A Yes, sir.

5 Q All right. So we're clear, two and a half
6 pages later, about 30 seconds later in your
7 testimony you are asked another direct question, a
8 very simple open ended question from Mr. Bailey.
9 "All right, and did you leave the town of
10 Branchville?" Your answer was yes. And the
11 question was, "Okay, tell the jury where he went,
12 where you followed him." And as we now know, as
13 you just testified to, your answer was, "We went
14 out down McElhanney Road and went out to Nursery
15 Road"?

16 A Yes, sir.

17 Q Don't you think that if your plea agreement
18 required you to testify to the absolute truth and
19 not omit any fact, that the jury would have been
20 interested to know that you went to the E-Z Horizon
21 store and bought gasoline enroute to McElhanney
22 Road and then down Nursery Road?

23 MR. WATERS: I object to the form of that
24 question.

25 THE COURT: All right, overruled.

JA 1954

1 MR. WATERS: The question was what the jury
2 might be interested in.

3 THE COURT: Okay. Just explain, if you would
4 like to explain why you didn't answer the way he
5 said.

6 THE WITNESS: I was nervous at the time and I
7 forgot.

8 THE COURT: Okay. That's his answer.

9 MR. SINCLAIRE: The Court's indulgence, Your
10 Honor?

11 BY MR. SINCLAIRE:

12 Q Do you remember during the deposition that
13 you gave we went over this very issue?

14 A Yes, sir.

15 Q And when asked that question, "Okay, tell the
16 jury where he went and where you followed him," and
17 what was your answer? Your answer was, "We went
18 out down McElhanney Road." Is that correct?

19 A What page are you on?

20 Q Page 22, line 17.

21 THE COURT: We're dealing with the deposition
22 here?

23 MR. SINCLAIRE: We are, Your Honor.

24 THE COURT: The deposition?

25 THE WITNESS: Yes, sir.

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1 BY MR. SINCLAIRE:

2 Q You said, "We went out McElhanney Road, went
3 out Nursery Road," that was your direct answer to
4 that direct question, correct, your answer was,
5 line 24?

6 A Yes, sir.

7 Q All right. Then I said, "That's a lie, isn't
8 it?" Your answer was what?

9 A "I don't remember what road it was. I mean,
10 like I said, if it is, it is. Like I said, sir, I
11 went down the road."

12 Q The question was, "Listen, listen, it's
13 pretty simple, tell the jury where he went and
14 where you followed." Your answer was what?

15 A "I don't remember."

16 Q The question is, "The truth is you followed
17 him to the E-Z Horizon store where he told you to
18 go inside and buy the gas. That's the truth, isn't
19 it?" Your answer was?

20 A "Okay, yes, sir."

21 Q The question was, "That is not down
22 McElhanney Road, then went out to Nursery Road, is
23 it?"

24 A "No, sir."

25 Q So, at least in your deposition you admitted

JA 1956

1 that that was not the truth, that that was an

2 absolute intentional omission on your part?

3 A No, it was not intentional omission.

4 Q All right. I believe it was during
5 cross-examination during the deposition by Mr.

6 Waters, on page 42, lines 18 through 20 --

7 MR. WATERS: What page?

8 MR. SINCLAIRE: 42, 18 through 20.

9 Q You didn't leave that relevant information
10 out during your trial, that you had gone to the E-Z
11 Horizon store and bought the gas that was used to
12 burn the car because nobody asked you?

13 MR. WATERS: I'm sorry?

14 Q Correct?

15 MR. WATERS: Is that question in the
16 deposition?

17 MR. SINCLAIRE: No. I'm asking another
18 question.

19 Q At the trial, the trial of Marion Bowman?

20 A Okay.

21 Q You didn't leave that fact out that you went
22 to the E-Z Horizon store and bought the gas because
23 nobody asked you, did you, that is not in the
24 deposition? I'm asking you a direct question. You
25 didn't testify at trial, did you?

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1 A Yes, I had to come back and testify.

2 Q During, during the original testimony you
3 left that out, didn't you?

4 A That is part of my original testimony because
5 I had to come back.

6 Q And you didn't leave it out?

7 A I didn't leave it out intentionally.

8 Q Well, when asked by Mr. Waters at the
9 deposition, "And what was the reason why you didn't
10 mention it in your initial testimony," your answer
11 on August 26th was what?

12 A "I had a lot of stuff on the table, I was
13 scared. I was scared, I was in jail for three
14 months and, you know what I'm saying, I lost my
15 job, I ain't had nothing."

16 Q You were scared to admit at trial that you
17 had bought the gas because that's accessory before
18 the fact to arson, isn't it, that is arson, you had
19 a lot of stuff, you were scared you would get tried
20 and convicted for a greater offense, the arson
21 itself instead of accessory after the fact, isn't
22 that correct?

23 A No, sir.

24 Q At the trial, just so that we're clear, at
25 the trial when Mr. Bailey is also trying to

JA 1958

1 rehabilitate your testimony he says, on page 4925,
2 in asking you why you left out the fact you bought
3 the gas, line 17, 4925, line 17, Mr. Bailey asked
4 you, "Why didn't you tell us that the other day,
5 Mr. Felder?" And your answer was?

6 A "Excuse me."

7 Q And he said, "Why didn't you tell us about
8 the gasoline the other day?" And your answer then
9 was?

10 A "You didn't ask."

11 Q But they had asked, they had asked you
12 exactly about following Marion Bowman out, this is
13 Solicitor Bailey's examination, Mr. Bailey asked
14 you exactly about following Marion Bowman out to
15 Nursery Road the same way he had asked you about
16 how you left Allen Murray Club and went home.
17 Isn't that correct, an open ended question?

18 A Say the question again, sir.

19 Q An open ended question from Walter Bailey
20 about when you are leaving the Allen Murray Club
21 and going back to Valona's house, about where did
22 you go and your answer was, "I went to the E-Z
23 Horizon store and bought chips." Isn't that
24 correct?

25 A No, sir.

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1 Q Page 4094, question, line 3. "And did you
2 leave the town of Branchville?" What was your
3 answer from the trial?
4 A "Yes."
5 Q Open ended question. "Okay, tell the jury
6 why you went --" I'm sorry. Page 4091, line 8,
7 4091, line 9, okay, open ended question, "And where
8 did you go when you left the club?" What was your
9 answer?
10 A That ain't the question.
11 Q What was your answer starting on line 10?
12 A "I went, went back to Branchville, I went to
13 the store and got some chips."
14 Q "And what store did you go to?"
15 A "E-Z Horizon."
16 Q All right. Two pages later, 4094, another
17 direct open ended question from Solicitor Bailey,
18 line 3, "All right, and did you leave the town of
19 Branchville?" What was your answer?
20 A "Yes."
21 Q "Okay. Tell the jury where he went and where
22 you followed him." And what was your answer?
23 A "We went down McElhanney Road, then we went
24 out Nursery Road."
25 Q And that's a lie, isn't it, because isn't it

JA 1960

1 true you left Valona's apartment and went to the
2 E-Z Horizon store where you bought gas and put
3 three dollars worth of gas into a red gas can that
4 you say Marion Bowman gave you, isn't that the
5 truth?

6 A Yes, sir.

7 Q So, isn't that where you went when you
8 followed him from Valona's apartment?

9 A Yes.

10 Q You didn't go down McElhanney Road and out
11 Nursery Road, the truth is you went to the, he gave
12 you a gas can and you went to the E-Z Horizon store
13 and bought three dollars worth of gas?

14 A Yes.

15 Q "Would you tell the jury where he went, where
16 you followed him?" And the answer is, "We went out
17 McElhanney Road and went out to Nursery Road,"
18 that's a lie, isn't it?

19 A Yes, sir.

20 Q All right. And you had another chance to fix
21 that, to fix that lie by omission when Mr. Cummings
22 had a chance to stand up and cross-examine you for
23 the first time, and that is on page 4105, line 7.
24 Page 4105, line 7. Are with you me. And Mr.
25 Cummings asked, "Okay, 3:00 o'clock in the

6416

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1 morning," because he just heard your testimony,
2 "then you go with him, from your testimony, to
3 Nursery Road, just followed him out in the car,
4 right?" This is during the first part of the
5 trial, and what was your answer?

6 A "Yes, sir."

7 Q So, even when Mr. Cummings asked you, "Am I
8 understanding your testimony correctly, that from
9 your testimony you went to Nursery Road, just
10 followed him out in the car, right?" And your
11 answer was what? Line 10.

12 A "Yes, sir."

13 Q You didn't tell the truth then either about
14 going to the E-Z Horizon and buying the gas and
15 putting it in a can, Marion Bowman, that would be
16 the absolute truth, wouldn't it, according to your
17 testimony?

18 A I told the truth.

19 Q You told a half truth. The absolute truth
20 would have included a very significant fact,
21 according --

22 MR. WATERS: I object to counsel's statement.

23 Q The absolute truth would have been, "All
24 right, I followed him to the E-Z Horizon store
25 where I bought three dollars worth of gasoline and

JA 1962

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1 put it in a can"?

2 A I came back to court and I testified to that.

3 Q We'll get to that. But before you were
4 brought back to court to testify to the whole truth
5 you also left out the fact that three dollars worth
6 of gas you carried in your car to Nursery Road,
7 isn't that correct?

8 A Yes, sir.

9 Q You didn't testify to that during your
10 original trial, the first time you were up there,
11 did you?

12 A No, sir.

13 Q You didn't testify that you bought the three
14 dollars worth of gas and you didn't testify you
15 carried the gasoline to Nursery Road, did you, in
16 your original testimony?

17 A No, sir.

18 Q How was it that you found yourself back on
19 the witness stand in the penalty phase of this
20 trial?

21 A They called me back.

22 Q They called you back? Who called you back?

23 A My lawyer told me I needed to go back down
24 there.

25 Q Did you meet, again, did you meet with the

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1 prosecutor and/or Mr. Cummings before you took the
2 stand again?

3 A I don't recall.

4 Q I'm showing you now Plaintiff's Exhibit
5 Number 14 and ask you if you recognize that plea
6 agreement, that agreement. See if that is your
7 signature on the last page of it?

8 A Yes, sir.

9 Q Okay. And also signing that last page are
10 Solicitor Walter Bailey, Jr., is that correct?

11 A Yes.

12 Q And your attorney Charles Williams, attorney
13 for the defendant?

14 A Yes, sir.

15 MR. SINCLAIRE: Your Honor, I move
16 Plaintiff's 14 into evidence at this time.

17 MR. WATERS: Your Honor, as long as it's
18 limited to the allegations that were raised in the
19 amended application, except for my previous
20 objection to the third amended application, those
21 would be my only objection.

22 THE COURT: I'll admit it in evidence.

23 (Plea agreement marked and received in
24 evidence as Plaintiff's Exhibit 14).

25 MR. BROWN: Your Honor, on that note, because

1 this is a little different, he was deposed on
2 August 26, we found out he lied in his trial
3 testimony and --

4 THE COURT: That is your characterization.

5 MR. BROWN: He said it today.

6 THE COURT: Well, anyway --

7 MR. BROWN: And --

8 THE COURT: -- I'm going to admit this, I
9 will admit the matter.

10 MR. BROWN: I just wanted to respond it was
11 amended after that deposition, in fact it was
12 amended within two days of receiving the
13 transcript, maybe even the day of receiving his
14 transcript in our hands of the deposition. I don't
15 know how much faster we could have amended it.

16 THE COURT: It's in evidence.

17 BY MR. SINCLAIRE:

18 Q I direct your attention to the second
19 paragraph on the first page. Do you agree that,
20 "The defendant Travis DeWitt Felder further
21 understands and agrees that the State will advise
22 the sentencing judge at the time of the plea as to
23 the extent of his truthful cooperation with the
24 State provided all the terms of this agreement are
25 fully complied with." Is that correct?

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1 A Yes, sir.

2 Q All right. "And said plea will take place
3 after the trial of Marion Bowman, Jr., and the
4 other individuals named herein." Is that correct?

5 A Yes, sir.

6 Q We talked about the debriefing at paragraph
7 five on the second page. "The defendant Travis
8 DeWitt Felder understands and agrees his
9 cooperation is to include but is not limited to a
10 truthful and complete debriefing of his knowledge
11 concerning any and all criminal activity or
12 unlawful activity he has been involved with, is
13 aware of or knows about." You did that, correct?

14 A Yes, sir.

15 Q And paragraph eight, the top of the next
16 page, "The defendant Travis DeWitt Felder
17 understands and fully agrees to tell the absolute
18 truth at any trial or proceeding either when
19 questioned by the attorney for the State of South
20 Carolina or being cross-examined by any attorney
21 representing any defendant who is being tried." Is
22 that correct?

23 A Yes, sir.

24 Q You agreed to tell the absolute truth?

25 A I told the truth.

JA 1966

1 Q Okay. And then on paragraph ten of the final
2 page, "The defendant Travis DeWitt Felder further
3 understands and agrees that any testimony given by
4 him must be factual and truthful and that he is not
5 able to omit facts or attempt in any way to benefit
6 while on the witness stand either the State of
7 South Carolina or any defendant he may testify
8 about in any future proceeding or trial"?

9 A Yes, sir.

10 Q You entered into that plea agreement with
11 Solicitor Bailey and you subsequently entered a
12 guilty plea to accessory after the fact to arson
13 third degree. Is that correct, accessory after the
14 fact to arson third?

15 A Yes, sir.

16 Q All right. So, what that meant to you was
17 that they were not-prossing the indictment for
18 accessory after the fact of murder, that is either
19 fifteen or ten years, depending on what your
20 understanding was, based on your conversations with
21 Mr. Williams. Is that correct?

22 MR. WATERS: Your Honor, I object to that
23 question. I think he can ask him what his
24 understanding was but there were a lot of predicate
25 facts in there.

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1 THE COURT: A lot of them. Go ahead and
2 answer. What would your answer be, they would drop
3 the arson third?

4 THE WITNESS: Drop the accessory before the
5 fact.

6 THE COURT: What was your understanding,
7 whatever the deal was, what they were dropping and
8 not dropping? What was your understanding?

9 THE WITNESS: The understanding was they
10 would drop accessory after the fact of murder and
11 arson.

12 THE COURT: Okay.

13 BY MR. SINCLAIRE:

14 Q And that meant you weren't going to be
15 exposed to the fifteen years for accessory before
16 the fact of murder, correct -- accessory after the
17 fact of murder, correct?

18 A Possibly fifteen years.

19 Q And you weren't going to be exposed to the
20 ten years for the arson third degree, were you?

21 A Possibly.

22 Q When you say possibly, that means you are
23 recognizing those are the maximum sentences, is
24 that correct?

25 A No.

JA 1968

1 Q You thought they were ten and ten?

2 A No, sir. What it was, he said, "This is your
3 plea agreement and I can try to help you," and that
4 is what it was.

5 Q Are you talking about Mr. Bailey?

6 A Yes.

7 Q Okay. Just so we're clear, what did Mr.
8 Bailey tell you when he met with you and your
9 lawyer and you signed that plea agreement?

10 A I don't remember word for word what he said.
11 I mean, I signed the paper and identify it, he
12 said, "You know, this is your plea, we're going to
13 drop the charge down to arson third degree."

14 Q Accessory after the fact of arson third
15 degree?

16 A I guess.

17 Q All right. Well, did Mr. Williams tell you
18 that carried a maximum sentence of five years in
19 prison?

20 A No, sir.

21 Q Did the judge tell you that prior to your
22 sentencing?

23 A I don't recall.

24 Q Do you recall Solicitor Bailey appearing at
25 your sentencing and talking to Judge Diane

6424

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1 Goodstein before she imposed sentence?

2 A Yes, sir.

3 Q And what did Solicitor Bailey say at your
4 sentencing?

5 A I can't tell you word for word.

6 Q Did he tell Judge Goodstein that you had
7 testified truthful at the trial and had assisted
8 him in the prosecution of Marion Bowman?

9 A Something to that extent.

10 Q And what was your sentence?

11 A I'm thinking, I'm not for sure, three years
12 suspended to three years on probation.

13 Q And?

14 A And community service and stuff like that.

15 Q Have you still got the deposition transcript
16 up there? Refer to page 53. Starting on line 14,
17 "How long have you known Marion Bowman?"

18 A "Elementary school."

19 Q "All right. So, just say the last ten years,
20 did you know Marion Bowman to drink on a regular
21 basis?"

22 A Yes.

23 Q The question, "The big 42 ounce ones, bottle
24 of gin?" Your answer?

25 A "Bottle of gin, beer, whatever."

1 Q The question was, "Is it safe to say he
2 drank every day, too?"

3 A "Yes, sir."

4 Q And if Mr. Cummings had asked you that
5 question during trial would you have testified the
6 same way?

7 A Yes, sir.

8 MR. SINCLAIRE: The Court's indulgence, Your
9 Honor?

10 Answer any questions defense counsel, I'm
11 sorry, counsel might have for you.

12 MR. WATERS: Your Honor, I have been here
13 since 1:30, might I go across the hall real quick?

14 THE COURT: Do you need to go to the restroom
15 at all, sir?

16 THE WITNESS: No, sir.

17 THE COURT: Anyone else need to go to the
18 restroom, go to the restroom.

19 (Recessed at 4:04 p.m.).

20 (Reconvened at 4:10 p.m.).

21 THE COURT: All right, cross-examination, Mr.
22 Waters.

23 MR. WATERS: Thank you, Your Honor, may it
24 please the Court.

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CROSS EXAMINATION

QUESTIONS BY MR. WATERS:

Q Mr. Felder, how you doing today?

A All right.

Q First I want to ask you a couple questions based on a comment I heard from the other side of the aisle here. You remember that deposition we had you have been asked questions about?

A Yes, sir.

Q Had you ever seen, prior to that time had you ever seen me before in your life?

A No, sir.

Q Had you ever had a phone call from me?

A No, sir.

Q Have you ever had a letter from me?

A No, sir.

Q And after that time when was the next time you saw me?

A Down here.

Q Down here?

A Yes, sir.

Q Did I call you during that period of time?

A No, sir.

Q Did I write you a letter during that period of time?

JA 1972

1 A No, sir.

2 Q Did I come and see you during that period of
3 time?

4 A No, sir.

5 Q Okay. Did Mr. Alphonso Simon come and see
6 you any of that time?

7 A No, sir.

8 Q Did he write you a letter or call you?

9 A No, sir.

10 Q Did any law enforcement officer come and see
11 you about this case?

12 A No, sir.

13 Q Did anyone call you or write you a letter
14 from law enforcement about this case?

15 A No, sir.

16 Q Did anyone from the Attorney General's office
17 call or write you about this case?

18 A No, sir.

19 Q When you had that deposition back in August
20 had you been provided with your, with a copy of
21 your trial testimony?

22 A No, sir.

23 Q Okay. So, you were coming in and testifying
24 cold about something that happened six years ago,
25 is that correct?

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1 A Yes, sir.

2 Q All right. And since that time has anyone
3 provided you a copy of this deposition?

4 A Today.

5 Q Today? So, nobody mailed you a copy of this
6 deposition?

7 A No, sir.

8 Q Nobody called you up about your answers you
9 gave?

10 A No, sir.

11 Q What about your trial testimony, anybody give
12 you a copy of that?

13 A No, I didn't get it. I don't, I don't know
14 whether I received it, I don't know whether my
15 parents received it but I didn't get one.

16 Q Okay. So, the bottom line is since this
17 deposition nobody has provided you with a copy of
18 this deposition and nobody from the Attorney
19 General's office or law enforcement has contacted
20 you about the answers you gave at that deposition,
21 is that correct?

22 A No, sir.

23 Q That's correct?

24 A Yes, that's correct.

25 Q Okay. All right. Now, right now you're

JA 1974

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1 presently, you are a diesel mechanic, is that
2 correct?

3 A Yes, sir.

4 Q You work at Coburg, is that right?

5 A Yes, sir.

6 Q You have a family, just had a son born, as I
7 recall?

8 A Yes, sir.

9 Q Okay. And you have been working off and on
10 at Coburg for a number of years, is that correct?

11 A Yes, sir.

12 Q Okay. Now, you were asked some questions
13 about going to the E-Z Horizon and the gas can, and
14 I just want to get it straight. Tell me what
15 happened when Marion Bowman, I'm not asking you
16 word for word, just the best of your recollection
17 right now, what happened when Marion Bowman came to
18 your door?

19 A He knocked on the door, I came to the door,
20 he said, "I need to holler at you." We went
21 outside, he said, "Hey, I need to get rid of this
22 car." He got a gas can, I went to the store and he
23 waited.

24 Q When he said, "I need to get rid of this
25 car," what did you think he meant by that?

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1 A I figured he was going to park it in the
2 woods, he needed some gas, didn't want to go to the
3 station in the car, so all right, I go to the store
4 and get some gas, he park it and leave it, that
5 will be a wrap.

6 Q He gave you the gas can?

7 A Yes.

8 Q And what did he ask you to do?

9 A Put a couple gallons of gas.

10 Q Okay. So you went to the store and put that
11 gas in at the E-Z Horizon, is that correcct?

12 A Yes, sir.

13 Q Where was Marion Bowman at the time you were
14 putting that gas in the gas can at E-Z Horizon
15 store?

16 A The next street, I mean like a street across
17 from it.

18 Q Describe it as best you can.

19 A 70 toward, going toward Bamburg, 70 that goes
20 through town, I was at the stop sign.

21 Q He was kind of pulled over out of sight on
22 the side road, is that right?

23 A Yes, sir.

24 Q Okay. Then he told you, he told you to
25 follow him?

1 A Yes, sir.

2 Q Okay. And then you were asked about whether
3 you lied when you said that you all went out from
4 McElhanney Road to Nursery Road, but that is
5 exactly where you went, correct?

6 A Yes, sir.

7 Q You followed Marion Bowman out from
8 McElhanney Road to Nursery Road, is that correct?

9 A Yes, sir.

10 Q Okay. All right. Now, there was a video
11 camera present in that store, right?

12 A Yes, sir.

13 Q Did you all know there was a video camera in
14 that store? Did you know there was a video camera
15 in that store?

16 A Any store? In the store, yes.

17 Q So, if whoever went up there and purchased
18 the gas was going to end up on the video camera, is
19 that correct?

20 A Yes, sir.

21 Q And Mr. Bowman was parked on the side of the
22 road outside of any view of the camera, correct?

23 A Yes, sir.

24 Q Okay. What you just related to me is exactly
25 what you told us back on August 28, correct?

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1 A Yes, sir.

2 Q And that was without having any review of

3 your trial testimony, right?

4 A Yes, sir.

5 Q Okay. All right. So, you testified at trial

6 and then tell me how it was that you came back and

7 testified again.

8 A My lawyer called me and told me I needed to

9 go back down there.

10 Q Okay. What happened after that?

11 A I came back and went on the stand and he told

12 me --

13 Q Did you meet with the defense lawyer at all?

14 A No. He called me on the phone, told me go

15 down there.

16 Q Which is that, Charles Williams?

17 A Mr. Charles Williams.

18 Q He told you you needed to come back down

19 there, they wanted you to testify again?

20 A Yes, sir.

21 Q When you got down there they put you right up

22 on the stand and talked to you first what happened?

23 A I don't recall.

24 Q But they got you up on the stand and the

25 defense attorney asked you if that was you on the

JA 1978

1 tape, correct?

2 A Yes, sir.

3 Q You told him it was?

4 A Yes, sir.

5 Q And then he asked you some more questions and
6 you told us exactly what you just said, Marion
7 Bowman gave you the gas can and asked you to get a
8 couple dollars worth of gas, correct?

9 A Yes, sir.

10 Q All right. So, you told that in front of the
11 jury in the sentencing phase, is that right?

12 A Yes, sir.

13 Q Okay. All right. Now, you were asked why
14 you left that out the first time and I believe that
15 you stated that you were scared. Is that correct?

16 A Yes, sir.

17 Q Okay. Do you recall what you told us at the
18 deposition?

19 A Not word for word, no.

20 Q All right.

21 MR. WATERS: Court's indulgence just one
22 moment?

23 Q Look at page 42, line 20.

24 A Yes, sir.

25 Q What was your answer from lines 20 to 23?

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1 A "I had a lot of stuff on the table, I was
2 scared. I was scared, I was in jail for three
3 months and, you know what I'm saying, I lost my
4 job, I had nothing."

5 Q You ain't had nothing?

6 A "I ain't had nothing."

7 Q I want you to turn over to page 49 and read
8 your answer beginning at line 19.

9 THE COURT: This is the deposition again?

10 MR. WATERS: Yes, sir, it is.

11 MR. WATERS: Questions, Your Honor,
12 deposition of August, 2008.

13 THE COURT: Page 49, line 19?

14 BY MR. WATERS:

15 Q Read your answer when that question was
16 raised again.

17 A "I don't know, this case cost me a lot more
18 than I want it to be, you know what I'm saying, and
19 I barely can get a job right now because, because
20 of this. I made a mistake and I, I made a mistake
21 and I paid the price for it and so this part of my
22 life I blacked out. I'm trying, I'm trying, I
23 don't want to remember none of this, so when I'm
24 telling you I don't recall, I don't recall."

25 Q Okay. So, let me ask you about that. Again,

JA 1980

1 you got called into this deposition some six years
2 after this trial and you hadn't had any
3 preparation, correct?

4 A No, sir.

5 Q Nobody had contacted you about this case?

6 A No, sir.

7 Q Nobody had let you review your trial
8 testimony or refresh your recollection or anything
9 like that?

10 A No, sir.

11 Q So, you were just trying to answer these
12 questions as best you could years later, is that
13 right?

14 A Yes, sir.

15 Q Okay. Now, you were asked some questions
16 about whether or not you told the Solicitor that
17 you went out to, that you went to the E-Z Horizon
18 store to get the gas prior to going out to
19 McElhanney road and Nursery Road. Correct?

20 A Yes.

21 Q Okay. And at one point you stated that you
22 didn't remember what you told the Solicitor,
23 another point you stated you did tell him that, at
24 least today you said you don't remember and then in
25 the deposition you said that you did remember that

6436

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1 or you did tell him that. Which is it, or do you
2 remember?

3 A I don't recall.

4 Q Well, I mean, we're right here under oath,
5 this is where it counts.

6 A Yes, I understand.

7 Q I don't want a false answer, I want you to
8 give the best true answer. I don't care if it's
9 not a good answer unless it's a true answer, the
10 best you've got.

11 A To the best of my knowledge, sir, I don't
12 remember what I told the Solicitor.

13 Q Okay. So, you don't remember your
14 conversations with Walter Bailey word for word?

15 A No, sir.

16 Q Let me ask you something else. I think you
17 also testified, do you remember a time when you and
18 Tawain Gadson and Marion Bowman went to Orangeburg
19 to purchase a weapon?

20 A Yes, sir.

21 Q Okay. And who bought a weapon that day?

22 A Marion Bowman.

23 Q What kind of gun was it, do you remember?

24 A It was a .380.

25 Q All right. And did that gun he bought that

JA 1982

1 day appear to be the same gun he had tucked in his
2 waist during the course of the day or during the
3 course of that evening?

4 A Yes, sir.

5 Q Do you remember we talked a little bit at
6 that deposition about Darien Williams, right?

7 A Yes, sir.

8 Q Are you familiar with Darien's reputation for
9 telling the truth in the community in which you all
10 live?

11 A Yes, sir.

12 Q What is that reputation?

13 A It's not good.

14 Q Okay. In fact I think you said something to
15 the effect he's liable to say anything?

16 A Yes, sir.

17 Q And that you have also seen him flip out?

18 A Yes, sir.

19 Q Okay. What about Marion Bowman's reputation,
20 he was known as a pretty rough dude, is that
21 correct?

22 A Yes, sir.

23 Q And I think the way you described it, it was
24 better to be his friend?

25 A Yes, sir.

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708

1 Q And that you didn't want to push his button
2 or mess with him?

3 A Yes, sir.

4 Q You were asked a little bit about Marion
5 Bowman and his drinking. Do you recall seeing Mr.
6 Bowman drinking on the time that you spent with him
7 on the night of that incident?

8 A I don't recall.

9 Q Okay. Do you recall him slurring his words
10 and staggering around and acting all drunk?

11 A I don't know, I don't recall.

12 Q Okay.

13 THE COURT: Stop your question right there
14 just one second.

15 MR. WATERS: Yes, sir, Your Honor.

16 (Brief recess).

17 THE COURT: Go ahead with your questions.

18 MR. WATERS: Thank you, Your Honor.

19 BY MR. WATERS:

20 Q Mr. Felder, you were asked about when you got
21 arrested for this warrant, you stated that you
22 thought you were being charged with murder and
23 arson?

24 A Yes, sir.

25 Q Okay. Did you think you were being charged

JA 1984

1 with murder or accessory to murder?

2 A Accessory to murder.

3 Q You were never confused you were actually
4 being charged with murder itself?

5 A No, I wasn't charged with murder, myself.

6 Q Okay. So, you never had that belief,
7 correct?

8 A No, sir.

9 Q In fact, when you all had that initial
10 arraignment where it was you and Tawain Gadson and
11 Mr. Bowman all there together they didn't arraign
12 you on murder charges, did they?

13 A No, sir.

14 Q Okay. All right. When you ultimately -- let
15 me ask you this. At the deposition you were asked
16 about when you decided to cooperate with the law
17 enforcement. Right?

18 A Yes, sir.

19 Q And that was after you had a discussion with
20 your lawyer, correct?

21 A Yes, sir.

22 Q And what did he tell you when you all had
23 that discussion?

24 A I was looking at a great amount of time and,
25 "From what you're telling me you need to go ahead

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1 and plead with the State."

2 Q So, you told him everything you knew?

3 A Yes, sir.

4 Q And his judgment to you was that, what did he
5 tell you, he told you you needed to tell the truth,
6 is that what he told you?

7 A Tell the truth.

8 Q Those were the words from Mr. Williams,
9 correct?

10 A Yes, sir.

11 Q So, it wasn't any polygraph or anything like
12 that, it was Mr. Williams saying, "You need to tell
13 the truth and let's see what we can do with the
14 State," correct?

15 A Yes, sir.

16 Q That is exactly what you told us at the
17 deposition that you can recall after six years as
18 well, right?

19 A Yes, sir.

20 Q At anytime did anyone, Solicitor Bailey or
21 anyone that worked for him suggest facts to you to
22 testify?

23 A No, sir.

24 Q Did they tell you to not testify about the
25 going to the gas station?

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1 A No, sir.

2 Q Did anyone in law enforcement suggest facts
3 to you?

4 A No, sir.

5 Q Did they tell you not to tell about going to
6 the gas station?

7 A No, sir.

8 Q So, like your attorney, they just told you to
9 tell the truth, correct?

10 A Yes, sir.

11 Q Did anybody in law enforcement or the
12 Solicitor's office ask you to do anything but tell
13 the truth?

14 A No, sir.

15 MR. WATERS: Your Honor, I have nothing
16 further at this time.

17 THE COURT: Any redirect?

18 MR. SINCLAIRE: Just briefly, Your Honor.

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REDIRECT EXAMINATION

QUESTIONS BY MR. SINCLAIRE:

Q That videotape from the E-Z Horizon store, the one you knew was inside, they gave a copy of that videotape to Mr. Williams, didn't they, as part of your discovery?

A I don't recall.

Q Well, your face appears on the video after 3:00 o'clock buying gas, is that correct?

A Yes, sir.

Q Okay. And you and Mr. Bailey talked about that fact, didn't you, Mr. Bailey and Mr. Williams?

A Say again.

Q You and Mr. Williams talked about the fact that they had hard core evidence that your face was on the videotape buying gasoline prior to Kandee's car being burned with her in it, isn't that correct?

A Hard core evidence that I -- I don't understand the question, brother.

Q Was your face on the video?

A Yes, sir.

Q Was your face on the video buying gasoline?

A Yes, sir.

Q Did you talk about that with your lawyer?

JA 1988

1 A Yes, sir.

2 Q You covered that ground, just so we're clear,
3 you told your lawyer everything about this case?

4 A Yes, sir.

5 Q Including you bought the gas before the car
6 was burned?

7 A Yes, sir.

8 Q All right. And your lawyer went over with
9 you the plea agreement you entered into with
10 Solicitor Bailey, isn't that correct?

11 A Yes, sir.

12 Q Your lawyer didn't advise you to withhold
13 information from the Solicitor, did he?

14 A No, sir.

15 Q So he says, "Look, you're signing a plea
16 agreement that basically waives all your appellate
17 rights, you've got to tell them the truth." Is
18 that correct?

19 A Yes, sir.

20 Q And as part of that, that you met with
21 Solicitor Bailey in a debriefing and told him you
22 bought the gas, your lawyer was sitting right
23 there, he would have known you were leaving that
24 out, correct?

25 MR. WATERS: I object.

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714

1 THE COURT: The question is do you remember
2 if you told Solicitor Bailey that when you talked
3 to him or not?

4 THE WITNESS: I don't know, sir, I don't
5 remember.

6 BY MR. SINCLAIRE:

7 Q Okay. What you're saying, then, is that you
8 lied to us in your deposition, is that correct?

9 A No. I'm saying I didn't lie to you in your
10 deposition.

11 Q Okay. The question was very clear in your
12 deposition and there was no equivocation at that
13 time, there was no I don't remember at that time,
14 page 27, line 23. Do you have your transcript?

15 Question, "In your meeting with the Solicitor
16 originally you told him you had bought the gas that
17 was used to burn Kandee Martin and her car, right?"
18 And what was your answer?

19 A Yes, sir.

20 Q "No, I don't remember." Then, this was
21 August 26, you told us unequivocally you told the
22 Solicitor that you bought the gas, isn't that
23 correct, isn't that what you told us?

24 A That is what the transcript says.

25 Q So, you're saying today you don't remember

1 but the truth is you told the Solicitor that,
2 didn't you?

3 A Yes, sir.

4 Q At your trial Solicitor Bailey's
5 cross-examination of you?

6 THE COURT: Could I see that one second?
7 Give me one second.

8 MR. SINCLAIRE: Yes, sir.

9 THE COURT: Okay, go ahead, yes, sir.

10 BY MR. SINCLAIRE:

11 Q At your trial, after the defense lawyer calls
12 you to the stand and brings to the Solicitor's
13 attention for the first time that you bought the
14 gas, the Solicitor asked you --

15 THE COURT: By the way, is this in the guilt
16 phase or the penalty phase?

17 MR. SINCLAIRE: Penalty.

18 THE COURT: It never was brought up there.

19 Q The Solicitor says, "Why didn't you testify
20 to that earlier," and your answer was? What did
21 you say that day?

22 A I was scared.

23 Q No, that is not what you said.

24 THE COURT: Well, then read it, it's in the
25 transcript. Do you want to show it to him?

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716

1 A Where at in the transcript?

2 Q Page 4925, line 17, cross-examination by Mr.

3 Bailey. "Why didn't you tell us that the other

4 day, Mr. Felder?" Your answer was, "Excuse me?"

5 "Why didn't you tell us that about the gasoline the

6 other day?" And your answer then was?

7 A "You didn't ask."

8 Q Of course they did ask, didn't they, we have

9 been all over that. They asked you the same way

10 about where you went from the club back to the

11 Villas, as they did when you said you followed

12 Marion out to Nursery Road, didn't they, "Where did

13 you go?" Do you remember that?

14 A Yes.

15 Q When they asked you when you left the club,

16 open ended question, your answer was, "I went to

17 the E-Z Horizon store and bought chips." Is that

18 correct?

19 A Yes, sir.

20 Q When they said, "And where did you follow

21 Marion?" You said, "Went out McElhanney Road to

22 Nursery Road," didn't you?

23 A Yes, sir.

24 Q And even when, on cross examination in your

25 original testimony at trial, he said, "Where did

1 you go," and you said, "Out Nursery Road to
2 McElhanney rode, McElhanney Road to Nursery Road,"
3 right?

4 A Yes.

5 Q Completely leaving out the fact you went and
6 bought three dollars worth of gasoline, put it in a
7 can and carried it in your car to where you say you
8 saw Marion drag the body out of the woods. Right?
9 You completely left that out because nobody asked
10 you that?

11 A I forgot, sir.

12 Q You forgot that you bought the gas before an
13 arson?

14 A Sir, I left that part out, I forgot to put it
15 in my testimony.

16 Q Well, at least at the deposition you came up
17 with a different answer as to why you hadn't put it
18 in your testimony. Do you remember that?
19 Deposition page 42.

20 THE COURT: I have it.

21 Q Line 18.

22 THE COURT: I think you're referring to line
23 20, aren't you?

24 MR. SINCLAIRE: That was his answer, Your
25 Honor.

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718

1 THE COURT: You can read line 20.

2 BY MR. SINCLAIRE:

3 Q On page 42, the answer?

4 A "I had a lot of stuff on the table, I was
5 scared, I was scared, I was in jail for three
6 months, you know what I'm saying, I lost my job, I
7 had nothing."

8 Q Well, that's completely different than nobody
9 asked me or you didn't ask me, isn't it, that's a
10 conscious decision, I'm scared if I say I bought
11 the gas, so that's different from you didn't ask
12 me, isn't it?

13 A It's different. I mean, but this is seven
14 years later, I'm saying, like I say, I didn't have,
15 you know, no preparation for you.

16 Q Did you have some preparation for us today?

17 A No.

18 Q You hadn't spoken to anybody in law
19 enforcement about your testimony?

20 A No.

21 Q Out in the hallway even before you came to
22 the witness stand?

23 A No.

24 Q Okay. Now, Mr. Waters asked you about buying
25 the gasoline. Before I get to that, the first

1 thing, you have already testified to that, Marion
2 shows up, according to your testimony, says, "I
3 need to get rid of this car." Is that correct?

4 A Yes.

5 Q And then you followed him or you went to the
6 E-Z Horizon store and bought gasoline. Is that
7 correct?

8 A Yes, sir.

9 Q Isn't it true that you bought the gasoline so
10 that you could then use the gasoline to get rid of
11 the car?

12 A To go put it in the woods, yes.

13 Q To put the car in the woods and torch it,
14 isn't that correct?

15 A No, sir.

16 Q Do you want us to believe that you bought gas
17 in a red gas can and you were going to just leave
18 it in the car?

19 A No, sir. We was going to put the gas in the
20 car so he could get where he was going.

21 Q You didn't do that, though, did you?

22 A No.

23 Q You took, you drove behind Mr. Bowman,
24 according to your testimony, with the gas can,
25 three dollars worth of gas in your hand and then

6450

720

1 when you got out to where he parked the car in the
2 abandoned field you gave him the gas?

3 A Yes.

4 Q And according to your testimony, what
5 immediately followed after you gave him the
6 gasoline, what happened?

7 A He burned the car.

8 Q And it is your testimony that came as a
9 complete shock to you, he burned the car?

10 A No. After he put the gas on it, I mean, yes,
11 he burnt the car.

12 Q You saw him put the gas on it?

13 A Yes.

14 Q You weren't driving down the road and doing a
15 U-turn or anything, you saw him pour gasoline on
16 the car?

17 A Yes.

18 Q All right. That is slightly different from
19 your trial testimony, isn't it?

20 A Can I see my testimony, then?

21 THE COURT: He wants to see the area you're
22 referring to. What area are you referring to that
23 is different? I assume he hasn't had a transcript
24 in his home perusing it over.

25 MR. SINCLAIRE: Correct, Your Honor.

1 THE COURT: What page are you referring to?

2 MR. SINCLAIRE: Judge, that one surprised me,
3 I didn't know he was going to change that part of
4 his testimony.

5 THE COURT: How do we know he changed it?
6 Can you show me where you're talking about he
7 changed it?

8 BY MR. SINCLAIRE:

9 Q Do you recall testifying at trial that you
10 gave the gas to Marion and you drove off and made a
11 U-turn and came back and the car was burning, do
12 you remember that?

13 A I don't remember word for word what I said at
14 trial, sir.

15 THE COURT: Without the details, you saw the
16 car on fire?

17 THE WITNESS: Yes, sir.

18 BY MR. SINCLIARE:

19 Q All right. So, have you found where we're
20 talking about?

21 A Uh-huh.

22 Q 4099, line 20, down at line 20 it says, "All
23 right, you left from here, Mr. Bowman left from
24 here, he told me to go up and turn my car around."
25 Your answer on line 23 was?

6452

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1 A "Okay."

2 Q Okay. The answer, "Okay." Question, "Okay."
3 Answer, "He pulled in this area right here." I
4 think you're pointing to a diagram at that time.
5 Do you remember that?

6 A Yes, I guess.

7 Q Then your answer, "I went farther up the road
8 and turned around." Is that correct? And the
9 question was, "Where did you park?"

10 A "Came back as I turned around, I came back
11 and parked in the middle of the road."

12 Q And the answer was, the question, "Okay."
13 Then you said?

14 A "He was already up it, he was already up in
15 here."

16 Q Subsequent to that, I think you said you did,
17 on 13, "Okay, after he went up in that little field
18 as you described, you stopped your car in the road,
19 and what is the next thing you saw?" And the
20 answer was?

21 A Line thirteen?

22 Q "Yes, sir."

23 A "I seen him get out of the car, lit
24 something, threw it in the car, the car was on
25 fire."

1 Q So, you did see him light the car after you
2 did the U-turn?

3 A Yes, sir.

4 Q Did you at the time or do you know now why it
5 would have been he told you to do a U-turn instead
6 of, "Just stand right here until we leave"?

7 A Because that was the direction going back
8 home.

9 Q Okay. So, did you see him pour any gas on
10 the car? You didn't see him pour any gas on the
11 car, did you?

12 A According to this I didn't see that.

13 Q So, which one is the truth, did you see him
14 pour gas on the car or you didn't see him pour gas
15 on the car?

16 A The truth is he lit the car on fire.

17 Q Did you see him pour any gas on the car?

18 A Sir, I didn't say that at trial and you're
19 trying to make me out a liar and I'm, like I'm
20 trying to say, I told the truth at trial, that's
21 all, I mean, that's all I can tell you.

22 Q Mr. Felder, I'm not trying to make you out to
23 be anything. You testified today you saw him pour
24 gas on the car. You testified at trial that you
25 didn't. I'm just asking you which one is the

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1 truth.

2 THE COURT: Wait a minute. Was he asked at
3 the trial, "Did you see him pour gas on the car?"
4 You are reading from the statements he made about
5 the fire as meaning he said, "I did not see him
6 pour gas on the fire." From what he read, one
7 could say, "I saw him set the car on fire."
8 Whether he actually saw him pour gas on it or not,
9 he might have meant he saw him pour it on or might
10 not have. I'm missing the significance. The
11 significant statement is he saw him set the car on
12 fire. Whether he actually saw him pour the gas
13 before he set the car on fire or not, if you see
14 some significance in that as for as differences, I
15 can see your comment and concerns about not saying
16 anything about getting gas before, in the guilt
17 phase, but I'm just concerned about this point
18 about whether he saw him pour gas on it or not, as
19 opposed to seeing him light it?

20 MR. SINCLAIRE: No, Your Honor.

21 THE COURT: The car caught on fire for some
22 reason.

23 MR. WATERS: There is no denial anywhere in
24 the statement or the transcript's talking about.

25 THE COURT: Okay.