

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 6 OF 9
PAGES 2501 – 3000**

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Counsel for Respondent-Appellee

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and although he reported that he has had problems with disturbed sleep and worrying since the incident, and also was seen to be tearful at times; he did not appear to be lacking sufficient capacity to conform his conduct to the requirements of the law due to a mental disease or defect on February 16, 2001.

RECOMMENDATIONS: It is recommended that the defendant be returned to court.

The above opinions are based on information available to us at this time, and are subject to change should new information become available.

Pratap Narayan, M.D.
 Attending Psychiatrist

Tora Brawley, Ph.D.
 Licensed Clinical Psychologist

PN/rba

D: 05/25/01
 RT/EM: 05/29/01
 F/EM: 06/11/01

CONFIDENTIAL

This information can be disclosed to you from records without restriction, and is not subject to the provisions of the Freedom of Information Act. This information is not to be used for any purpose other than the one for which it was provided. It is not to be used for any purpose other than the one for which it was provided. It is not to be used for any purpose other than the one for which it was provided.

BOWMAN, JR., MARION
 211-0136
 OUTPATIENT EVALUATION

WILLIAM S. HALL PSYCHIATRIC INSTITUTE
 FORENSIC UNIT STAFFING 0346

9376

August 6

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

Rick Davis

Sworn to before this
____ day of _____ 2001

Notary Commission Expires _____



RULE 5
DISCOVERY

9381

THE CUMMINGS LAW FIRM
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September 18, 2001

Dorchester County
Attn: Solicitor Walter Bailey
140 North Main, Suite 102
Summerville, SC 29483

RE: Marion Bowman, JR.
Case #: 2001-GS-18-348; 349

Dear Mr. Bailey:

I would like to have this opportunity to Thank-You for meeting with me Monday to discuss the Bowman case in particular obtaining a copy of all the photos and video involved in the case to include the surveillance photos at the gas station. If you have any questions, please do not hesitate to contact this office.

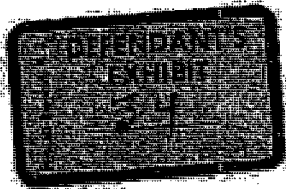
With warm and kind regards, I am

Sincerely,



Norbert E. Cummings, Jr.

NEC/lgr



JA 2905

9382

The State of South Carolina

OFFICE OF SOLICITOR

First Judicial Circuit

140 N. Main St., Suite 102
Post Office Box 2520
Summerville, S.C. 29484
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Solicitor

2 OCTOBER 2001

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Post Office Box 1318
Summerville, South Carolina 29484-1318

Marva A. Hardee-Thomas, Esquire
Dorchester County Public Defender
Post Office Box 50503
Summerville, South Carolina 29485-0503

IN RE: STATE OF SOUTH CAROLINA vs. MARION BOWMAN, JR.

Dear Marva and Norb:

Please find enclosed herewith for each of you a copy of additional discovery together with an itemized list of same with regard to the above matter.

Also, for Norb only I am enclosing herewith a copy of the following:

1. Two Videotapes from the Horizon EZ Shop in Branchville; and
2. Nine Autopsy Pictures. These are copies of the autopsy pictures that I ordered for my file. There are additional autopsy pictures which are available by contacting Dr. Janice Ross at Newberry Pathology Associates.

Please do not hesitate to give me a call if you have any questions.

With kindest personal regards, I remain,

Sincerely,

A handwritten signature in dark ink, appearing to read "WMBjr".

Walter M. Bailey, Jr.

WMBjr:jgh

Enclosures: As stated



JA 2906

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The State of South Carolina

OFFICE OF SOLICITOR
First Judicial Circuit

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Solicitor

2 JANUARY 2002

Norbert E. Cummings, Jr., Esquire
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Marva A. Hardee-Thomas, Esquire
Dorchester County Public Defender
Post Office Box 50503
Summerville, South Carolina 29485-0503

IN RE: STATE OF SOUTH CAROLINA vs. MARION BOWMAN, JR.

Dear Marva and Norb:

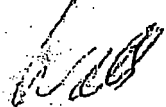
Please find enclosed herewith for each of you a copy of the following with regard to the above matter:

1. Statement of Rickie Davis dated 8/6/01;
2. Handwritten Notes - undated/re: Ricky Davis;
3. Letter dated 8/2/01 to Lt. Nettles from Sgt. Gretschi; and
4. Dorchester County Detention Center Policy Number 3795 dated 3/2/98 (3 pages).

Please do not hesitate to give me a call if you have any questions.

With kindest personal regards, I remain,

Sincerely,



Walter M. Bailey, Jr.

WMBjr:jgh

Inlosures: As stated (6 pages)



JA 2907

9442

STATE OF SOUTH CAROLINA) RECORDED
COUNTY OF DORCHESTER) -5 AM 11:53
C.A. No. 06-CP-18-569

MARION BOWMAN, #6006)
CHERYL CAMPBELL)
CLERK OF COURT)
DORCHESTER COUNTY)

Petitioner,)

v.)

FOURTH AMENDED APPLICATION FOR
POST-CONVICTION RELIEF

STATE OF SOUTH CAROLINA)

Respondent.)

[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-Withdrawn

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.

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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 evidence elicited by prosecuting attorney regarding plea agreements entered between the State and Applicant's family members in exchange for testimony regarding efforts to secrete a firearm. 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-Withdrawn

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

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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-Withdrawn

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, Eighth, 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), and *Johnson v. Mississippi*, 486 US 578 (1988).

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. This other mitigating information included testimony from lay and expert witnesses involving applicant's capacity to be of emotional value to others as a positive character trait, how a sentence of death would adversely impact this character trait and how a sentence less than death would allow for applicant to continue to contribute to society.
- (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

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Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth, Eighth 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. Further, trial counsel were also ineffective for failing to object to a death sentence rendered by the sentencing body outside of the statutory authority providing for capital sentencing. *Strickland v. Washington*, 466 U.S. 668 (1984) and *State v. Burkhardt*, --- S.E.2d ---, 2007 WL 80036 (SC 2007) & *Johnson v. Mississippi*, 486 US 578 (1988)

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, Eighth, 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), & *Johnson v. Mississippi*, 486 US 578 (1988).

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-Withdrawn

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-Withdrawn

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.

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- (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, Eighth, 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 or non-statutory mitigating circumstance. *Strickland v. Washington*, 466 U.S. 668 (1984) & *Johnson v. Mississippi*, 486 US 578 (1988).

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. Gadson also lied to Coker about owning a .380 firearm. Gadson also fired Bowman's gun within weeks of Martin's death and returned the gun to Bowman. The jury never heard this information.
- (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. In fact, counsel never informed the jury that Gadson cut a plea deal to avoid death, without objection, for capital murder.
- (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. Counsel failed to inform the jury that Coker knew that Felder bought the gasoline and lied during the guilt phase testimony. Counsel also failed to elicit the fact that Coker swore Gadson was the shooter and that Felder was an accessory before the fact to murder or that this information was presented to the grand jury. Further, the jury never learned that Coker continued to believe in Felder and Gadson's responsibility for Martin's death.
- (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" or that Gadson lied about owning a 9

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millimeter instead of a Highpoint .380.

- (13) Trial counsel failed to inform the jury that casings linked to Tawain Gadson's gun were compared by SLED Agent Collins. Trial counsel failed to inform the jury that Hiram Johnson provided inconsistent statements to the police which did not include any reference to the alleged confession of Marion Bowman or that Johnson possessed bias towards the state to avoid a possession of a stolen vehicle charge.
- (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

- (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."

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- (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 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 [redacted]) 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. Further, Felder lied about the number of times he met

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with representatives of the state.

- (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 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 of exculpatory or impeachment value. 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, James Tawain Gadson and Hiram Johnson.
- (2) Mr. Felder testified that he left the apartment (Number [redacted]) and followed applicant to McAlhenny Road and then to Nursery Road. Transcript 4093-4094 and Transcript 4105, l. 7-9. Hiram Johnson testified that he heard Bowman confess to this killing. The prosecution emphasized that Johnson had not cut a deal with the state and had not reason to lie.
- (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. Felder also did not inform the jury about his proffer statement to the prosecution, made by his defense counsel or his number of meetings with the representatives of the state. Further, he lied to the prosecutor nearly every time he spoke with the executive branch as he sought to minimize his liability and shift guilt to Bowman. Felder also received the benefit of a "wink wink" deal when he was allowed to lie with impunity and still receive the benefit of his plea agreement. However, Johnson was in fact charged, under the prosecutor's direction, with three charges including Receiving Stolen Goods, Burglary, 2nd Degree, and Grand Larceny. Johnson received the benefit of his "wink wink" deal when he later had two of these charges dismissed and one remanded to magistrate court.
- (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." The state also knew that Ricky Davis told an investigator from the prosecutor's office that he overheard a confession from Gadson in which he admitted he shot Kandee Martin and not Marion Bowman.
- (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 I, 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 [redacted]) and followed applicant to McAlhenny Road and then to Nursery Road. Transcript 4093-4094 and Transcript 4105, I. 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

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been different.

Ground V

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth, Eighth, 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 challenge the kidnaping aggravating factor with available evidence contradicting this assertion. *Strickland v. Washington*, 466 U.S. 668 (1984) & *Johnson v. Mississippi*, 486 US 578 (1988)

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 and failed to present evidence which contradicted this assertion.
- (3) But for counsel's deficient performance, the outcome of the proceeding would have been different.

Ground W

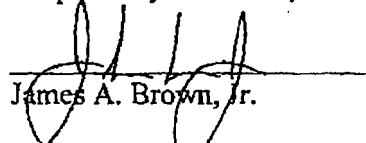
Applicant's right to counsel, as guaranteed by the Sixth Amendment , Eighth Amendment and Fourteenth Amendment of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60, was violated as a result of the constructive absence of counsel during the preparation, strategic planning and presentation of evidence in mitigation as accumulated by the mitigation specialist and presented by the testifying social worker. See *U.S. v. Cronin*, 466 U.S. 648, 659 (1984) , *Brooks v. Tennessee*, 406 U.S. 605 (1972), *Frett v. State*, 298 S.C. 54, 378 S.E.2d 249 (1988) and *Johnson v. Mississippi*, 486 US 578 (1988)

Supporting Facts for Ground W

- (1). Trial counsel employed the services of a mitigation specialist and a testifying social worker.
- (2) Trial counsel failed to adequately meet with either of these two members of the defense team or convey a trial strategy which would accommodate and reconcile the theory of the guilt phase with the theory of the penalty phase.

- (3) Trial counsel instead allowed a non-lawyer, expert witness to determine what type of mitigation should be presented and what type should not be pursued.
 - (4) This strategy decision to not pursue the presentation of evidence of applicant's good character traits but instead focus on negative aspects of his life was made by a non-lawyer witness instead of a lawyer or two lawyers to which applicant was entitled.
 - (5) This failure is amounts to a complete breakdown in the adversarial system such that applicant was effectively deprived of the guiding hand of counsel in the pursuit of a sentence of less than death. Because of this constructive denial of counsel, prejudice is presumed and a new penalty trial should be held.
- 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 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,


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June 5, 2009

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STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS

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

MARION BOWMAN, #6006)

Applicant,)

v.)

STATE OF SOUTH CAROLINA)

Respondent.)

APPLICANT'S AMENDED BRIEF
SUPPORTING THE FOURTH
AMENDED APPLICATION
FOR POST-CONVICTION RELIEF

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Introduction

_____ The Government convicted Marion Bowman of murder and arson and obtained a sentence of death related to the killing of Kandee Martin and the burning of her body. These verdicts are not worthy of confidence because the jury never understood the real evidence suggesting: that Tawain Gadson killed Kandee Martin, that Gadson had serious problems with his credibility as a witness, that Gadson lied to the police more than once, that Gadson faced the death penalty, that he was assisted by Travis Felder, that Felder was the arsonist, that Felder lied to the police, the prosecutor and the jury, that Hiram Johnson testified with an undisclosed bias towards the state, that Johnson lied to the police, that Ricky Davis told the prosecution he overheard Gadson confess to this killing, that the government knew Felder perjured himself, or that Detective Coker swore, under oath, that Gadson killed Kandee Martin with Felder's assistance and that Felder burned the car.

The jury never understood the lack of evidence in aggravation, or heard the multitude of evidence in mitigation, was never properly instructed by the court to consider mitigation and never saw a sentencing defense presented by competent counsel, but instead saw a defense based upon non-lawyer strategy. Finally, the jury considered an arbitrary factor in its sentencing determination.

Counsel offers the Court this assessment and this brief not as a complete or exhaustive listing of either the law or facts supporting the claims found in the Fourth Amended Application, but instead as a summary or guide to the most compelling issues which warrant the grant of post-conviction relief to applicant, Marion Bowman. PCR counsel specifically incorporates by reference all of the record into this brief, including the trial testimony and exhibits and all items

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contained in the General Sessions file in the clerk's office, the PCR transcript and exhibits and all items contained in that Common Pleas file in the clerk's office as well as all items proffered to the Court and all items of which the Court took judicial notice. Counsel respectfully submits this Amended Brief as a corrected and supplemental version to the Brief previously submitted.

James Tawain Gadson, Jr. -Grounds T(4-7), M(1-7),

_____Mr. Bowman is entitled to a new trial based upon the State's failure to turn over evidence involving James Tawain Gadson, Jr. in violation of the requirements of Brady v. Maryland, 373 U.S. 83 (1963). Additionally, Bowman is entitled to a new trial because trial counsel was ineffective for failing to investigate and utilize exculpatory and impeachment evidence regarding Gadson's involvement in the death of Kandee Martin.

Brady Violation-T(4-7)

The United States Supreme Court has set out the three components or essential elements of a Brady prosecutorial misconduct claim: "The evidence at issue must be favorable to the accused, either because it is exculpatory or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." Strickler v. Greene, 527 U.S. 263, 281-282 (1999). Further, the government's duty to disclose evidence favorable to the accused encompasses evidence known by others acting on the government's behalf, even if not known by the prosecutor. Kyles v. Whitley, 514 U.S. 419 (1995). Kyles defines material evidence as that type of evidence which, if withheld, would result in a trial unworthy of confidence. Id.

Gadson's Mental Illness, Chronic Drug Use and Memory Impairment

Favorable to the Accused

During the guilt/innocence phase of the trial, Gadson testified that he alone was the sole direct witness to Bowman's involvement as the shooter of Kandee Martin. See generally, Trial, 3980-4039. No other independent, direct evidence of the identity of the shooter was presented. Therefore, evidence impeaching the credibility and believability of Mr. Gadson was of

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paramount concern to the defense. See PCR, p. 1273, l. 1-22.

Mr. Gadson's credibility and believability was subject to scrutiny because of his status as a cooperating witness. While some of the details of this arrangement were provided to the jury, some of these were not. This issue will be addressed below in the portion of this brief regarding IAC.

However, other matters also called into question the veracity of statements made by Mr. Gadson. Chief among these were serious concerns about his drug use and severe mental disorders. These items were never disclosed to the trial attorneys or the jury who decided Mr. Bowman's fate.

From the beginning, the prosecutor, the trial court and Gadson's own counsel harbored questions about Gadson's mental health. Because of this, an order was signed requesting that the State's hospital conduct an evaluation for both competency and criminal responsibility. See Plaintiff's 8. Even though found competent and criminally responsible, this evaluation revealed serious mental health concerns and questions about Gadson's ability to recall events.

Of paramount concern is that Gadson was found to suffer from cannabis dependence as an Axis One, clinical diagnosis. In fact, Gadson admitted during the evaluation that he "consumed up to six blunts of cannabis on a daily basis." During the PCR hearing, the prosecuting attorney admitted the impeachment value of this information. PCR, p. 1648, l. 11-22.

Further, and possibly related, is the finding that Gadson suffers memory impairment. While the report attempts to minimize this shortcoming by indication that Gadson suffers from no long or short term memory problems, the jury is the proper arbiter of the impact of this

information upon their review of Gadson's testimony.

Further, Gadson suffered from periodic blackouts and loss of consciousness related to an Axis Three diagnosis of seizure disorder. The report indicates that these blackouts have been temporally associated by Gadson with his exorbitant consumption of marijuana. Put in his own words, one episode occurred when "... he was smoking marijuana and he...fell down, and when he 'came back,' felt somewhat dizzy."

Most importantly, these blackouts are accompanied by "incontinence." Plaintiff's 8, page 2. This is important because Gadson told the jury he suffered "incontinence" during the shooting of Kandee Martin. Trial, 4013, l. 6-10. Had this correlation been presented to the jury, the argument could have been made that Gadson suffered a blackout during the time of the incident in question.

Finally, this suppressed mental health report contained information indicating that Gadson heard "a voice" and a beeping noise. Gadson could not relay to PCR counsel what this voice told him to do. Neither could the prosecuting attorney describe the contents of conversation provided by this voice.

However, the prosecutor clearly admitted that "arguably there would be some impeachment value" found in the mental health information withheld. PCR, p. 2121, l. 13-14.

Withheld by the State

Both the prosecuting trial attorney and the respondent's counsel acknowledge that the information contained in the mental health report was never disclosed to applicant's trial counsel. PCR, p. 1649, l. 18- p. 1650, l. 14. In fact, PCR counsel only obtained a copy of this report following the service of a subpoena upon the First Circuit's Solicitor for the trial file. PCR, p.

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1650, l. 15. Finally, trial counsel admits that he never knew of this important impeachment information, but would have desired to have the same for purposes of cross examination of the State's star witness and lone piece of direct evidence linking Mr. Bowman to the killing of Kandee Martin. PCR, p. 1648, l. 7-1649, l. 22.

Prejudice Ensued

There is no way to adequately describe the impact of Gadson's testimony towards the ultimate question of the shooter's identity without consideration of the other evidence of identity. To begin, the State possessed and believed at least until a late stage in the proceeding evidence indicating that Gadson was involved in shooting and killing the decedent. Plaintiff's 3 & 84 (letter from Bailey to Gadson's attorney, dated March 25, 2002 noting that "due to your client's admitted involvement, I cannot reduce the murder charge.")¹ This evidence included the prosecutor's assessment, Coker's sworn statements, statements from Mr. Bowman, Gadson's own access to a .380 firearm and the statements of Darian Williams, Rickie Davis, and Wayne Mood. See Plaintiff's 1, 3, 4, 7, 11, 17, 18, 35, 36, 45, 67, 68, 70, 84, 85, 86, & Def's 4, 5, & 6.

Any information which undercut the credibility of Gadson's testimony, directly weakened the State's case. Further, this impeachment would actually assist in the defense argument that Gadson was the shooter, thus this information was also indirectly exculpatory.

Therefore, based upon this one claim alone and in conjunction with the other claims contained herein, Mr. Bowman should receive a new trial because the verdict in his previous trial

¹This murder charge was dismissed despite this earlier assertion and the jury never heard about Bailey's pre-trial assessment as indicated in Plaintiff's 84.

is not worthy of any confidence in the result.²

Ineffective Assistance of Counsel-M(3, 7, 9).

Failure to Investigate/Impeach/Introduce Evidence of James Tawain Gadson's Plea Deal and True Bias to Avoid a Death Sentence

As an independent ground for relief, Bowman's trial counsel failed to adequately investigate Gadson's background and failed to utilize the material available to undermine credibility in Gadson's testimony. Trial counsel's conduct in this regard fell below a reasonable standard for the performance of counsel in similar circumstances. Trial counsel had no reasonable strategy to excuse this failure. And if not for this failure, there is a reasonable probability that the outcome of Bowman's trial would have been different.

Un-Presented Details of Gadson Plea Deal

Most importantly left from the examination of Gadson by Bowman's trial counsel were details concerning the plea deal struck between Gadson and the State. Plaintiff's 3. While the jury heard that Gadson cut a deal to reduce a murder charge to charges of accessory after the fact and misprision, the jury was incorrectly informed of the potential penalty Gadson avoided. Finally, the jury was left with the incorrect impression that Gadson would serve 20 years in prison.

Specifically related to Gadson's avoidance of a death sentence is a failure to inform the jury that Gadson expressly bargained to avoid the death penalty. Plaintiff's 3, § 9(b). At trial, the only reference to Gadson's exposure to the death penalty was an inartful question presented by trial counsel Cummings. Counsel asked Gadson: "You were never served the notice of death

²Gadson also lied to the police about owning a .380 firearm.

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penalty at all?" Trial, 4024, l. 18-20. Gadson replied: "No, sir." In reality, the written plea agreement, provided to trial counsel the morning of the trial, clearly stated that a failure by Gadson to "...cooperate in the investigation and prosecution of Marion Bowman, Jr....." will result in the State seeking "...the death penalty against the Defendant and the Defendant hereby waives any objection to the State's seeking of the death penalty."³ See Plaintiff's 3, § 9.

Even though there exists no greater incentive for anyone to testify favorably for the State than the reduction from a death sentence to a twenty-year non-violent sentence where one is parole eligible after serving less than five years, trial counsel failed to effectively cross-examine Gadson regarding this bias and motive to misrepresent the facts. Though there was no doubt in Gadson's mind that he faced the death penalty, trial counsel's questioning left the exact opposite impression with the jury. When questioned about this failure, trial counsel Cummings indicated that he probably wished he had done a better job examining Gadson in this regard. PCR 1664, l. 25-1667, l. 7. In fact, it appears that trial counsel concedes his ineffective cross-examination by proclaiming that he received the plea agreement in such a manner that his other trial obligations prevented his proper preparation of effective and reasonable cross-examination of Gadson.

Prior Assertions that Gadson was the Triggerman

This failure to cross-examine Gadson was compounded by the failure to present evidence to the jury that the State harbored a long-held belief that Gadson was the triggerman in Martin's death. To begin, the affidavit attached to the arrest warrant for Gadson clearly contained a sworn statement from lead Detective Alvin Coker indicating that Gadson was the shooter. See Plaintiff's 4 ("[Gadson] willfully and unlawfully with malice and (sic) aforethought did shoot

and kill one Kandee Martin.”) Months later and after extensive investigation by multiple law enforcement agencies, including Dorchester County, Orangeburg County, Branchville City and the State Law Enforcement Division, Ballistics unit, this same detective presented and obtained a true-billed indictment in which the State alleged, in part, that “James Tawain Gadson, did kill one Kandee Martin by means of shooting the victim in the head....” See Plaintiff’s 1.

The jury was never presented any information indicating that the State ever believed Gadson was the shooter. Instead, the jury was left with the impression that Bowman was the only person who was targeted in the investigation as the shooter. When questioned about this failure, trial counsel indicated he held no strategic reason for this failure. Specifically the testimony shows:

Q: Isn’t it of impeaching value to the State’s case, if not Gadson’s testimony in particular, that he was alleged to have been the shooter?

Q: Why didn’t you tell the jury the State had sworn in previous proceedings that Gadson was the shooter?

A: I can’t answer that today. I don’t know why I didn’t ask it. I mean, it wasn’t strategy, that’s for sure, and if I didn’t ask it that way, I thought I was cross-examining him the best way I could get evidence out of him

Q: There is no strategy reason?

A: No, sir, no strategy reason.

This information was in keeping with the defense theory, the prosecutor’s own assessment of Gadson’s “admitted involvement” in the murder, and other un-presented information supporting the contention that Gadson was the shooter. Plaintiff’s 84. Chief among these is Gadson’s own confessions. Plaintiff’s 11 & 67.

Gadson’s Confessions-M(1-6)

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As fully explained in the later portion of this brief regarding Ricky Davis, trial counsel possessed evidence that Gadson confessed to killing Kandee Martin while he was incarcerated in the Dorchester County Detention Center (DCDC), A-side. See Plaintiff's 11 & 68. Records indicate that Gadson was housed on A-side at the time of the confession. See Plaintiff's 41. Further, inmate Ricky Davis, to whom one confession was made, was also housed on A-side according to his own statement and the investigative notes of Sam Richardson of the First Circuit Solicitor's Office. See Plaintiff's 67.

Also, the prosecutor himself expressed belief in the statement of inmate Wayne Mood which indicated that Gadson confessed to him as well. According to the notes from the prosecutor's interview with Mood, Gadson confessed to shooting Martin while in the DCDC. This information was conveyed to trial counsel as late as one week before jury selection. Plaintiff's 68.

Most telling about this conveyance is that the prosecutor, himself, recognized and conveyed the "impeachment" value of Gadson's confessions. See Plaintiff's 68.

Gadson's Access and Prior Shooting of Alleged Murder Weapon

Applicant's trial counsel's failure to cross-examine Taiwan Gadson about his prior confession to Ricky Davis, the substance of which was that he had the murder weapon in his hand and shot Kandee Martin with it, dovetails into Applicant's trial counsel's failure to present evidence that Margaret Hawkins and Tierra Coleman saw Taiwan Gadson just two weeks prior to the killing, fire the same weapon that the State contends is the murder weapon and then hand it back to Marion Bowman. (See Plaintiff's Exhibits 29 and 30, Statements by Margaret Hawkins and Tierra Coleman).

The jury never heard that Taiwan Gadson had fired the gun that the State contends is the murder weapon just two weeks prior to Kandee Martin's killing. And no doubt, had Gadson been cross-examined on this point, he would have testified exactly as he did in the PCR Hearing on Page 163, lines 23-25 and Page 164, lines 1-10:

Q: Did you shoot a High-Point .380 at the Villas projects in February, 2001?
A: Yes, I did. That is way before the murder even happened, weeks before.
Q: Weeks before the murder you shot a High Point .380?
A: Yes.
Q: High Point .380?
A: Yes.
Q: At the projects?
A: Yes.
Q: In Branchville?
A: Yes.

And Gadson reiterated this damning testimony in the PCR Hearing, confirming he got the gun from the Applicant: See on page 196, lines 18-25:

Q: That was Marion's gun?
A: Uh-huh.
Q: He let you borrow it?
A: It was a dude standing in front of the apartments talking as if he had a knife, he handed me the gun, I started shooting it.
Q: Marion was there?
A: Yes, he was there.

Trial counsel offered no strategic reason for the failure to question Gadson regarding the shooting of the alleged murder weapon. In fact, when questioned about this failure to inform the jury of Gadson's familiarity and access to the .380 in evidence, trial counsel replied: "I don't have a strategy reason for that." PCR, p. 1681, l. 1.

Gadson's lie about his owning a .380 & lie to Detective Stephenson (M3 & 9)

Gadson also told Detectives that he owned a 9 millimeter firearm. This is incorrect as the police knew that he actually purchased a Highpoint .380, the identical make and model gun that

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Bailey and law enforcement believe killed Martin. Gadson also lied to the police when he told Detective Stephenson that he was not involved in the death of Kandee Martin. PCR, p. 1761 & Plaintiff's 7⁴. Counsel never provided this information to the jury. Instead, the jury believed that only Bowman owned a weapon which would produce class and subclass characteristics consistent with the casings linked to Martin's death. Further, the jury was led to believe that Gadson was not involved in Martin's death, when the police and prosecutor had reason to believe otherwise.

But for these errors, there is reasonable likelihood that Marion Bowman would not have been convicted of murder and arson.

Conclusion

Therefore, considering the significance of the above-mentioned errors relative to the importance of Gadson's testimony as the only direct evidence offered against Bowman as the shooter, these errors, individually and cumulatively are such that a new trial should be granted.

⁴This information served as the basis for Stephenson and Coker's belief that Gadson was involved in Martin's death. Further, it is assumed that Bailey believed this falsehood demonstrated a sufficient basis to both credit the information in the Sam memo as well as provided the mechanism to threaten Gadson with a death sentence. See Plaintiff's 84.

Travis Felder-Grounds S(1-6), T(1-7),M (10, 11) & U (1-6)

Mr. Bowman also seeks a new trial because of the errors involved in the presentation of evidence by Travis Felder, the discovery violations related to Mr. Felder and the ineffective assistance of counsel related to the evidence presented by Mr. Felder. A new trial should be granted because of each of these errors and because of the cumulative impact of all of the errors cited in the brief.

Failure to Correct False Testimony Regarding the Gasoline Purchase

During the guilt/innocence phase of Mr. Bowman's trial, Mr. Felder presented a false statement when questioned concerning his actions when he left the apartment complex in Branchville, South Carolina at approximately 3:15 a.m. on February 17, 2001. Both Mr. Felder and the prosecutor now concede that this statement was a "lie." PCR, p. 685, l. 15-19 & p. 2113, l. 20-25. However, the State failed to correct this false statement even though the falsehood was known by the lead investigator in the case. Further, Mr. Felder and the investigator believe they informed the prosecutor of the true information which was not conveyed to the trial jury, and no matter what, this information should have been known by the prosecutor given other information within the custody of the state.

To begin, the United States Supreme Court categorically condemns the utilization of false testimony. In fact, for nearly three quarters of a century, the Supreme Court has unequivocally indicated that the failure to correct the knowing presentation of false testimony will result in reversal of any conviction obtained therewith. Mooney v. Holohan, 294 US 103 (1935). In Mooney, the Court refuted the argument of the State Attorney General that due process is satisfied when the "State has contrived a conviction...through deliberate deception of court and

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jury by the presentation of testimony known to be perjured.” Mooney, at 112. The Court held that “[s]uch a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.” Id. at 112.

Nearly a half century ago, the United States Supreme Court reversed a murder conviction based upon a prosecutor’s failure to correct false testimony regarding a plea agreement struck between the State and a cooperating witness. Napue v. Illinois, 360 US 264 (1959). In Napue, the Court reviewed the constitutionality of a murder conviction obtained, in part, by the testimony of a cooperating co-defendant. At the trial, the co-defendant testified that he had not struck any plea bargain with the State’s attorney. This was false and this false assertion went uncorrected. The Supreme Court held that the prohibition on the use of false testimony applied even when the “false testimony goes only to the credibility of the witness.” Napue, at 269. The Court continued to note that a “lie is a lie...” and that it was “of no consequence that the falsehood bore upon the witness’ credibility rather than directly...” on the question of guilt. Id. at 269-270 (internal citations omitted).

Finally, the South Carolina Supreme Court has recently issued a ruling regarding a Napue claim. See Riddle v. Ozmint, 631 SE2d 70 (SC 2006). In Riddle, the state Supreme Court reversed a murder conviction, in part, because the State presented the false testimony from a witness and allowed that testimony to go uncorrected. In that case, a cooperating co-defendant falsely testified regarding the number of times he met with authorities to discuss his testimony. The State Supreme Court granted relief noting that the “issue is not why [witness] failed to tell the truth: rather, it is why the solicitor, who knew [witness’] testimony to be false, failed to

correct it.” Riddle, at 75. The Court reaffirmed the notion that the “failure to correct false evidence is as reprehensible as its presentation.” Id.

Turning to the facts of this case and as a matter of review, Marion Bowman was tried and convicted for Murder and Arson, Third Degree, in a trial conducted in the Dorchester County Court of General Sessions. As part of the State’s case, Travis Felder testified on behalf of the prosecution as a cooperating witness. Trial, p. 4084- 4102. He testified that he assisted Mr. Bowman by giving him a ride from the scene of the arson. Trial, p. 4094- p. 4101. He testified that he struck a deal with the prosecution to reduce his criminal liability in exchange for his cooperation.

The jury learned that, as part of this agreement, the State would reduce both the criminal charges against Mr. Felder and minimize the potential that he would actually be incarcerated. Trial, p. 4085, l. 3-4086, l. 5. In exchange, Mr. Felder would provide testimony of his knowledge of the events of February 16-17, 2001 which served as the basis of this trial. Further, the agreement mandated that Mr. Felder’s testimony be truthful and complete and that he not omit any facts. Plaintiff’s 14 & PCR, p. 667, l. 11- p. 668, l. 5.

Mr. Felder testified that he left an apartment in Branchville and drove to the area of McAlhany Road and Nursery Road in Dorchester County. Trial, 4094, l. 6-9. He testified that he then retrieved Mr. Bowman and gave him a ride from the scene of an arson. He did not indicate his involvement in the procurement of the gasoline used to burn the automobile. Instead, his testimony falsely minimized his role.

However, Mr. Felder now indicates that he lied during this testimony. PCR, p. 685, l. 15-19. During a deposition provided to undersigned counsel during collateral proceedings, Mr.

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Felder admitted it was a lie when he failed to indicate that he went from the apartment to obtain gasoline at the EZ Horizon Shop instead of directly traveling to the Nursery Road area in an effort to get rid of a car. He knew this gasoline was to be used to get rid of this car. However, the jury never heard this different version of Felder's testimony before deliberating and returning a guilty verdict against Mr. Bowman for murder and arson. See PCR, p. 671- p. 685.

Also, Mr. Felder's false testimony was not corrected by the prosecution, as required by due process and fair trial requirements of the US and SC Constitutions. Instead, the prosecution continued to reward Mr. Felder for his false testimony by awarding him his bargain from the plea agreement despite his breach of its terms. The jury never learned of this perverse result as Mr. Felder was not sentenced until after the conviction and sentence of Mr. Bowman. Plaintiff's 63.

The prosecution knew of this false testimony because the lead investigator testified he was aware that Felder bought the gasoline. Detective Coker indicated that:

- Q: And do you recall who purchased the gasoline from E-Z Horizon Mart?
 A: Yes, sir. Based on some of the statements and stuff there was some talk about the fact they went and purchased gas.
 Q: Okay. And was it Travis Felder that bought the gas?
 A: I believe so, yes, sir.
 Q: Okay. That was your belief during the prosecution of this case?
 A: Yes, sir.
 Q: And was that information conveyed to the prosecutor?
 A: Yes, sir.
 Q: And that was conveyed to him prior to Mr. Bowman's trial?
 A: Yes, sir.
 Q: There is no question about that?
 A: Everything we had in the case was given to the Solicitor's office.
 Q: Specifically the information that Travis Felder purchased the gas?
 A: I'm quite sure it was.
 Q: Quite sure?
 A: Yes, sir.

.....
 Q: If that wasn't him on the video would you have still charged him with this

[Arson]?

A: I'm sure I wouldn't.

Q: Your accusing him with the arson was based on the fact he was the person purchasing the gas from the E-Z Horizon Store?

A: That and based on the co-defendant's statements, yes sir.

Q: And that video?

A: Yes, sir.

Q: And the purchase of the gasoline, That was something you all certainly were interested in?

A: We were. I think Detective Miller initially picked up the tape, gave it to me, I in turn gave it to Agent Helms who took it for further analysis at SLED headquarters.

Q: And eventually it ended up in the hand of the prosecutor?

A: Yes, sir.

Q: And that was a crucial piece of evidence regarding the arson charge?

A: Yes, sir.

Q: Regarding who to charge with the arson?

A: Yes, sir.

Q: I will hand you what has been marked as Plaintiff's 43 and 44 and ask you if you recognize those documents?

A: 43 would be the indictment for arson third degree for Travis DeWitt Felder, and 44 is the accessory after the fact [to murder] indictment against Travis DeWitt Felder.

Q: Who was the witness in the grand jury proceedings regarding those charges?

A: That would be me sir.

Q: Any other witnesses?

A: No, sir.

Q: And Mr Felder was indicted in fact not for accessory after the fact of arson, but for arson?

A: That's correct.

Q: That is consistent with him purchasing the gasoline?

A: Correct.

PCR, p. 899, l. 6- 905, l. 24.

However, the prosecutor allowed Mr. Felder to lie before the jury and this false testimony was never corrected. Instead the jury was led to believe that Mr. Felder played no role in the planning to burn or burning of the car, but instead was surprised when he saw the car afire. This

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trial testimony falsely minimized Felder's role and hid from the jury the fact that the only physical evidence documenting involvement in the arson pointed to Felder and not Bowman.

To place this in context, the prosecution again originally charged Gadson as the shooter of Kandee Martin and Felder as an accessory before the fact of murder for assisting Felder in Martin's murder. Plaintiff's 17. Felder was also charged with the arson during this same arrest, the week of Ms. Martin's death. Plaintiff's 18.

The jury never learned that Detective Coker believed that Felder and Gadson killed Martin, but instead was presented false information regarding Felder's role.

Because the prosecution committed misconduct in the failure to correct this false testimony, a new trial should be granted. See PCR, p. 671, l. 2-16.

Failure to Correct False Testimony Regarding Meetings between Felder and "anybody representing the State"

Mr. Felder also testified falsely regarding false statements made during the trial regarding the number of times he met with "anybody representing the State." Trial, p. 4109, l. 9. Even though not an element of a misconduct claim, this falsehood is significant because it contributed to the shielding from defense counsel and the jury of Felder's numerous lies to law enforcement and the prosecutor. This is part of a pattern of falsehoods, suppressed evidence and ineffective examination which misled the jury about Felder's actual role in the killing and murder of Kandee Martin.

At trial, Felder indicated that he met once with "anybody representing the State." Trial, p. 4109, l. 7-17. This was modified upon prodding by the prosecutor who reminded Felder of a meeting which occurred that morning. Trial, p. 4110, l. 3-10. However, even this modified

statement that Felder met twice was a false statement. In fact, Felder met at least 5 times with the representatives of the State such as detectives or the prosecutor before his testimony in the penalty phase of the trial.

Felder initially met with law enforcement just two days after Martin's body was found. PCR, p. 651, l. 10- p. 652, l. 4. At this meeting, Felder informed law enforcement that he did not know anything about her death. The jury never heard about this inconsistent prior statement, but instead only heard he met once pre-trial with the prosecutor and once the morning of his penalty phase testimony.

Felder later met with a detective when he was arrested. PCR, p. 652, l. 5-18 & Plaintiff's 16, 17, & 18. At that time, he was briefly Mirandized and questioned at the time of his arrest. Even though he made no statement at that time, the jury never heard about this meeting with "anybody representing from the State."

Felder also met pre-trial to broker a plea deal. At this meeting, review was had of a proffer letter which his attorney submitted to the prosecutor in an effort to cut a plea bargain. Plaintiff's 64. The prosecutor admitted, during the PCR testimony, that Felder's proffer on his attorney's letterhead was also false and that this was the second attempt on Felder's part to lie to the State when brokering a plea deal. PCR, p. 2109, l. 15-p. 2111, l. 10. The jury never heard about this proffer, the false nature of this proffer or that this was the first of two attempts within a month where Felder lied to "anybody representing the State" in an effort to minimize his culpability.

Later, Felder met with representatives from the state when his lawyer and the prosecutor arranged for a polygraph. See Plaintiff's 15. This meeting was a carefully crafted meeting with

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involvement by Felder, a polygrapher from the Dorchester County Sheriff's Department, the lead investigator, Felder's attorney and the prosecutor. PCR, p. 2107, l. 12- p. 2112, l. 9. This meeting was carefully crafted to limited the questions which could be asked of Felder. PCR, p. 821, l. 1-25. Both the prosecutor and the lead investigator testified at the PCR hearing that the questions were to be limited in a way which shielded exposure of Mr. Felder's involvement in the crimes at question. PCR, p. 811, l. 23- p. 812, l. 21. The prosecutor arranged for this polygraph because Felder lied about his knowledge of the presence of Kandee Martin's body in the trunk of the car when the arson occurred. The jury was never told of this meeting, that the meeting was limited in the parameters of investigation regarding Felder's liability, or that Felder lied at this meeting.

Finally, Felder met with the prosecutor prior to his guilt phase false testimony. Trial, p. 4109- p. 4110. They also met following his false testimony in the guilt phase but prior to his penalty phase testimony. Felder initially omitted reference to the meeting the morning of his guilt phase testimony, but the prosecutor eventually straightened out this omission for the jury through pointed and sharp questioning of a leading manner.

Then Felder admitted that he met with the prosecutor two times. Trial, p. 4110, l. 9-10. This number is also misleading as documented by the multiple meetings documented above. Further, Felder never indicated that his guilt phase testimony was a "lie" which was perpetrated because he was "scared" and "had a lot on the table." PCR p. 680, l. 1- p. 685, l. 19 ("That's a lie, isn't it? Yes, sir.")

In retrospect, both Felder and the prosecutor indicate that the guilt phase testimony was a lie. PCR, p. 685, l. 15-19 & p. 2113, l. 20-25. In fact, the prosecutor indicates that there is no

other way to characterize Felder's guilt phase testimony other than a lie and that this was the third time within six weeks that Felder lied in an attempt to minimize his involvement while providing evidence against Marion Bowman. PCR, p. 2109-2114. The jury never heard of the prosecution's characterization of this pattern of lies by the State. Also, the jury never heard that Felder lied during the penalty phase when Felder did not describe these five meetings as outlined above, but instead proclaimed there only to be two meetings with "anybody representing the State."

The prosecutor obviously knew this was false. Further, this false statement appears strikingly similar to the falsehood which was criticized and cited for reversal of a murder conviction and death sentence in the Riddle case, mentioned above. There, a cooperating witness lied in at least one of his multiple meetings with law enforcement when providing information against the petitioner at the underlying capital trial. Neither was this pre-trial lie exposed, nor was the in-court lie about the number of meetings to debrief revealed. On consideration following denial of post-conviction relief, the Supreme Court found that failing to correct a false statement was as opprobrious as the knowing presentation of one and reversed the circuit court by granting a new trial on the question of guilt.

Again, here, the prosecutor knew that Felder met more than 2 times with the state. In fact, the prosecutor knew that Felder met with him or his agents in carefully planned meetings at least three times prior to that penalty phase testimony and that he lied at least at two of the prior meetings. Also, the third meeting was necessitated by Felder's third attempt to lie and minimize his own role in the death and cover up of Kandee Martin's body.

Thus, this error warrants post-conviction relief in the form of a new trial because the state

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allowed Felder to lie about the number of meetings with the executive branch.

Brady Violation

Mr. Bowman also deserves a new trial because neither he nor his trial counsel were informed about Felder's extensive attempts to minimize his involvement by providing false information to the State.

Pattern of Minimizing Involvement

It was not until the conclusion of the PCR hearing that Mr. Bowman and his PCR counsel became aware of the exact details of Felder's efforts to minimize his own involvement in the death and arson of Kandee Martin. To understand the impact that this pattern of deception could have played at the trial level and, thus, the materiality of this withheld evidence in the Brady context, a brief review of Felder's possible role in this crime is necessary. The PCR testimony of the lead detective suffices to explain this role.

Detective Coker indicated that Felder was clearly charged in the arrest warrant as an accessory *before* the fact to murder. PCR, p. 979, l. 9- p. 980, l. 1 & Plaintiff's 17. This was not a typographical error, as Coker testified that he believed, at the time of the arrest, that Felder and Gadson were involved in the killing of Kandee Martin. This included the above-referenced belief that Gadson was the shooter. In fact, Coker testified at the PCR hearing that he still believes that Gadson accompanied Felder to the scene of the arson and burning of Martin's body. PCR, p. 885, l. 4- 10 & p. 888, l. 19- p. 889, l. 10.⁵

⁵Also, see Plaintiff's 85-interview notes of Prosecutor Baily, wherein Darien Williams indicates that Gadson was at the scene of the arson and the Williams "will probably make a good witness." This is consistent with Detective Coker's belief but inconsistent with Gadson and Felder's trial testimony. These notes were not disclosed to the trial counsel, although Williams prior consistent statement, Plaintiff's 36, was disclosed.

When initially questioned, Felder told the police that he knew nothing about the killing of Kandee Martin. PCR, p. 651, l. 10- p. 652, l. 4. This denial predated Felder's arrest. This information was conveyed to trial counsel through the provision by the state of Coker's report.

Identity of Felder as Purchaser of Gasoline

However, it is unclear that the State provided the defense with the identity of Felder as the one who purchased the gasoline. While the tape was provided to the defense, the image on the tape does not clearly indicate that Felder purchased the gas. Plaintiff's 42, CD copy of EZ Horizon Video tape of Gadson purchase of gasoline contained in Detective Coker's File, -also marked as Court's exhibit 2⁶. However, it is clear that the purchaser of the gasoline is the same person who purchased chips and dip from the very same E-Z Horizon Store just minutes before the purchase of the gasoline. Same video.

These purchases occurred about 3:00 a.m. on February 17, 2001. The exact time of one of these purchases is noted on a post-it note in Detective Coker's handwriting which he affixed to Felder's booking report in his trial notebook. Plaintiff's 50. While Coker could not positively state when the note was attached, he did indicate that he did not modify his notebook after trial and that he was aware of Felder's identity as the gasoline purchaser before trial. PCR, p. 990, l. 12- p. 991, l. 11 & p. 1013, l. 24- p. 1016, l. 16.

Further, defense counsel did not know that Felder purchased the chips and dip before Felder testified to this at the guilt phase of the trial. In fact, it is clear that Felder did not provide a written statement to law enforcement. Nor was a summary of Felder's testimony provided to

⁶Another copy of this video is marked as Defendant's Exhibit 19 from the underlying trial and has been expressly incorporated into this record.

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the defense, pre-trial.

Instead, defense counsel knew only of Felder's pre-arrest denial and his polygraph denial, both of which the State considered to be a false statements. The State never provided any proffer or summary to the defense counsel. This withheld information includes both the false proffer from Felder's defense counsel and other information as noted by Coker which demonstrated the falsehood of Felder's guilt phase testimony.

Proffer Letter from Felder's Defense Counsel

Following the carefully orchestrated polygraph examination, which did not include any post-testing examination, Felder's attorney provided the State with a letter which summarized Felder's proposed testimony. Plaintiff's 64. The most interesting point in this letter is that Felder denied knowing that he was traveling to Nursery Road to destroy Kandee Martin's car. Instead, he indicated that his trip to Nursery Road was to perpetrate an insurance scam.

Even to this day, the State does not believe the contents of this letter. But more interestingly is the fact that the prosecutor did not believe the letter pre-trial either. PCR, p. 2109, l. 13- 24. In fact, former solicitor Bailey clearly indicated at the PCR hearing that Felder was lying when he informed his attorney of this proposed testimony referenced in the proffer letter and that this deception was intended to minimize his role in the burning of Martin's car and body in an effort to curry favor with the State and receive lenient treatment.

The contents of this letter, the recognition of the letter's deception or the pattern of minimizing involvement, beginning pre-arrest and continuing post-polygraph into the guilt phase testimony were never provided to the defense. PCR, p. 2109, l.25 - p. 2114, l. 15. This is strikingly similar to suppressed information withheld by the State in Gibson v. State, 514 SE2d

320 (SC 1999).

In Gibson, the prosecutor met with the purported star witness in a killing. Id. at 520-521. While conducting this pre-trial interview, it became apparent that the witness was not telling the truth about his ability to have viewed the events in question. The witness admitted to the prosecution that he did not see what he claimed to have seen.

The prosecutor in Gibson did not reveal this information. Instead, the State accepted a plea in which the defendant admitted his guilt in the killing. On PCR, the circuit court found a Brady violation and ordered a new trial.

On appeal, the South Carolina Supreme Court affirmed this reversal. The Court easily recognized the Brady violation. Despite the fact the defendant admitted his guilt, the conviction was reversed as the Court noted that the cross-examination of the witness with this lie to law enforcement would carry powerful weight in the accused's decision of whether to plea or proceed to trial. Id. at 526-527.

Likewise, had the defense in Bowman been provided this letter, it could have been used to impeach the testimony of Felder. Felder was the only purported direct witness to Bowman's guilt as the arsonist who destroyed Martin's car and body. Thus, the suppression by the prosecution of the pre-trial confrontation and the admission by Felder that the letter was a lie, undermines the confidence in the outcome of the guilt phase of Bowman's proceedings.

Wink Wink Deal-Lie and Omit and Still Receive Benefit

The most telling of all of the withheld information is the now-apparent "wink wink" deal which was suppressed by the State. To put this another way, outside of the written plea agreement which Felder entered with prosecutor Bailey, another, unwritten deal has become

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apparent. This is the “wink wink” deal which condones testimony including lies and omission by rewarding benefits if the outcome of the trial is successful in the prosecution of the target.

As part of his pre-trial motions, defense counsel prepared a discovery request which included fairly standard language seeking information regarding deals cut by the state with prosecution witnesses. This discovery request specifically referenced “wink wink” deals. PCR, p. 1297, l. 4-9. The defense counsel testified that a “wink wink” deal was a colloquialism for an unwritten promise between the state and the cooperating witness to scratch each other’s back. PCR, p. 1297, l. 22.

In Bowman’s case, the prosecutor admitted that Felder lied at least three times while attempting to curry favor for a lesser sentence. This first lie was contained in the proffer letter conveyed by Felder’s defense counsel to the prosecution. Plaintiff’s 64. This letter was never provided to defense counsel. PCR, p. 1318, l. 20- p. 1320, l. 8. However, this proffer was also false as it again incorrectly minimized Felder’s role in the arson of Martin’s car and body. This falsehood was revealed to the defense.

Felder gave a second version during the carefully crafted polygraph examination. When confronted with this obvious lie, Felder changed his story to add a slightly more culpable version of events. The jury never heard of these lies.

The state continued to seek Felder’s assistance and drafted a written agreement which document the restrictions upon Felder’s trial testimony. This testimony was not only to be truthful, but was not to contain any omission as was not to unfairly benefit either Felder or any third party. If this provision was violated, Felder faced his original charges and withdrawal of his benefit of the bargain.

Felder lied at trial during the guilt phase. There he indicated that he left the apartments in Branchville and traveled down MacAlheny Road to Nursery Road. Trial, p. 4094, l. 6-9. In fact, Felder left the Branchville Apartments and purchased the very gasoline used to burn Martin's car and body. Whether the fault of Felder, the prosecutor or defense counsel, the correct information was never conveyed to the jury which convicted Bowman of murder or arson and was not brought to the attention of the court.

Instead, in a most perverse series of events, Felder was awarded the benefit of his plea agreement even though he breached his end of the deal. PCR, p. 2114, l. 1-14. The prosecutor played an integral role in this perversion, and the Solicitor indicated at trial that he did not revoke the plea agreement despite the false trial testimony because "it was not worth it." PCR, p. 2155, l. 1- 19. This appears to be double talk for the recognition that the prosecutor received what he really sought, a conviction, not truthful testimony.

Finally, Felder indicated that the prosecution appeared at his sentencing to urge that the very same trial judge before whom Felder perjured himself reward Felder for this false testimony. PCR, p. 694, l. 3-9. Unaware of the false nature of the testimony and encouraged by the prosecutor as a minister of justice, the judge obliged and Felder received probation for his role in the same killing that the lead investigator still believes Felder was involved in as an accessory to murder and an arsonist. PCR, p. 694, l. 10-14 & Plaintiff's 63.

This "wink wink" or unwritten deal was never revealed to the defense. Had it been, the defense would have likely used this information to impeach Felder's testimony and the State's case. PCR, p. 1316, l. 9- 25. The suppression of this information undermines confidence in the outcome and a new trial should be granted.

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Ineffective Assistance of Counsel*Un-presented Evidence of Felder's Original Charge as
Accessory Before the Fact to Murder*

As an additional claim regarding the evidence provided by Felder during Bowman's trial, defense counsel was ineffective for failing to adequately cross examine Felder regarding the discrepancy between his exposure on the initial charges upon which he was arrested and the charges to which he bargained to plea. While the jury heard that Felder was pleading to a reduction in charges from Accessory after the Fact to Murder and Arson, 3rd down to Accessory after the fact to Arson 3rd, the jury never heard that Felder was originally charged as an Accessory (before the fact) to Murder and Arson, 3rd. Further, the jury never heard that, at least at the time of the 2002 trial, Felder's potential exposure as an Accessory before the Fact to Murder (capital) was a sentence of death or at least a sentence of 30 years to life in prison.

When he was arrested, Felder was charged with Accessory before the Fact to Murder related to the shooting of Kandee Martin. Plaintiff's 17. Felder was also charged with Arson for the burning of her car with her body in the trunk. Plaintiff's 18. The body of the affidavit supporting the Accessory before the Fact to Murder charge clearly indicated a belief that Felder assisted Gadson in shooting Kandee Martin.

Detective Coker's testimony confirmed that this assertion was not a typographical error, but that the government actually believed that Felder was involved in Martin's death through assistance provided to Tawain Gadson. Further, even seven years after the investigation into Martin's death, Coker still believes that Felder and Gadson were involved, and this belief obviously, is quite a different version of liability for Felder than the testimony he provided in

either the guilt or penalty phases portrayed.

Defense counsel's failure to present this information to the jury falls below a reasonable standard of performance as textbook cross examination includes a recital of the potential exposure of the witness in contrast to the expected gain from testimony provided in cooperation with the government. See State v. Mizell, 563 SE2d 315 (SC 2002)(Wherein the South Carolina Supreme Court reversed a conviction where the trial court improperly excluded reference to the potential penalties facing the cooperating witness, even though this would indirectly inform the jury of the potential penalties facing the defendant.) In fact, the Mizzell court found that a witness who had not entered a negotiated plea was even "more likely to engage in biased testimony in order to obtain a future recommendation for leniency." Id. at 333. If this right to examine on these matters trumps the general rules regarding presenting sentence information to the jury, surely counsel is expected to utilize this right in a case where his client's life is on the line.

Further, trial counsel offered no strategic reason for this failure. PCR, p. 1300, l. 7- 15. Instead, he repeatedly indicated that if his cross examination should have done a better job, then he apologized to Mr. Bowman. PCR, p. 1300, l. 10-15. Counsel emphasized that this was a matter involving Bowman's life and that he should get any breaks if the performance was found lacking. PCR, p. 1303, l. 11- p. 1304, l. 25.

As far as prejudice, this failure exacerbates the failure to inform the jury of the State's long-held belief that Gadson was the shooter and that Felder assisted Gadson prior to the killing. Again, Gadson and Felder were the only two witnesses who offered direct evidence of Bowman's guilt. This testimony is suspect because the effort to incriminate Bowman also served to

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exculpate the very witnesses who offered this testimony. In this regard, this is similar to the bias reviewed in the Mizzell opinion as the Supreme Court found the error there was not harmless because the cooperating witness in Mizzell was the lone eyewitness and the “only link” to the petitioners’ involvement in that case. Mizzell at 334. In Mizzell, a statement that the witness faced a long prison sentence was not enough to make the error harmless.

Here, defense counsel did not examine Felder adequately and in accordance with the law. There is no strategy supporting this failure. Had counsel’s performance been better, there is a reasonable likelihood that the outcome of the proceeding would have been different.

Un-presented Identity as Purchaser of the Gasoline used in Arson

Likewise, defense counsel was ineffective for failing to expose Felder’s identity as the purchaser of the gasoline. This is pled as an alternate claim to the Napue claim, Brady claim and Rule 29(b) claim⁷ regarding this issue. Had counsel cross-examined Felder to expose the lies presented on direct examination by the State and had the jury learned that Felder was actually the principal who purchased the gasoline instead of the accessory after the fact to this arson, the outcome of the guilt phase proceedings would have been different.

As a brief recap, it is now clear that Felder provided false testimony under oath to the jury regarding his involvement in the burning of Kandee Martin’s car and body. This information was never corrected before Mr. Bowman was convicted of murder and arson. In fact, before

⁷This Rule 29(b) claim is also pending at the time of this briefing before the trial judge in the Dorchester County Court of General Sessions. Also pending before this PCR court is a Motion to hold the PCR proceedings in abeyance pending the resolution of the Rule 29(b) issues. This Motion to hold the PCR proceedings in abeyance is based, in part, upon concerns regarding the possibility of inconsistent findings of fact as they pertain to the timing of the knowledge of Felder’s identity as the gasoline purchaser.

deliberating on Mr. Bowman's guilt or innocence, the jury never learned that Felder lied regarding this information. In fact, PCR counsel were unaware of the prosecutor's bold characterization of this testimony as a lie until Felder's deposition prior to the PCR merit's hearing. This characterization of this testimony as a lie is unequivocally reaffirmed the testimony from Felder provided at a deposition and at the PCR.

Prosecutor Bailey was pointedly questioned about whether there was any question that Felder purchased the gasoline. Bailey agreed that Felder was the purchaser. Bailey also agreed that there was no other way to characterize the testimony provided by Felder than as a lie. Bailey also asserted that he did not correct this testimony. This failure to correct this false testimony is explained more fully above.

However, the record remains unclear regarding the timing of defense counsel's awareness of Felder's identity as the gasoline purchaser. Because Felder did not provide a written statement, but instead lied multiple times to law enforcement, pre-trial, there is a possibility that defense counsel was not aware of Felder's identity as the gas purchaser. But Detective Coker's methodical investigation and pages of pointed testimony in this regard clearly demonstrate law enforcement's knowledge of this fact. This serves as the basis for the Brady claim and Napue regarding Felder's identity as the gasoline purchaser.

But if the Court finds that defense counsel did know about Felder's identity as the gasoline purchaser prior to the conclusion of the guilt phase, then counsel's failure to reveal this fact to the jury, either in the form of cross examination of Felder or Detective Coker or through the presentation of substantive evidence of identity such as the videotape, is a blatant and obvious failure to perform to reasonable standards of representation.

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Again, the identity of the gas purchaser makes the claim more likely that Felder was directly involved in Kandee's death and the burning of her car and body. This does not corroborate in any manner that Bowman was involved as Bowman is not seen or referenced on the tape. Further, because Felder did not reveal his identity as the gasoline purchaser in any of his multiple examinations by law enforcement, but instead falsely minimized his role, even on direct examination during trial, the jury would be inclined to believe that Felder was covering up for his own guilt and trying to pass the same off on Bowman in an effort to curry favor with Solicitor Bailey. Finally, the exposure of the truth after Bailey's incorrect presentation to the contrary would have dealt a serious blow to the jury's belief in the credibility of the State's case and taken the wind out of the government's sails.

Failure to File Rule 29(b) Motion for a New Trial

_____ Counsel was deficient because they failed to file a Rule 29(b) motion for a new trial following the conclusion of the guilt phase of the trial if that is when counsel learned that Felder lied when he intentionally omitted that he purchased the gasoline used in the arson after he left the apartments in Branchville instead of traveling to McAlheny Road and Nursery Road as he testified. Counsel testified at PCR that he knew that Felder was the purchaser of the gasoline. However, it is unclear as to when he became aware of this fact as the prosecutor testified at the PCR hearing that he, himself, was unaware of this lie until after Bowman's trial for the murder and arson charges.

If counsel became aware of this falsehood post-verdict in the guilt phase, but prior to the conclusion of this obligation as trial counsel, then counsel should have filed a SCRE Rule 29(b) Motion for a New Trial. Counsel had no strategic reason for this failure as he readily admits that

Bowman always maintained his innocence to this charge. Further, Felder's testimony was clearly false.

Direct physical evidence of Felder as the gas purchaser is consistent with law enforcement's original theory that Felder assisted Gadson in the killing of Kandee Martin and Felder committed the arson as the principle. Nothing about the fact Felder is viewed on tape provides any proof of Marion's guilt. Instead this information exculpates Marion by inculcating Felder in a manner in never portrayed to the jury.

Thus, but for counsel's deficient performance, there is a reasonable likelihood that Marion Bowman would not have been convicted of murder and arson.

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Hiram Johnson-Grounds M(13 & 14), T(1-3, 6 & 7)

Mr. Bowman should receive a new trial because of both Brady violations and ineffective assistance of counsel claims related to the testimony presented at trial by Hiram Johnson.

Brady Violation

Undisclosed Pending Charges in the First Judicial Circuit

Mr. Bowman should receive a new trial because the prosecution suppressed information regarding the receiving stolen goods, grand larceny and burglary second degree charges pending against Mr. Johnson at the time he testified as a government witness. Plaintiff's 48 and 71. To begin, Mr. Bowman was prosecuted by Solicitor Walter Bailey of the First Circuit Solicitor's Office. This office oversees all prosecutions in State court which originate in Dorchester, Orangeburg, and Calhoun Counties.

While Mr. Bowman lived in Orangeburg County, he was prosecuted in neighboring Dorchester County as that is where the evidence presented indicated that the killing of Kandee Martin and the burning of her car occurred. Nonetheless, Solicitor Bailey oversaw prosecutions in both counties. This is significant because of the testimony presented by Hiram Johnson.

Hiram Johnson testified as a government witness in the guilt phase of Bowman's trial. The main thrust of his testimony concerned Mr. Bowman's possession of Kandee Martin's vehicle in the time period between her killing and the burning of the vehicle. Johnson also testified that he heard Bowman confess to killing Kandee and relayed this statement by indicating Bowman said: "I killed Kandee, heh, heh, heh." See Trial, p. 4068 l. 6.

Johnson never indicated either on direct or cross that he cut a deal with the prosecutor's office. Further, he never indicated any bias to testify favorably for the State. Instead his

testimony was presented as if he was a friend of Bowman's with no bias to curry favor with the prosecution. The prosecutor argued in closing to the jury that: "You hadn't heard any testimony about Hiram Johnson having *any* kind of charge against him or any kind of a deal with the State, any reason to say something wasn't true." Trial, p. 4474, l.8-11 (emphasis added).

Further, the prosecution provided a copy of Johnson's rap sheet to Bowman's defense counsel. This rap sheet was devoid of reference to any charges pending in the jurisdiction of Solicitor Bailey's office. PCR, p. 1009, l. 3-p. 1010, l. 7. This rap left defense counsel with the impression that Johnson had no other charges pending. (PCR, p. 1369, l. 3-8 & p. 1371, l. 20-25)

In fact, Hiram Johnson did have charges pending within the First Judicial Circuit. While these charges were both magistrate level and general sessions level charges, they were all pending within the Orangeburg General Sessions Court at the time of Bowman's trial. Thus, Solicitor Bailey and his office were well aware of the pendency of these charges.

Further, Johnson had legal representation on these charges. This representation was conducted by either Mr. John O'Leary or his associate counsel, Will Bryant. This representation originated with a lawsuit Mr. Johnson filed against the Orangeburg County Sheriff's Department related to Johnson's brain injury suffered following a shooting incident.

Bowman's defense counsel expressed concern about the suppression of this evidence when he was made aware, at the PCR hearing, of the charges then pending against Johnson. Counsel even conceded the appropriateness of this type of cross-examination and the effectiveness of a display of this bias. This was true even though defense counsel expressed concern about his ability to delve into such an examination if he had been provided such documents.

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This suppressed evidence is material because of the significance attached to Johnson's testimony concerning Bowman's alleged confession. The bias exposed by revelation of these charges is increased when one considers that Johnson first spoke of this alleged confession at the Bowman's trial. He never mentioned this alleged confession in his written statement, which was taken prior to the existence of the charges against him and the bias these charges created.

The suppression of this evidence undermines confidence in the outcome of the case. This suppression hamstrung the efforts of defense counsel in preparing for cross of Johnson and limited counsel's ability to expose the serious bias. Instead, the State presented the testimony of Johnson as an independent witness with nothing to gain.

Undisclosed "Wink Wink" deal between Johnson and 1st Circuit Solicitor

Bowman also deserves a new trial because the State suppressed evidence of a "wink wink" deal into which it entered with Hiram Johnson and his attorney. This information was material to the impeachment of Johnson's testimony. Finally, the suppression of this information undermines confidence in the outcome because it limited the defense counsel's ability to conduct meaningful cross-examination and shielded the jury from the bias which has now been exposed.

As stated above, the defense counsel requested all "wink wink" deals cut between the State and cooperating witnesses. For the most part, written deals were provided to defense counsel pre-trial, with the exception of the deal cut with Felder. However, no "wink wink" deals were ever revealed.

Instead the State hid what is now obviously an implicit deal between the prosecutor's office and Mr. Johnson. As a matter of timing, Mr. Johnson was questioned regarding the information concerning Kandee Martin's death at least three times before May, 2001. The first

questioning occurred at the Branchville Police Department. Next, Mr. Johnson was questioned at his father's place of business which was a tire store/fish market. Finally, Johnson provided a written statement to Detective Coker on April 5, 2001. See Plaintiff's 33.

Detective Coker was cognizant of all of these statements and was involved in the decision to question Johnson. In fact, Coker indicated at the PCR hearing that it would have been possible to charge Johnson with felony Possession of a Stolen Vehicle charge based upon the statements Johnson provided. However, none of these statements ever provided any reference to the alleged confession of Marion Bowman to the killing of Kandee Martin.

Instead, Johnson provided this information for the first time during his testimony in the guilt phase of Bowman's trial. Bowman's counsel confirmed that testimony about this alleged confession was the most damning piece of evidence provided by Johnson at trial. (PCR p. 1386, l. 22-25 & p.1387, l. 1-4) Trial counsel further confirmed that any information which could impeach Johnson would be useful to counter this alleged confession. (PCR p. 1388, l.8-9)

However, counsel did not know that following the three interviews of Johnson, Prosecutor Bailey's office decided to charge Johnson with several crimes. However, these crimes was not related to the stolen vehicle charge for his part in the constructive possession of Kandee Martin's vehicle. Instead, Johnson was charged with Burglary, Grand Larceny and Receiving Stolen Goods less than or equal to \$1,000.00. See Plaintiff's 48 & 71.

These are serious charges and allegations of acts of moral turpitude. The prosecutor did not conflict these charges to the Attorney General office, but instead decided to maintain authority over the felonies and assume concurrent jurisdiction over this misdemeanor charge. This move enabled Prosecutor Bailey to exert more direct control over the disposition of the

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case. These charges remained pending until after Bowman's conviction.

None of this development was revealed to defense counsel for Bowman. Instead this matter remained pending throughout the time of Johnson's testimony as a witness in the government's case in chief in the guilt phase of Bowman's trial. Only during the year following Bowman's conviction and death sentence, was the misdemeanor charge remanded by the prosecutor's office to magistrate court. More than two years later the felony charges were dismissed, outright.

This pattern of conduct creates a clear indication of plea agreement entered between the State and Johnson and his attorney. Because this agreement is not written or otherwise memorialized, this becomes a classic "wink wink" deal. The suppression of this evidence undermines confidence in the outcome of Bowman's proceedings in the trial court.

Ineffective Assistance of Counsel

No Cross Regarding Absence of Bowman's Alleged Confession in Johnson's Prior Statements

Bowman should also receive a new trial because his trial counsel's performance was deficient related to the examination of Hiram Johnson. Specifically, counsel was defective in failing to impeach his testimony concerning the alleged confession because of the prior inconsistent statements Johnson provided to the police. Further, counsel failed to impeach Johnson with the fact he faced criminal liability by virtue of his constructive possession of Kande Martin's stolen vehicle. But for these errors, there is a reasonable likelihood that the outcome of the proceedings would have been different.

As mentioned above, Johnson testified that Bowman confessed to killing Kande Martin.

However, Johnson only revealed this for the first time during Bowman's trial. More interestingly, Johnson never revealed any of this information to law enforcement during his previous three interviews.

There is no strategic reason for this failure. In fact, counsel conceded that this alleged confession was the most damaging part of Bowman's testimony. Exposure of the fact that the feeble-minded Johnson only recalled this alleged statement more than a year after his first three interviews with law enforcement would have caused the jury hesitation when determining the credibility to be attached to Johnson's testimony.

But for this error, the outcome of the proceedings would have been different.

No Possession of Stolen Vehicle Charge

Counsel was also ineffective for failing to examine Johnson regarding his criminal liability for his constructive possession of Kandee Martin's stolen vehicle.

Johnson's testimony also indicated that he knew he was riding in Martin's stolen car during the night and early morning of February 16 and 17, 2001. In fact, he informed police in the first two interviews that he wore brown cotton work gloves to prevent leaving any prints on the inside of the vehicle. Detective Coker recalled traveling to Johnson's house to retrieve these gloves. These gloves were introduced into evidence.

Both Detective Coker and lead defense counsel, who was a former law enforcement officer, conceded that a valid charge could have been made against Johnson under the theory of constructive possession or the hand of one hand of all theory. Certainly Johnson carried a sufficient mens rea as evidenced by his wearing of the gloves. Further, his actions in wearing the gloves were an affirmative physical act sufficient to trigger the actus rea concerns. Finally, such

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a charge would have exposed Johnson to felony liability.

Counsel had no reason to refrain from asking Johnson about this liability created by his version of the events of February 16-17, 2001. In fact, this would have exposed the bias of Johnson to accommodate the State. Not only was Johnson attempting to avoid criminal liability for the Burglary, Grand Larceny, and Receiving Stolen Goods charges, but he was now also avoiding felony liability for his possession of Kandee Martin's stolen car.

Had the jury heard this information there would have been reason to hesitate to believe Johnson's testimony regarding the alleged confession of Bowman. This is especially true when this error is considered in conjunction with the deficient exposure of the three prior inconsistent statements which excluded reference to this alleged confession. Thus, but for this error, there is a reasonable likelihood that the outcome of the proceedings would have been different.

Ricky Davis-GroundsBrady Claim for Failure to Provide Exculpatory and Impeaching "Sam Memo"

Mr. Bowman also deserves a new trial because of the suppression of an explosively exculpatory and impeaching memo compiled by an investigator with the prosecutor's office. The contents of this memo document an interview conducted by Sam Richardson, the investigator for prosecutor Bailey, of an individual named Ricky Davis. See Plaintiff's 67. This interview was conducted prior to trial at the Lieber Correctional Institution.

Materiality

The material nature of this suppressed "Sam Memo" is obvious because the contents are exculpatory on the issue of Bowman's guilt as the shooter of Kandee Martin. Further, the materiality also relates to the impeachment value given the State's reliance upon James Tawain Gadson as the sole eyewitness to the killing. Details of the suppressed items best support this contention.

During this interview, Ricky Davis informs Sam that he overheard James Tawain Gadson confess to shooting Kandee Martin in the head with a .380 hand gun. This memo is detailed in that it indicates that Gadson's confession occurred on the A-Side table in the presence of 4 or 5 other inmates. Further, Ricky Davis informs Sam that he wrote a memo documenting this confession on August 6, 2001. See Plaintiff's 11. In fact, Ricky Davis even provides Sam with details noting that approximately three weeks pass between the time Ricky Davis heard Tawain Gadson's confession and the time he wrote this down.

Significant about this "Sam Memo" is that this entire interview was conducted with no reason for Ricky Davis to lie to Sam. As noted above, Sam was an investigator for Walter

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Bailey, the prosecuting attorney and elected prosecutor over the entire First Judicial Circuit. In fact Bailey's office was the very same office responsible for prosecuting Ricky Davis and incarcerating him for 20 years for an Armed Robbery charge. Further, Bailey's office also held the power to revive the prosecution of another Armed Robbery charge within the First Judicial Circuit which was dismissed with leave to restore.

Also, Marion Bowman was not housed within the South Carolina Department of Corrections (SCDOC), Lieber Facility, at the time Sam interviewed Ricky Davis. To the contrary, Marion Bowman was still housed in the local Dorchester County Detention Center. Marion Bowman was never held in the SCDOC pre-trial. Thus, Bowman exerted no influence over Ricky Davis' statements to Sam Richardson.

Further, Sam's memo indicates that Marion Bowman never coerced Ricky Davis into providing a false statement regarding James Tawain Gadson's confession to the shooting of Kande Martin. Instead, Ricky Davis clearly indicates that Bowman told him "If you heard all this, write it down." This is consistent with the actions of an innocent person who desires for a reluctant, but important witness to come forward.

This Sam Memo is consistent with several other items which dovetail to form strong defense evidence of an exculpatory nature, none of which were presented to the jury. First, the Sam Memo is consistent with the Ricky Davis memo which is referenced by Davis when speaking to Sam. Further, the Ricky Davis memo and the Sam memo both mention that Davis and Gadson were housed on A-Side together. The DCDC records introduced at PCR prove that Gadson was in fact housed on A-Side. See Plaintiff's 41.

Also, Detective Coker's notes confirm that Davis was "in cell block with Tawain

Gadson.” See Plaintiff’s 45. Further, the Sam memo is consistent with other information contained in Detective Coker’s narrative. As Coker explained at the PCR hearing, Tawain was told to “take Kandee’s car because Kandee owed them money.” This is eerily similar to the Sam memo reference that “they thought she was wired and he[Tawain Gadson] shot her in the head with a .380. See PCR, p. 919, l. 15-17 and Plaintiff’s 67.

The Ricky Davis memo is also consistent with multiple pieces of evidence suggesting that Tawain Gadson was in the habit of using Marion Bowman’s gun to threaten and shoot at persons and returning the gun to Marion. About two weeks before Kandee’s death, Gadson borrowed Bowman’s gun to shoot at others in the Branchville Apartment projects. See Plaintiff’s 29 & 30. Gadson confirmed this information at the PCR hearing. PCR, p. 163, l. 23-25; p. 164, l. 1-10; & 196, l. 18-25. Also, at trial, as referenced in the Bowman direct appeal opinion from the South Carolina Supreme Court, Marion Bowman believed that Tawain Gadson had stolen his gun or moved this gun the very morning of Kandee Martin’s death. State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (Pages 380-381).

Suppression by the Government

Prosecutor Bailey admits he did not provide the Sam memo to defense counsel. PCR, p. 2151, l. 25- p. 2152, l. 2. Defense counsel was shocked to read the Sam memo. In fact, defense counsel admitted that he would have drastically altered his trial strategy had he been provided this memo. PCR p. 1339, l. 6-11.

At the PCR, counsel stated: “If I had known about the second interview by law enforcement [Sam memo], I would have put Mr. Richardson up on the stand if I had known about it.” PCR, p. 1339, l. 6-11. Counsel took such an altered position because of his opinion of

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Sam Richardson's integrity, stating: "...Sam is probably the, I don't ever wish to bolster anybody, but he is one of the politest, most educated young men I have ever met in my life and he was the Solicitor's investigator..." PCR, p. 1674, l. 4-24. Instead, without this memo, defense counsel presented no exculpatory evidence in the defense of Bowman during the guilt phase of the trial and did not attempt to impeach Gadson trial testimony or the State's theory with evidence of this confession.

Thus, the suppression of the Sam memo undermines confidence in the outcome of Bowman's trial proceedings.

Ineffective Assistance of Counsel claims

Failure to Present Ricky Davis' testimony regarding Tawain Gadson's confession

Failure to present Tawain Gadson's location on A-side

Failure to present Coker's notes confirming that Gadson and Davis together on A-side

Marion Bowman should receive a new trial because his attorneys were ineffective in his representation because they failed to present evidence related to Tawain Gadson's confession. This failure falls below the acceptable standard for a reasonable attorney. But for this deficient performance, the outcome of the proceedings would have been different.

It is evidence that Ricky Davis provided a memo detailing James Tawain Gadson's confession to the murder of Kandee Martin. See Plaintiff's 11: Ricky Davis admitted at both a pre-PCR deposition and in the PCR merits hearing that this memo was drafted in his handwriting. This memo was in the hands of both law enforcement and defense counsel prior to Marion Bowman's trial.

Both defense counsel knew of the existence of this letter. First, Marva Hardee-Thomas

admitted that this letter contained her handwriting on the un-executed notary provision at the bottom of Plaintiff's 11. PCR, p. 1564, l. 18-24. Secondly, prosecutor Bailey provided both counsel a copy of this letter, as referenced by his May 7, 2002 letter, written less than a week before jury selection began.

Norbert Cummings then engaged a private investigator to speak with Ricky Davis. Marva Hardee-Thomas testified at the PCR hearing that she never spoke to Bowman about Ricky Davis.⁸ PCR, p. 1562, l. 8-11 & p. 1564, l. 11-17. Following the interview by the private investigator, Cummings declined to present Ricky Davis' testimony.

However, this was deficient performance because the veracity of portions of the Ricky Davis statement are borne out by other evidence. To begin, the Ricky Davis memo indicates that the conversation took place while both were housed in A-side of the DCDC. Alvin Coker's notes also verify that Ricky Davis was housed on the cell block with Tawain Gadson. Plaintiff's 45. Finally, Ricky Davis' memo is correct that Gadson was actually housed on A-Side, according to the DCDC records. Plaintiff's 41.

Counsel was deficient for failing to present this information as Ricky Davis provided concrete evidence of Tawain Gadson's guilt as the killer of Kandee Martin. This would have dovetailed perfectly with the un-presented information contained in the arrest warrant and indictment of Gadson. Finally, although withheld from the defense, the Sam memo supports the ineffectiveness of the failure to present Ricky Davis' testimony and the corroborating information regarding the housing of Davis and Gadson, now that the truth of Gadson's

⁸As noted in a later portion of the brief, Hardee-Thomas operated under a serious conflict of interest because she simultaneously represented Ricky Davis and Marion Bowman.

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confession is further corroborated.

But for these errors, there is a reasonable likelihood the outcome of the proceedings would have been different.

Detective Alvin Coker-Grounds M(7, 9, 11,12, 13 & 14)

Marion Bowman deserves a new trial due to the ineffective assistance counsel related to the testimony of Alvin Coker. Detective Coker was the lead investigator for the murder of Kandee Martin. Coker testified during the guilt phase of Bowman's trial.

Ineffective Assistance of Counsel*Gadson lied about owning a .380 firearm*

Marion deserves a new trial because his counsel failed to cross examine Detective Coker about Gadson's lie concerning his ownership of a .380 firearm. This lie appears in Detective Coker's report. This information possesses both impeachment and exculpatory value.

Gadson was questioned several times by law enforcement concerning his involvement in the death of Kandee Martin. His responses ranged from a complete denial of any knowledge of the death to full knowledge of her death at the hands of Marion Bowman. Included within this questioning was the issue of Gadson's ownership of a firearm.

Evidence collected at the crime scene indicated the police were looking for a .380 firearm. The police also learned that Gadson was the owner of a High-Point .380, as documented by the gun purchase records required by federal law. Thus, Detective Coker's investigative report clearly references the government's belief that Gadson's .380 was suspected as being the murder weapon.

However, Gadson was not forthcoming with the police concerning his ownership of this type weapon. Instead, Gadson informed the police that he owned a 9 millimeter handgun. PCR trial, p. 911, l. 1-6. This information is listed in Detective Coker's report as a statement made by Gadson.

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Although dealt with more specifically in the portion of the brief regarding ballistics, testimony is unclear about the link between a bullet found at the crime scene and a Highpoint .380 attributed to Marion Bowman. Obviously, because Gadson's gun and the gun attributed to Bowman are of the same make and model, the class and subclass characteristics are the same. Finally, although the trial testimony from the State's ballistics expert indicates the casings were fired by a gun attributed to Bowman "to the exclusion of all other firearms," it appears that this match was overstated, according to information derived from the PCR hearing.

Because both the false statement and the gun ownership records were provided to defense counsel, pre-trial, the government did not withhold evidence of this exculpatory and impeaching information. Gadson never came clean about this falsehood. However, because defense counsel failed to examine Detective Coker about this lie concerning Gadson's ownership of the .380, the jury never learned about this important and relevant information.

There is no strategic reason for this failure. To the contrary, this information supports the very defense theory used at trial: that someone other than Bowman killed Ms. Martin and that Gadson was this shooter using his own Highpoint .380. But for this deficient examination of Detective Coker by trial counsel, the outcome of the proceedings would have been different.

Failure to Bring Out Statements Heard by Bruce McLean

Marion Bowman deserves a new trial because his trial counsel never cross-examined Det. Coker about the E-Z Horizon videotape evidence wherein Bruce McClean states he overhears people talking about killing a girl and wanting to dispose of her body and her car. PCR Trial, p. 922, l. 2-13. This information was highly relevant because according to Travis Felder, Marion Bowman was never at the gas pumps and therefore could not be one of the "people" talking

about killing a girl and disposing of her car and body. There was no strategic reason for this failure. To the contrary, this information supports the defense's theory that someone other than Bowman killed Kandee Martin. But for this deficient examination of Detective Coker by trial counsel, the outcome of the proceedings would have been different.

Failure to expose Felder as purchaser of gasoline

As an alternate ground to the claims listed above concerning the purchase of the gasoline by Travis Felder, Marion Bowman deserves a new trial because his attorney failed to elicit information concerning Travis Felder's identity as the purchaser of the gasoline used to burn Kandee Martin's car and body.

As recounted above, Travis Felder testified falsely during the guilt phase of the trial concerning his involvement in the burning of Kandee Martin's car and body. Both the prosecutor and Felder characterize this false testimony as a lie. PCR trial, p. 685, l. 15-19 The prosecutor says there is no other way to characterize this information. PCR trial, p. 2114, l. 7-15.

Detective Coker testified that he knew that Felder was the purchaser of the gasoline. This testimony was developed, *ad nauseam*, at the PCR hearing and appears in the above portion of the brief concerning Travis Felder. Defense counsel Cummings also testified at the PCR hearing regarding his knowledge of Felder as the purchaser of the gasoline.

Cummings specifically indicated that he was provided the videotape from the EZ Horizon store. This tape documents Felder's purchase of the chips and dip at approximately 3:00 a.m. This purchase is followed fifteen minutes later by Felder's purchase of gasoline.

A post-it note documents the chips and dips purchase time. This note appeared in Detective Coker's file, in Detective Coker's handwriting, attached to the Travis Fedler booking

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report. See Plaintiff's 50. Detective Coker had no reason to place this post-it note to this report to document the chips and dip purchase at any time after Felder's guilt phase testimony and Coker did not modify his notebook following the conclusion of the trial.

The video clearly indicates that the purchaser of the chips and dip at 3:00 am and the purchaser of the gasoline at 3:15 am are the same person because the purchaser is wearing the same clothing. Further, the store attendant remarks that the purchaser is back so soon. Coupled with the testimony from Felder about the chips and dip purchase, arguably, defense counsel was aware of Felder's identity as the purchaser of the gasoline.⁹

Armed with this knowledge, defense counsel should have examined Detective Coker, and Felder, about this gasoline purchase. In fact, proof of Felder's identity as the purchaser and Coker's knowledge of the same would have provided a serious blow to the case as presented by Bailey. Further, the jury could have divined that the State's witnesses were being less than forthcoming in an effort to minimize their liability by passing credit for the shooting and arson onto Marion Bowman.

This is also consistent with the State's original theory that Gadson shot Kandee Martin and that Felder provided assistance before the fact. See Plaintiff's 4, 17 & 18. This is consistent with Detective Coker's belief that Gadson and Felder both participated in the burning of the car. See PCR transcript. This is directly in contradiction to the case presented to the jury.

Thus, but for Cummings deficient performance in the examination of Detective Coker,

⁹This logic equally supports the position that the prosecutor was also aware of Felder's identity as the gasoline purchaser despite the prosecutor's claims otherwise. Because of this imputed knowledge and the false nature of this testimony, the prosecution clearly allowed false testimony to go uncorrected, notwithstanding any claim of ineffective assistance of counsel.

there is a reasonable likelihood that Marion Bowman would not have been convicted of murder or arson.

Sworn Statements to other tribunals

Defense counsel also failed to provide the effective assistance of counsel to Marion Bowman when they failed to elicit information concerning the other sworn statements and official positions taken by Detective Coker during the investigation of this case. This information was clearly within defense counsel's knowledge. Had the performance been up to par, there is a reasonable likelihood that the outcome of the proceedings would have been different.

Detective Coker provided several sworn statements or took official positions regarding the State's theory of Kandee Martin's death. Chief among these were the arrest warrant affidavits for James Tawain Gadson and Travis Felder. Also, included were the indictments for Gadson and Felder.

The chief statement not revealed to the jury was that Coker swore before a magistrate that James Tawain Gadson "did shoot and kill one Kandee Martin." See Plaintiff's 4. This is consistent with the indictment language which states, in part, that Gadson did "...kill one Kandee Martin by means of shooting the victim in the head..." See Plaintiff's 1. Coker was the sole witness to the grand jury for this indictment and because the indictment was "true billed" without correction or amendment, it is assumed that Coker's presentation to the grand jury was consistent with this language.

This information was consistent with the defense theory that Gadson was the shooter. Further, this information was consistent with other information which was either not provided to

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defense counsel or not presented to the jury including information contained in the Sam memo and the Ricky Davis memo. This information is also consistent with the terms of Gadson's plea agreement with the State where Gadson remained liable for death penalty murder if he did not "...cooperate in the investigation and prosecution of Marion Bowman, Jr...." See Plaintiff's 3.

Also, Coker swore to a magistrate that Felder was an "...accessory to felony (murder/arson) in violation of section 16-1-40..." because he and James Tawain Gadson "took the victim to a remote area of Dorchester county where they shot and killed the victim (Kandee Martin). See Plaintiff's 17. Coker further swore that Felder "...then burned the car and the victim's body to destroy evidence." Plaintiff's 18. Finally, Felder's indictment notes the assertion that Coker presented to the Grand Jury, months later, that Felder did "...willfully, unlawfully and maliciously burn or cause to be burned, with intent to destroy, a car belonging to Cordelia Martin and/or Kandee Martin." Plaintiff's 43.

Because counsel never examined Coker with regard to these assertions and statements, the jury never learned of the State's endorsement of these alternate theories involving Martin's death. Instead, counsel for Bowman was left to speculate in closing, based upon no evidence presented by the defense in the guilt phase of the trial, that someone else killed Kandee Martin. There is no strategic benefit to this failure.

Had counsel performed in a reasonable manner and presented this information to the jury, there is a reasonable likelihood that Marion Bowman would not have been convicted of murder or arson, third degree.

Conflicts of Interests-Grounds N, O, & R

Marion Bowman should also receive a new trial because one of his attorney's labored under active conflicts of interest which deprived Marion Bowman of his right to the effective assistance of counsel. These conflicts related to two main issues, one is the fact that the Dorchester County Public Defender's office represented both Marion Bowman and Ricky Davis and the other is that this office represented both Marion Bowman and James Tawain Gadson. Because of this active representation of conflicting interests and the adverse effect upon his case, prejudice is presumed.

Alternately, counsel's performance was adversely affected by the conflict. Further, petitioner's counsel labored under conflict so serious as to be unwaivable. Following an introductory section regarding the general rules of conflicts, the different conflict issues present in Bowman's case will be reviewed.

Introduction

The Sixth Amendment provides that a criminal defendant shall have the right to "the Assistance of Counsel for his defence." Sixth Amendment, United States Constitution. This right has been accorded, the courts have said, "not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." United States v. Cronin, 466 U.S. 648, 658 (1984). However, assistance which is ineffective in preserving fairness does not meet the constitutional mandate, see Strickland v. Washington, 466 U.S. 668, 685-686 (1984).

As a general matter, a defendant alleging a Sixth Amendment violation must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland at 694. The courts have traditionally spared the

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defendant the need of showing probable effect upon the outcome, and have simply presumed such effect, where assistance of counsel has been denied entirely or during a critical stage of the proceeding. When that has occurred, the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary. See Cronic at 658-659; also see Geders v. United States, 425 U.S. 80, at 91 (1976) and Gideon v. Wainwright, 372 U.S. 335, 344-345 (1963). But only in “circumstances of that magnitude” do the courts forgo individual inquiry into whether counsel’s inadequate performance undermined the reliability of the verdict. Cronic, at 659, n. 26.

Circumstances of that magnitude may arise when an accused’s counsel actively represents conflicting interests. Mickens v. Taylor, 535 U.S. 162, at 166 (2002). As an initial matter, the courts have considered “joint representation of conflicting interests” to be “inherently suspect.” Mickens, at 168 explaining underlying rationale of Holloway v. Arkansas, 435 U.S. 475 (1978). And Mickens suggests that multiple representation of interests which are not aligned are more closely scrutinized than multiple representation of interests which are aligned. Mickens, at 168. Further, “(j)oint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing.” Wheat v. U.S., 486 U.S. 153, at 160, citing Holloway, at 489-490.

Multiple Representation Scenario

In a multiple representation setting, absent an objection, a defendant may prevail in a conflict claim by proving the conflict “actually affected the adequacy of his representation.” Cuyler v. Sullivan, 446 U.S. 335, at 348-349. The test formulated in Cuyler v. Sullivan is then a two part burden on a petitioner seeking relief to show 1) that trial counsel represented conflicting interests and 2) that the conflict adversely affected the attorney’s performance. Thus, a

competing interests' influence upon trial counsel's strategic decisions suggests that an actual conflict of interest exists. Mickens, at 170. However, it must be cautioned that a showing of adverse effect does not require a probable effect upon the outcome or verdict. Mickens, at 174.

Actual Conflict

An actual conflict of interest "occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's." Fuller v. State, 557 S.E2d 664, 665 (SC 2001). In Mickens, the majority concluded that a defendant who demonstrates that counsel actively represented conflicting interests has also established the constitutional predicate for his claim of ineffective assistance of counsel. Mickens, at 175 citing Cuyler v. Sullivan, at 350 ("[U]ntil, a defendant shows that his counsel *actively represented* conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." (emphasis added in Mickens)). The Mickens court also noted the test in Cuyler v. Sullivan has been applied "when representation of the defendant somehow implicates counsel's personal or financial interests, including a book deal, United States v. Hearst, 638 F.2d 1190, at 1193 (9th Cir. 1980), (or) a job with the prosecutor's office, Garcia v. Bunnell, 33 F.3d 1193, at 1194-1195 & 1198, n.4 (9th Cir. 1994)." Mickens, at 174. In fact, the Ninth Circuit has held that there is no distinction in the test used in cases of conflict between multiple client representation and a conflict between a client and an attorney's personal interests. Hearst, 638 F.2d 1190, at 1193 (9th Cir. 1980).

Adverse Effect

However, there exists a split in the federal circuits regarding evidence of adverse effect. Some circuits hold that whenever counsel failed to pursue a "plausible" defense "that was inherently in conflict with or not undertaken due to the attorney's other loyalties," there is

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sufficient evidence of adverse effect to show a Sixth Amendment violation. See McFarland v. Yukins, 356 F.3d 688, 706 (6th Cir. 2004), citing Winkler v. Keane, 7 F.3d 304, 309 (2nd Cir.1993); U.S. v. Gambino, 864 F.2d 1064, 1070 (3rd Cir. 1988); United States v. Fahey, 769 F.2d 829, 836 (1st Cir.1985). But other circuits also require that the foregone defense be “reasonable.” McFarland, citing Freund v. Butterworth, 165 F.3d 839, 860 (11th Cir.1999) (en banc) (showing of adverse effect requires proof of tactic foregone, of reasonableness of tactic on facts, and of a causal link between conflict and decision to forego tactic); Mickens, 240 F.3d 348, at 361 (4th Cir. 2001) (same) denial of habeas affirmed in Mickens v. Taylor 535 U.S. 162 (2002). Finally, the Fourth Circuit has held that a petitioner has adequately demonstrated adverse effect “if the attorney took action on behalf of one client that was necessarily adverse to the defense of the other or failed to take action on behalf of one because it would adversely affect the other.” Williams v. French, 146 F.3d 203, 212 (4th Cir. 1998), cert. denied, 525 U.S. 1155, 119 S. Ct. 1061, 143 L. Ed. 2d 66 (1999).

Further, petitioner may prevail in a conflict claim even if trial counsel does not admit a causal link between a conflict of interest and choice of action on behalf of his client. In fact, a petitioner does not have to produce direct evidence, such as the lawyer's testimony, that the lawyer chose to do one thing rather than another in order to accommodate another client's interests. McFarland, at 706. Instead, causation can be proved circumstantially, through evidence that the lawyer did something detrimental or failed to do something advantageous to one client that protected another client's interests. McFarland, at 706.

Waiver

Introduction

When an accused's counsel operates under a conflict of interest, a trial court may allow an attorney to proceed despite this conflict "if the defendant makes a voluntary, knowing, and intelligent waiver." Garcia v. Bunnell, 33 F.3d 1193, 1195 (9th Cir. 1994). A waiver is an intentional relinquishment or abandonment of a known right or privilege. Johnson v. Zerbst, 304 U.S. 458, at 464 (1938). Further, the validity of the waiver of an accused's Sixth Amendment rights depends "upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." Edwards v. Arizona, 451 U.S. 477, 482 (1981). Also, the protecting duty of the court imposes a "serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused." U.S. v. Ellison, 798 F.2d 1102, at 1108 (7th Cir. 1986)(internal citations omitted). Finally, a reviewing court must "indulge every reasonable presumption against the waiver of fundamental rights." United States v. Allen, 831 F.2d 1487, 1498 (9th Cir. 1987) (internal citation omitted).

The federal appellate courts have identified several factors to be examined regarding the validity of a waiver involving trial counsel's conflict of interests. Also, the federal courts have identified situations where a conflict is so severe that a trial court should refuse to accept or override a waiver, even if the defendant validly waives the conflict. Further, as stated by Chief Justice Rehnquist in the majority opinion in Wheat v. U.S., "(n)ot only the interest of a criminal defendant but the institutional interest in the rendition of just verdicts in criminal cases may be jeopardized by unregulated multiple representation." Wheat v. U.S., 486 U.S. 153, at 160

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(1988).

Factors of a Valid Waiver

As an initial matter, to waive the right to conflict-free representation, a “defendant must be provided with sufficient information or advice to permit choice between meaningful options.”

U.S. v. Ellison, 798 F.2d 1102 at 1108 (7th Cir. 1986). The first task of the trial court is to alert the defendants to the substance of the dangers of representation by an attorney having divided loyalties in as much detail as the court's experience and its knowledge of the case will permit.

U.S. v. Curcio, 680 F.2d 881, 888-890 (2nd Cir. 1982). A defendant must be informed, and he must have the capacity for making a rational decision. Id.

In assessing the level of each defendant's comprehension of the dangers, the court should devise a variety of methods for gaining the necessary insights. Curcio. Questions designed to elicit from the defendant a narrative statement of his understanding are preferable to questions designed to elicit mere “yes” or “no” answers. Id. Further, the court's inquiry in each instance should take place after the defendant is provided reasonable time to digest and contemplate the risks posed by the conflict. Curcio, 890 (“[T]he court should advise the defendant of his right to separate and conflict-free representation, instruct the defendant as to problems inherent in being represented by an attorney with divided loyalties, allow the defendant to confer with his chosen counsel, encourage the defendant to seek advice from independent counsel, and allow a reasonable time for the defendant to make his decision.”). Finally, a court reviewing the validity of a waiver should consider whether an explanation of the risks was presented to the accused, whether the explanation was given by the trial court as opposed to conflicted counsel and the time for the accused to consider the matter. U.S. v. Iorizzo, 786 F.2d 52, at 59 (2nd Cir. 1986).

Also, upon discovery that a defense attorney suffers from only a *potential* conflict of interest, such that rational defendant could knowingly and intelligently desire conflicted attorney's representation, a court should "advise defendant of dangers arising from particular conflict; determine through questions that are likely to be answered in narrative form whether defendant understands those risks and freely chooses to run them; and give defendant time to digest and contemplate risk after encouraging him to seek advice from independent counsel." U.S. v. Levy, 25 F.3d 146 (2nd Cir. 1994). Further, waiver of defense "counsel's potential conflict of interest does not foreclose possibility that actual conflict could adversely have affected adequacy of representation and thus violated defendant's Sixth Amendment right to counsel, though the conflict must be real, not some attenuated hypothesis having little consequence to adequacy of representation." U.S. v. Fahey, 769 F.2d 829 (1st Cir. 1985).

Finally, a trial court may "enforce ethical rules governing the legal profession with respect to both client-attorney communications and conflict-free representation, regardless of any purported waiver by defendant, when necessary to protect the important candor that must exist between client and attorney and to engender respect for the court in general." U.S. v. Moscony, 927 F.2d 742 (3rd Cir. 1991). The trial court may enforce the ethical rules by overriding a defendant's purported waiver when an actual conflict is "so egregious that no rational defendant would knowingly and voluntarily desire the attorney's representation" and cannot be waived. U.S. v. Martinez, 143 F.3d 1266 (9th Cir. 1998) citing U. S. v. Lussier, 71 F.3d 456, 461 (2d Cir. 1995).

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New Waiver Required when Potential Conflict becomes Actual Conflict-Thomas v. State

In Thomas v. State, the Supreme Court of South Carolina reversed the drug trafficking conviction of Malissa Thomas based upon an actual conflict of interest which adversely affected her attorney's performance. Thomas v. State, 551, S.E.2d 254 (SC 2002). The trial attorney represented both Thomas and her husband as co-defendants regarding the drug charge. At the beginning of the case, the attorney obtained a waiver regarding the potential conflict posed by the joint representation of the co-defendants. However, the Supreme Court reversed the denial of post conviction relief, finding that "(p)etitioner should have been given another opportunity to waive the conflict, if she so chose", when the actual conflict arose. Thomas, 256 The Supreme Court continued that a voluntary waiver must also be knowingly and intelligently made and that an accused can not waive what she does not know. Thomas, 256 citing Hoffman v. Leeke, 903 F.2d 280, 289 (4th Cir. 1990).

Thus, a waiver of an attorney's conflict may preclude an accused from later complaining about ineffectiveness related to the waived conflict. However, the waiver must be voluntarily, knowingly and intelligently entered and a presumption exists against waiver. Thus, not all purported waivers are constitutionally valid or effectively made.

Marva Hardee Thomas' Simultaneous Representation of Bowman and Ricky Davis

The most direct and egregious conflict involves Marva Hardee-Thomas' simultaneous representation of both Ricky Davis and Marion Bowman. Mrs. Thomas represented Ricky Davis for two separate Armed Robbery events as a Dorchester County Public Defender. Plaintiff's 19-23 & Defendant's 17. This representation began following Davis' arrest in April, 2001, which was after her appointment to represent Marion Bowman. Plaintiff's 19. The representation on

one charge ended upon Davis' trial conviction in October, 2001. Plaintiff's 20.

The other armed robbery charge was also terminated that same month by a *nolle prosee* with leave to restore. Plaintiff's 22. Ricky Davis believed at both the time of Marion's trial in May, 2002 and the time of his deposition in the Summer of 2008 that Mrs. Thomas was still his lawyer on that charge because he had not yet been informed that the charge was dismissed. PCR, p. 255-260. Both of these charges were prosecuted under the direction of Prosecutor Bailey.

Davis gave at least two statements detailing a confession made to him by James Tawain Gadson to the killing of Kande Martin. See Plaintiff's 11(Ricky Davis memo) & 67(Sam memo). One of these statements, the Sam memo, was not provided to the defense and was given under conditions which bolster the credibility of the Ricky Davis memo because it was made to a prosecution investigator in the absence of any bias against the state. However, Mrs. Thomas did not present this testimony, even with knowledge of the Ricky Davis memo.

When questioned about this conflict between Davis' interest to curry favor with the State and Bowman's interest in presenting this testimony, Mrs. Thomas replied during the PCR that she did "... not remember talking to him [Bowman] about anything regarding Ricky Davis." PCR, p. 1562, l. 8-11. She later stated that she did not "... remember even discussing Ricky Davis. Why would I have discussed Ricky or anybody else with Mr. Bowman?" PCR, p. 1564, l. 11-17. \

Ms. Thomas knew that Ricky Davis provided a statement favorable to Marion Bowman. Plaintiff's 11 & 68. She was provided the Ricky Davis memo, but not the Sam memo, by Bailey himself. Plaintiff's 68 & 11. Further, she admitted at the PCR that her handwriting appeared at the bottom of the Ricky Davis memo. Plaintiff's 11 & PCR, p. 1564, l. 24. This indicates that

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she did speak to Davis about Bowman. At the time Ricky Davis wrote the memo in August, 2001, Thomas clearly still represented both Bowman and Davis.

Obviously, Mrs. Thomas was obligated to Marion at the time of Marion's trial. However, she was also obligated to Ricky Davis at the time of the trial as she indicated at the PCR hearing by stating that "I still am obligated to him [Ricky Davis]." PCR, p. 1555, l. 20-25. Ricky Davis' testimony was contrary to prosecutor Bailey's theory in Bowman's case. Because Bailey held the prosecutorial strings against Davis, the use of his testimony created a conflict between Davis' legal well-being and Marion's defense.

Thomas evidently never explained or sought a waiver of this conflict. That alone is a deficient performance of her duties. Thomas stated at the PCR when asked about explaining the conflict to Bowman or obtaining a waiver that "I didn't do that. I didn't see any reason to do that." PCR, p. 1574, l. 24-25.

This was the case even though Thomas admitted that she still had some confidence or privilege with Davis. Further, she understood that Davis was an important witness considering the information contained in the Ricky Davis memo. See Plaintiff's 11 and PCR, p. 1574, l. 4-18.

Davis did not testify at trial even though he was called to the courthouse, under subpoena, by defense counsel. No other evidence of Gadson's confession as the shooter was presented to the jury, even though this fact was documented in the Ricky Davis memo, the Sam memo, Coker's sworn statement in Gadson's arrest warrant affidavit, the body of Gadson indictment and in information obtained by Bailey from Wayne Mood.

The clear implication is that Thomas took action adverse to Marion Bowman in part

because of her allegiance and obligation to Davis. If nothing else, it appears that this conflict prevented Thomas from discussing Davis with Marion Bowman. Prejudice is presumed and a new trial should be granted.

Dorchester County's Public Defender Conflict Regarding Simultaneous Representation of Marion Bowman, Jr. and James Tawain Gadson

The State's key witness, Taiwan Gadson was represented by the Chief Public Defender of the Dorchester County Public Defender's Office, Gene Dukes. Mr. Dukes was considered the Chief Public Defender by virtue of his seniority. (PCR trial transcript page 1540, lines 3-9). At the time of the original trial, Troy Knight, Esq. was President of the Public Defender Corporation.

It was Mr. Knight who had the authority to hire and fire each of the Public Defenders in Dorchester County. Mr. Knight was the one responsible for signing the paychecks of those Public Defenders. (PCR trial transcript page 1536 lines 9-22). Ms. Marva Hardee-Thomas admits that she and Gene Dukes had a common boss on page 1546 of the PCR trial transcript lines 18 and 19.

In his capacity as president of the Public Defender Corporation, Troy Knight could determine the outcome of any particular client's representation by virtue of his authority to hire and fire each of the Public Defenders. The public defenders in Dorchester County were assigned cases/clients by a common employee of the Dorchester County Public Defenders office. That assignment coordinator's name was Kathy Rogers, and she was responsible for coordinating case assignments. (See PCR trial transcript page 1537 lines 18-25 and Plaintiff's Exhibit 12).

In this case, both Gene Dukes who represented Taiwan Gadson and Marva Hardee-

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Thomas worked for the same Dorchester County Public Defender Office. Both Mr. Dukes and Ms. Hardee-Thomas had letterhead identifying them as attorneys that worked for the Dorchester County Public Defender's Office. (See PCR trial transcript page 1535 and page 1534 lines 21-25 and 1535 lines 1-25.) During the PCR trial, as found on page 1542 lines 14-18, Ms. Marva Hardee-Thomas acknowledged again that she would send out letters from her office on letterhead that said Dorchester County Public Defender in her representation of Mr. Bowman. On Page 1543 Ms. Marva Hardee-Thomas acknowledged again that both Mr. Duke's and her letterheads reflected Dorchester County Public Defender (See lines 4-10).

The Chief Public Defender's client Taiwan Gadson turned State's evidence and testified against another Public Defender's client, Marion Bowman. See below

Q: And in his capacity as Public Defender, the Chief Public Defender's client turned State's evidence against another Public Defender's client?

A: Okay.

PCR trial transcript page 1544 line 20-23.

Plaintiff's 77 shows the appointment of Mr. Dukes to represent Taiwan Gadson as assigned by Kathy Rogers. See Plaintiff's Exhibit 77 (Public Defender appointment sheet.) Furthermore, Gene Dukes and Marva Hardee-Thomas shared office space in the courthouse. See PCR trial transcript page 1553 lines 7-25. Finally, the common perception in the eyes of the public was that the public defender represented both the target of the prosecution by Bailey in the murder of Kandee Martin and the star witness against this same target.

Because the Dorchester County Public Defender office actively represented adverse interests and took action detrimental to one client on behalf of the other, prejudice should be presumed and Marion Bowman should receive a new trial.

IAC regarding Improper Introduction of Evidence in Guilt Phase-Grounds B, C, E, O & P

Improper Admission of Irrelevant and Prejudicial Character Evidence of Sex between Marion Bowman and Kandee Martin-Ground C

_____ The evidence offered by the State during the guilt phase indicating that Marion Bowman had sex with Kandee Martin was inadmissible. To begin, the evidence was not relevant to any issue before the jury. Further, whatever probative value this evidence held, it was outweighed by the prejudice stemming from allegations that Bowman had sex with Martin, out of wedlock and while married to another.

Both adultery and fornication are still legitimate criminal offenses in South Carolina. See SC Code Section 16-15-60. Further, this evidence casts an eerily racist shadow over the unspoken issue of interracial sexual relations as Bowman was an African American and Martin was Caucasian. This served to inject character evidence into a trial where this character evidence was inadmissible pursuant to SCRE Rule 402, 403, 404, 608, and 609. Finally, based upon all of the evidence available to the State at the time the prosecution offered this evidence, the sexual relations were clearly not part of the *res gestae* of the killing of Kandee Martin or the burning of her car.

Bowman was denied the effective assistance of counsel when counsel failed to object to this improper testimony regarding his character and other acts during the guilt/innocence phase of the trial. SCRE Rule 402, 403 & 404(b) and Strickland v. Washington, 466 U.S. 668 (1984). Specifically, during the course of the trial counsel failed to object to the testimony of a DNA expert and introduction of evidence that Mr. Bowman's semen was found on a vaginal swab taken from the victim's vagina during her autopsy.

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The introduction of the DNA expert's conclusion that Mr. Bowman was the donor of the semen presented to a very conservative, predominantly white jury what otherwise should have been inadmissible evidence of a married black man having extramarital sex with a white woman. As stated earlier, adultery and fornication are still criminal offenses in South Carolina.

The last witness called by the State of South Carolina was a DNA expert by the name of Mathew G. Fitts. Applicant's trial counsel did not object to the admissibility of this evidence. After a lengthy dissertation about the identity of the blood found at the scene of the murder all matching the DNA profile of the victim, Kandee Martin, Fitts was asked to identify the DNA profiles found on a vaginal swab taken during Ms. Martin's autopsy.

In the original trial transcript on page 4381 lines 14-20, Mr. Fitts testifies:

- Q: Okay. And on the ones where you were able to separate it out and get a male and female fraction, how does the second number compare to the DNA profile of Marion Bowman?
- A: At each site that we were detecting an additional profile, it matched Marion Bowman's profile.

When Mr. Bailey moved the DNA charts (Exhibits 73-A and 73-B) into evidence, Applicant's trial counsel responded to the Court's inquiry as follows:

- The Court: Any objection?
- Mr. Cummings: Judge, at this point, no, ma'am.
- The Court: Very well.
- Mr. Cummings: No legal objection.

Applicant's trial counsel did not object to the admissibility of the DNA charts that identified the semen in the victim as belonging to the Applicant, nor did he challenge the expert's qualifications. See (Trial p. 4365, l. 20-21), "no objection to him testifying as an expert..."

Trial counsel's assertion at the PCR hearing that he wanted the DNA evidence in to show the close

personal relationship between the applicant and the victim flies in the face of his cross-examination of the DNA expert at trial. Having not objected to his qualifications as an expert and having “no legal objection” to the admissibility of the damning DNA charts, it makes no sense for Cummings to examine Mr. Fitts as follows (Trial p. 4391, l. 19-24):

Q: Okay. And you’ve explained that to the ladies and gentlemen of the jury. So there are at least several hundred males in South Carolina alone that would match the DNA sample found in the swab that you were presented to identify here in this courtroom today; is that correct, sir?

In his further cross examination challenging the veracity of the expert’s findings all found on 4392 and 4393 of the original trial transcript lines 22-25 and 1-3 respectively:

Q: This is a long, intense process. And then there’s nothing beyond the scientific issue to you, sir, or scientific doubt that the person who left any fluid back there actually lives in this state that you can say to a scientific certainty; isn’t that true?

A: That’s correct.

Further, trial transcript page 4393 lines 4-8 indicates:

Q: Alright. Does that DNA result indicate, and, again, Doctor this is a professional question, any particular race of a person who left any of the sample behind?

A: No, it does not.

The only testimony from Fitts supporting Applicant’s trial counsel’s theory for admitting DNA evidence at all is found on page 4393 lines 9-19, but the prejudice regarding the character smear against Bowman outweighs the suggestion made in hindsight by Applicant’s trial counsel that the evidence was needed to show Mr. Bowman and Kandee Martin were intimate friends.

Q: Okay. And, again, your DNA results cannot say when that bodily fluid was placed inside another person that you did-- when you got the swabs there’s nothing in your scientific testing to say when that fluid was left behind?

A: That’s correct.

Q: Okay. And you can’t say, Doctor, again, respectfully, sir, to you, that there was not any consensual activity between an adult female and an adult male?

A: That’s correct.

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(Trial, p. 4393, l. 9-19)

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.

No Sex on Nursery Road or as Part of the Res Gestae of the Killing

Trial counsel knew that criminal sexual conduct was one of the alleged aggravators in this case and a ground for the Solicitor's office seeking the death penalty; and his knowledge that there was no evidence whatsoever of any sexual activity or conduct at or near the time of Ms. Martin's death should have been sufficient grounds for him to move for the exclusion of the DNA evidence. However, when asked by the trial court, his response was he had "no legal objection." Trial counsel acknowledged during the PCR hearing that it is was the State's position that there was criminal sexual conduct pre-mortem that occurred during the commission of a murder. PCR transcript Page 1746 lines 8-25:

- Q: Alright. Now, the State, the allegation that there was CSC pre-mortem, when did the State provide you notice that that occurred, because obviously they are alleging it occurred during the commission of a murder or it is not an aggravator, right?
- A: Correct.
- Q: So, they are saying -- and when would you say is the commission of the murder window?
- A: Nursery Road.
- Q: Okay. You got it. Any other time?
- A: I mean, right, because the car had been burned so the only evidence that the government had would to show that Kandee was shot on Nursery Road.
- Q: So, the window of the murder is that Nursery Road area?
- A: Correct.

At the PCR hearing, trial counsel was asked,

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

A: Because I wanted to show that he was with her, that he cared about Kandee, there was no rape, let the DNA come in, and my man's DNA is inside her. I'm sorry, maybe we differ on this, but I wanted to show that they were friends, they were intimate friends. (PCR trial, p.1753, l. 12-20)

But that trial strategy appears to be nothing more than a cover up at this point for his woefully ineffective assistance of counsel. For as was borne out of previous testimony during the Post Conviction Relief Hearing, if counsel wanted to show that the applicant and the victim were close intimate friends, he admits that there were other ways to introduce that fact without prejudice attached to the testimony of the DNA expert. (PCR p. 1752 l. 10-25):

Q: -- that this African American man and this white lady had been having sex while Mr. Bowman is married to another lady and also while he is not married to Ms. Martin?
 A: But they were intimate friends and the only way to show that he had no ill motive or reason to kill this lady was that they were intimate friends.
 Q: Well, hold on a second, now. We had some family members testify about Ms. Martin being friends with Mr. Bowman, right?
 A: Yes.
 Q: And they could have shown they were intimate friends. You're talking about sex, right?
 A: Well, intimate friends means sex, I'm sorry, in that context in that courtroom that day. Again, sir, I used everything I could, including the family, to prove he cared about that lady. Yes, maybe he committed adultery, that is God's law and man's law, but again, I'm trying to be here to save his life.

Evidence of the intimate friendship between the Applicant and the victim could have well been a plausible trial strategy and could have been put before the jury without the necessity of the DNA evidence. For as the testimony bore out, there was no way to date the time the semen was deposited, and according to the State's only witness to the commission of the crime, Taiwan Gadson, there is no question but that there was no sex between the Applicant and the victim at anytime during the commission of the murder. During the PCR hearing Taiwan Gadson testifies as follows:

Q: Was there any sex that night while you were with Marion and Kandee?
 A: No.

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Q: That's from the time they picked you up at the apartments in Branchville, to the time that you went back to the apartment in Branchville?

A: Yes.

Q: There was absolutely no sex?

A: No.

Q: No sex with a corpse?

A: No.

Q: No sex beforehand?

A: Beforehand, no.

Q: Before the shooting?

A: No.

Q: Was there any sex?

A: No.

Q: Did you ever, was there ever a time when they weren't in your sight and there was sex?

A: No.

Q: Never sex?

A: No.

(PCR trial, p. 148, l. 25 & p. 149, l. 1-21)

And this would have been Taiwan Gadson's testimony during the original trial as evidenced by the following exchange:

Q: If you were asked that question at trial back in 2002, would you have answered it the same way?

A: Yes.

Q: I want to make sure. No sex while she was alive?

A: No.

Q: No sex after she was killed?

A: No.

Q: No rape?

A: No.

(PCR trial, p.150, l. 5-14)

And although Applicant's trial counsel alleged he had limited access to Taiwan Gadson because his lawyer indicated that Mr. Gadson was not talking to Mr. Cummings, Mr. Cummings admitted during the PCR hearing that he didn't know why he didn't ask Mr. Gadson during the penalty phase of Applicant's trial about the lack of sexual activity at Nursery Road.

PCR trial, p. 1748, l. 20-22: